

SOUTH CAROLINA JOURNAL
OF INTERNATIONAL LAW AND
BUSINESS

VOLUME 15

FALL 2018

ARTICLES

CORPORATE CULTURE AND COMPETITION COMPLIANCE IN EAST
ASIA

Jingyuan Ma
Mel Marquis

U.S.A. VS. THE WORLD: RIGHT TO PUBLIC ACCESS OF COURT
RECORDS AND CONFIDENTIALITY CONCERNS IN COMMERCIAL
ARBITRATION

Christopher M. Campbell

SOUTH CAROLINA JOURNAL
OF INTERNATIONAL LAW &
BUSINESS

Volume 15, Issue 1

Fall 2018

The *South Carolina Journal of International Law & Business* (US ISSN 1936-4334) is a student-edited legal journal published in affiliation with the University of South Carolina. The Journal is an online publication.

SUBMISSIONS INFORMATION

The South Carolina Journal of International Law & Business welcomes the submission of articles from scholars, practitioners, business leaders, government officials, and jurists on topics relating to recent developments in international law and business. The Journal also welcomes the submission of shorter works such as book reviews, commentaries, and bibliographies by qualified authors. The Journal does not consider submissions from students not on the Journal's staff.

In selecting a submission for publication, the Journal considers its originality, meaningfulness, and thoroughness. Submissions must conform with *The Bluebook: A Uniform System of Citation* (20th ed. 2015) and the *Texas Law Review Manual on Usage & Style* (12th ed. 2011). Submissions should be in Microsoft Word format, double-spaced, and footnoted appropriately. Additionally, submissions should have numbered pages.

The Journal prefers submission through the ExpressO or Scholastica electronic submission services. Alternatively, submissions may be emailed to scjilb@gmail.com or sent via post to

Submissions
South Carolina Journal of International Law & Business
USC School of Law
1525 Senate Street
Columbia, South Carolina 29201

When submitting via email or post, the author should include a curriculum vitae or résumé listing educational and employment history and previous publications.

The Journal promptly reviews submissions on a rolling basis. Expedited review may be available for authors facing strict acceptance deadlines from other publications. The author should email the submission and include in the subject line "expedited review." The body of the email should include the author's name, the title of the manuscript, the names of other publications from which the author has received offers, and the relevant deadline. The Journal does not guarantee it will make a selection decision prior to the author's deadline. Regrettably, the Journal is unable to perform expedited reviews during May or December.

SOUTH CAROLINA JOURNAL OF INTERNATIONAL LAW & BUSINESS

VOLUME 15

FALL 2018

CONTENTS

ARTICLES

CORPORATE CULTURE AND COMPETITION COMPLIANCE IN
EAST ASIA

Jingyuan Ma 1
Mel Marquis

U.S.A. VS. THE WORLD: RIGHT TO PUBLIC ACCESS OF COURT
RECORDS AND CONFIDENTIALITY CONCERNS IN COMMERCIAL
ARBITRATION

Christopher M. Campbell 106

SOUTH CAROLINA JOURNAL OF INTERNATIONAL LAW & BUSINESS

VOLUME 15

2018-2019

EDITORIAL BOARD

Editor in Chief
RACHEL E. LEE

Senior Articles Editor
JESSICA N. SHULTZ

Managing Editor
JEFFREY M. BLAYLOCK

Student Works Editors
RYAN E. BONDURA
JESSICA L. PARIBELLO

Articles Editors
KENDALL P. CRAWFORD
ROBERT KOONS
ROBERT W. PILLINGER

Associate Managing Editor
SAMANTHA SANDERS

Publications Editor
EDWARD J. WAEDELDE

Research Editors
ALEXANDER K. CARRIE
IVEY LAVALLE

Symposium Editor
DANA E. MAURIZIO

Associate Symposium Editors
BAILEY N. LOFTIS
ASSATTA A. HERBERT

Communications Editors
TIMOTHY B. GAVIGAN, II
WILLIAM G. LAND

Associate Publications Editor
CHANDLER J. HILL

FACULTY ADVISORS

PROF. JANICE M. BAKER
PROF. SUSAN S. KUO
PROF. APARNA POLAVARAPU

EDITORIAL STAFF

LYNSEY BARKER
AVERY DOUGLAS
BAILEY DUKES
JOHN GARDNER
ALYSSA HILTBOLD
SHAWN HUNTER
PERI IMLER

AIMEE INTAGLIATA
MAX MAZUREK
ZACHARY MCCORMACK
FRANKLIN MCGUIRE JR.
BRIANNA MORRISON
ALICIA MOSS
ANNALISE MUSSELMAN

NAOMI NUDELMAN
TIARA PITTS
FIONA REED
WILLIAM SHELLEY
CARLEE TABER
LAWRENCE TURNER

UNIVERSITY OF SOUTH CAROLINA SCHOOL OF LAW FACULTY
2018-2019

ADMINISTRATION

Robert M. Wilcox, A.B., J.D.; *Dean and Professor of Law*
Eboni S. Nelson, B.A., J.D.; *Associate Dean for Academic Affairs and Professor of Law*
Colin Miller, B.A., J.D.; *Associate Dean of Faculty Development and Professor of Law*
Susan Palmer, B.A., J.D.; *Associate Dean for Student Affairs and Director of Career Services*
Karen Britton, B.A., M.A., Ph.D.; *Assistant Dean for Admissions*
Gary Moore, B.S.; *Assistant Dean for Academic Technology*
Elizabeth Niehaus, A.B., M.B.A.; *Assistant Dean for Administration*

EMERITUS

Gregory B. Adams, B.S., J.D., LL.M., J.S.D.; *Professor Emeritus of Law*
F. Ladson Boyle, B.S., J.D., LL.M.; *Charles E. Simons, Jr. Professor Emeritus of Federal Law*
R. Randall Bridwell, B.A., J.D., LL.M.; *Distinguished Professor Emeritus of Law*
Katharine I. Butler, B.S., M.Ed., J.D.; *Distinguished Professor Emerita of Law*
W. Lewis Burke, B.A., J.D.; *Distinguished Professor Emeritus*
Nathan M. Crystal, B.S., J.D., LL.M.; *Distinguished Professor Emeritus of Law and Class of 1969 Professor Emeritus of Professional Responsibility and Contract Law*
Richard E. Day, B.S., J.D.; *Distinguished Professor Emeritus of Law*
Robert L. Felix, A.B., LL.B., M.A., LL.M.; *James P. Mozingo, III Professor Emeritus of Legal Research, Distinguished Professor Emeritus of Law*
James F. Flanagan, A.B., LL.B.; *Oliver Ellsworth Distinguished Professor Emeritus of Federal Practice*
Patrick J. Flynn, A.B., J.D.; *Clinical Professor Emeritus of Law*
John P. Freeman, B.B.A., J.D., LL.M.; *Distinguished Professor Emeritus of Law and John T. Campbell Distinguished Professor Emeritus of Business and Professional Ethics*
Thomas R. Haggard, B.A., LL.B.; *Distinguished Professor Emeritus of Law*
F. Patrick Hubbard, B.A., J.D., LL.M.; *Ronald L. Motley Distinguished Professor of Tort Law*
Herbert A. Johnson, A.B., M.A., Ph.D., LL.B.; *Distinguished Professor Emeritus of Law*
Philip T. Lacy, B.A., LL.B.; *Distinguished Professor Emeritus*
Henry S. Mather, B.A., M.A., J.D.; *Distinguished Professor Emeritus of Law*
William S. McAninch, B.A., LL.B., LL.M.; *Distinguished Professor Emeritus of Law*
Ralph C. McCullough, II, B.A., J.D.; *Distinguished Professor Emeritus of Law*
John E. Montgomery, B.Ch.E., J.D., LL.M.; *Distinguished Professor Emeritus of Law, Dean Emeritus*
Dennis R. Nolan, A.B., M.A., J.D.; *Distinguished Professor Emeritus of Law and Webster Professor Emeritus of Labor Law*
David G. Owen, B.S., J.D.; *Carolina Distinguished Professor of Law*
Burnele Venable Powell, B.A., J.D., LL.M.; *Miles and Ann Loadholt Professor of Law*
Walter F. Pratt, Jr., B.A., D.Phil., J.D.; *James P. Mozingo III Professor Emeritus of Legal Research Distinguished Professor Emeritus of Law*
O'Neal Smalls, B.S., J.D., LL.M.; *Distinguished Professor Emeritus of Law*
Stephen A. Spitz, B.S., J.D.; *Distinguished Professor Emeritus of Law*
Roy T. Stuckey, B.A., J.D.; *Distinguished Professor Emeritus of Law and Webster Professor Emeritus of Clinical Legal Education*
Jon P. Thames, J.D., LL.M.; *Distinguished Professor Emeritus of Law*
James L. Underwood, A.B., J.D., LL.M.; *Distinguished Professor Emeritus of Law*
Eldon D. Wedlock, Jr., A.B., J.D., LL.M.; *Distinguished Professor Emeritus of Law*

FACULTY

Janice M. Baker, B.A., J.D.; *Assistant Director of Legal Writing*
Derek W. Black, B.A., J.D.; *Professor of Law and Class of 1959 Chair for Legal Research*
Robert T. Bockman, B.A., M.A., J.D.; *Senior Legal Writing Instructor*
Marie C. Boyd, A.B., J.D.; *Assistant Professor of Law*
Josephine F. Brown, B.A., J.D.; *Associate Professor of Law*
James R. Burkhard, B.A., M.A., J.D.; *Associate Professor of Law*
Elizabeth Chambliss, B.S., M.S., Ph.D., J.D.; *Professor of Law and Director, NMRS Center on Professionalism*
Jaclyn A. Cherry, B.A., J.D. *Associate Professor of Law*
Thomas P. Crocker, B.A., M.A., M.A., Ph.D., J.D.; *Distinguished Professor of Law*
Jesse M. Cross, M.A., J.D.; *Assistant Professor of Law*
Elizabeth M. Dalzell, B.S., J.D.; *Legal Writing Instructor*
Tessa Davis, B.S., J.D., LL.M.; *Assistant Professor of Law*
Joshua G. Eagle, B.A., M.S., J.D.; *Solomon Blatt Professor of Law*
Lisa A. Eichhorn, A.B., J.D.; *Director of Legal Writing and Professor of Law*
Ann M. Eisenberg, J.D., LL.M.; *Assistant Professor of Law*
Jacqueline R. Fox, B.A., J.D., LL.M.; *Professor of Law*

Kenneth W. Gaines, B.S., J.D., LL.M.; *Associate Professor of Law*
 Joshua Gupta-Kagan, B.A., J.D.; *Associate Professor of Law*
 Susan S. Kuo, A.B., J.D.; *Associate Dean for Diversity and Inclusion and Professor of Law, Class of 1969 Chair for Teaching Excellence*
 Shelby Leonardi, B.A., J.D.; *Legal Writing Instructor*
 Ami Leventis, B.A., J.D.; *Legal Writing Instructor*
 David K. Linnan, B.A., J.D.; *Associate Professor of Law*
 Lisa Martin, B.A., J.D.; *Assistant Professor of Law*
 Martin C. McWilliams, Jr., B.A., J.D., LL.M.; *Professor of Law*
 Benjamin Means, A.B., J.D.; *Professor of Law*
 S. Alan Medlin, B.A., J.D.; *David W. Robinson Professor of Law*
 Amy L. Milligan, B.S., B.A., J.D.; *Assistant Director of Legal Writing*
 Elizabeth G. Patterson, B.A., J.D.; *Professor of Law*
 Aparna Polavarapu, B.S., J.D., M.A.L.D.; *Assistant Professor of Law*
 Claire Raj, B.A., J.D.; *Assistant Professor of Law*
 Nathan Richardson, B.S., J.D.; *Associate Professor of Law*
 Wadie E. Said, A.B., J.D.; *Professor of Law*
 Joel H. Samuels, A.B., M.A., J.D.; *Professor of Law and Director, Rule of Law Collaborative*
 Joseph A. Seiner, B.B.A., J.D.; *Oliver Ellsworth Professor of Federal Practice*
 Bryant Walker Smith, B.S., J.D., LL.M.; *Assistant Professor of Law*
 Ned Snow, B.A., J.D.; *Ray Taylor Fair Professor of Law*
 Seth Stoughton, B.A., J.D.; *Associate Professor of Law*
 Howard B. Stravitz, B.A., J.D.; *Associate Professor of Law*
 Emily F. Suski, B.A., J.D., M.S.W., LL.M.; *Assistant Professor of Law*
 Michael J. Virzi, B.A., J.D.; *Legal Writing Instructor*
 Clinton G. Wallace, A.B., J.D., LL.M.; *Assistant Professor of Law*
 Shelley Welton, B.A., J.D., M.P.A., Ph.D.; *Assistant Professor of Law*
 Marcia A. Zug, A.B., J.D.; *Professor of Law*

COLEMAN KARESH LAW LIBRARY FACULTY

Duncan E. Alford, B.A., J.D., M.L.I.S.; *Associate Dean and Director of the Law Library, Professor of Law*
 Megan Brown, B.A., M.L.I.S.; *Acquisitions and Electronic Resources Librarian*
 Amanda Bullington, B.A., M.L.I.S.; *Cataloging and Serials Librarian*
 Terrye M. Conroy, B.S., J.D., M.L.I.S.; *Assistant Director of Legal Research Instruction*
 Aaron Glenn, B.A., J.D., M.L.I.S.; *Reference Librarian*
 Andrew Kretschmar, B.A., M.L.I.S.; *Access Services Librarian*
 Rebekah K. Maxwell, B.A., J.D., M.L.I.S.; *Associate Director for Library Operations*
 Cornelius Pereira, B.A., M.A., M.L.I.S.; *Head of Technical Services*
 Eve Ross, B.A., M.L.I.S.; *Reference Librarian*
 Candle M. Wester, B.S., J.D., M.S.L.I.S.; *Associate Director for Faculty Services and Administration*

ADJUNCT AND VISITING FACULTY

Hon. Joseph F. Anderson, Jr.	Hon. David R. Duncan	John D. Martin
Brook B. Andrews	Hon. John Few	Dave Maxfield
Michael Anzelmo	Christopher Todd Hagins	Joseph M. McCulloch, Jr.
Steven Austermilller	Richard Handel	Elizabeth Scott Moïse
Hon. James R. Barber, III	Richard Harpootlian	Deborah Morgan
Brett H. Bayne	Rachel A. Hedley	Clarke Newton
Margaret Bodman	Blake Hewitt	Sara Parrish
William B. Brannon	William O. Higgins	Charles F. Reid
Teri Callen	Lee P. Jedziniak	Hon. Dennis W. Shedd
Ronald M. Childress	Bill Killough	Karen Thomas
Joseph D. Clark	Stanford E. Lacy	Travis C. Wheeler
Lesley M. Coggiola	John K. Langford	Hon. H. Bruce Williams
Hon. Thomas W. Cooper, Jr.	Ernest Lipscomb	Benton D. Williamson
Jennalyn C. Dalrymple	James E. Lockemy	Richard H. Willis
Emma Dean	Cory E. Manning	David S. Wyatt

CORPORATE CULTURE AND COMPETITION COMPLIANCE
IN EAST ASIA

Jingyuan Ma^{*}
Mel Marquis^{**}

Abstract

Efforts to secure competition law compliance among commercial operators can usefully be tailored in a way that takes account of cultural characteristics. Since culture forms part of the conditions in which the development of a robust and credible compliance system occurs, it makes sense to approach compliance issues in a manner sensitive to that cultural background. In the context of East Asian enterprises, this implies a need to take account of the legacy of Confucian ethics, which has had a profound influence on the psychology and behavior of commercial organizations in the region. The importance of that legacy suggests that compliance will not be achieved within East Asian firms solely on the basis of the external legal environment, an environment in which deterrence-oriented factors such as sanctions and the threat of detection play a central role. More

^{*} *Jingyuan Ma, Ph.D, is Assistant Professor at Central University of Finance and Economics in Beijing.*

^{**} *Mel Marquis, Ph.D, is Part-time Professor of Law at the European University Institute in Florence and Professore a contratto at LUMSA University in Rome. The authors thank the editors for their helpful assistance with the manuscript of this article.*

attention should be given to the internal moral and social environment, and to shaping the logic of appropriateness within a given firm. A compliance culture can thus be constructed on the basis of elements such as moral commitment, Eastern-style education, the cultivation of virtue, and the convergence of the interests of the enterprise and those of its employees.

I. INTRODUCTION

Since the early 1990s, antitrust authorities have taken actions to encourage companies to implement compliance programs, thereby raising the likelihood that they conform to the requirements of antitrust law. Such actions include offering reductions in fines,¹ issuing compliance guides,² and producing YouTube videos, or

¹ See, e.g., *Guidance as to the Appropriate Amount of Penalty*, OFF. OF FAIR TRADING (2012), http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf.

² See, e.g., *Drivers of Compliance and Non-Compliance with Competition Law: An Ofi Report*, OFF. OF FAIR TRADING (2010), http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf; *How your Business can Achieve Compliance with Competition Law*, OFF. OF FAIR TRADING (2011), http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf; *Promoting Compliance with Competition*, ORG. FOR ECON. CO-OPERATION AND DEV. (2012) [hereinafter OECD], <http://www.oecd.org/daf/competition/Promotingcompliancewithcompetiti onlaw2011.pdf>. See also *United States Sentencing Commission*, 2015 US

even cartoons, to aid compliance training.³ In the United States, if an offending firm has implemented a compliance program, it may be taken into account when the authorities decide whether the enterprise will be prosecuted, whether it should be rewarded with a fine reduction, and during any settlement negotiations.⁴ In Australia, Canada, France, India, Israel, Italy, Singapore, South Africa, and the United Kingdom, the effectiveness of existing compliance programs will be considered by the competition authority when calculating fines or in the context of settlements.⁵ Among those authorities, some

SENTENCING COMMISSION GUIDELINES MANUAL (2015), <http://www.ussc.gov/guidelines/2015-guidelines-manual>.

³ See *Benefits of Competition Policy for Consumers*, Eur. Comm'n on Competition http://ec.europa.eu/competition/consumers/why_en.html (April 16, 2012); Ted Banks & Joe Murphy, *The International Law of Antitrust Compliance*, 40 DENVER J. INT'L LAW & POL'Y 368, 373-4 (2012); see NMaMovie, *Leniency in Cartel Cases*, YOUTUBE (June 9, 2008), <http://www.youtube.com/watch?v=5diFAaJdweI>; see also Konkurrensverket, *Be the First to Tell - A Film about Leniency*, YOUTUBE (Mar. 3, 2010), https://www.youtube.com/watch?v=_r99qzC8aHA.

⁴ See Banks & Murphy, *supra* note 3, at 376 (citing *United States Att'ys' Manual*, STATES DEP'T OF JUSTICE 9-28.000, (2018) http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcr m.htm#9-28.800).

⁵ See Banks & Murphy, *supra* note 3, at 379-80. Subject to variations and nuances, certain jurisdictions including Australia, Brazil, Canada, the UK and the US provide for the possibility of fine reductions for companies with effective compliance programs. Other authorities, including notably the European Commission and most European competition agencies (with some exceptions) maintain the opposite policy and refrain from granting fine reductions. See, e.g., Eva Lachnit, *Compliance Programmes in*

(such as those in the United States,⁶ Canada,⁷ The Netherlands,⁸ and France⁹) provide guidelines on the key elements and tools that should be incorporated in a compliance program, whereas others, such as the competition authority in Singapore,¹⁰ provide standards that will be used to evaluate whether, in the authority's view, the compliance program is effective.¹¹

The latter point concerning Singapore illustrates the fundamental point that *adopting* a compliance program is not sufficient; the crucial issue is whether a well-

Competition Law: Improving the Approach of Competition Authorities, 10 UTRECHT L. REV. 31, 46 (2014).

⁶ See *US Sentencing Comm'n*, *supra* note 2.

⁷ See Corporate Compliance Programs, CAN. COMPETITION BUREAU (Jan. 3, 2015), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html>.

⁸ See Lachnit, *supra* note 5, at 38.

⁹ The French competition authority (the Autorité de la concurrence) has issued compliance guide brochures in English and French (Antitrust compliance and Compliance Programmes - Corporate Tools for Competing Safely in the Marketplace) http://www.autoritedelaconcurrence.fr/doc/brochure_conformite_uk.pdf (2018); see also, Framework Document on Antitrust Compliance Programmes, AUTORITÉ DE LA CONCURRENCE (2012), http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf.

¹⁰ See Guidelines on the Appropriate Amount of Penalty, COMPETITION COMMISSION OF SINGAPORE, <https://www.cccs.gov.sg/legislation/cccs-guidelines> (last updated Jan. 24, 2019).

¹¹ See Banks & Murphy, *supra* note 3, at 382.

designed compliance program is effectively and sustainably implemented.¹² The current debate on corporate compliance is largely based on optimal deterrence theory—it revolves around the use of “carrots” (fine reductions) and “sticks” (criminal penalties) to induce compliance.¹³ However, the deterrence model has some shortcomings.¹⁴ In the

¹² The need to consider not just the existence of a compliance program but also its effectiveness is stated succinctly by Transparency International-USA in the anti-corruption context: “Verification reviews should focus on two questions: is the program well-designed and is the program operating effectively?” *Verification of Anti-Corruption Compliance Programs*, TRANSPARENCY INT’L-USA (2014), https://www.coalitionforintegrity.org/wp-content/uploads/2016/03/TI-USA_2014_verificationreportfinal.pdf.

¹³ See generally Anne Riley & Daniel Sokol, *Rethinking Compliance*, 3 J. ANTITRUST ENF. 31 (2015).

¹⁴ See Kevin Kennedy, *A Critical Appraisal of Criminal Deterrence Theory*, 88 DICK. L. REV. 1, 7-11 (1983) (highlighting objections to deterrence theory that are based on, *inter alia*: the occasionally unrealistic nature of the rational actor model; a lack of convincing proof of causation between sanctions and deterrence; deterrence theory’s indifference to morality; paradoxes such as the fact that the specific deterrent effect of sanctions has already failed if the sanction must be administered once an offense has been committed; certain classic critiques of utilitarianism, for example that it instrumentalizes human beings or is, even worse, “sadistic” in nature; and the possibility that the “ambiguity that often pervades the punishment message can diminish the deterrent effect”). See also KAREN YEUNG, *SECURING COMPLIANCE: A PRINCIPLED APPROACH* 63-72 (2004) (on the issue of the deterrence theory’s assumption that firms carefully weigh the costs and benefits of illegal conduct and thus respond rationally to prescribed punishments, Yeung notes that “empirical studies suggest that corporations are not solely driven by self-seeking individuals concerned

context of compliance programs, no clear empirical evidence demonstrates a causal link between the threat of sanctions and effective compliance, and surveys show that business practitioners are often unaware of compliance requirements in relation to antitrust law.¹⁵ Research also shows that severe sanctions alone are unlikely to achieve deterrence and optimal compliance. An effective motivation to comply with the law is better secured by increasing the perceived value of such compliance and increasing the perceived risk that misconduct will be detected.¹⁶

exclusively with the pursuit of profit, but who may be motivated, at least partially, by non-financial concerns, including a sense of social responsibility and respect for the rule of law. If so, then attempting to deter commercial firms from committing offences on pain of punishment may be only weakly effective, and perhaps less effective, than the use of non-punitive strategies to encourage compliance.”).

¹⁵ See D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think about Compliance*, 78 ANTITRUST L. J. 201 (2012).

¹⁶ See Vibeke Lehmann Nielsen & Christine Parker, *The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings*, ANU CENT. FOR COMPETITION AND CONSUMER POL’Y (December 1, 2005), <http://ssrn.com/abstract=906945> (summarizing national survey of business practitioners in Australia regarding their attitudes, beliefs and experiences on compliance with respect to competition and consumer protection law and with respect to the enforcement activities of the Australian Competition and Consumer Commission); Vibeke Lehmann Nielsen & Christine Parker, *Mixed Motives: Economic, Social and Normative Motivations in Business Compliance*, 34 L. & POL’Y 428 (2012). See also Christine Parker, *The*

Despite such problems with deterrence-based strategies to promote compliance, some competition agencies decline to explore the possibility of putting more attention on rewarding enterprises that show a bona fide commitment to compliance.¹⁷ The use of carrots (notably in the form of fine reductions) to incentivize companies to design and implement competition programs¹⁸ has been criticized.¹⁹

“Compliance” Trap: The Moral Message in Responsive Regulatory Enforcement, 40 L. & SOC’Y REV. 591 (2006) (recommending responsive regulation as a means of “leveraging” deterrence). See generally Christine Parker & Vibeke Lehmann Nielsen, *Deterrence and the Impact of Calculative Thinking on Business Compliance with Regulation*, 56 ANTITRUST BULL. 377 (2011).

¹⁷ The European Commission explains its policy in the following terms.: “If a company which has put a compliance programme in place is nevertheless found to have committed an infringement of EU competition rules, the question of whether there is any positive impact on the level of fines frequently arises. The answer is: No. Compliance programmes should not be perceived by companies as an abstract and formalistic tool for supporting the argument that any fine to be imposed should be reduced if the company is ‘caught.’ The purpose of a compliance programme should be to avoid an infringement in the first place.” *Compliance Matters: What Companies Can Do Better to Respect EU Competition Rules 21*, EUR. COMMISSION (2012), <https://publications.europa.eu/en/publication-detail/-/publication/78f46c48-e03e-4c36-bbbe-aa08c2514d7a/language-en>.

¹⁸ See, e.g., Stephen Calkins, *Corporate Compliance and the Antitrust Agencies’ Bi-Modal Penalties*, 60 L. & CONTEMP. PROB. 127, 146-47 (1997).

¹⁹ See Andreas Stephan, *Why the UK’s New Approach to Competition Compliance Makes for Good Enforcement*, 1 CPI ANTITRUST CHRONICLE (2012); Wouters Wils, *Antitrust Compliance Programmes and Optimal*

As the debate on the desirability of rewarding compliance programs proceeds, there is not a clear consensus on how to determine whether a compliance program is effective, and there is no universal template for the content of such a program. It is true that efforts have been made to create and expand a set of ingredients for an effective compliance program.²⁰ On the other hand, many have pointed out that compliance programs are not “one size fits all,” although overall objectives and

Antitrust Enforcement, 1 J. ANTITRUST ENF. 52 (2012); Damien Geradin, *Antitrust Compliance Programmes and Optimal Antitrust Enforcement: A Reply to Wouter Wils*, 1 J. ANTITRUST ENF. 325 (2013); Andreas Stephan, *Hear no Evil, See No Evil: Why Antitrust Compliance Programmes May Be Ineffective at Preventing Cartels*, CCP WORKING PAPER 09-09 <http://competitionpolicy.ac.uk/documents/107435/107587/1.122147!ccp09-9wp.pdf>; D. Daniel Sokol & Rosa Abrantes-Metz, *Antitrust Corporate Governance and Compliance*, THE OXFORD HANDBOOK OF INT'L ANTITRUST ECON. VOL. 2 586 (2014).

²⁰ For example, Joe Murphy and William Kolasky have listed twenty features on an ‘effective’ compliance program. See Joe Murphy & William Kolasky, *The Role of Anti-Cartel Compliance Programs in Preventing Cartel Behavior*, 26 ANTITRUST 61 (2012). See also Christine Parker & Sharon Gilad, *Internal Corporate Compliance Management Systems: Structure, Culture and Agency*, EXPLAINING COMPLIANCE: BUS. RESPONSES TO REG. (Christine Parker & Vibeke Lehmann Nielsen eds., 2011); Christine Parker et al., *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEORGETOWN J. LEGAL ETH. 201 (2009); Gary Weaver et al., *Corporate Ethics Programs as Control Systems: Influences of Executive Commitment and Environmental Factors*, 42 ACAD. MGMT. J. 41, 42 (1999).

principal features may be identified.²¹ Indeed, the same type of compliance program may function differently in firms with different organizational cultures.²² Similar to other competition enforcement instruments—such as criminal sanctions, severe fines,²³ leniency programs,²⁴

²¹ See, e.g., Joe Murphy, *One Size Fits All: A Flawed Approach to Company Compliance Programs* (2012), <https://www.competitionpolicyinternational.com/assets/Uploads/CartelColumnApril-2.pdf>; OECD, *supra* note 2, at 13 (2012) (“Delegates and private sector representatives agreed that ‘one size fits all’ approaches to designing compliance programmes are not advisable because each sector and firm is so different. However, clarifying the overall objectives and principal features of good competition programmes can be helpful. There is general agreement that these objectives can be summarized as ‘the 5 C’s’: (i) Commitment, (ii) Culture, (iii) Compliance know-how and organization, (iv) Controls and (v) Constant monitoring and improvement. Genuine compliance programmes are taken seriously at every level of the corporation, and they involve regular training, audits, screening and updates.”).

²² This argument is likely reinforced by the consideration that, like the proverbial “black box,” the internal workings and cultures of different firms may be impervious to observation. See Ronald J. Mann & Curtis J. Milhaupt, *Foreword*, 74 WASH. U. L. Q. 317, 323 (1996). See also Daron Acemoglu & Simon H. Johnson, *Unbundling Institutions*, 113 J. POL. ECON. 949 (2005) (explaining the importance of policy and the protections it allows).

²³ See, e.g., Sanghyun Lee, *Using Action in Damages to Improve Criminal Penalties Against Cartels: Comparative Analysis of Competition Law of United States and South Korea*, 16 CURRENTS: INT’L TRADE L. J. 55 (2007).

²⁴ See ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION 149 (Caron Beaton-Wells & Christopher Tran eds., 2015) [hereinafter LENIENCY RELIGION].

and individual liabilities—it is thought that compliance programs should be implemented all around the world,²⁵ and yet, at the same time, there are doubts about whether the same enforcement tool can be transplanted with success in a vast number of countries with starkly different backgrounds and cultures.²⁶

This article proposes that corporate culture has a significant impact on the effectiveness of compliance, since corporate culture contributes to the shaping of incentives and constraints in a firm and thereby drives behavior. Competition law compliance and the promotion of compliance by stakeholders external to the firm should be cognizant of, and where appropriate should be tailored to take account of, the corporate cultures found in a given country or relevant geographic space. It is argued that the effectiveness of compliance mechanisms will largely depend on the extent to which such mechanisms are embedded within the culture of local businesses and local communities,²⁷ and

²⁵ See John M. Connor, *Global Antitrust Prosecutions of International Cartels: Focus on Asia* (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027949.

²⁶ See Anzhela Korzhevskaya, *Achieving a Competition Compliance Culture in Russia: Assessing the UK Experience in Compliance Programmes to Deter Cartels*, 3 *RUSS. L. J.* 62 (2015).

²⁷ See, e.g., Theodore Banks, *Antitrust Compliance—It's All About the Culture*, *CPI ANTITRUST CHRON.* 1 (2012) <http://www.canadianadvertisinglaw.com/antitrust-compliance-its-all->

compatible with relevant social norms.²⁸ Where sensitivity to these features is lacking, a competition authority may be incapable of distinguishing between cosmetic and genuine compliance.²⁹ As the work of other commentators reveals, the objective should be to trigger a deep transformation of internal corporate culture and business ethics, as this may be the only sure way to secure robust compliance with the law.³⁰

about-the-culture/. A more general debate on this issue relates to the cultural barriers that condition the prospects of success for legal transplants. This debate, particularly prominent since the 1970s, originates from Montesquieu's work *The Spirit of Laws* (Livre I) (Gallimard 1749) (reprinted: J.P. Mayer & A.P. Kerr eds., 1970). Whereas legal commentators (characterized as "legal scientists") such as Judge Easterbrook, propose sets of assumptions and criteria that purport to be capable of application anywhere irrespective of cultural-historical distinctions, "legal culturalists" such as Legrand and Hall argue that law is unique, locally based, and "untranslatable." See Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 MODERN L. REV. 262 (1995); Stuart Hall, *Cultural Studies: Two Paradigms*, 2 MEDIA CULTURE & SOC'Y 57 (1980).

²⁸ Law and anthropology scholars often claim that law is a form of local "knowledge." See Janet Ainsworth, *Categories and Culture: On the Rectification of Names in Comparative Law*, 82 CORNELL L. REV. 19, 28 (1996). As argued by Clifford Geertz, "local" refers not only to place, time, class and variety of issue but also to "accent," which is closely linked to particularized local norms. See CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167-234 (3rd ed, 2000).

²⁹ See generally Miriam H. Baer, *Governing Corporate Compliance*, 50 B. C. L. REV. 1 (2009); Wils, *supra* note 19.

³⁰ See LENIENCY RELIGION, *supra* note 24, at 301.

This article proposes that the discourse on compliance efforts and their effectiveness would be well served by explicitly considering the relevance of corporate culture, which may have distinct local characteristics. In this context, local culture can be relevant in two ways. First, there is a clear need to incentivize companies to establish an internal compliance program to prevent, or at least quickly detect, illegal conduct (*e.g.* price fixing, market sharing, bid-rigging and the like). Further, a firm's incentives to invest in compliance efforts are more likely to be successful if enforcement policies go far beyond the precarious assumption that "optimal deterrence" will produce optimal compliance. The second consideration, which concerns the wider public (including small businesses) is that enforcement by a competition agency, as well as judicial enforcement and the contributions of civil society, should all aim to demonstrate the harmful effects of cartels and establish a social norm that morally condemns them.³¹

These arguments are raised with the example of East Asian firms, which have been influenced by Confucian

³¹ We are not alone in calling for broader public awareness and stigmatization of cartels. *See, e.g.,* Andreas Stephan, *Cartel Laws Undermined: Corruption, Social Norms, and Collectivist Business Cultures*, 37 *J. L. & Soc'y* 345, 350 (2010).

beliefs and by particular corporate organizational cultures. The underlying contention is that if business success in East Asia has been culture-driven,³² then a successful approach to competition law compliance should likewise be culture-driven. This article begins with the observation that in East Asia parts of Confucian philosophy have substantially shaped cultural and societal norms for thousands of years.³³ Confucianism provided the fundamental basis for ancient jurisprudence

³² For the argument that the post-WWII economic success of East Asia is culture-driven, see Michael Bond & Geert Hofstede, *The Cash Value of Confucian Values*, CAPITALISM IN CONTRASTING CULTURES 383-90 (S.R. Clegg & S.G. Redding eds., 1990). A few studies have attributed the economic success of East Asian countries to Confucian business ethics. See, e.g., Gary Kok Yew Chan, *The Relevance and Value of Confucianism in Contemporary Business Ethics*, 77 J. BUS. ETHICS 347 (2008); Edward Romar, *Globalization, Ethics, and Opportunism: A Confucian View of Business Relationships*, 14 BUS. ETHICS Q. 663 (2004); Kit-Chun Joanna Lam, *Confucian Business Ethics and the Economy*, 43 J. BUS. ETHICS 153 (2003); Daryl Koehn, *Confucian Trustworthiness and the Practice of Business in China*, 11 BUS. ETHICS Q. 415 (2001).

³³ See Andrew Tae-Hyun Kim, *Culture Matters: Cultural Differences in the Reporting of Employment Discrimination Claims*, 20 WM. & MARY BILL RTS J. 405, 437 (2011). "No other philosophy has so deeply influenced the life and thought of the East Asian people and character. Though many profess to be Taoist, Buddhist, or Christian, they also simultaneously profess to be Confucianist, as Confucianism has become an inseparable part of East Asian thought and society, and synonymous with what it means to be East Asian." In particular contexts this expansive statement may need to be tempered, as some societies exhibit some but not all of the classical Confucian characteristics, and other influences have certainly also left their own imprints.

and imperial governance in East Asia,³⁴ and it became the source of a “common Asian Law.”³⁵ Ancient Confucian laws and philosophical norms in East Asia have deeply influenced the organization of social activities, the collective (un)conscious, and the behavior of individuals in a wide variety of contexts.³⁶ This distinctive cultural heritage and value system may impede the re-modeling of corporate governance according to assumptions and criteria of western, rule-based regimes.³⁷ Although there is a focus on competition law as a specific sphere of business regulation, the discussion in this article illustrates more generally that compliance programs should be tailored to take account of and if possible, harness the paradigms of societal and business culture.

³⁴ See CHONGKO CHOI, *EAST ASIAN JURISPRUDENCE* (2009).

³⁵ Takao Tanase, *Global Markets and the Evolution of Law in China and Japan*, 27 MICH. J. INT’L L. 873, 877 (2006).

³⁶ See, e.g., Kim, *supra* note 33.

³⁷ See Kun Luen Alex Lau & Angus Young, *Why China Shall not Completely Transit from a Relation Based to a Rule Based Governance Regime: A Chinese Perspective*, 21 CORP. GOVERNANCE.: AN INT’L REV. 577 (2013) (explaining that relation-based governance was influenced by Confucian doctrines and moral codes regulating behavior and relationships and that, since relation-based governance is culturally embedded, firms in China are unlikely to abandon it entirely in favor of a rule-based system imported from the West.).

A caveat is required because there are many variations in business and management cultures in Asia.³⁸ This article acknowledges past criticism of attempts to link pre-modern beliefs with modern business organizations, and the risk of over-reliance on culture-based—plus for that matter institution-based—explanations.³⁹ Cognizant of the criticisms relating to the linear model of organizational culture and business performance,⁴⁰ and of the pitfalls of overestimating

³⁸ See *Managing Across Diverse Cultures in East Asia: Issues and Challenges in a Changing Globalized World* (Malcolm Warner ed., 2013); Michael Minkov & Vesselin Blagoev, *Is There a Distinct Asian Management Culture?*, 20 ASIA PAC. BUS. REV. 209 (2014).

³⁹ See Barry Wilkinson, *Culture, Institutions and Business in East Asia*, 17 ORG. STUD. 421 (1996) (critical of both culturist and institutionalist perspectives, since each may lead to a determinist account that ignores human agency and neglects the issues of interests, power and ideology in business structures); *Contra* Sid Lowe, *Culture and Network Institutions in Hong Kong: A Hierarchy of Perspectives. A Response to Wilkinson: 'Culture, Institutions and Business in East Asia*, 19 ORG. STUD. 321 (1998) (criticizing Wilkinson's article and emphasizing, *inter alia*, the importance of social, political, economic and other influences that provide context for corporate behavior).

⁴⁰ For criticisms on the overly simple nature of the studies on corporate culture and organizational performance, see DANIEL R. DENISON, *CORPORATE CULTURE AND ORGANIZATIONAL EFFECTIVENESS* (1990); JOHN P. KOTTER & JAMES L. HESKETT, *CORPORATE CULTURE AND PERFORMANCE* (1992); Daniel Carroll, *A Disappointing Search for Excellence*, 6 HARV. BUS. REV. 78 (1982); George Gordon & Nancy Ditomaso, *Predicting Corporate Performance from Organizational Culture*, 29 J. MGMT. STUD. 83 (1992); Paul Reynolds, *Organizational Culture as Related to Industry, Position and Performance: A Preliminary Report*, 23 J. MGMT. STUD. 333

cultural factors to explain managerial issues in ethnic Chinese business,⁴¹ this article nevertheless argues that corporate culture, which is a reflection of societal culture, partly determines the character and functioning of an organization and that, consequently, corporate culture may be an important factor in the development and operation of internal compliance systems. This article therefore identifies certain elements of East Asian corporate culture and considers how they might be further integrated into the design of compliance programs in order to enhance the effectiveness of competition laws to the benefit of societies that rely on market institutions.

The analysis is structured as follows. Part two argues that approaches to competition law compliance

(1986); Guy Saffold III, *Culture Traits, Strength and Organizational Performance: Moving Beyond "Strong" Culture*, 113 ACAD. MGMT. REV. 546 (1988).

⁴¹ See Yuan Lu et al. *Knowledge Management and Innovation Strategy in the Asia Pacific: Toward an institution-based view*, 25 ASIA PAC. J. MGMT. 361, 374 (2008) discussing the theme of "Managing in Ethnic Chinese Communities." For an overview of the contributions to the Special Issue, see David Ahlstrom et al., *Managing in Ethnic Chinese Communities: Culture, Institutions, and Context*, 27 ASIA PAC. J. MGMT. 341, 344-9 (2010). Traditionally, many economists tended to be very negative towards the explanatory power of culture. As Amir N. Licht once vividly noted: "culture used to have a bad name among economists. It was not particularly popular among lawyers [either]. One reason probably was that culture is very difficult to observe. One therefore may fear that people would resort to cultural explanations when they run out of good ones, as the former would be impossible to disprove" Amir Licht (2014), *Culture and Law in Corporate Governance*, ECGI L. Working Paper No. 247/2014, 15 (2014), <http://ssrn.com/abstract=2405538> (last visited July 30, 2018).

should be culture-driven in the sense that culture should be considered and if possible, harnessed to enhance the quality and effectiveness of compliance. Part three begins by summarizing Confucian values and the impact of Confucianism on the general business environment. Specifically, this article discusses the influence of Confucian values by reference to three dimensions: hierarchy-based leadership, the role of family in business, and the interaction between internal and external actors. Part four discusses the theoretical and empirical literature on organizational culture, examines management studies and corporate governance, and identifies the organizational culture of East Asian companies according to different ownership types (i.e. state-owned companies, family businesses, and foreign-invested companies). Empirical literature from business and management studies on corporate and organizational culture in China, Japan, and Korea will be discussed in order to highlight the characteristics of companies in each country. This connection considers how competition law compliance could be facilitated by taking account of Confucian values and patterns of organizational culture. Part five focuses on competition law compliance and reflects on how it may be possible to harness cultural norms to enhance compliance efforts in this context.

II. CORPORATE CULTURE AND COMPETITION COMPLIANCE

A. *CORPORATE CULTURE AS AN INTERNAL CONTROL FORCE*

Almost every organization has common values to

maintain as a united entity.⁴² Likewise, every business entity embodies certain values and corporate culture.⁴³ As with the concept of culture itself, defining “corporate culture” or the similar notion of “organizational culture” presents difficulties.⁴⁴ According to Edgar Schein, organizational culture is: “a pattern of shared basic assumptions that the group learned as it solved its problems of external adaptation and internal integration that has worked well enough to be considered valid and therefore to be taught to new members as the correct way to perceive, think and feel in relation to those problems.”⁴⁵ Jay B. Barney defines organizational culture as “a complex set of values, beliefs, assumptions, and symbols that define the way in which a firm conducts its business.”⁴⁶ Similarly, Rohit Deshpande and

⁴² See Jennifer Chatman & Karen Jehn, *Assessing the Relationship Between Industry Characteristics and Organizational Culture: How Different Can You Be?*, 37 ACAD. MGMT. J. 522, 525 (1994); John Van Maanen & Stephen R. Barley, *Toward a Theory of Organizational Socialization*, 6 RESEARCH IN ORGANIZATIONAL BEHAVIOR 287 (1984).

⁴³ See Philip Selznick, *Leadership in Administration: A Sociological Interpretation* (1957).

⁴⁴ For example, A.L. Kroeber and Clyde Kluckhohn claimed already in the 1950s that 164 different meanings of “culture” had been identified in anthropology and sociology. See A.L. Kroeber & Clyde Kluckhohn, *Culture: A Critical Review of the Concepts and Definitions* (1952).

⁴⁵ EDGAR SCHEIN, *ORGANIZATIONAL CULTURE AND LEADERSHIP* 11, 12 (2nd ed. 1992).

⁴⁶ Jay B. Barney, *Organizational Culture: Can It Be a Source of Sustained Competitive Advantage?*, 11 Acad. Mgmt. Rev. 656, 657 (1986).

Frederick Webster describe organizational culture as “patterns of shared values and beliefs that help individuals understand organizational functioning and thus provide them with norms for behaviors in the organization.”⁴⁷ As Terrence Deal and Allan Kennedy point out, corporate culture is the “commercialized” version of organizational culture.⁴⁸ The definition of corporate culture provided by Jerald Greenberg and Robert Baron suggests that, similar to the concept of “culture” itself, *corporate* culture refers to the behavioral norms, values, and expectations within an organization.⁴⁹ Literature reviews provided by other authors shared the view that corporate culture consists of behavioral norms and “codes of conduct,” expressed in varying combinations of formal and informal terms, and that such norms and codes are generally understood and accepted by the members of the organization.⁵⁰

⁴⁷ Rohit Deshpande & Frederick E. Webster, Jr., *Organizational Culture and Marketing: Defining the Research Agenda*, 53 *J. Marketing* 3, 4 (1989).

⁴⁸ See Terrence E. Deal & Allan A. Kennedy, *Corporate Cultures: The Rites and Rituals of Corporate Life* (1982).

⁴⁹ See Jerald Greenberg & Robert A. Baron, *Behavior in Organizations* 544 (9th ed, 2008).

⁵⁰ See, e.g., Golnaz Sadri & Brian Lees, *Developing Corporate Culture as a Competitive Advantage*, 20 *J. Mgmt. Dev.* 853 (2001); Choong Y. Lee & Jennifer Y. Lee, *South Korean Corporate Culture and Its Lessons for Building Corporate Culture in China*, 9 *J. Int'l. Mgmt. Stud.* 33, 34 (2014).

Business and management literature distinguish between strong and weak corporate culture.⁵¹ Strong cultures are a source of competitive advantage,⁵² organizational effectiveness,⁵³ innovation,⁵⁴ and better financial performance.⁵⁵ It has also been argued that corporate culture can be an instrument of “social control”⁵⁶ and can complement other control systems to change incentives and preferences.⁵⁷ Empirical

⁵¹ See Barney, *supra* note 46.

⁵² See *id.*; Denison, *supra* note 40; Kotter & Heskett, *supra* note 40; Charles O'Reilly, *Corporations, Culture, and Commitment: Motivation and Social Control in Organizations*, 31 Cal. Mgmt. Rev. 9 (1989); Alan Wilkins & William Ouchi, *Efficient Cultures: Exploring the Relationship Between Culture and Organizational Performance*, 28 Admin. Sci. Q. 468 (1983); Michael E. Porter, *Competitive Strategy* (1985).

⁵³ See Daniel R. Denison & Aneil K. Mishra, *Organizational Culture and Organizational Effectiveness: A Theory and Some Preliminary Empirical Evidence*, 6 ORG. SCI. 204-223 (1995); Denison, *supra* note 40.

⁵⁴ See Charlan Jeanne Nemeth & Barry M. Staw, *The Tradeoffs of Social Control and Innovation in Groups and Organizations*, 22 Advances in Experimental Social Psychology 175 (Leonard Berkowitz, ed., 1989).

⁵⁵ See THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE (1982); NOEL M. TICHY, MANAGING STRATEGIC CHANGE: TECHNICAL, POLITICAL, AND CULTURAL DYNAMICS (1983); Shinichi Hirota et al., *Does Corporate Culture Matter? Evidence from Japan*, WIAS Discussion Paper No.2008-001 (2008), <https://core.ac.uk/download/pdf/46881754.pdf>.

⁵⁶ See Charles A. O'Reilly & Jennifer A. Chatman, *Culture as Social Control: Corporations, Cults, and Commitment*, 18 RES. ORG. BEHAVIOR (Barry Staw & Larry Cummings, eds., 1996).

⁵⁷ See Luigi Guiso et al., *Social Capital as Good Culture*, 6 J. EUR. ECON. ASS'N. 295 (2008); Geoffrey M. Hodgson, *Corporate Culture and*

literature shows that corporate culture has a direct influence on corporate performance.⁵⁸ For example, the empirical study by Shinichi Hirota demonstrates that companies with strong culture managed to survive during the business fluctuations, recession, and banking crisis of 1997.⁵⁹ Economic literature portrays culture as a substitute for contracts in that it can solve coordination problems within sizable firms.⁶⁰ As Barney explained, organizational culture not only has “pervasive effects” that are sustainably applied to customers, suppliers, and competitors, it also affects how these actors engage with each other.⁶¹ The literature reviewed above thus

the Nature of the Firm, TRANSACTION COST ECON. & BEYOND 249 (Jo Groenewegen ed., 1996).

⁵⁸ See, e.g., Rohit Deshpandé et al., *Corporate Culture, Customer Orientation, and Innovativeness in Japanese Firms: A Quadrad Analysis*, 57 J. MARKETING 23 (1993); Daniel R. Denison & Aneil K. Mishra, *Toward a Theory of Organizational Culture and Effectiveness*, 6 Org. Sci. 203, 203-04 (1995); Jin Han et al., *Market Orientation and Organizational Performance: Is Innovation a Missing Link?*, 62 J. MARKETING 30 (1998).

⁵⁹ See Hirota et al., *supra* note 55.

⁶⁰ See David M. Kreps, *Corporate Culture and Economic Theory*, PERSP. ON POSITIVE POL. ECON. 90 (James Alt & Kenneth Shepsle eds., 1990). According to Robert Cooter and Melvin Eisenberg, the cultural norm of fairness was a “stable platform” serving to induce cooperative behavior of agents and thus promoting productive firm behavior. See Robert Cooter & Melvin A. Eisenberg, *Fairness, Character and Efficiency in Firms*, 149 U. PA L. REV. 1717 (2001). For a detailed review of some of the economic literature on corporate culture, see BENJAMIN E. HERMALIN, *ECON. & CORP. CULTURE* (1999).

⁶¹ See Barney, *supra* note 46, at 657.

provides a helpful landscape for organizational behavior, although understanding specific organizational, commercial decisions, or both also requires a focused examination of the business functions of the entity concerned as well as its incentives, constraints, and a variety of other factors that depend on the relevant facts and circumstances.

*B. COMPLIANCE AS AN INTERNAL FORCE FOR LAW
ENFORCEMENT*

In many jurisdictions there has been an increasing use of criminal sanctions and individual liabilities to sanction cartel behavior.⁶² However, empirical evidence shows that the effectiveness of severe penalties is often insufficient because business people often ignore or rationalize messages they receive and their knowledge about anti-cartel law is often limited.⁶³ For example, a survey of 567 business people in Australia by Christine

⁶² See, e.g., Jingyuan Ma & Mel Marquis, *Moral Wrongfulness and Cartel Criminalization in East Asia*, 36 ARIZ. J. INT'L & COMP. L. 1, 1-63 (forthcoming, 2019) (discussing the uneven but growing international trend toward harsher penalties and criminal sanctions in cases where cartel laws are violated).

⁶³ See Christine Parker & Chris Platania-Phung, *The Deterrent Impact of Cartel Criminalisation: Supplementary Report on a Survey of Australian Public Opinion Regarding Business People's Views on Anti-Cartel Laws and Enforcement* <http://ssrn.com/abstract=2026725> (last visited August 1, 2018).

Parker and Chris Platania-Phung indicated that, although at that time cartels had been criminalized for over a year in Australia (since 2010), fewer than half of the respondents realized that cartel behavior was a criminal offense.⁶⁴ Furthermore, many of the respondents believed that the risk of being caught for cartel activities was low, and that, hypothetically speaking, they would not be detected in the context of their own circumstances.⁶⁵ More recently, a 2014 telephone survey of around 1,200 private sector businesses in the United Kingdom (UK) revealed that, despite higher levels of awareness of competition law among large UK enterprises compared to smaller firms, an overall remarkably low rate of nineteen percent (19%) of the respondent firms engaged in discussions at senior level of the requirements of competition law (compared to a seventy-eight percent (78%) rate for health and safety).⁶⁶ Only six percent (6%) of the respondents held

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See* IFF RESEARCH, UK BUS.' UNDERSTANDING OF COMPETITION L. 28 (2015) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429876/UK_businesses_understanding_of_competition_law_-_report.pdf. For discussion, see Barry Rodger, *Competition Law Compliance: The CMA 2015 Study, Compliance Rationales and the Need for Increased Compliance Professionalism and Education*, 36 EUR. COMP. L. REV. 423 (2015).

competition law training sessions for employees.⁶⁷ Only twenty-three percent (23%) considered that they know competition law well, and twenty percent (20%) had never heard of it⁶⁸—a disappointing result later seized by the UK Comptroller and Auditor General.⁶⁹ It is also quite telling that nineteen percent of respondents thought that the “Federal Trade Commission,” a rather widelyknown organ of the American federal government, was responsible for enforcing competition law in the UK.⁷⁰ Considering the significant transparency of the enforcement and outreach efforts of the Office of Fair Trading and its successor, the Competition and Markets Authority, these figures from the UK can hardly bode well for other jurisdictions worldwide.⁷¹

Considering the findings from the above studies in Australia and the UK, many observers and anti-trust regulators recognize that merely increasing cartel penalties and enhancing detection by means of leniency programs are unlikely to achieve the goal of effective

⁶⁷ See UK BUSINESSES’ UNDERSTANDING, *supra* note 66, at 5, 30.

⁶⁸ *Id.* at 5, 31.

⁶⁹ See The UK Competition Regime, UK NATIONAL AUDIT OFFICE, 8, 27-28 (2016), <https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf>.

⁷⁰ See UK BUSINESSES’ UNDERSTANDING, *supra* note 66, at 57.

⁷¹ See *id.* at 59.

enforcement, unless, those measures are complemented by suitable and widespread compliance programs.⁷²

C. COMPLIANCE SHOULD BE CULTURALLY DRIVEN

Much of the global debate about corporate compliance in the field of competition law fails to push past a discussion of the *external* consideration of carrots and sticks and to consider compliance as an *internal* force that can change values, norms, and behavior within the corporation.⁷³ Seen from this perspective, culture and cultural change within organizations should be high on the agenda.⁷⁴ In light of the above-reviewed evidence

⁷² Some commentators recommend making the grant of immunity under a leniency program conditional on the establishment of a well-designed compliance program. See, e.g., Brent Fisse, *Reconditioning Corporate Leniency: The Possibility of Making Compliance Programmes a Condition of Immunity*, https://www.brentfisse.com/images/Fisse_Compliance_Programs_as_Condition_of_Corporate_Immunity_201114.pdf

⁷³ See, e.g., Riley & Sokol, *supra* note 13, 34-36 (arguing that the discourse on competition law compliance should not only revolve around punishment and penalty mitigation but should aim at changing the “normative values” of the corporation).

⁷⁴ On the importance of culture, see, e.g., LAI CHEN, *THE CORE VALUES OF CHINESE CIVILIZATION* (2016); Calvin Boardman & Hideaki Kiyoshi Kato, *The Confucian Roots of Business Kyosei*, 48 J. BUS. ETHICS 317, 318 (2003); Rick Hackett & Gordon Wang, *Virtues and Leadership: An Integrating Conceptual Framework Founded in Aristotelian and Confucian Perspectives in Virtues*, 50 MGMT. DECISION 868, 889 (2012); Liang-Hung Lin & Yu-Ling Ho, *Confucian Dynamism, Culture and Ethical Changes in Chinese Societies—A Comparative Study of China, Taiwan, and Hong Kong*,

suggesting a strong relationship between organizational culture and corporate performance, this article argues that competition regulators and practitioners should shift their focus from the deterrence-based enforcement model towards a more *culturally-driven* compliance model.⁷⁵ The debate on compliance, this article submits, should not treat corporations as “black boxes”; such an entity should instead be studied taking account of the details of the corporate culture of the entity and the manner in which that culture shapes norms and behavior.⁷⁶ Since corporate culture in East Asia reflects more than two millennia of Confucian civilizations, this article will turn to an overview of the Confucian tradition and its relevance to the present discussion.

20 INT’L J. HUM. RES. MGMT. 2402, 2043 (2009); Shu-hsien Liu, *A Philosophic Analysis of the Confucian Approach to Ethics*, 22 PHIL. EAST & WEST 417, 424 (1972).

⁷⁵ See generally CHEN, *supra* note 74; Boardman & Kato, *supra* note 74 (explaining the effects of implementing kyosei virtues into corporate culture to reward proper behavior); Hackett & Wang, *supra* note 74 (discussing the importance of leaders using confusion values in the business world); Liang-Hung Lin & Yu-Ling Ho, *supra* note 74 (explaining cultural transformation can diversify behaviors in a corporation); Shu-hsien Liu, *supra* note 74 (discussing confusion ethics and its importance to achieving rationality).

⁷⁶ See Riley & Sokol, *supra* note 13, 46-48.

III. CONFUCIAN TRADITION AND CORPORATE CULTURE IN EAST ASIA

A. CONFUCIAN TRADITION AND ITS INFLUENCE ON BUSINESS ENVIRONMENT

The starting point for studying corporate culture in East Asian companies is to understand the long and profound tradition of Confucianism and its ethical values, which have had a continuing influence on the work attitudes of employees in modern organizations.⁷⁷ This tradition has even affected employees' cognitive processes and their metaphysical beliefs.⁷⁸ Confucianism, which is not a single strand of philosophy but a family of related traditions that evolved over centuries,⁷⁹ has had a dominant and enduring influence on economic activities and business organizations in East Asian countries.⁸⁰ In China, for example, a Confucian system of self-regulated governance was a

⁷⁷ See, e.g., Bih-Shiaw Jaw et al., *The Impact of Culture on Chinese Employees' Work Values*, 36 PERSONNEL REV. 128, 129-32 (2007).

⁷⁸ See Richard Nisbett et al., *Culture and System of Thought: Analytic and Holistic Cognition*, 108 PSYCHOL. REV. 291, 299-305 (2001).

⁷⁹ See Jingyuan Ma & Mel Marquis, *Business Culture in East Asia and Implications for Competition Law*, 51 TEX. INT'L L. J. 1, 7 n.31 (2016) (Confucianism consists not just of the contributions of Confucius himself but on a "multitude of subsequent and sometimes famous scholars, interpreters, and glossators," leading to many sub-strands of Confucian thought and ethics).

⁸⁰ See Ma & Marquis, *supra* note 79, 9-10.

functional equivalent for company law for centuries until the first company law, largely transplanted from European civil codes, was implemented in 1904.⁸¹ Today, in mainland China and Hong Kong, Confucian concepts are still relevant when businesses make corporate governance decisions.⁸² Confucianism has likewise deeply influenced values in Korea and has significantly shaped (together with other influences including Christianity) inter-personal relations in both social and work environments.⁸³ Confucianism in China has enjoyed a cautious resurgence over the last three decades; many of its fundamental precepts are acknowledged and respected by the government, particularly because it represents an alternative to Western-style systems and ideologies.⁸⁴ In September 1999, the government officially celebrated the 2,550th

⁸¹ See Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1677 (2000). See also Alex Chu Kwong Chan & Angus Young, *Chinese Corporate Governance Regime from a Historical-Cultural Perspective: Rethinking Confucian System of Governance*, 3 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156300 (last visited Aug. 1, 2018).

⁸² See Chan & Young, *supra* note 81, at 28.

⁸³ See Tan Soo Kee, *Influences of Confucianism on Korean Corporate Culture*, 36 ASIAN PROFILE 9, 9 (2008).

⁸⁴ See e.g., Jeremy Page, *Why China is Turning Back to Confucius*, WALL ST. J., (Sept. 20, 2015), <http://www.wsj.com/articles/why-china-is-turning-back-to-confucius-1442754000> (last visited Aug. 1, 2018).

birthday of Confucius in Qufu, his hometown in Shandong Province.⁸⁵ Another celebration was held worldwide in 2014 for Confucius's 2,565th birthday.⁸⁶ With regard to business culture both in China and among the widely dispersed Chinese diaspora, Confucian values are indispensable to understanding the behavior, organization, and management of family businesses.⁸⁷

It is significant that the East Asian business ethos did not entirely lose its Confucianist character even when the 1997 financial crisis jolted the South Korean and Japanese economies and prompted substantial reforms to corporate governance.⁸⁸ As part of those reforms, and following the Anglo-American model, independent

⁸⁵ See Jun Yan & Ritch Sorenson, *The Effect of Confucian Values on Succession in Family Business*, XIX FAM. BUS. REV. 235, 248 (2006).

⁸⁶ See China Central Television News, broadcast of (Sept. 28, 2014) (in Chinese), <http://news.cntv.cn/special/jkr/index.shtml> (last visited Aug. 1, 2018).

⁸⁷ See Jean Lee, *Culture and Management - A Study of Small Chinese Family Business in Singapore*, 34 J. SMALL BUS. MGMT. 63 (1996); Murray Weidenbaum, *The Chinese Family Business Enterprise*, 38 CALIF. MGMT. REV. 141 (1996); Richard Whitley, *The Social Construction of Business Systems in East Asia*, 12 ORG. STUD. 1 (1991); Yan & Sorenson, *supra* note 85, at 248.

⁸⁸ See Lilian Miles & S.H. Goo, *Corporate Governance in Asian Countries: Has Confucianism Anything to Offer?*, 118 BUS. & SOC'Y REV. 23, 24-25, 37-38 (2013) (In relation to Japan, that "[l]ifetime employment, collectivism, and pursuit of harmony continue to characterize Japanese corporate governance, and the traditional keiretsu system of related party transactions, reinforced by cross-shareholdings will continue to exist.").

directors were recruited and internal financial reporting and corporate control were strengthened, yet many of the core values defined by Confucian doctrine, such as collectivism and the pursuit of harmony, remained unchanged or have since re-emerged in East Asian companies.⁸⁹ Janis Sarra and Masafumi Nakahigashi have argued that, although the Commercial Code and the Audit Special Exception Code took effect in Japan in 2003 and aimed at introducing Anglo-American elements of corporate governance, local culture and business norms in Japan should never be overlooked.⁹⁰ The corporate board in Japan is still “like a small community” with a consensus-building culture.⁹¹ Workers’ representation on corporate boards is dependent upon employees’ long-term loyalty and commitment, and promotion depends to a large extent on contributions to the team, rather than on individual achievements.⁹² According to Sarra and Nakahigashi, although there has been a perception that Japanese corporate law has shifted towards the corporate

⁸⁹ See *id.* at 37-38 (stating in relation to China, the authors note “the enduring influence of Confucius on Chinese culture, despite the ongoing corporate governance reforms along Anglo-American lines”).

⁹⁰ See Janis Sarra & Masafumi Nakahigashi, *Balancing Social and Corporate Culture in the Global Economy: The Evolution of Japanese Corporate Structure and Norms*, 24 LAW & POL’Y 299, 330 (2002).

⁹¹ See *id.*

⁹² See *id.* at 339.

governance model prevalent in North America since the Commercial Code was amended in 2003, the key traditional elements in business ethnic and corporate culture remain constant.⁹³

Moreover, the long-standing Confucian tradition is also often manifested in informal institutions.⁹⁴ These institutions play the role of guiding principles and polices in doing business; they remove conflicts while strengthening information flow, trust, and mutual understanding within and among business firms.⁹⁵ Many have claimed that these informal institutions and cultural norms bridge the gap between formal legal institutions and the judicial system, and sometimes provide more efficient solutions.⁹⁶

Collective behavioral and decision-making norms, strong internal hierarchical relationships, moral values,

⁹³ *See id.*

⁹⁴ *See* Chenting Su et al., *Enabling Guanxi Management in China: A Hierarchical Stakeholder Model of Effective Guanxi*, 71 J. BUS. ETHICS 301 (2007).

⁹⁵ *See id.*

⁹⁶ *See* Ricky Y.K. Chan et al., *The Dynamics of Guanxi and Ethics for Chinese Executives*, 41 J. BUS. ETHICS 327 (2002); *see also* Sven Horak & Andreas Klein, *Persistence of Informal Social Networks in East Asia: Evidence from South Korea*, 33 ASIA PAC. J. MGMT. 673, 677 (2016) (“Several authors point out the efficiency and flexibility guanxi offers as a substitute to sometimes unclear and frequently changing rules and policies. In business, guanxi is effective in resolving conflicts more easily than the judicial system.” (citations omitted)).

and family and community ties are often regarded as constituting typical Asian or Confucian values.”⁹⁷ In the following sections, this article focuses on five main aspects of corporate culture in East Asian companies that derive from Confucianism influences. Specifically, this article discusses: paternalistic leadership, family ownership, corporate governance, rules of business ethics, external relations (e.g., the relations between a given enterprise and other entities), and social responsibilities.

B. CONFUCIAN TRADITION AND CORPORATE CULTURE

While Confucian values and the Confucian ethical system were originally designed for application at the micro level in the family and at the macro level of the government of the Chinese empire, they have also had a defining role in East Asian commercial life.⁹⁸ Indeed,

⁹⁷ See Russell Dalton & Doh Chull Shin, *Weber's Theory of Capitalism in Confucian East Asia*, CITIZENS, DEMOCRACY, AND MARKETS AROUND THE PACIFIC RIM: CONGRUENCE THEORY AND POLITICAL CULTURE 159, 174-79 (Russell Dalton & Doh Chull Shin eds., 2006) (As observed by Kim, the literature highlights four dimensions of Asian values: familialism, communalism, authority orientation, and work ethic.); see So Young Kim, *Do Asian Values Exist? Empirical Tests of the Four Dimensions of Asian Values*, 10 J. EAST ASIAN STUD. 315 (2010).

⁹⁸ See, e.g., Marc Dollinger, *Confucian Ethics and Japanese Management Practices*, 7 J. BUS. ETHICS 575, 575-76 (1988) (describing the

the influence of Confucianism in the business environment throughout East Asia has been credited for the Asian values of hard work, education, thrift, and social order that fueled the economic miracle of the four, so-called, *tigers* (Korea, Taiwan, Hong Kong, and Singapore).⁹⁹

In Korea, for example, Confucian values contributed to the economic development and industrialization in the 1960s and 1970s.¹⁰⁰ There, the Confucian tradition was fused with strong economic nationalism and provided an important cultural and ideological basis for the economic development of the country.¹⁰¹ Important aspects of that tradition—loyalty, respect for authority and for elders, self-cultivation, and harmony in the workplace and in families—were all incorporated as part of the modern work ethic.¹⁰² In the 1980s and 1990s, harmony,

importance of Confucian moral concepts and social duties in relation to Japanese business management styles).

⁹⁹ See Angus Young et al., *Corporate Governance in China: The Role of the State and Ideology in Shaping Reforms*, 28 *COMPANY LAWYER* 204, 205 (2007). Use of the term “tigers” in reference to Hong Kong, South Korea, Taiwan and Singapore seems to have been popularized originally by the World Bank; See WORLD BANK, *THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY* 2, 24, 37-38 (1993).

¹⁰⁰ See Andrew Eungi Kim & Gil-sung Pak, *Nationalism, Confucianism, Work Ethic and Industrialization in South Korea*, 33 *J. CONTEMP. ASIA* 37, 39 (2003).

¹⁰¹ See *id.* at 45.

¹⁰² See *id.* at 44.

solidarity, and cooperation were the most prominent company mottos in South Korean enterprises.¹⁰³ “Family” is frequently used as a metaphor, both within the company¹⁰⁴ and also to describe relationships with other firms; for example, terms such as *moche* (“mother company”) and *jamaehoesa* (“sister companies”) are common expressions in business.¹⁰⁵ Analogous vocabulary is found in Japan as well, as illustrated by the terms *oya gaisha* (“parent company”), *kogaisha* (“child company”), and *magogaisha* (“grandchild company”).¹⁰⁶ Of course, expressions such as parent company and daughter company are also found in many other parts of the world, but there may be somewhat deeper psychological associations in countries where, as in Japan, the company often assumes a family-like

¹⁰³ See Roger Janelli, *Making Capitalism: The Social and Cultural Construction of a South Korean Conglomerate*, 239 (1993).

¹⁰⁴ See, e.g., Yung-Ho Cho & Jeonkoo Yoon, *The Origin and Function of Dynamic Collectivism: An Analysis of Korean Corporate Corp. Culture*, 7 *Asian Pac. Bus. Rev.* 70, 76 (2010) (noting that CEOs in Korea emphasize “strong family-like bonds among employees,” and that CEOs adopt the role of a father figure).

¹⁰⁵ See Kim & Pak, *supra* note 100, at 44-5.

¹⁰⁶ See Gregory Ornatowski, *Confucian Values, Japanese Economic Development, and the Creation of a Modern Japanese Ethics*, *INT’L BUS. ETHICS: CHALLENGES AND APPROACHES* 386, 395 (Georges Enderle ed., 1999) (discussing Japanese business terms); Chan, *supra* note 32, at 348 (citing Ornatowski and referring to the same terms).

role.¹⁰⁷ Furthermore, the prominence of Confucian values in East Asian companies may also be distinguished by the use of such values as motivational tools.¹⁰⁸ In 1989, Hak Chong Lee conducted a survey of seventy-seven (77) Korean companies and found that words and phrases central to Confucian moral values, such as diligence, social responsibility, unity, reliability, and sacrifice, were emblazoned on the walls of factories, offices, and elevators.¹⁰⁹ Lee found these values positively motivated workers to make determined efforts to achieve the goals of the company.¹¹⁰

While Japan's economic afflictions in the 1990s sharply distinguished the country from the four tigers, some of the same Confucian values have also profoundly influenced Japanese business culture.¹¹¹ Famously, loyalty to one's organization or company, often as part of a lifelong reciprocal commitment, is of crucial

¹⁰⁷ On the traditional role of the Japanese company serving in some circumstances as a substitute for the family, see Ma & Marquis, *supra* note 79, at 11 (f n.75) ("First-born sons in Japan inherited the family business and other assets, leaving younger sons to strike out on their own with their new employers assuming a role akin to an adopted family.").

¹⁰⁸ See Hak Chong Lee, *Managerial Characteristics of Korean Firms*, KOREAN MANAGERIAL DYNAMICS 147, 160-61 (Kae Chung & Hak Chong Lee eds., 1989) (achieving company goals was also regarded as consistent with the goals of the nation).

¹⁰⁹ See *id.* at 149.

¹¹⁰ See *id.* at 160-61.

¹¹¹ See generally Dollinger, *supra* note 98.

importance to employees.¹¹² When employees mention their company, instead of saying they are “working for Toyota,” they would say that they “belong to Toyota.”¹¹³ Similarly, when young people were recruited by large companies in China, they moved from other parts of the country to company dormitories and they called the company their new home.¹¹⁴ These young workers expect companies to organize collective activities in the spheres of culture, education, or sports, and to develop their potential in a paternalistic environment.¹¹⁵ In Japan, senior managers require young employees to listen to and obey their commands and promotion can only be expected when the employees meet relevant age requirements, which prove they have spent sufficient time in the company.¹¹⁶ Furthermore, loyalty and trust are not only important for the relationship between managers and employees, but also important for business partners and even competitors to nurture and maintain.¹¹⁷ Norimasa Furuta, then-President of Mazda, expressed a

¹¹² See Ma & Marquis, *supra* note 76, at 27-28.

¹¹³ See Charles Rarick, *The Philosophical Impact of Shintoism, Buddhism, and Confucianism on Japanese Management Practices*, 7 INT’L J. VALUE-BASED MGMT. 219, 223 (1994).

¹¹⁴ See Colin Hawes, *Representing Corp. Culture in China: Official, Academic and Corp. Perspectives*, 59 CHINA J. 33, 37 (2008).

¹¹⁵ See *id.*

¹¹⁶ See Rarick, *supra* note 113, at 224.

¹¹⁷ See *id.*

typical sentiment in this regard as he once said in reference to automobile manufacturers, “strategic alliances” need to be formed with competitors and suppliers in order to achieve success.¹¹⁸ This article interprets Furuta’s statement as reflecting a particular ethos and worldview not driven merely by considerations such as the integration of complementary assets and the achievement of synergies.

C. *INFLUENCES OF CONFUCIAN CULTURE ON THE
STRUCTURE OF BUSINESS ORGANIZATIONS*

1. *Paternalistic Leadership*

The concept of role-based relationships emphasized by Confucianism has had a profound influence on business entities in East Asia.¹¹⁹ By analogy to the fundamental principle of filial piety in the family, superiors expect employees at an inferior level to respect them and follow orders.¹²⁰ Paternalistic leadership is

¹¹⁸ See *id.* at 223. See also Thomas Bellows, *Bridging Tradition and Modernization: The Singapore Bureaucracy*, in CONFUCIANISM AND ECON. DEV.: AN ORIENTAL ALTERNATIVE? 195, 195-96 (Hung-chao Tai ed., 1989).

¹¹⁹ See, e.g., John Hill, *Confucianism and the Art of Chinese Management*, 1 J. ASIA BUS. STUD. 1, 8-9 (2006) (focusing on links between Confucianism and elements of Chinese management culture such as its emphasis on paternalism and personal relationships).

¹²⁰ As one might expect, the exaltation of obedience has been criticized, in particular because it may curb creativity in private and professional settings. See Kyung Hee Kim, *Exploring the Interactions*

another prominent feature of Chinese family businesses in Hong Kong, Taiwan, Singapore and Indonesia.¹²¹ In a family enterprise, it is often the head of the family that adopts the relevant business policies, and his decision-making power is highly authoritarian and discretionary.¹²² Supervisors expect subordinates to implement their policy by interpreting the boss's idea carefully, and disagreements can only be expressed in a polite, indirect way through private and personal channels.¹²³ With the patriarch or the matriarch acting as the head of the company, key members of the family hold executive positions, and when kinships link subsidiaries, a network of companies can be formed;

between Asian Culture (Confucianism) and Creativity, 41 J. CREATIVE BEHAV. 28, 34 (2007) ("Overemphasis on following rules and traditions at work creates organizational barriers to creative innovation Creative potential is only realized in work situations where employees can influence decision-making and communicate new ideas" (citations omitted)); Another obvious weakness of historical Confucianism is that it systematically undervalued women and generally deprived them of voice. *See id.* at 37-38.

¹²¹ *See* GORDON REDDING, *THE SPIRIT OF CHINESE CAPITALISM* 143, 156-69 (1990). *See also* Robert Westwood & Andrew Chan, *Headship and Leadership*, in *ORGANIZATIONAL BEHAV.: A SOUTHEAST ASIAN PERSPECTIVE* 123 (Robert Westwood ed., 1992).

¹²² *See* Gordon Redding, *The Conditional Relevance of Corporate Governance Advice in the Context of Asian Business Systems*, 10 *ASIA-PAC. BUS. REV.* 272, 285 (2004).

¹²³ *See* Min Chen, *Asian Management Systems* 73 (2d ed. 2004).

ownership is thus distributed throughout the family.¹²⁴ Given the complex and sometimes concealed relationships within the company, it often takes time for an outsider, such as independent non-executive directors, to access core information. For these reasons, the role and functions of outsiders can be merely symbolic.¹²⁵

The majority of leadership studies concerning Chinese business organizations have concluded that paternalistic rule is the prevalent leadership type.¹²⁶

¹²⁴ See Ming-Jer Chen, *Inside Chinese Business: A Guide for Managers Worldwide* 26 (2001).

¹²⁵ See Angus Young, *Corporate Governance in China and Hong Kong: Reconciling Traditional Chinese Values, Regulatory Innovation and Accountability* 1, 12 (2010), <http://ssrn.com/abstract=1533904> (last visited Aug. 2, 2018). The role of independent directors in Korea is likewise rather limited. See also Amir Licht, *Legal Plug-Ins: Cultural Distance Cross-Listing, and Corporate Governance Reform* 22 *Berk. J. Int'l Law* 195, 225 (2004) (“[A] truly independent director may be considered an outsider rather than an outside director. Even if perceived as an integral part of the group of board members (and to the extent that this is so), it would be difficult for her to identify the complex cases and to ask the hard questions. This is not to say that independent directors would be worthless in Korea Yet the trend toward giving independent directors greater pride of place is somewhat puzzling.”).

¹²⁶ See Chin-Yi Chen et al., *Spiritual Leadership, Follower Mediators, and Organizational Outcomes: Evidence from Three Industries Across Two Major Chinese Societies*, 42 *J. APP. SOC. PSYCH.* 890, 923 (2012); Bor-Shiuan Cheng et al., *Paternalistic Leadership and Subordinate Responses: Establishing a Leadership Model in Chinese Organizations*, 7 *ASIAN J. SOC. PSYCH.* 89, 90-92 (2004).

Decision-making power is often centralized at the top or at least at the level of senior management.¹²⁷ Michael Witt and Gordon Redding's study on the institutional characteristics of thirteen Asian business systems (mainland China, Hong Kong, India, Indonesia, Japan, Korea, Laos, Malaysia, Philippines, Singapore, Taiwan, Thailand, and Vietnam) shows that top-down decision-making and internal hierarchical structures are commonly observed in Asia.¹²⁸ Top managers usually have the major decision-making power, and among the above-mentioned thirteen systems, the only exception was Japan, which features a participatory model.¹²⁹

Studies on the organizational culture in Chinese firms have incorporated theories of management, organizational science, and leadership behavior.¹³⁰

¹²⁷ See Lee & Lee, *supra* note 50, at 37.

¹²⁸ See Michael Witt & Gordon Redding, *Asian Business Systems: Institutional Comparison, Clusters and implications for Varieties of Capitalism and Business Systems Theory*, 11 SOCIO-ECON. REV. 270 (2013). See also Jeffrey Podoshen et al., *Materialism and Conspicuous Consumption in China: A Cross-Cultural Examination*, 35 INT'L J. CONSUMER STUD. 17, 18 (2011).

¹²⁹ See Witt & Redding, *supra* note 128. See also Ma & Marquis, *supra* note 79, at 16, 28 (discussing the unusual ringiseido system in corporate Japan).

¹³⁰ See generally Daniel Denison et al., *Corporate Culture in Chinese Organizations*, in THE HANDBOOK OF ORGANIZATIONAL CULTURE AND CLIMATE 1, 561 (Neal Ashkanasy et al. eds., 2nd edn 2010); Denison & Mishra, *supra* note 53, 205-07.

Although the styles of management are clearly influenced by multiple factors, few authors would disagree that traditional values informed both the philosophy management and the psychological motivations underlying the behavior of employees and employers.¹³¹ A particular feature of the management style of Chinese companies is the dominant role of leaders,¹³² who may be the local managers at foreign firms doing business in China¹³³ or foreign-based

¹³¹ See Lee Cheuk Yin, *Do Traditional Values Still Exist in Modern Chinese Societies? The Case of Singapore and China*, 1 ASIA EUR. J. 43, 57 (2003). Yin points out that traditionalism is not manifest uniformly in Asian societies. Yin points out that “circumstances in various regions differ greatly. Japan, South Korea and Taiwan have a richer ambience of indigenous cultural tradition, whereas Hong Kong and Singapore are more ‘westernized.’ ... What the people [in the latter countries] still widely accept and preserve are the basic tenets of individual moral conduct and interpersonal relations in Confucianism. These do not come from classical tradition, but mainly from implicit influence from within the family and subtly internalized moral values. Some call this ‘secular Confucianism’ or ‘popular Confucianism,’ others deem it to be hybridized with Buddhist and Taoist values and therefore can no longer be called ‘Confucianism.’ (footnotes omitted).

¹³² See Zhi-Xue Zhang et al., *Business Leadership in the Chinese Context: Trends, Findings, and Implications*, 10 MGMT. & ORG. REV. 199, 204 (2014).

¹³³ See Crystal Zhao, *Management of Corporate Culture Through Local Managers’ Training in Foreign Companies in China: A Qualitative Analysis*, 9 INT’L J. TRAINING & DVPMT 232, 232-35 (2005) (showing that local managers play an important role in foreign companies located in China, and that the main values, beliefs of foreign corporate culture are mainly applied through the management practices of local managers).

Chinese managers of Chinese firms operating overseas.¹³⁴ In these settings of Chinese management, leaders have a tendency to be less reliant on formal contracts.¹³⁵ Leaders are paternalistic; and at least ideally, they combine discipline, authority, fatherly benevolence, and moral integrity.¹³⁶ Among East Asian countries, hierarchical structures and paternalistic leadership are especially prevalent in Chinese,¹³⁷ and Korean companies.¹³⁸ The rules of the game are evident down to the level of concrete behavioral ritual, for example, in both China and Korea, elders as well as persons of higher social status, are granted priority to initiate activities, such as being the first to enter the

¹³⁴ See Stijn Claessens et al., *The Separation of Ownership and Control in East Asian Corporations*, 58 J. FINAN. ECON. 81, 82-83 (2000); John Kao, *The Worldwide Web of Chinese Business*, 71 HARV. BUS. REV. 1, 24 (1993).

¹³⁵ See CHEN, *supra* note 123, at 80. As Chen noted, “[i]n an environment structures by the implicit rules of loyalty and mutual obligation, a contract is seen as unnecessary at best and offensive at worst. Historically, important deals have been executed among Chinese firms without legal contracts of any kind.” A paper contract can symbolize suspicion and fear, and it “implies that the obligations and loyalty of partnership are not taken seriously, and it is rarely resorted to among Chinese businesses as a means of protecting the parties against each other.”

¹³⁶ See Zhang et al., *supra* note 132, at 204.

¹³⁷ See Min Wu & Erica Xu, *Paternalistic Leadership: From Here to Where?*, in HANDBOOK OF CHINESE ORGANIZATIONAL BEHAV.: INTEGRATING THEORY, RES. AND PRAC. 449 (Xu Huang & Michael Bond eds., 2012).

¹³⁸ See Kee, *supra* note 83.

room, or being served food first during a business banquet, and so on.¹³⁹ Senior officials, who are often the decision makers, are unwilling to meet negotiating teams with junior members.¹⁴⁰ A company expects a hierarchical and reciprocal relationship—similar to the respective roles of father and son—between superiors and their subordinates.¹⁴¹ Similar patterns are observed in family firms and state-owned businesses, where managers and employees tend to fulfill reciprocal obligations; superiors expect subordinates to perform duties and show respect, while subordinates expect superiors to lead with loyalty, fairness and justice.¹⁴² In Korea, companies employ a highly centralized and top-down decision-making process.¹⁴³ Personnel policies relate closely to seniority and embody unwavering respect for elders.¹⁴⁴ In such an environment, the authoritarian nature of leadership and decision-making makes it difficult for employees to express dissenting opinions.¹⁴⁵ The exchange of ideas during business

¹³⁹ See Choong Lee, *Korean Culture and Its Influence on Business Practice in South Korea*, 7 J. INT'L MGMT. STUD. 184, 186 (2012).

¹⁴⁰ See *id.* at 187.

¹⁴¹ See Wei-Ming Tu, *Probing the "Three Bonds" and "Five Relationships" in Confucian Humanism*, in CONFUCIANISM AND THE FAMILY 121, 122-23 (Walter Slote & George De Vos eds., 1998).

¹⁴² See Kee, *supra* note 83, at 13.

¹⁴³ See *id.* at 14.

¹⁴⁴ See Lee, *supra* note 137, at 185.

¹⁴⁵ See Kee, *supra* note 83, at 15.

meetings, particularly between juniors and senior managers, becomes infrequent and psychologically challenging, leaving many insightful and creative views unvoiced.¹⁴⁶ It is worth adding that, in this type of environment where work relationships are highly personal and relation-based, two studies conducted by Zhen Xion Chen show that the performance of employees correlates more strongly with their loyalty to a supervisor than with commitment to the organization.¹⁴⁷ Loyalty to the supervisor strongly influences employees' attitudes.¹⁴⁸

The above discussion highlights a contrast between the structured, process-oriented style and rule-based style that tends to characterize governance in the West.¹⁴⁹ In East Asian business, as demonstrated above, corporate governance is generally relation-based, top-down, structured, stable, informal, and less

¹⁴⁶ See *id.* See also Kim, *supra* note 120, at 34 (referring to organizational barriers to creative innovation arising from rigid business hierarchies that dampen the input of subordinates in decision-making).

¹⁴⁷ See Zhen Xiong Chen et al., *Loyalty to Supervisor vs. Organizational Commitment: Relationships to Employee Performance in China*, 75 J. OCCUPATIONAL & ORG. PSYCHOL. 339, 343 (2002).

¹⁴⁸ See Chen, *supra* note 147, at 340.

¹⁴⁹ See Shaomin Li et al., *The Great Leap Forward: The Transition from Relation-Based to Rule-Based Governance*, 33 ORG. DYNAMICS 63, 64-66 (2004).

transparent.¹⁵⁰ However, paternalistic leadership is also credited for the superior performance of many multinational companies. First, Zhang Ruimin, an authoritarian but also benevolent CEO, led the Haier Group to great commercial success.¹⁵¹ Similarly, Li Ka-Shing, Chairman of the Cheung Kong Group (today, CK Hutchinsson) has had enormous success with his businesses and has become a legendary figure in Hong Kong while earning the status of Knight Commander (KBE) of the Order of the British Empire.¹⁵² Having experienced hardship and difficulties in wartime, Li educated himself and has used Confucian principles throughout his life.¹⁵³ In particular, he developed a reputation for being polite, trustworthy, hardworking,

¹⁵⁰ See Young, *supra* note 125, at 9.

¹⁵¹ Hawes and Chew attribute the success of the Haier Group to Zhang Ruimin's leadership. He defined the organizational culture, created the firm's value and incentivized all employees to work for the company. He also accommodated the company's 800 workers, kept them motivated and provided them with improved working conditions. See Colin Hawes & Eng Chew, *The Cultural Transformation of Large Chinese Enterprises into Internationally Competitive Corporations: Case Studies of Haier and Huawei*, 9 J. CHINESE ECON. & BUS. STUD. 67 (2011); Paul McDonald, *Confucian Foundations to Leadership: A Study of Chinese Business Leaders Across Greater China and South-East Asia*, 18 ASIA PAC. BUS. REV. 465, 476 (2012); Ruimin Zhang, *Raising Haier*, 85 HARV. BUS. REV. 141 (2007).

¹⁵² See McDonald, *supra* note 151, at 477-78.

¹⁵³ See *id.*

philanthropic, and loyal to families.¹⁵⁴ His nickname in Hong Kong, “Superman,” reflects both the success of his family business and the exceptional esteem he earned among the public in his country.¹⁵⁵ After a 68-year career, Li is settling into retirement in 2018.¹⁵⁶

2. *Family Ownership*

Consistent with Confucian philosophy, many East Asian companies treat their work environment like a family household. For example, companies expect managers and supervisors to play a role analogous to that of family elders.¹⁵⁷ Employees often value the feeling of belonging to a company—like the feeling of belonging to a family—more than they value financial compensation.”¹⁵⁸ Empirical studies in recent years show that the majority of East Asian firms are owned by families,¹⁵⁹ and family relationships play a key role in

¹⁵⁴ *See id.*

¹⁵⁵ *See id.* *See also* BIOGRAPHICAL DICTIONARY OF NEW CHINESE ENTREPRENEURS AND BUS. LEADERS 81 (Wenxian Zhang & Ilan Alon eds., 2009).

¹⁵⁶ *See* Luisa Kroll, *Hong Kong’s Richest, Li Ka-shing, Announces Plans to Retire After 68 Years*, FORBES (March 16, 2018), <https://www.forbes.com/sites/luisakroll/2018/03/16/hong-kongs-richest-li-ka-shing-announces-plans-to-exit-after-68-years/#57fd102d3436>.

¹⁵⁷ *See* Kee, *supra* note 83, at 14.

¹⁵⁸ *See* Lee & Lee, *supra* note 50, at 36.

¹⁵⁹ *See* Claessens et al., *supra* note 134, at 82.

business organizations.¹⁶⁰ In Korea, many of the sprawling conglomerates, *i.e.* the *chaebol* (Samsung Electronics, The Hyundai Group, The LG Group, Hanjing Group, The Ssangyong Group, etc.), are owned and controlled by the families of their respective founders.¹⁶¹ It is the chairman's eldest son or another close family member, and not a professional manager, that often becomes heir to the corporate throne.¹⁶² In the Taiwan region, research by Wen-Hsien Tsai on Taiwanese family firms shows that, when the performance and productivity of managers in family firms are poor, the managers are more likely to be replaced by other family members than by non-family members.¹⁶³ The research also suggests family firms change CEOs three times more often than non-family firms, reflecting the prevalence of managerial-level power struggles within the family.¹⁶⁴ Furthermore,

¹⁶⁰ See Xiaowei Luo & Chi-Nien Chung, *Keeping It All in the Family: The Role of Particularistic Relationships in Business Group Performance During Institutional Transition*, 50 ADMIN. SCI. Q. 404, 410 (2005).

¹⁶¹ See Kee, *supra* note 83, at 16-18.

¹⁶² See Sang-Woo Nam, *Business Groups Looted by Controlling Families, and the Asian Crisis*, 27 ASIAN DEV. BANK INST. RESEARCH PAPER SERIES 1, 21 (2001), <<https://think-asia.org/bitstream/handle/11540/4133/2001.11.rp27.controlling.families.crisis.pdf?sequence=1>>.

¹⁶³ See Wen-Hsien Tsai et al., *CEO Tenure in Taiwanese Family and Nonfamily Firms: An Agency Theory Perspective*, 19 FAM. BUS. REV. 11, 12 (2006).

¹⁶⁴ See *id.*

networks within families are self-dependent and closed.¹⁶⁵ In Hong Kong, research by Henry Wai-chung Yeung shows closed networks may include non-family members, but only when they can develop “family-like trust.”¹⁶⁶ This occurred in the case of Hong Kong Toys Ltd. when the Hong Kong-based family firm developed its new markets in Singapore.¹⁶⁷ It is argued that Confucian values contribute to the success of overseas Chinese family firms, and that these firms value mutual obligations, cooperation, frugality and hard work—elements which mitigate the classic principal-agency problem where authority is delegated to company managers.¹⁶⁸

The subject of family ties also raises the topic of *interpersonal networks*, specifically as they relate to relationships between family businesses and non-family

¹⁶⁵ See Sun-Ki Chai & Mooweon Rhee, *Confucian Capitalism and the Paradox of Closure and Structural Holes in East Asian Firms*, 6 *MGMT. & ORG. REV.* 5, 16 (2010).

¹⁶⁶ See Henry Wai-chung Yeung, *Limits to the Growth of Family-owned Business? The Case of Chinese Transnational Corporations from Hong Kong*, 14 *FAM. BUS. REV.* 55 (2000).

¹⁶⁷ See *id.*

¹⁶⁸ See Irene Yeung & Rosalie Tung, *Achieving Business Success in Confucian Societies: The Importance of Guanxi (Connections)*, 25 *ORG. DYNAMICS* 54 (1996); Lee Jean & Francis Tan, *Growth of Chinese Family Enterprises in Singapore*, 14 *FAM. BUS. REV.* 49 (2001); Eric Tsang, *Internationalizing the Family Firm: A Case Study of a Chinese Family Business*, 39 *J. SMALL BUS. MGMT.* 88; Whitley, *supra* note 87.

partners or clients. In mainland China, the business network system is often called *guanxi*.¹⁶⁹ In the context of *guanxi*, it is important for entities outside the family, such as business partners or clients, to maintain a reciprocal relationship with the family business.¹⁷⁰ Long-term, interpersonal relationships are highly valued, and often family businesses prefer to hire family members and their relatives.¹⁷¹ These relationships are hierarchal in nature; when conflicts arise, the person of lower status is expected to find ways of compromise without open confrontation.¹⁷²

In Korea, the relations established through kin, school, or regional ties are defined as *yongo*.¹⁷³ Similar

¹⁶⁹ See Chao Chen et al., *Chinese Guanxi: An Integrative Review and New Directions for Future Research*, 9 MGMT. & ORG. REV. 167 (2013) (for a review of different *guanxi* ties).

¹⁷⁰ See Jun Yan & Ritch Sorenson, *The Influence of Confucian Ideology on Conflict in Chinese Family Business*, 4 INT'L J. CROSS CULT. MGMT. 5, 11 (2004).

¹⁷¹ See *id.*

¹⁷² See *id.* at 11. See also Yan & Sorenson, *supra* note 85, at 237 (“The basic unit of society is not the individual, but the family. Family is always more important than any individual member, and harmony is the most important value for all family members. Without harmony, no family can stand, neither can a family business.”). See Joyce Leong et al., *Perceived Effectiveness of Influence Strategies in the United States and Three Chinese Societies*, 6 INT'L J. CROSS CULT. MGMT. 101 (2006), showing that, in contrast to the case of managers in the United States, gentle persuasion may not be an effective management tool in mainland China.

¹⁷³ See Horak & Klein, *supra* note 96, at 675.

to *guanxi* networks, the less formal institution of *yongo*, which delineates between in-group and out-group trust levels, is considered an efficient alternative to markets and hierarchies in business transactions.¹⁷⁴ *Yongo* can be developed through sharing the same bases of experience such as the same home town (*Jiyon*), the same school (*Hakyon*), or sharing blood ties or indirect family ties through marriage (*Hyulyon*).¹⁷⁵ Therefore, it is typical for a Korean to simultaneously belong to various associations within the loyalty-based *yongo* network, and *yongo* is commonly used for daily interactions such as exchanging favors, gathering information or attaining career achievements.¹⁷⁶ Hierarchical relationships are a predominant feature of the *yongo* network, and it is often the case that a senior can ask a favor from a junior but not vice versa.¹⁷⁷ The *yongo* concept is similar to another concept—*yonjul*—which also refers to an interpersonal network but which is used for a particular and often dubious purpose: for

¹⁷⁴ See *id.*; see also SEOK-CHUN LEW, THE KOREAN ECONOMIC DEVELOPMENT PATH: CONFUCIAN TRADITION, AFFECTIVE NETWORK (2013); Jaehyuck Lee, *Society in a Vortex? Yonjul Network and Civil Society in Korea*, 40 KOR. J. 366 (2000); Jaeyeol Yee, *The Social Networks of Koreans*, 40 KOR. J. 325 (2000).

¹⁷⁵ See Horak & Klein, *supra* note 96, at 675.

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

example, personal gain through unfair or deceitful means.¹⁷⁸

3. *Business communities*

As mentioned previously, many business networks in East Asia are structured through personal relations and family ties. The *guanxi* system in China encompasses and shapes both the internal relations among family members and the complex connections between a given entity and its business partners, clients and shareholders.¹⁷⁹ Individuals and business operators are

¹⁷⁸ See Sven Horak, *Antecedents and Characteristics of Informal Relation-Based Networks in Korea: Yongo, Yonjul and Inmaek*, 20 *ASIAN PAC. BUS. REV.* 78, 89 (2014), (“Yonjul refers to informal and rather particular ties between individuals that exist for a purpose. The word itself shares with the word *Yongo* the ‘yon,’ again standing for ‘tie’, but the second syllable—the ‘jul’—translates to ‘rope’ or ‘string.’ The common judgement based on the interviews conducted is that the word *Yonjul* itself has a rather negative connotation as *Yonjul* presupposes a purpose or intention and objective, such as personal gains. The purpose of *Yonjul* ties is often to secure favours or benefits granted because of those ties, and not based on fair competition or equal treatment. Examples include, on the individual level, the usage of *Yonjul* for job entry, career progression or the acquisition of secret competition-relevant information or, on an organizational level, receiving subsidies or securing monopoly rights in the market Based on the interviews conducted it is clear that *Yonjul* blurs the border between legality and illegality and is often associated with illegal transactions.” (citations omitted)).

¹⁷⁹ See Sun-Ki Chai, *supra* note 165; see Wen-Hsien Tsai, *supra* note 163; see also Henry Wai-chung Yeung, *supra* note 166.

interdependent; network circles are cross-connected.¹⁸⁰ In Japan, as William Laufer and Iwao Taka have explained, interest groups in one circle often constitute a part of another circle, and the hierarchies in each circle sometimes overlap.¹⁸¹ Politics play a role as well: for example, a company executive may also be a politician's supporter, or he may be a member of one of the advisory councils, known as *shingikai*, that provide input to public bodies on questions of policy.¹⁸² Among business circles, the government is viewed as having the highest position in all the hierarchies within a given industry.¹⁸³ Government intervention at all levels of the society has traditionally been widely accepted and has even been

¹⁸⁰ See William Laufer & Iwao Taka, *Japan, Regulatory Compliance, and the Wisdom of Extraterritorial Social Controls*, 18 HAST. INT'L & COMP. L. REV. 487, 505, 521 (1995).

¹⁸¹ See *id.* at 521.

¹⁸² See *id.* *Shingikai* are often composed of representatives from business, academia, and other sectors to deal with policy questions and specialized administrative issues. Since industries and market actors generally hope to maintain a good relationship with the regulatory agency, regulations and policies are rarely challenged or criticized. See Curtis Milhaupt, *A Rational Theory of Japanese Corporate Governance: Contract Culture, and the Rule of Law*, 37 HARV. INT'L L. J. 3, 31 (1996).

¹⁸³ See Laufer & Taka, *supra* note 180, at 521 ("Private corporations or industries, in particular, view the government as occupying the highest position in the industrial hierarchies. The government is also perceived as an important interconnection among different hierarchies.").

perceived as natural and necessary.¹⁸⁴ Attempts have been made since 2001 to draw sharper distinctions between the State and the market, and in the field of competition policy Japan's engagement is more convincing today than it once was.¹⁸⁵ Still, the burden of history is not easily shrugged off: structural reforms have often been stymied, and the interconnections between industry, politicians, and agencies of the State remain significant.¹⁸⁶ The relatively stable hierarchies that are part of those interdependent circles generate

¹⁸⁴ See *id.* at 521 (bureaucratic informalism is “underwritten by a consensus among citizens that bureaucratic intervention and informal coordination are necessary and meaningful.”). See also FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 207 (1987) (extensive discussion of Japan's bureaucratic informalism).

¹⁸⁵ See, e.g., Mel Marquis, *Firebird Suite: Cartel Suppression Reborn in Japan*, 4 J. ANTITRUST ENF. 84 (2016).

¹⁸⁶ See William Pesek, *Corporate Japan Thinks it's 1985*, BLOOMBERGVIEW, <https://www.bloomberg.com/view/articles/2015-06-15/corporate-japan-thinks-it-s-1985> (last visited August 2, 2018) (“Abe's new initiatives are no match for Japan's traditional ‘iron triangle’—the clubby nexus of elected officials, bureaucrats and CEOs that has long dominated Japan's economy and resisted any prime minister who dared challenge them. That's not to say change isn't afoot. Aside from nudging corporate boards to add more outsiders and women, Abe's new regulations have forced companies to disclose their policies on cross-shareholdings and the exercise of shareholder voting rights. And it's a sign of progress that Japan Exchange recently declared it is ‘ashamed’ at Toshiba's accounting scandal.”); see also, Richard Colignon & Chikaku Usui, *The Resilience of Japan's Iron Triangle*, 41 ASIAN SURV. 865 (2001).

resistance against changes to the status quo.¹⁸⁷ Long-standing and stable interconnected relationships have become a particular characteristic intrinsic to social and commercial life in Japan.¹⁸⁸ Corporations have traditionally prioritized the goal of maintaining stable and predictable relationships with other actors (including competitors), and this value originates from the Japanese conception of “co-existence” or “co-survival” whereby opportunities for cooperation and mutual benefit arise when, proverbially speaking, people “eat from the same rice pot” (*onaji kama no meshi wo kū*).¹⁸⁹

¹⁸⁷ See Pesek, *supra* note 186. See also Laufer & Taka, *supra* note 180, at 522.

¹⁸⁸ See Sung-Joon Roh, *Evolution of “Partnership Rationality” in Japan: The Logic of Collaboration between Rival Firms*, 22 BUS. & ECON. HIST. 138, 141 (1993).

¹⁸⁹ See *id.* at 145. The present authors have provided the relevant Japanese expression and have loosely translated it as “eating from the same rice pot” to capture the sense in English whereas Roh refers to rivals eating rice together. The expression *onaji kama no meshi wo kū* dates back to the Tokugawa period in which samurai apprentices lived in common dormitories, shared experiences and thereby developed a sense of brotherhood, bondedness and solidarity. See Thomas Tudor et al., *Significant Historic Origins That Influenced the Team Concept in Major Japanese Companies*, 12 J. APP. BUS. RES. 115, 123 (1996) (citing ROBERT MARCH, *WORKING FOR A JAPANESE COMPANY: INSIGHTS INTO THE MULTICULTURAL WORKPLACE* (1992)).

D. *CORPORATE AND ORGANIZATIONAL CULTURE IN CHINA, JAPAN AND KOREA: EMPIRICAL EVIDENCE*

Among various models on the study of organizational culture, the Competing Values Framework is one of the most influential models applied internationally to test the impact of culture on organizational effectiveness, change, and performance.¹⁹⁰ The Competing Values Framework is also one of the few models that has been used extensively in studying Asian firms.¹⁹¹ This model, which was first developed by Robert Quinn and John Rohrbaugh, identifies two dimensions of organizational effectiveness: the vertical axis of stability and control versus flexibility and discretion, and the horizontal axis of internal focus versus external focus.¹⁹² Cameron and Quinn later proposed attributes corresponding to the four types of organizational culture: Clan, “Adhocracy”,

¹⁹⁰ See Kim Cameron & Robert Quinn, *Diagnosing and Changing Organizational Culture Based on the Competing Values Framework* (3rd edn, 2011).

¹⁹¹ See David Ralston et al., *Today's State-owned Enterprises of China: Are They Dying Dinosaurs or Dynamic Dynamos?*, 27 *Strat. Mgmt. J.* 825, 830 (2006).

¹⁹² See Robert Quinn & John Rohrbaugh, *A Competing Values Approach to Organizational Effectiveness*, 5 *PUB. PRODUCTIVITY REV.* 122 (1981); Robert Quinn & John Rohrbaugh, *A Spatial Model of Effectiveness Criteria: Towards a Competing Values Approach to Organizational Analysis*, 29 *MGMT. SCI.* 363 (1983).

Market, and Hierarchy.¹⁹³ *Clan* culture is concerned with interpersonal loyalty, relationship building, teamwork, trust, and commitment.¹⁹⁴ It has a flexible internal orientation and indicates the family-type atmosphere of the organization.¹⁹⁵ *Adhocracy* culture emphasizes entrepreneurship, experimentation, and innovation, and attaches importance to individual initiative and freedom to react to quick market changes and develop new strategies.¹⁹⁶ It has a flexible external orientation.¹⁹⁷ *Market* culture values market competition, competitiveness, and results, with a focus on control and external “winning.”¹⁹⁸ Market culture aims at maximizing productivity and profits through assessable goals and procedures.¹⁹⁹ *Hierarchy* culture is dominated by internal control and bureaucratic, formalized rules and procedures.²⁰⁰ An organization with hierarchy culture is governed by predictable and stable policies.²⁰¹

¹⁹³ See Cameron & Quinn, *supra* note 190, at 41-50.

¹⁹⁴ *See id.*

¹⁹⁵ *See id.*

¹⁹⁶ *See id.*

¹⁹⁷ *See id.*

¹⁹⁸ *See id.*

¹⁹⁹ *See id.*

²⁰⁰ *See id.*

²⁰¹ *See id.* See also Ralston et al., *supra* note 191, at 832.

The following three subsections explain the relevance of the above-described Competing Values Framework for the three jurisdictions discussed in this article: China, Japan, and Korea. Highlighted are empirical findings that have emerged by reference to the Competing Values Framework approach.

1. *China*

Despite more than two decades of reform, State-owned enterprises (SOEs) are still pervasive in China's economy; there is no way to seriously discuss economic activity or business culture in China without reference to SOEs.²⁰² SOEs followed a clan organizational culture prior to China's decision to transition to a more open, market-based economy in 1978.²⁰³ Under the centrally-planned economic system, employees were strongly oriented toward the internal factors of stability and production, and they treated their organization like a family.²⁰⁴ However, David Ralston has shown that the organizational culture of Chinese SOEs post-1978 has been shifting from a clan/hierarchy culture toward a market culture, with the least focus on Adhocracy

²⁰² See generally Sheng Hong & Zhao Nong, CHINA'S STATE-OWNED ENTERPRISES: NATURE, PERFORMANCE AND REFORM (2013).

²⁰³ See Ralston et al., *supra* note 191, at 832.

²⁰⁴ See *id.*

(innovation, experimentation, and change).²⁰⁵ The executive management system used by SOEs reflects the significant influence of Chinese political institutions. This system utilizes an institutionalized personnel rotation scheme similar to the management of civil servants in the government. In this system, executives are mainly incentivized by political promotion.²⁰⁶ Top managers of SOEs are frequently rotated across business groups to reduce the concentration of managerial power and to promote management skillsharing among SOEs.²⁰⁷ Empirical studies show that the managerial culture of SOEs is “hierarchical” and “paternalistic,” and that decision-making power is concentrated.²⁰⁸

The authors in the above-mentioned Ralston survey compared the organizational cultures of SOEs to private-owned enterprises and foreign-controlled businesses.²⁰⁹ Their data sample was 435 Chinese managers from three

²⁰⁵ See *id.* at 839.

²⁰⁶ See generally Li-Wen Lin, *State Ownership and Corporate Governance in China: An Executive Career Approach*, 3 COLUM. BUS. L. REV. 743 (2013).

²⁰⁷ See *id.*

²⁰⁸ See *id.*; See also Cherric Jiu-hua Zhu et al., *Development of HR Practices in Transitional Economies: Evidence from China*, 19 INT’L J. HUMAN RES. MGMT. 840 (2008); Siew-Huat Kong, *An Empirical Investigation of Mainland Chinese Organizational Ideology*, 5 ASIAN BUS. & MGMT. 357 (2006).

²⁰⁹ See Ralston, *supra* note 191.

ownership types, and the average age of the respondents was 35.²¹⁰ Their findings show that the executives running SOEs have learned market-oriented management styles, market strategies, and business values.²¹¹ In contrast, privately owned enterprises are least focused on structure and control (Hierarchy or Market culture), and instead they are most oriented toward Clan culture, followed by Adhocracy.²¹² The authors also found that the organizational culture of foreign-owned enterprises is balanced across the four types, reflecting a managerial strategy of balancing traditional Chinese culture with commercial constraints and logic.²¹³

2. *Japan*

The Competing Values Framework described above has been applied to assess organizational culture in

²¹⁰ *See id.* at 835.

²¹¹ *See id.* at 838-41. At page 839, the authors state that their findings are “understandable in the sense that management education or learning the Western style management theories and practices has been a priority in [China’s] reform strategy SOE managers, who have been influenced by what they have learned about Western business practices, have apparently applied them in their organizations.” (citation omitted).

²¹² *See id.* at 839.

²¹³ *See id.*

Japanese businesses as well.²¹⁴ From October to December 2009, Masaki Sugita and Takuya Takahashi surveyed numerous Japanese corporations appearing in the environmental management rankings of a leading daily newspaper called Nippon Keizai Shinbun.²¹⁵ The survey, which returned 109 responses, divided corporations into their cultural types, as summarized in Tables 1 and 2.²¹⁶ The Tables are divided into a manufacturing category (76 respondents) and a non-manufacturing (services) category (33 respondents).²¹⁷ The authors of the survey found that Adhocracy culture (experimentation and innovation) was positively correlated with the better performance in terms of environmental management or sustainability management.²¹⁸ By contrast, excessive Hierarchy culture (high stability, predictability, control, and an internal focus) correlated negatively with environmental management performance.²¹⁹ For present purposes, it is worth noting that Market culture type (demanding leaders, results, and winning) and Hierarchy culture

²¹⁴ Masaki Sugita & Takuya Takahashi, *Influence of Corporate Culture on Environmental Management Performance: An Empirical Study of Japanese Firms*, 22 CORP. SOC. RESP. & ENVIRON. MGMT. 182 (2015).

²¹⁵ *See id.*

²¹⁶ *See id.* at 186.

²¹⁷ *See id.*

²¹⁸ *See id.* at 187.

²¹⁹ *See id.*

(formality, structure, and efficient procedures) are relatively prevalent in both manufacturing and nonmanufacturing cultures.²²⁰ While inferences must remain tentative since industry-specific data are not included, these figures may to some extent reflect both the competitive pressures that shape the high-productivity side of Japan's "dual" economy²²¹ and the adherence to formality and ritualized norms in Japanese society.²²² However, the finding of a Market culture in

²²⁰ See *id.* at 186.

²²¹ Many authors have written about Japan's dual economy, consisting of high- (but declining) productivity sectors driven by competition and low-productivity sectors (including service sectors) where dynamism was often dampened by weak competition and sometimes ill-conceived economic policies; in some cases there are links between two sides of the productivity gap since, for example, inputs from low-productivity sectors may make it harder for high-productivity sectors to reach their full potential in terms of competitiveness. For discussion, see, e.g., WILLIAM LEWIS, *THE POWER OF PRODUCTIVITY: WEALTH, POVERTY AND THE THREAT TO GLOBAL STABILITY* 23-49 (2004); RICHARD KATZ, *JAPANESE PHOENIX: THE LONG ROAD TO ECONOMIC REVIVAL* 40-58 (2003). See also ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *OECD ECONOMIC SURVEYS: JAPAN OVERVIEW* 26-28 (2017) (graphically depicting a decline of productivity in Japan in manufacturing and especially non-manufacturing sectors and making recommendations to boost productivity).

²²² As McVeigh and others have pointed out, formality and ritualized practices permeate Japanese social life. See Brian McVeigh, *Ritualized Practices of Everyday Life: Constructing Self, Status, and Social Structure in Japan*, 8 *J. RITUAL STUD.* 53 (1994). There is a "constant emphasis" on ceremony and ritual behavior, and the rules of social convention make it imperative to know the "right way" to do things. *Id.* at 60-64. At the same time, the formality of procedures in Japanese companies co-exists with

a significant number (14 of 33) nonmanufacturing organizations is somewhat counter-intuitive given the relatively low level of productivity in Japan's nonmanufacturing sectors.²²³

informal modes of decision-making. See Caslav Pejovic, *Japanese Corporate Governance: Behind Legal Norms*, 29 PENN ST. INT'L L. REV. 483, 504 (2011) ("In Japan the formal processes are rigid top-down involving a kind of ritual formality with importance given to seals and do not allow much deviation from the established rules. On the other hand, the informal processes are far more flexible and have a very different logic with great importance given to consensus and collective participation in making a decision. This informal way of making decisions through various forms of meetings and communications is based on personal relations rather than on formal ways of communication.").

²²³ The persistence of low productivity in Japan's service industries is underlined by Haruhiko Kuroda, the current governor of the Bank of Japan. As Kuroda points out, the service sector continues to lag behind manufacturing, and productivity in services is only around 70 percent of the levels prevailing in the US and Europe. See Leika Kiraha, *BOJ Kuroda Calls for Raising Japan's Service-Sector Productivity*, REUTERS BUSINESS NEWS (March 15, 2018), <https://www.reuters.com/article/us-japan-economy-boj/boj-kuroda-calls-for-raising-japans-service-sector-productivity-idUSKCN1GR0E0> (last visited August 5, 2018).

Table 1 Japanese Manufacturing Corporation
Initiatives According to Cultural Types
(Total number = 76)

Cultural type	Number (out of 76 total)
Clan	16
Adhocracy	4
Market	20
Hierarchy	26
Clan/Market	3
Clan/Hierarchy	4
Adhocracy/Market	1
Market/Hierarchy	2

Table 2 Japanese Nonmanufacturing
Cooperation Initiatives According to Cultural Types
(Total number = 33)

Cultural Type	Number (out of 33 total)
Clan	5
Adhocracy	1
Market	14
Hierarchy	9
Clan/Market	2
Market/Hierarchy	2

3. *Korea*

According to a number of studies, Korean organizations score most highly for Hierarchy culture, followed by Clan culture and Market (results-focused)

culture.²²⁴ Their lowest score is for Adhocracy (entrepreneurial) culture.²²⁵ Other studies corroborate the finding that Korean organizational culture is largely associated with Hierarchy culture.²²⁶ In a comparative study, Ali Dastmalchian examined organizational culture in thirty-nine (39) Canadian and forty (40) Korean organizations operating in six different industries.²²⁷ Their data shows that Korean firms, when compared to Canadian organizations, exhibit more hierarchy culture and are characterized by greater tendencies toward rigidity and control.²²⁸ Historically, Korean corporate culture offered some advantages, leading to the observation that some traditional work culture—like loyalty to organizations and superiors, readiness to take and execute orders without questioning and sacrificing private life—were part of the force that drove the government-led economic development and the

²²⁴ See Ali Dastmalchian et al., *The Interplay Between Organizational and National Cultures: A Comparison of Organizational Practices in Canada and South Korea Using the Competing Values Framework*, 11 INT. J. HUMAN RES. MGMT. 388 (2000).

²²⁵ See *id.* at 392.

²²⁶ See *id.* at 392-94.

²²⁷ See *id.*

²²⁸ See *id.* at 402, 408 (“the predominance of the hierarchy culture among Korean firms irrespective of the industry is apparent from the six graphs”; “Canadian organizations showed a considerably higher climate of openness and lower climate of rigidity and control than the Korean sample.”).

consequent expansion of the Korean corporate sector during the past several decades.²²⁹ However, recent assessments suggest that the traditional tendencies toward authoritarianism and rigidity in business are holding Korean companies back and hampering their global competitiveness.²³⁰

*E. INCORPORATING CONSIDERATIONS OF CORPORATE
CULTURE IN COMPETITION COMPLIANCE STRATEGIES
IN EAST ASIA*

It has been noted that Confucian philosophy has substantially influenced the values and cultural norms that are prevalent in East Asia.²³¹ Particularly, it is suggested that *guanxi*-type networks, which are generally rigid hierarchy-based internal structures, and family ownership are particular features that distinguish East Asian corporate governance from modern governance approaches in the West.²³² In the light of

²²⁹ See Editorial notes: *Change work culture to improve competitiveness: The Korea Herald*, THE STRAITS TIMES (March 21, 2016), <https://www.straitstimes.com/asia/east-asia/change-work-culture-to-improve-competitiveness-the-korea-herald> (last visited August 5, 2018).

²³⁰ See *id.* (referring to studies linking poor “organizational health” to indicators such as top-down command structures, frequent demands that employees perform work after hours, unproductive internal meetings, and unfair job performance assessments).

²³¹ See *supra* section 1.

²³² See *supra* section 3.

research showing that a high degree of “traditionality” is relevant to the manner in which employees interact with their employers, it is expected that these features of East Asian business culture and governance are liable to significantly impact the effectiveness of competition compliance programs.²³³ Internal control mechanisms may lose their power when employees are concerned that reporting misconduct will affect long-term relations, or when employees at different levels of a company tend to fulfill their duties and obligations based on implicit *guanxi* rules or the equivalent of such rules. In relation to such control mechanisms, Irwin has explained that in view of “the Confucian values of loyalty to one’s group, respect for superiors in a hierarchy, and avoiding loss of ‘face,’ the willingness of Chinese to speak up or ‘blow the whistle’ on fellow employees if they become aware of [an] unethical practice is low.”²³⁴

The investments that firms make in achieving compliance with regulation is often motivated according

²³³ See Larry Farh et al., *Individual-level Cultural Values as Moderators of Perceived Organizational Support-Employee Outcome Relationships in China: Comparing the Effects of Power Distance and Traditionality*, 50 *ACAD. MGMT. J.* 715 (2007); showing that employees with high *traditionality* in China would react to their employers in accordance to social role obligations.

²³⁴ Judith Irwin, *Doing Business in China: An Overview of Ethical Aspects*, INSTITUTE OF BUSINESS ETHICS OCCASIONAL PAPER 6, 16 (2012), <https://www.ibe.org.uk/userfiles/chinaop.pdf> (last visited August 5, 2018).

to the expected financial consequences and benefits, including the value of avoiding the pain of legal sanctions.²³⁵ However, in light of the cultural specificities discussed in this article, it is suggested that more attention should be given to these other factors. In the following subsections, the implications of the Confucian tradition and of local norms for developing effective competition compliance in East Asian companies are discussed. Particular attention will be given to the duties incumbent on CEOs and senior managers, the role of the compliance officer, internal control mechanisms, and the education function of the compliance program.

1. Competition Compliance Programs

Compliance programs are designed to perform three main functions. The first function is to *educate* personnel and to provide relevant information about what types of conduct are prohibited by antitrust or competition law.²³⁶ The second is to *signal* to the outside world that the

²³⁵ See, e.g., Donald Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 937 (2017) (stating the basic formula that “[i]f the law imposes the right mix of detection and sanctions, firms will for that reason alone have an incentive to take steps to reduce legal risk” but also recognizing the practical complications arising from imperfect detection and a range of other factors).

²³⁶ See, e.g., Wils, *supra* note 19.

company has the commitment and determination to comply with competition rules, which contributes to building a positive brand for “ethical businesses.”²³⁷ And the third function is to either *prevent* anticompetitive behavior or, if misconduct has already occurred, to *detect* that misconduct, preferably at an early stage.²³⁸ It has been said that the goal of a compliance program is to let the businessman feel the antitrust laws, and to make him think twice before engaging in conduct liable to constitute a violation.²³⁹ This palpable awareness of the law and its consequences will thus create conditions in which cartel activity is more likely to be avoided.²⁴⁰ This perspective may not be sufficiently ambitious. While it is necessary to clearly disseminate information that enables a potential infringer to consider the risks and rewards of illicit

²³⁷ See Lachnit, *supra* note 5, at 35.

²³⁸ Early detection by a company (by way of internal audit and/or effective compliance efforts) of its own cartel infringement may enable it to benefit from immunity or leniency in any subsequent public enforcement proceedings; in some jurisdictions this may also secure benefits for the company in the context of private damages claims. See, e.g., William Kolasky, *Antitrust Compliance Programs: The Government Perspective*, address before the Corporate Compliance 2002 Conference, San Francisco, July 12, 2002, <http://www.justice.gov/atr/public/speeches/224389.pdf> (last visited August 8, 2018) (discussing the detection function of compliance programs).

²³⁹ See James Withrow, *Compliance with the Antitrust Laws*, 9 N.Y. L. F. 187, 194 (1963).

²⁴⁰ See Kolasky, *supra* note 238, at 14.

conduct, the deeper objective should be to trigger a change in the logic of appropriateness that sets the parameters of conduct of that agent.²⁴¹ If such a change is achieved, the agent will act ethically—not necessarily due to the hypothetical consequences of a legal regime external to the business organization, but as a function of the standards for exemplary behavior within the environment of the organization.²⁴²

Although there is no internationally accepted one-size-fits-all template of a competition compliance

²⁴¹ On the logic of appropriateness, which may be contrasted with (but which in some specific circumstances may overlap and interact with) the logic of consequences, see James March & Johan Olsen, *The Logic of Appropriateness*, in THE OXFORD HANDBOOK OF PUBLIC POLICY 689 (Goodin et al. eds., 2008). March and Olsen summarize this concept as follows: “The logic of appropriateness is a perspective that sees human action as driven by rules of appropriate or exemplary behavior, organized into institutions. Rules are followed because they are seen as natural, rightful, expected, and legitimate. Actors seek to fulfill the obligations encapsulated in a role, an identity, a membership in a political community or group, and the ethos, practices and expectations of its institutions. Embedded in a social collectivity, they do what they see as appropriate for themselves in a specific type of situation.” *Id.* at 689. A general account is given in JAMES MARCH & JOHAN OLSEN, *REDISCOVERING INSTITUTIONS* (1989). For the important point that the logic of appropriateness and the logic of consequences should not be regarded as necessarily mutually exclusive, see Kjell Goldman, *Appropriateness and Consequences: The Logic of Neo-Institutionalism*, 18 GOVERNANCE 35 (2005).

²⁴² See March & Olsen, *supra* note 241.

program,²⁴³ and though competition authorities have not officially agreed upon uniform contents for a “good” compliance program,²⁴⁴ many scholars have listed a number of key elements that should be incorporated

²⁴³ The Organization for Economic Development and Cooperation Working Group on Bribery issued the first international compliance and ethics program standard in 2009. The basic elements of this standard are applicable to any type of compliance program. See OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, November 26, 2009, <https://www.oecd.org/daf/anti-bribery/44176910.pdf> (last visited August 8, 2018). See also Banks & Murphy, *supra* note 3, at 375. Murphy and Boehme referred to the 2010 version of the Canadian Competition Bureau’s Bulletin on Compliance Programs as an excellent example. See Joseph Murphy & Donna Boehme, *Fear No Evil: A Compliance and Ethics Professionals’ Response to Dr. Stephan* (2011), <http://ssrn.com/abstract=1965733> (last visited August 8, 2018). See also Joseph Murphy, *Good News from Canada for the Compliance & Ethics Profession*, 6 COMP. & ETHICS MAG. 34 (2009). The Canadian Competition Bureau has issued revised Bulletins in 2015 and 2018 which have been influential.

²⁴⁴ See Lachnit, *Compliance Programmes*, *supra* note 5, at 41. See also Pier Luigi Parcu & Maria Luisa Stasi, *Antitrust Compliance Programs in Europe: Status Quo and Challenges Ahead*, EUI/RSC POLICY BRIEF 2016/1 (2016), http://cadmus.eui.eu/bitstream/handle/1814/39644/ENTraNCE_PB_2016_01.pdf?sequence=3 (“While there seems to be a wide and increasing consensus among public and private stakeholders around the benefits of compliance programs, such benefits are identified and present only in cases of ‘good’ programs. Thus, the main challenge lays in the identification of what is a ‘good’ compliance program, in order to elaborate best practices for its implementation.”).

within such a program.²⁴⁵ These include, for example: the genuine support of senior managers; the appointment of an ethics and compliance officer; the maintenance of an internal auditing, monitoring, and reporting system; effective communications to ensure that employees are fully informed; frequent evaluation of the compliance program and improvements where necessary; and appropriate risk assessments for anticompetitive conduct.²⁴⁶ These ingredients may be further tailored and scaled up or down according to a variety of factors such as, among others: the size of a company, its sophistication and resources, its compliance record, the

²⁴⁵ See, e.g., William Lawrence, *Protecting Against Problems—Corporate Compliance Programs*, 57 ANTITRUST L. J. 601 (1988); Kate Taylor & John Pratt, *Anti-Trust Compliance Programs*, 8 INT’L BUS. L. J. 981 (1994); Joseph Murphy, *How DG Competition and US DOJ Antitrust Division Hurt Compliance Efforts*, CPI ANTITRUST CHRON. (Feb. 2012) 1; Banks & Murphy, *supra* note 3, at 381.

²⁴⁶ See Lawrence, *supra* note 245; Taylor & Pratt, *supra* note 245, at 984-85; Murphy, *supra* note 245, at 4-5; Banks & Murphy, *supra* note 3, at 381. Murphy has argued that the necessary management techniques are very extensive, and that there is no easy way to reduce them to a simple list. A good compliance program should employ the full range of compliance techniques, and the different elements of the program work together coherently. See JOSEPH MURPHY, 501 IDEAS FOR YOUR COMPLIANCE AND ETHICS PROGRAM 93-6 (2008); Murphy & Boehme, *supra* note 243, at 4-5.

nature of its activities, the industries in which it operates, and, of course, the applicable legal environment.²⁴⁷

Materials that discuss and encourage compliance measures, such as brochures and similar materials, PowerPoint slides, and policy books, are common and widely distributed.²⁴⁸ Nevertheless, the training and education provided to managers and employees do not seem fully effective, and the rate and seriousness of antitrust violations, including repeat offenses, persist largely unabated.²⁴⁹ That is not to say that PowerPoint training is useless—presentations that convey eye-opening information and provide accurate and predictable information for business operators can make a key contribution to inducing compliance.²⁵⁰ It is

²⁴⁷ See generally INT'L CHAMBER OF COMMERCE, *The ICC Antitrust Compliance Toolkit* (2013), <https://cdn.iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf><https://cdn.iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf> (suggesting practical tips for building compliance programs).

²⁴⁸ See generally Banks, *supra* note 27 (indicating that there is ample information available about antitrust in the form of policies, handbooks, slides, etc.).

²⁴⁹ See generally *id.* (stating that antitrust violations continue regardless of access to information).

²⁵⁰ See generally Murphy & Boehme, *supra* note 243 (highlighting examples of times that employees have admitted to accidental noncompliance after receiving proper training on what constitutes compliance).

doubtful that a compliance program relying solely on classroom-style teaching sessions will make the difference between compliance and non-compliance. Conceivably, there may even be a risk that a determined price-fixer might be emboldened by enhanced knowledge about how the enforcement system works rather than deterred.²⁵¹ While it may be useful for a company manager to know specifics about the law, such as maximum corporate penalties for misconduct, focusing too much on such details may dilute the more fundamental objective which is to trigger a cultural change within the corporate environment.²⁵² From this point of view, a policy of promoting effective compliance programs requires a solid understanding of the relevant corporate culture and the relevant social and political norms. A holistic approach that takes account of these factors will help to create a strong and sustainable compliance culture at all levels of the organization and thus contribute to the success of the competition law that applies in a given jurisdiction. It will induce company personnel to develop effective internal mechanisms consonant with the external regulatory pressure of the law and tailored specifically to

²⁵¹ However, a determined price-fixer may of course attempt to engage in misconduct irrespective of whether he has a sophisticated understanding of the applicable legal prohibitions.

²⁵² See generally John Galgay, *Corporate Plans and Policies for Voluntary Antitrust Compliance*, 19 BUS. LAW 637 (1964) (suggesting that businessmen do not need to understand antitrust law as intimately as an antitrust lawyer but having a basic understand will help businessmen see that compliance programs are good for businesses).

the firm in light of its managerial, corporate, and social culture. As Galgay observed more than fifty years ago, compliance efforts should aim to achieve a level of *sympathetic understanding* of the antitrust prohibitions which:

[I]s in the constant and conscious forefront of the minds of businessmen, so that [this sympathetic understanding] may operate as an *ever-present and conscious guide* in future actions. ... [Bringing that sympathetic understanding] to the forefront of their minds is, it seems to me, the most important task of lawyers concerned with compliance programs emphasis added).²⁵³

When a business actor achieves what John Galgay calls a sympathetic understanding of the law, a process of internalization of norms has taken place; the will to comply with the law has become the actor's own norm and has become part of his or her identity.²⁵⁴ Because the agenda of promoting sympathetic understanding, internalized norms, and the will to comply is effected by the interplay between external discipline of the law and internal corporate dynamics, the "black box" of the firm needs to be uncovered, not only to develop better

²⁵³ *Id.* at 641.

²⁵⁴ See George Akerlof & Rachel Kranton, *Identity and the Economics of Organizations*, 19 J. ECON. PERSP. 9, 12 (2005) ("Psychologists say that people can *internalize* norms; the norms become their own and guide their behavior.").

understandings of the structure and internal governance of the organization, but more importantly to understand the invisible, and often psychological rules, governing the communication channels between managers and employees.²⁵⁵

Regardless of the position competition authorities take on the debate about whether compliance programs should be taken into account when those authorities calculate fines, or whether such programs should be made a mandatory condition for the grant of leniency,²⁵⁶ there is no doubt that several authorities are trying to provide both financial and reputational incentives for firms to actively invest in compliance programs.²⁵⁷ The key issue in making a compliance program effective is

²⁵⁵ See D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 789 (2013) (indicating that after nearly three decades, the myth of the “black box” of the firm is still perpetuated in antitrust scholarship). See generally Ronald Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 714 (1992) (using the “black box” metaphor, which was originally used in the very different context of electronic circuit theory and cybernetics and later used in numerous other fields, and now appears to have been transposed to the subject of corporate behavior).

²⁵⁶ See generally Fisse, *supra* note 72 (arguing that corporations should not be given any leniency in anti-cartel sanctions against them unless the corporation has a compliance program in place).

²⁵⁷ See Florence Thépot, *Can Compliance Programmes Contribute to Effective Antitrust Enforcement?*, COMPETITION LAW COMPLIANCE PROGRAMS: AN INTERDISCIPLINARY APPROACH 191 (Johannes Paha ed., 2016).

how an authority can best collaborate with business operators to ensure that they internalize the potential costs of infringements caused, at least in part, by poor corporate governance, and to encourage a change in corporate culture so that a *compliance culture* prevails at all levels of the businesses concerned.²⁵⁸ On the corporate side, cultural elements need to be taken into account; CEOs, managers, sales staff, and other employees at various positions within the corporate hierarchy must cooperate and communicate effectively and third parties may also be relevant as Nielsen and Parker have pointed out, the influence of customers, shareholders, business partners, and employees can have a significant and positive impact on corporate compliance.²⁵⁹

2. *Paternalistic Leadership at CEO and Senior Manager Level*

Although it has been acknowledged that competition compliance programs are important, the design and implementation of such programs are often weak, and while lectures, workshops, and compliance

²⁵⁸ See Riley & Sokol, *supra* note 13, at 47-9 (2015).

²⁵⁹ See Vibeke Lehmann Nielsen & Christine Parker, *To What Extent Do Third Parties Influence Business Compliance?* 35 J. L. & Soc. 309, 340 (2008).

manuals can be helpful, they are unlikely to suffice.²⁶⁰ It is doubtful that a thin or merely *pro forma* approach to compliance will make a difference in securing better compliance, at least absent more comprehensive efforts. In the context of East Asia, this point is reflected in a study by Van Uytsel that led him to conclude that the compliance manuals of the large Japanese firms surveyed, along with the compliance training sessions organized by those firms, are of low value.²⁶¹

Therefore, a compliance policy is more likely to be successful when it is embedded within the corporate culture.²⁶² The policy has to be implemented through the continuous dedication and support of managers and employees.²⁶³ As Stephany Watson advises, there must

²⁶⁰ See, e.g., Joseph Murphy, *Promoting Compliance with Competition Law: Do Compliance and Ethics Programs Have a Role to Play?* ORG. FOR ECON. CO-OPERATION AND DEV. (2012) at 251-52 (“In the past companies might have satisfied themselves that they were doing ‘all they could possibly do’ by sending out codes and manuals, having employees sign certifications, and having lawyers give lectures on the statutes but this is no longer considered an effective approach.”).

²⁶¹ See Steven Van Uytsel, *Leniency in Japan—An Empirical Survey of its Use* (2015), at 18-20, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692445.

²⁶² See Rachel Taylor, *A Cultural Revolution: The Demise of Corporate Culture Through the Whistleblower Bounty Provisions of the Dodd-Frank Act*, 15 TRANSACTIONS: TENN. J. BUS. LAW 69, 78 (2013).

²⁶³ See Stephany Watson, *Fostering Positive Corporate Culture in the Post-Enron Era*, 6 TRANSACTIONS: TENN. J. BUS. L. 7 (2004).

be specific individuals “from top to bottom” that are responsible for building a strong compliance culture.²⁶⁴ Companies must promote This compliance culture through building trust, commitment, and cooperation between employees.²⁶⁵ The most responsible public companies have devoted significant efforts to promoting trust, ethics, and good compliance practices, which are positively correlated with business success, and companies with a strong and sustainable culture of voluntary compliance at all levels can derive substantial value from their compliance efforts.²⁶⁶

The paternalistic leadership style in East Asian companies suggests that senior managers and employees are expected to fulfill mutual obligations.²⁶⁷ Subordinates are willing to perform the tasks that their senior managers assign to them, and father-like managers, who provide support and protection for the employees’ professional (and sometimes even personal)

²⁶⁴ See *id.* at 38.

²⁶⁵ See *id.* at 31-2.

²⁶⁶ See Taylor, *supra* note 262, at 81-5 (2013).

²⁶⁷ Paternalistic leadership is also observed in countries such as India, Turkey and Mexico, among others. See Zeynep Aycan et al., *Impact of Culture on Human Resource Management Practices: A 10-Country Comparison*, 49 APPLIED PSYCH.: AN INT’L REV. 192 (2000); Ekin Pellegrini & Terri Scandura, *Paternalistic Leadership: A Review and Agenda for Future Research*, 34 J. MGMT. 566 (2008).

lives, repay subordinates' obedient behavior.²⁶⁸ However, since leaders and subordinates are engaged in a long-term reciprocal relationship of a very broad scope that extends to personal and affective-emotional dimensions,²⁶⁹ employees in East Asian firms may be less willing to "blow the whistle" by reporting the misconduct of managers or other employees, or by coming clean about their own transgressions.²⁷⁰ Indeed, the fact that CEOs and senior managers in East Asia often play a paternal role might have the effect of intensifying the "loss of face" that may come with self-reporting misconduct and correcting past errors.²⁷¹

²⁶⁸ See Pellegrini & Scandura, *supra* note 267, at 567; Ying Chen et al., *Supervisor-Subordinate Guanxi: Developing a Three-Dimensional Model and Scale*, 5 MGMT & ORG. REV. 375, 378 (2009) (suggesting that there are three key components of the supervisor-subordinate *guanxi* relationship: affective attachment, personal life inclusion, and deference to the supervisor).

²⁶⁹ See Xiao-Ping Chen et al., *Affective Trust in Chinese Leaders: Linking Paternalistic Leadership to Employee Performance*, 40 J. MGMT. 796, 802 (2014).

²⁷⁰ See Irwin, *supra* note 234, at 16. See also Bor-Shiuan Cheng et al., *A Triad Model of Paternalistic Leadership: Evidence from Business Organizations in Mainland China*, 20 INDIGENOUS PSYCH. RES. CHINESE SOC'Y. 209 (2003); Tsung-Yu Wu et al., *Expressing or Suppressing Anger: Subordinate's Anger Responses to Supervisors' Authoritarian Behaviors in a Taiwan Enterprise*, 18 INDIGENOUS PSYCH. RES. CHINESE SOC'Y. 3 (2002).

²⁷¹ See P. CHRISTOPHER EARLEY, *FACE, HARMONY AND SOCIAL STRUCTURE: AN ANALYSIS OF ORGANIZATIONAL BEHAVIOR ACROSS CULTURES* 137 (Oxford University, 1st ed. 1997) (explaining the nexus

Many empirical studies show that a serious commitment to compliance must be observed at the highest echelons of the organization.²⁷² For example, on the basis of their examination of forty-three (43) antitrust cases covering a span of twenty (22) years, Sally Simpson and Christopher Koper argue that, compared with other factors, antitrust violations are most likely to be correlated with managerial variables that depend on the characteristics of a company's top leadership.²⁷³

between the importance of face in East Asian societies and the collectivism prevailing in those societies); *See also* Hsien Chin Hu, *The Chinese Concepts of Face*, 46 AM. ANTHROP. 45, 61 (1944) (linking social standing and the fear of isolation and noting that “[i]n extreme cases the realization that one’s conduct has been damned by group standards drives an individual to suicide.”); *See* Qiumin Dong & Yu-Feng L. Lee, *The Chinese Concept of Face: A Perspective for Business Communicators*, 20 J. BUS. & SOC. 204, 205 (2007) (noting in Chinese and other group-oriented Asian cultures, a “loss of face” is closely associated with a loss of status within a given social network. Conversely, a gain of face indicates enhanced respect or attention from others in the network.).

²⁷² *See, e.g.*, Sally Simpson & Christopher Koper, *The Changing of the Guard: Top Management Team Characteristics, Organizational Strain, and Antitrust Offending, 1960-1986*, 13 J. QUANT. CRIM. 373 (1997).

²⁷³ *See id.* at 394 (finding that “chief executive officers from certain subunits, most notably finance and administration, increase company involvement in antitrust offending. To the extent that the philosophies of finance and administration are used to assess problems and promote solutions within the organization, internal strain [from poor or declining corporate performance, or from the fear thereof] may develop among managers, subunits, and divisions, as resources, power, and upward mobility are all affected by bottom-line performance criteria. These results lend credence to... speculation of almost two decades ago that an

Another study focusing on forty (40) international cartels prosecuted in Europe and the U.S. from 1998 to 2008 shows that most episodes of collusion were organized by senior managers such as general managers, heads of sales, company presidents and vice-presidents, managing directors and CEOs.²⁷⁴ The resulting argument that the top corporate leadership must set the tone for compliance at all levels of the firm applies *a fortiori* in Confucian societies where hierarchical leadership and patriarchal relationships are prominent and where loyalty and obedience are expected from subordinates.²⁷⁵ In this context, the external discipline of the law may seem quite remote compared to the immediacy of the norms that apply within the confines of the organization. Therefore, the efficacy of the law may depend to a great degree on whether the corporate leadership's commitment to compliance is genuine and sufficiently visible within the firm, and whether the

overemphasis on organizational goals [in this case efficiency] may come with an unanticipated price.”).

²⁷⁴ See Andreas Stephan, *Hear No Evil, See No Evil: Why Antitrust Compliance Programmes May Be Ineffective at Preventing Cartels*, ESRC CENTRE COMP. POLICY & NORWICH L. SCH. 8-9, <http://competitionpolicy.ac.uk/documents/8158338/8256108/CCP+Working+Paper+09-09.pdf/9d0cd693-8796-408c-b6eb-90b414d1ecf3> (last visited August 8, 2018).

²⁷⁵ See Akerlof & Kranton, *supra* note 254 (noting the emphasis on the internalization of norms, which shapes an actor's identity).

requirements of relevant legal norms are translated within the firm into social norms that employees then internalize and make their own.²⁷⁶ Of course, tone-setting is important at lower levels of the organization as well,²⁷⁷ but the “tone at the top” is the indispensable driving force for the whole company’s investment in compliance.²⁷⁸ In scenarios where senior executives have disproportionate importance in corporate governance,²⁷⁹ it is essential to ensure that their commitment to antitrust compliance is beyond question.²⁸⁰ In this context, where a business’ authority is highly centralized, an executive must act as a role

²⁷⁶ See Akerlof & Kranton, *supra* note 254 (noting the emphasis on the internalization of norms, which shapes an actor’s identity).

²⁷⁷ See Hon. Patti Saris, Chair, U.S. Sentencing Comm’n, Remarks at the 12th Annual Compliance & Ethics Institute (Oct. 7, 2013) (<http://www.uscc.gov/sites/default/files/pdf/training/organizational-guidelines/special-reports/saris-remarks-annual-compliance-and-ethics-institute.pdf>).

²⁷⁸ See Susan Lorde Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability*, 29 NOTRE DAME J. LAW, ETHICS & PUB. POL’Y 169, 187 (2015).

²⁷⁹ See Len Gainsford & Angus Young, *Compliance Heroes, Leadership, and Ethnical Values: In Search of a Chinese Benchmark* (Aug. 31, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1464602 (last visited August 8, 2018).

²⁸⁰ See Sokol & Abrantes-Metz, *supra* note 19, at 593 (“The CEO must project a sincere desire to comply. This will set the tone for the entire organization in terms of its antitrust compliance. The CEO must be fully committed to the antitrust compliance program and be consistent in such commitment.”).

model for the company. As Confucius once said in plain terms: if the leader acts properly, the common people will obey him without being ordered to; if the leader does not act properly, the common people will not obey him even after repeated injunctions.²⁸¹

3. *The Compliance Officer*

A company's chief compliance and ethics officer is a core element of an effective compliance program.²⁸² Ideally, this person should play a direct and central role in ensuring the success of the program.²⁸³ They should be independent in performing their duties, highly trusted

²⁸¹ K.C.P. Low & Sik-Liong Ang, *Confucian Leadership and Corporate Social Responsibility (CSR): The Way Forward*, 2 ASIAN J. BUS. RES. 85, 88 (2012) (quoting Analects of Confucius, XIII:6).

²⁸² See generally Deborah DeMott, *The Crucial but (Potentially) Precarious Position of the Chief Compliance Officer*, 8 BROOK. J. CORP. FIN. & COM. L. 56, 59 (2013) (discussing compliance and the role of compliance officers with reference to financial and banking scandals); John Krenitsky, *Defining the Chief Compliance Officer Role*, 6 AM. U. BUS. L. REV. 303, 311 (2017) (noting the potential complexity facing compliance officers due to the numerous regulatory fields that may apply in the corporate context and pointing out that responsibilities for compliance may well have to be divided among different specialists and coordinated by the chief compliance officer.).

²⁸³ See Banks & Murphy, *supra* note 3, at 381 (calling for “[a]n empowered, senior officer-level chief ethics and compliance officer with sufficient autonomy, empowerment, and resources. If there is not a strong compliance and ethics officer at the top, the program may be nothing more than a corporate decoration.”).

and visible to all employees, and well-informed about all aspects of the company's compliance program.²⁸⁴ They should not wear multiple or conflicting hats; playing the part of teammate in one meeting and referee in the next.²⁸⁵ The notion of establishing a dedicated compliance officer within the management structure and of situating that officer in an independent compliance department is relatively new.²⁸⁶ Traditionally, compliance matters were typically handled by the company's general counsel or by a subordinate. In some organizations, this trend is still the norm.²⁸⁷ In a survey by the Association of Corporate Counsel in 2010, nearly half of the respondents confirmed that either the general counsel was the chief compliance officer, or that compliance was part of the general counsel's duties.²⁸⁸ Similarly, in a 2013 Corpedia survey in which 630 compliance professionals participated, only thirty-six percent (36%) answered that they reported to the general counsel.²⁸⁹ Of course, separating the compliance officer

²⁸⁴ See Lachnit, *supra* note 5, at 43.

²⁸⁵ See John McNeece IV, *The Ethical Conflicts of the Hybrid General Counsel and Chief Compliance Officer*, 25 GEO. J. LEGAL ETHICS 677 (2012).

²⁸⁶ See Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L. J. 71, 75 (2014).

²⁸⁷ See *id.* at 74.

²⁸⁸ See *id.* at 99.

²⁸⁹ *Id.*

from the legal department is only realistic if it is possible to allocate substantial budget and decision-making power to separate compliance personnel.²⁹⁰ The arguments for establishing a separate and autonomous compliance department to encourage intramural competition leading to better compliance practices²⁹¹ seem to be less compelling when the management structure of a company is highly centralized, and where bottom-up and cross-department communication is weak.²⁹²

Another issue is whether East Asian firms are willing to hire in-house lawyers as independent compliance officers.²⁹³ In a survey of ninety-seven (97) listed companies in Shenyang, Shenzhen and Shanghai, 51.5 percent of the respondents replied that the company had hired in-house lawyers, but the number of lawyers hired was either one or two.²⁹⁴ Thirty-four percent (34%) answered that they had not hired any in-house lawyers, and 14.4 percent did not provide an answer.²⁹⁵ The most

²⁹⁰ See *id.* at 82.

²⁹¹ See *id.* at 83.

²⁹² See *id.*

²⁹³ See generally Kota Fukui, *On Prevailing Corporate Legal Compliance: Comparative Empirical Study on Need for Lawyers in Corporations in China and Japan*, 63 OSAKA U. L. REV. 1, 2 (2016).

²⁹⁴ See *id.* at 4.

²⁹⁵ See *id.*

frequent answer for not hiring an in-house lawyer was either that there was, “no work that needs a lawyer’s help,” or that the company did not have a sufficiently organized structure to use a lawyer.²⁹⁶ When asked to describe the ideal type of in-house lawyer, the most common response valued the “general counsel type” (29.9%).²⁹⁷ This implies that in-house lawyers are expected to hold an authoritarian position similar to the executive directors and to work closely with the executive body on legal issues.²⁹⁸ When asked about the capacities and personal attributes most desired for in-house lawyers, respondents identified a “sense of commitment” (62.9%) and “loyalty to the corporation” (56.7%).²⁹⁹ Since the task of implementing a corporate compliance program is often discharged by a company’s Chief Legal Officer and carried out by in-house corporate lawyers,³⁰⁰ these answers might indicate that the role and function of the compliance officer in Chinese firms are similar to those of a senior executive as opposed to a fully independent professional. In

²⁹⁶ See *id.* at 4-5.

²⁹⁷ See *id.* at 9.

²⁹⁸ See *id.*

²⁹⁹ See *id.*

³⁰⁰ See Robert Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L. J. 203, 203 (2016). See also Riley & Sokol, *supra* note 13, at 6.

smaller companies, it may be more realistic to let the CEO take responsibility for compliance.

4. *Effective Communication and Education*

Many empirical studies on unethical and illegal conduct show that the reason some managers violate the law is not because they are oblivious to legal prohibitions—the prohibitions are deliberately disregarded.³⁰¹ In a study surveying 2,321 business firms to assess the deterrent effect of the criminalization of cartel conduct by the Australian Parliament in July 2009 (given effect by the Competition and Consumer Act 2010), Parker and Nielsen showed that the very serious applicable sanctions and other consequences—including criminal penalties, corporate fines, and private actions for damages—had little impact on compliance management.³⁰² Furthermore, there was no correlation between the fear of being punished and any change in compliance performance.³⁰³ Recent empirical studies show that informing industry of legal sanctions does not

³⁰¹ See Parker & Nielson, *Deterrence and the Impact*, *supra* note 16, at 386.

³⁰² See *id.* at 393.

³⁰³ See *id.* at 406.

deter until the prohibited conduct is perceived to be sufficiently associated with moral opprobrium.³⁰⁴

The findings of the above studies call for further reflection on the issue of how managers and employees could be trained to comply with the requirements of competition law and policy. The notion that the risk of significant sanctions and possible detection alone suffice to stimulate compliance is increasingly archaic.³⁰⁵

³⁰⁴ See N. Craig Smith et al., *Why Managers Fail to Do the Right Thing: An Empirical Study of Unethical and Illegal Conduct*, 17 BUS. ETHICS Q. 633 (2007). See also Tom Tyler et al., *The Ethical Commitment to Compliance: Building Value-Based Cultures*, 50 CALIF. MGMT REV. 31, 34 (2008) (finding over 80 percent of the sample of compliance choices made by employees were incentivized by internal judgements on right and wrong, and by perceptions regarding the legitimacy of the manager's authority. Only, whereas only 20 percent of the compliance choices were motivated by concerns about being punished.).

³⁰⁵ See, e.g., Maurice Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 769 (2014). Stucke distinguishes between "intrinsic" and "extrinsic" approaches to compliance. An intrinsic approach involves the development of an ethical culture within a company for its own sake (i.e., for moral reasons), and not to tradeoff between the costs and benefits of lawful versus unlawful conduct. See *id.* at 825. In reaction to this dichotomy between intrinsic and extrinsic compliance, Ma and Marquis have cautioned that "it may not be prudent to establish a strict hierarchy between an ethics-based approach and a more calculative approach focused on tradeoffs. Maintaining conditions that favor both self-rewarding and materially rewarding benefits in parallel may be desirable insofar as these benefits may have mutually reinforcing effects." Ma & Marquis, *supra* note 79, at 40 n. 368. However, the latter authors endorsed Stucke's suggestion that "too much emphasis has been placed on material,

Consequently, it is necessary to develop a strategy that takes account of the social construction of compliance and the need to understand and then shape, where necessary, the logic of appropriateness that prevails within the walls of an organization.

In the context of East Asia, part of the strategy should build on the cultural-historical infrastructure which underlies commercial life, as outlined in this article. Confucian doctrines could thus be applied as part of the effort to educate corporate leaders³⁰⁶ and employees and build moral engagement on the subject of cartel activities. Confucian ethics emphasize the importance of moral education, and it is usually the responsibility of parents and leaders to educate children and subordinates with moral codes; the ideal result is to produce a “moral gentleman” (*junzi*).³⁰⁷ The Confucian system of

cost-benefit reasoning, and not enough on the idea that doing the ‘right thing’ and implementing ethical leadership are self-justifying pursuits.”

³⁰⁶ To some extent, this idea may also apply to top leadership and company managers. However, top management bears additional responsibility in that they must *actively* take the steps necessary to ensure an adequate compliance culture throughout the organization. This entails, among other things, a more proactive approach to learning, including self-education, as compared to the typical Confucian learning style. See Baiyin Yang et al., *Confucian View of Learning and Implications for Developing Human Resources*, 8 ADVANCES DEVELOPING HUMAN RES. 346, 349 (2006).

³⁰⁷ See Chau-kiu Cheung & Andrew Chi-fai Chan, *Philosophical Foundations of Eminent Hong Kong Chinese CEOs’ Leadership*, 60 J. BUS. ETHICS 47, 49 (2005).

teaching and education attaches high value to morality and social responsibility and less attention is given to discovering the truth.³⁰⁸ Learners usually prefer an accurate, systematic, and slow approach when receiving instructions, and teachers usually employ tools such as lists, rote memorization, and repetition.³⁰⁹ Since employees are accustomed to an instructor-centered approach to education, and since they rarely express dissent or personal opinions in front of a group,³¹⁰ providing a list of “do’s” and “don’ts” through formal training courses might be manageable and easy to implement. While employees in countries with Confucian traditions may prefer a more systematic, slow approach compared to the interactive, spontaneous, and quick approach often seen in western countries,³¹¹ it is crucial to ensure that employees understand why and how the compliance program is implemented—to show why cartel behavior is unambiguously unethical. Although it is simple and expedient for multinational corporations with subsidiaries spread across continents to give employees slide presentations outlining the finer

³⁰⁸ See Yang et al., *supra* note 306, at 351.

³⁰⁹ See *id.* at 349.

³¹⁰ See *id.* at 352.

³¹¹ See *id.* at 351-52.

points of competition law,³¹² it is more important to instill the idea that conduct such as fixing prices or colluding on tenders is tainted with moral stigma and leads to a loss of face for the individuals concerned and for the entire organization.³¹³ Teaching employees that cartel conduct is unambiguously unethical and raising the specter of social stigma are more likely to be more effective than emphasizing the threat of severe administrative and/or criminal sanctions. The Confucian value of moral “righteousness” (*yi*) is taught in East Asian countries, and the sense of right or wrong is cultivated through the transmission and absorption of moral rules.³¹⁴ It follows that explicitly moral messages should be a natural part of a company’s efforts to shape the norms and behavior of employees.³¹⁵ Moreover,

³¹² See Michele Lee, *Building an Effective Antitrust Compliance Program: International and Cultural Challenges*, ANTITRUST COMP. BULL. 16, 18 (ABA Section of Antitrust Law, March 2006).

³¹³ See Tsung-Yu Wu et al., *supra* note 270.

³¹⁴ See, e.g., Mei-Ju Chou et al., *Confucianism and Character Education: A Chinese View*, 9 J. SOC. SCI. 59, 64 (2013) (“Character education has provided the means by which the values and teachings of Confucius has been transmitted to the people.”).

³¹⁵ Educators in the field of business ethics are also calling for a synthesis of the Confucian virtues and the more modern business ethos associated with globalized business. See Peter Woods & David Lamond, *Junzi and Rushang: A Confucian Approach to Business Ethics*, A CONTEMPORARY CHINESE CONTEXT, 3 (2011) https://www.anzam.org/wp-content/uploads/pdf-manager/623_ANZAM2011-434.PDF (“The ideal new Confucian business person in the modern day would be a virtuous

tapping into Confucian-oriented moral education to implement compliance concepts is also consistent with the argument that the command-and-control style of compliance education should be de-emphasized in favor of value-based compliance training.³¹⁶ In this vein, and as empiricists suggest creating *identity* between the values of the company and the values of its employees, and making ethical rules and boundaries credible, are elements more apt to secure compliance than relying on either command-and-control mechanisms or carrots and sticks.³¹⁷ Indeed, it may be that aspiring to compliance is not aiming high enough. In the East Asian context, a more ambitious and fruitful objective would be to cultivate *virtue* at all levels of a company, and to instill the idea that lawfully competitive conduct is a necessary

business person who possess qualities such as benevolence (*ren*), [righteousness] (*yi*), propriety (*li*), wisdom (*zhi*), and trustworthiness (*xin*), meantime, the business person is able to make use the advanced management techniques from the Western world.”)

³¹⁶ See Scott Killingsworth, *Modeling the Message: Communicating Compliance Through Organizational Values and Culture*, 25 GEO. J. LEGAL ETHICS 961, 975 (2012).

³¹⁷ See *id.* at 375-77; See also Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CALIF. MGMT. REV. 131, 135-36 (1999).

part of virtuous conduct that enables the company to flourish as a good corporate citizen.³¹⁸

5. *Cultural Changes to Shape Business Incentives*

In the many countries where competition law is not a long-standing tradition, business executives and employees may not be fully aware of the illegality of cartel activities (all the more so in the case of SMEs), and they may be either unaware of leniency programs or may have only weak incentives to use such programs to report violations to the competent authorities.³¹⁹

³¹⁸ See Woods & Lamond, *supra* note 315, at 8, (as noted above, others have likewise called for a more explicit virtue-based approach to good business ethics.).

³¹⁹ Indonesia is an example of a developing country where competition law has been in place for two decades, yet there is still limited cognizance of the law among the business community. However, the strong outreach efforts of the Indonesian competition authority have raised the level of business awareness. See Deswin Nur, *Understanding the Competition Law and Policy of Indonesia*, CPI ANTITRUST CHRON. 1, 9 (2015). Nur refers to two studies conducted by the Indonesian competition authority in 2009 and 2014 to measure awareness on the part of businesses in metropolitan Jakarta with regard to the existence of the applicable competition law. *Id.* In 2009, only 26 percent of surveyed businesses were aware of the law even after about nine years of enforcement. *Id.* However, following intensive outreach efforts, the figure increased to 60 percent by 2014. *Id.* Experience from the UK indicates that low business awareness of competition law can be a significant issue even in a developed country where the law has been applied actively by the national and European competition authorities. As summarized by O'Regan, research published in 2014 showed that only 30%

Inducing competition compliance would not only require the development of an internal mechanism to facilitate the function of the compliance programs, but also to change business incentives to promote compliance ethics and competition values.³²⁰ The path-dependent legacy of Confucianism in East Asian countries implies that the government and relevant executive organs and enforcers wield abundant influence and are well-placed to promote competition culture and compliance and to actively shape appropriate incentives for business operators. But in order to ensure that such incentives are established, a fundamental (though not sufficient) condition for success is political will.³²¹ It is already well known that enforcing laws against cartels in countries with weak political support for competition policy is extremely challenging.³²² Indeed, to achieve legal and cultural

of UK businesses knew that market sharing was illegal, and only 55% of UK businesses knew that price fixing was illegal. See Matthew O'Regan, *Criminal Enforcement of Competition Law: The UK Experience* 1, 2 (2017), <http://www.stjohnschambers.co.uk/dashboard/wp-content/uploads/MO-Advanced-EU-Competition-Law.pdf>.

³²⁰ See generally, Riley & Sokol, *supra* note 13.

³²¹ "The introduction and implementation of a competition law is fraught with problems. Political will is necessary every step of the way." SUSAN JOEKES & PHIL EVANS, *COMPETITION AND DEVELOPMENT: THE POWER OF COMPETITIVE MARKETS* 61 (2008).

³²² See, e.g., Rijit Sengupta & Cornelius Dube, *Competition Policy Enforcement: Experiences from Developing Countries and Implications for Investment*, OECD GLOBAL FORUM ON INTERNATIONAL INVESTMENT VII, 10 (2008), <http://www.oecd.org/investment/globalforum/40303419.pdf> ("In

change in societies where the government historically encouraged cartel behavior, it was necessary for institutional elites to repudiate misguided policies which caused a cultural and behavioral tipping point.³²³ Where this process of legal and cultural change does not take hold and where efforts fail to reach the tipping point, there will be a lack of “moral seriousness” with regard to cartels; without moral seriousness, it will be difficult if not impossible to create and reinforce an anti-cartel social norm among the public, and to attach serious social stigma to cartel behavior.³²⁴ People are only likely to comply with a behavioral law if they believe in the “legitimate authority” of the law and of the agency that enforces it.³²⁵ In this light, it is crucial to consider

many countries, governments are seen not to have any plans or commitment to the promotion of competition in the market. Such apathy could be a result of a pre-determined approach to evolving the market, or merely a lack of awareness of the economic benefits of competition.”).

³²³ A dramatic example of a country where a cartel culture has successfully transformed into a competition culture that embraces the functioning of markets and the application of competition law is Germany. See generally David Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the New Europe*, 42 AM. J. COMP. L. 25 (1994) (tracing a broad arc of twentieth century history in which, among other things, Germany’s cartel economy in the 1930s and 1940s was repudiated notably in 1958 with the adoption of Germany’s modern competition law and cartel prohibition).

³²⁴ See *Cf.* Parker, *supra* note 16.

³²⁵ See TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2006); Tom Tyler & John Darley, *Building a Law-Abiding Society: Taking Public Views about*

how regulatory schemes and enforcement tools could be adapted to change a firm's behavior. For example, behavior may be modified when granting conditional fine reductions or conditionally immunizing a firm from criminal liability when it can show a good faith effort to comply notwithstanding the infraction for which it was investigated.³²⁶

IV. CONCLUSION

This article has expressed the view that efforts to secure competition law compliance among commercial operators can be tailored in a way that takes account of cultural characteristics. The cultural background forms part of the conditions in which the development of a robust and credible compliance system occurs. Therefore, it makes sense to approach compliance issues in a manner sensitive to that cultural background. In the context of East Asian enterprises, this implies a need to take account of the legacy of Confucian ethics, which has had a profound influence on the psychology and behavior of commercial organizations in the region. The importance of that legacy suggests that compliance will

Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law, 28 HOFSTRA L. REV. 707, 735 (2000).

³²⁶ For comprehensive discussion, see Stucke, *In Search of*, *supra* note 305. We note that the research conducted thus far on compliance has not unambiguously established, in empirical terms, that the offer of specific rewards by enforcement authorities guarantees that the business community as a whole will make a deeper commitment to compliance. Nevertheless, we consider that visible signs of commitment to "compliance policy" on the part of enforcers can send important and valuable signals to enterprises and to the wider public.

not be achieved within East Asian firms solely based on the external legal environment; an environment in which deterrence-oriented factors such as sanctions and the threat of detection play a central role. More attention should be given to the internal moral and social environment, and to the logic of appropriateness within a given firm. A compliance culture can thus be constructed on the basis of elements such as moral commitment, Eastern-style education, the cultivation of virtue and a convergence between the interests of the enterprise and those of its employees.

U.S.A. VS. THE WORLD: RIGHT TO PUBLIC ACCESS OF COURT RECORDS AND CONFIDENTIALITY CONCERNS IN COMMERCIAL ARBITRATION

*By: Christopher M. Campbell, Esq. **

ABSTRACT

The United States of America, often a paragon of the rule of law, has a long-established tradition of providing legal regimes and mechanisms that are the inspiration for other legal frameworks around the world. However, even the oldest traditions sometimes require occasional contemporary modification. Such is the case in the U.S. as

** Christopher M. Campbell is an associate at Willoughby & Hoefler in Columbia, South Carolina focusing on administrative law, business law, and litigation, in particular international commercial arbitration. He received his LL.M. in Chinese Law with a concentration in International Arbitration and Dispute Settlement from the Tsinghua University School of Law, his J.D. from the University of South Carolina School of Law, and his B.A. from the University of South Carolina, The Darla Moore School of Business. He continued his education by studying English Law and commercial arbitration at the Gray's Inn of Court in London. He has worked in Beijing and in 2015 was appointed as an observer-delegate to the United Nations Working Group on E-Commerce in New York on behalf of the Willem C. Vis Moot Alumni Association. Upon returning to South Carolina, he clerked for the Honorable Jocelyn T. Newman. In addition to regularly speaking at conferences and publishing pieces regarding international arbitration, Chris is also regularly appointed as an arbitrator by the South Carolina Judicial Department on Property Damage Liability Claims.*

it pertains to confidentiality and privacy in commercial arbitral proceedings.

As it stands today, even if the parties to an arbitration originally contemplated having wholly confidential proceedings, should those sentiments change upon the arrival of the inevitable dispute, one party can unilaterally destroy that confidentiality by filing documents in U.S. courts in accordance with the public's right to access judicial documents.

Although noble in its intention, this vulnerability potentially injures the interest of parties opting for arbitration for no convincing reason. Instead, the U.S. should consider the approaches taken by other national jurisdictions, which offer more limited public review of court documents. Such review is usually after the judiciary has had a chance to determine the fairness and prejudicial effect of revealing the contentious documents.

This article discusses the interplay between the public's right to access court documents and the parties' right to confidentiality in commercial arbitration in the U.S. and around the world, and then offers amendments to U.S. federal and state law to address this gap in U.S. civil procedure.

I. INTRODUCTION

A cornerstone in commercial arbitration is the right of the parties to determine the openness of the proceedings.¹ The parties may elect to have a fully transparent process, or they may agree to confidential proceedings before the tribunal.² Such flexibility in

¹ Olena S. Perepelynska, *Party Autonomy vs. Mandatory Rules in International Arbitration*, UKRAINIAN J. OF BUS. LAW, 34-35 (Jan. 2012).

² See Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, 24 J. OF INT'L ARBITRATION, 327-339 (2007).

determining the level of confidentiality in arbitral proceedings allows the participants to trust that potentially valuable or damagingly sensitive information will not fall into the possession of unintended parties.³ This principle contrasts with civil litigation in the United States legal systems, where there is a general accepted expectation of transparency in all aspects of civil court room matters.⁴ Curiously, there remain instances where, despite the parties initially agreeing to confidential and binding arbitration, one party may circumvent confidentiality by filing before certain national courts.⁵ In those cases, even if the court-filed case is dismissed in favor of an arbitration clause, the initial filing may still disclose confidential information.⁶

Some jurisdictions allow such initial filings to be disclosed under the auspices of a public right to access court proceedings.⁷ While this right is necessary for holding governments publicly accountable, it must be balanced against the needs of private parties in civil litigation to keep their sensitive business information secret.⁸ Allowing public access to proceedings when the parties presume to have confidentiality, or have explicitly agreed to confidentiality, engenders risks to party autonomy.⁹ This begs the question: how

³ See *id.*

⁴ See *The First Amendment presumption of access*, REP. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/5th-cir-open-courts-compendium/first-amendment-presumption-access> (last visited Sept. 16, 2018).

⁵ See Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255 (2006).

⁶ See S. Lembo and V. Guignet, *Confidentiality in Arbitration: From Myth to Reality*, <https://www.baerkarrer.ch/publications/Confidentiality%20in%20Arbitration%20-%20From%20Myth%20to%20Reality.pdf>.

⁷ See Avinash Poorooye & Ronán Feehily, *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance*, 22 HARV. NEGOT. L. REV. 275 (2017).

⁸ See *Access to Court Proceedings*, REP. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/reporter's-field-guide/access-court-proceedings> (last visited Sept. 16, 2018).

⁹ See Pryles, *supra* note 2, at 328.

should courts treat filings that would otherwise be public in cases where an arbitration clause may come into operation?

First, this piece will examine common law and civil law jurisdictions and discuss how selected states address the right of public access to court proceedings and records. Next, it will analyze United States jurisdictions. From there, the discussion will cover the role of confidentiality in commercial arbitration as a dispute resolution mechanism, which will include a comparison of U.S. jurisdictions and selected international counterparts. Then, this piece will address the balance between the right of public access in civil cases and the rights of parties to expect confidentiality in arbitrations. Finally, this piece will examine and propose methodologies for improving access to confidentiality for parties in litigation while maintaining public access to certain materials.

Indeed, the primary contention in this piece is that the current U.S. legal practice of allowing public access to court documents or filings should be amended to restrict public access if there is an arbitration clause at issue in a case, *unless* the parties have mutually and explicitly expressed a desire to have non-confidential arbitral proceedings. Such a restriction should exist unless, either the arbitration clause is not applicable or that the parties intended to have an open hearing of their resolution.

For the sake of clarity, the main purpose of this paper is to highlight a gap in U.S. law that pertains to commercial arbitration—not the fact that the U.S. does not have the ability to seal documents or make court documents confidential when it comes to arbitration. In the U.S., initial filings and oral arguments, which may contain sensitive material intended to be kept confidential through arbitration clauses, can potentially be made public.¹⁰ This seems to be a different practice than what other jurisdictions allow, which

¹⁰ See REP. COMM. FOR FREEDOM OF THE PRESS, *supra* note 8.

prevents needlessly exposing sensitive information of the parties in both common law and civil cases.¹¹

II. RIGHT TO PUBLIC RECORDS

Broadly defined, a public record is "[a] record that a governmental unit is required by law to keep, such as land deeds kept at a county courthouse. Public records are generally open to view by the public."¹² In order to preserve the integrity of the courts, the right to public records has generally been upheld in rule-of-law nations around the world to extend the right to observe court proceedings.¹³

A. THE UNITED STATES OF AMERICA

The Supreme Court of the United States, the highest court in the country, has determined that the public's right to access court proceedings and records differs between criminal and civil matters.¹⁴ This paper will only examine the public right to access in civil matters.

The U.S. Supreme Court has not extended the right of the First Amendment to civil proceedings.¹⁵ However, several U.S. federal circuits have expressed that the public has a right to access civil court proceedings.¹⁶ Although not dispositive until explicitly

¹¹See, e.g., Paul Magrath, *Open Justice and the Rule of Law*, INC. COUNS. OF L. REP. (Jan. 10, 2014), <https://www.iclr.co.uk/archive/open-justice-rule-law/> (explaining the common law test in Canada).

¹² *Record, Public Record (16c)*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹³ See Magrath, *supra* note 11.

¹⁴ See REP. COMM. FOR FREEDOM OF THE PRESS, *supra* note 4.

¹⁵ See *Id.*

¹⁶ See *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983), reh'g denied, 717 F.2d 963 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984) ("Simple showing that information would harm company's reputation is not sufficient to overcome strong common-

expressed by the Supreme Court, it appears that U.S. federal circuits lean towards the public right to access commercial or civil disputes filed within their jurisdiction.¹⁷ The way federal circuits have treated the right of public access is useful for the discussion of federal civil matters. However, for local state-by-state civil matters, it is important to consider the laws of the given state.¹⁸ This paper will analyze several relevant U.S. jurisdictions before moving to other nations' treatment of the right of public access to civil proceedings.

B. SURVEY OF U.S. JURISDICTIONS

1. California

California, a heavily populated state with high amounts of commercial activity, sheds some relevant insight on the right of public access to civil proceedings.¹⁹ Generally speaking, the public

law presumption in favor of public access to court proceedings and records"); *see also* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (question of whether public has a First Amendment right to attend civil trials was not raised in case, but noting "that historically both civil and criminal trials have been presumptively open"); *see also* *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) ("First Amendment secures to the public and the press a right of access to civil proceedings"); *see also* *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993) ("Open trials protect not only the rights of individuals, but also the confidence of the public that justice is being done by its courts in all matters, civil as well as criminal").

¹⁷ *See F.T.C.*, 710 F.2d at 1179; *Garden Way, Inc.*, 989 F.2d at 533.

¹⁸ *See California State Court Records*, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/state-court-records> (last visited Sept. 16, 2018) (stating that some variation exists for allowing public access to court records from state to state).

¹⁹ *See California*, WIKIPEDIA, <https://en.wikipedia.org/wiki/California> (last visited Sept. 16, 2018) (stating California is ranked first for largest population); *see also Economy of California*, WIKIPEDIA, https://en.wikipedia.org/wiki/Economy_of_California (last visited Sept. 16,

has the right to inspect and copy most records and documents filed in California state courts.²⁰

In a civil case, a court may seal documents if it determines that (1) one or more of the parties have a legitimate interest in keeping the documents confidential and (2) that the inherent nature of the evidence outweighs the public interest in accessing the documents.²¹ Parties to a civil lawsuit may stipulate to sealing documents, but the court must still determine whether the parties' interests in confidentiality outweighs the public interest.²² There are some categories of records which are not generally open to the public in California including: (1) most juvenile court records, (2) mental evaluation records, (3) discovery records not filed in court or introduced into evidence, (4) adoption records, (5) trade secret information, and (6) grand jury transcripts that do not result in an indictment.²³

Effective January 1, 2010, Rule 10.500 of the California Rules of Court set forth comprehensive public access provisions applicable to judicial administrative records maintained by state trial and appellate courts, and the Judicial Council of California.²⁴ In short, California, by statute, recognizes the public's right to access judicial records of both proceedings and administrative records.²⁵

Thus, outside of the examples cited above, California, a prominent jurisdiction in the U.S., generally allows for public access to records of documents filed in court.²⁶ These records are available for public view and, until they are sealed by a judge, any redacted

2018) (stating that the economy of California is the largest in the United States).

²⁰ California State Court Records, *supra* note 18.

²¹ *See id.*

²² *See id.*

²³ *See id.*

²⁴ Cal. Rules of Ct. § 10.500 (West 2018).

²⁵ California State Court Records, *supra* note 18.

²⁶ *See id.*

information can be viewed by the public, potentially leading to substantial harm to the parties involved in the dispute.²⁷

2. *Delaware*

Delaware, another state with a large amount of commercial activity, also addresses the public's right to access court records in a civil case.²⁸ Delaware's courts issued Administrative Directive No. 2001-1: Policy on Public Access to the Court of Common Pleas Judicial Records to provide guidance on which records in a civil proceeding may, or may not be, disclosed.²⁹

Similar to California, Delaware lists which records are generally restricted from public access, namely: (1) personnel records, (2) applications for employment and records of employment investigative hearings, (3) trade secrets and proprietary licensed materials, (4) judicial case assignments prior to the assignment of a judge, (5) court security records, (6) records controlled by statute or common law, and (7) attorney work-product.³⁰

While Delaware goes into great specificity regarding what records shall generally be restricted, these prohibitions do not vary significantly from the standard set by other states, which reinforces the principle of broad public access to most court records in civil matters.³¹

²⁷ *See id.*

²⁸ *See Delaware*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Delaware> (last visited Sept. 16, 2018) (stating that while Delaware is ranked 45th for largest population, it is ranked 6th based on density).

²⁹ *See* Admin. Dir. No. 2001-1, Del. Ct. Com. Pl., Smalls, A.J. (Sept. 1, 2001) at 1.

³⁰ *See id.* at 1-4.

³¹ *See id.*

3. *New York*

New York, a popular jurisdiction for international and commercial activities, also uses the same trends regarding public access to records as the states discussed above. The courts of New York hold:

Like criminal proceedings, civil actions are presumptively open pursuant to the guarantees under the First Amendment. Unlike criminal actions that present constitutional considerations for criminal defendants, in civil actions the First Amendment guarantees must be measured against the public interest in requiring closure.³²

Like other states, New York has determined instances where public disclosure of certain records is inappropriate. Those instances are: (1) matters before a family court, (2) matrimonial actions, (3) adoption proceedings, (4) mental competency proceedings, and (5) confidential records.³³

New York continues the trend of the federal circuit and of California and Delaware, by allowing the general public access in civil proceedings except under few specified circumstances.³⁴

4. *Louisiana*

Louisiana, unlike other U.S. jurisdictions, is a civil law jurisdiction due to heavy French influence.³⁵ Louisiana courts

³²See Access to Court Records, N.Y. Courts (2011), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/AccessToCourtRecords.pdf>.

³³ See *id.*

³⁴ See *id.*

³⁵ See William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, LA. L. REV. 677, 697-99 (2000).

function by using two bright-line statements regarding the public's right to access public court records.³⁶

First, the Louisiana Constitution states: "No person shall be denied the right to . . . examine public documents, except in cases established by law."³⁷ Louisiana takes this right further than other common law jurisdictions, establishing that "[a]ny person who has been denied the right to inspect [or] copy . . . a record . . . may institute proceedings for the issuance of a writ of mandamus, injunctive or declaratory relief."³⁸ Thus, Louisiana statutory law provides the public a right to access court documents and a remedy if that right has been denied.

Case law bolsters this right of access for the public. In *Keko v. Lobrano*, the Louisiana Court of Appeals found that, in light of the Public Records Act and Article 251, "there is no power in the trial court to order an entire civil case record sealed from public inspection."³⁹ Although there are certainly instances where court records may be sealed for various reasons, this case makes it abundantly clear that the public's right to access court records in Louisiana shall not be infringed.⁴⁰

5. *South Carolina*

The final state in the national analysis of the public's access rights to court records is South Carolina. As an original U.S. jurisdiction and an increasing hub for commercial transactions, South Carolina provides relevant insight concerning public access to court records. In fact, in a 1931 case, the Supreme Court of South Carolina discusses the matter openly, referencing civil proceedings and stating in relevant part:

³⁶ See LA. CONST. art. XII, § 3; see also LA. STAT. ANN. § 44:35 (2014).

³⁷ LA. CONST. art. XII, § 3.

³⁸ LA. STAT. *supra* note 36.

³⁹ *Keko v. Lobrano*, 497 So. 2d 353, 354 (La. Ct. App.), writ denied 497 So. 2d 1003 (La. 1986).

⁴⁰ See *id.*

It is the boast of our Anglo-Saxon system of jurisprudence that trials in our courts of law are conducted under established rules of procedure which insure a fair and open trial, where everything is done in the open, the jurors are drawn and sworn in open court, the witnesses are sworn and testify in open court, the judge's rulings and decisions are made in open court, and everything done is made of record. Litigants are guaranteed the right to be heard by counsel or in person at every stage of the trial and upon every phase of it.⁴¹

As a result, the principles discussed above are found in South Carolina. As with other jurisdictions, South Carolina has instances where matters may be put under seal and only opened under certain circumstances.⁴²

C. SURVEY OF NON-U.S. COMMON LAW JURISDICTIONS

I. Australia

The first non-U.S. common law legal system this paper examines is one that has implemented a legal tradition comparable to that of the U.S. Australian courts have held unambiguously that:

Whatever [the media's] motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public. This principle arises out of the belief that exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend courts in person,

⁴¹ *Ralph v. S. Ry. Co.*, 160 S.C. 229, 158 S.E. 409, 410 (1931).

⁴² *See* Rule 41.1, SCRPC.

in a practical sense this principle demands that the media be free to report what goes on in them.⁴³

This language will seem familiar as it parallels the rights endowed by courts in the U.S. The motivation seems to be clear: the public's right to access records is tied to avoiding the potential for injustice via corruption.⁴⁴

Additionally, Rule 36.12 of the Uniform Civil Procedure Rules (UCPR), which applies to all Australian Courts, holds that a person in compliance with the relevant regulation shall be allowed to review any court record.⁴⁵

There are cases where "open justice would not be prejudiced"⁴⁶ when Australian courts have refused public access to court records. In *Eisa Ltd v. Brady*, the court did not permit public access to court records until relevant issues regarding the disclosure of the disputed information had been resolved.⁴⁷ Again, this ability of the judiciary to examine court records before they are released to the public seems to be the primary way that other common law systems attempt to avoid destroying the confidentiality interests of parties involved in an arbitration.⁴⁸ Finally, as with other jurisdictions, when Australia finds sufficient basis for the "extraordinary circumstances," the court is permitted to seal the documents from public view.⁴⁹

2. *Canada*

According to the Canadian Supreme Court:

⁴³ *R v. Davis* (1995) 57 FCR 512, 514 (Austl.).

⁴⁴ *See id.*

⁴⁵ *See Uniform Civil Procedure Rules 2005* (NSW) r 36.12.

⁴⁶ *Austl. Sec. and Inv. Comm'n. v Rich*, [2009] NSWSC 1229 (Austl.).

⁴⁷ *Eisa Ltd v Brady* [2000] NSWSC 926 (Austl.).

⁴⁸ *See id.*

⁴⁹ *See* Judicial Comm'n. of N.S.W., "Closed Court," in *Civil Trials Bench Book* [1-0450] (2007), https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/Civil_Trials_Bench_Book.pdf.

Openness of court proceedings is one of the cornerstones of [the Canadian] justice system and . . . includes access to all aspects of the court process. The open court principle fosters confidence in the justice system as well as the public's understanding of the legal process.⁵⁰ With that said, sometimes full access to court proceedings or court records is restricted, when the restriction is necessary to protect other social values of superordinate importance.⁵¹

The Canadian Courts do not divert from the other examples and provide the important qualification that there are times when the public's right to know must be abridged in favor of the interest of justice.⁵² It is easy to see how challenging the confidentiality provisions of an arbitration clause could provide the basis for a court to exercise its discretion in what materials will be released to the public or sealed in the interest of justice.

A general trend in these examples is that the judiciary reviews and delays public access until after it is deemed appropriate, which is the inverse of the U.S. approach.

3. *United Kingdom*

Perhaps unsurprisingly similar to the U.S., the United Kingdom ("U.K.") also maintains a robust system of allowing the public access to civil court records. Indeed, the Public Records Office, established in 1938, was charged with the responsibility of maintaining government records as well as records of court proceedings in both a criminal and civil capacity.⁵³ Now titled the National Archives, the sheer volume of maintained information

⁵⁰ See Beverly McLachlin, Chief Justice of Canada, Remarks at the Annual Int'l Rule of Law Lecture: Openness and the Rule of Law (Jan. 8, 2014).

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *Our History*, THE NATIONAL ARCHIVES, <http://www.nationalarchives.gov.uk/about/our-role/what-we-do/our-history/> (Last visited SEPT. 16, 2018).

covers everything from “Shakespeare’s will to tweets from Downing Street.”⁵⁴

Notably, the U.K treats public access differently from the U.S. in that they give the public substantially *less* access to the litigants’ documents.⁵⁵ The parties themselves have a right to the majority of relevant case documents.⁵⁶ However, a non-party to the proceedings may:

. . . obtain from the court records a copy of—(a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;⁵⁷ . . .

(1B) No document –

(a) relating to an application under rule 78.24(1) for a mediation settlement enforcement order;

(b) annexed to a mediation settlement enforcement order made under rule 78.24(5);

(c) relating to an application under rule 78.26(1) or otherwise for disclosure or inspection of mediation evidence; or

(d) annexed to an order for disclosure or inspection made under rule 78.26 or otherwise, may be inspected without the

⁵⁴*What We Do*, THE NATIONAL ARCHIVES, <http://www.nationalarchives.gov.uk/about/our-role/what-we-do/> (Last visited May 7, 2017).

⁵⁵ *See id.*

⁵⁶ *See* U.K. R. CIV. P. 5.4B(1).

⁵⁷ *Id.* at 5.4C(1)(a).

court's permission .

(2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.”⁵⁸

While these restrictions on the public's right to access court records carry a different complexion than those of the U.S., perhaps they serve a more functionally practical purpose. As highlighted above in the U.S., the public, as a non-party, does not need to request access to court records; the records are there plainly to be examined.⁵⁹ The opposite appears to be true in the U.K., where a non-party, even without the records being sealed, needs to petition the court for the right to examine court records and relies on court discretion to be able to do so.⁶⁰

This fundamental difference, one that will be discussed further, may resolve the issue discussed at the outset. Namely, if the parties have an arbitration clause that compels confidentiality, is it proper that a party may unilaterally disclose confidential information in court proceedings? Under the U.K. system this question appears moot, since it is necessary to gain court approval before the court records are made available to the public.⁶¹

III. COMMON LAW JURISDICTIONAL SUMMARY

Having analyzed the approach of several prominent common law jurisdictions, it is apparent that there is a consensus that generally court proceedings should be open to the public and

⁵⁸ *Id.* at 5.4C(1B)(a)-(d), 5.4C(2).

⁵⁹ *See* *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1177, 1179 (6th Cir. 1983), *supra* note 16.

⁶⁰ *See* U.K. R. CIV. P. at 5.4C(1)(a), 5.4C(1B)(a)-(d), 5.4C(2).

⁶¹ *See id.*

restricted only in certain instances. However, the U.S. seems to take a unique approach in not restricting access to the records from the outset, unlike other countries that require judicial scrutiny before granting an allowance to observe records filed in civil court proceedings.⁶²

A. SURVEY OF CIVIL LAW JURISDICTIONS

I. China

The tradition of open governmental information in the People's Republic of China can be traced to the "open village affairs" at the village level in the early 1980s.⁶³ This was a result of the government attempting to create greater transparency among Chinese societal organs.⁶⁴

In the modern day, China is a developing economic and political superpower and its approach seems to be in-line with international norms. As China continues its commitment to rule of law,⁶⁵ the country has been quick to implement many laws, but struggles with the practical implementations of such laws.⁶⁶ It is important to understand that the codified law in China may be mitigated by extra-legal effects, which will be discussed below.

According to the Constitution of the People's Republic of China, "[e]xcept in special circumstances as specified by law, all cases in the people's courts are heard in public. The accused has the

⁶² *See id.*

⁶³ *See* Megan Carter & Lv Yanbin, *Access to Government Information in Europe and China: What Lessons to Be Learned?* EU-CHINA INFORMATION SOCIETY PROJECT 11-13 (Nov. 2007).

⁶⁴ *See id.*

⁶⁵ *See* Rogier Creemers, *China's Rule of Law Plan is for Real*, EAST ASIA FORUM (May 10, 2015), <http://www.eastasiaforum.org/2015/05/10/chinas-rule-of-law-plan-is-for-real/>.

⁶⁶ *See id.*

right to defense [sic].”⁶⁷ Pursuant to this rule, assuming the letter of the law is enforced, all court proceedings, records, and administrative materials are available to the general public—at least this appears to be the case for Chinese nationals.⁶⁸

Mr. Joshua Rosenzweig, a foreign practitioner in China, wrote: “There appears to be widespread confusion about what the proper procedure is for allowing foreigners access to court proceedings and a great deal of anxiety about the possible consequences if proper procedure is not followed exactly.”⁶⁹ Although anecdotal, this view point may indicate that despite the codified law, discrepancies may exist when discussing foreigners access to public court hearings in China.

However, even aside from the issues faced by foreigners, Chinese nationals are required to register and be specifically approved by the government before being permitted to attend court proceedings.⁷⁰ This sort of scrutiny may serve as a deterrent for those wanting to observe them.⁷¹ Additionally, in some cases where courts adopt a less transparent system than the sealing processes, they may use their sole discretion to prohibit public access for any reason from parties’ desire to “trade secrets.”⁷²

While certainly this is an improvement from the early days of the Chinese judicial system, these policies provide a striking look at how one civil law country treats the public’s access to court records. More relevant to the present discussion of arbitration, what are the implications if a foreign company may or may not have pertinent

⁶⁷ XIANFA art. 125 (2004) (China).

⁶⁸ *See id.*

⁶⁹ Joshua D. Rosenzweig, *Public Access and the Right to a Fair Trial in China*, DUI HUA (Feb. 2009), https://duihua.org/wp/?page_id=2542#10body.

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See id.*

documents disclosed in open court while enforcement of an arbitration clause is pending at a Chinese court's discretion?

2. *France*

Perhaps more in-line with the traditions articulated with common law countries is the French system. French law is well established in both codification and practice, and sets the jurisdictional model for many developing rule of law countries.⁷³ The relevant articles regarding public access among the French Rules of Civil Procedure are Articles 22 and 29, which provide:

Article 22—Oral arguments are held in public hearings, save where the law requires or allows that they be held in the judge's council chamber.⁷⁴

Article 29—A third party may be granted leave by the judge to consult the file of a case and to have copies thereof delivered to him where he shows cause of a legitimate interest in the same.⁷⁵

As with the previous examples, this right to access is not unlimited.⁷⁶ Either party may request a confidential hearing if they believe that their right to privacy is at issue.⁷⁷ Article 435 and 1016 of the French Rules of Civil Procedure counterbalance the publicity of potential confidential information and provide:

Article 435—The judge may decide that the hearings will take place or shall continue in the judge's council chamber where their publicity

⁷³ See CODE DE PROCÉDURE CIVILE [C.P.C.] (Fr.).

⁷⁴ *Id.* at art. 22.

⁷⁵ *Id.* at art. 29.

⁷⁶ See Rosenzweig, *supra* note 69.

⁷⁷ See Alexandre Bailly & Xavier Haranger, *Litigation and Enforcement in France: Overview*, DISP. RESOL. GLOBAL GUIDE (2018), [https://uk.practicallaw.thomsonreuters.com/9-502-0121?_lrTS=20181108014750530&transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/9-502-0121?_lrTS=20181108014750530&transitionType=Default&contextData=(sc.Default)).

might adversely affect individual privacy or, if all the parties so request, or if disturbances arise that may disrupt the atmosphere of the proceeding.⁷⁸

Article 1016—In accordance with Articles 11-1 and 11-2 of the Act n°. 72-626 of 5 July 1972 as amended, the oral arguments are held in public. The court may nevertheless decide that the oral arguments will take place or continue in the judge's council chamber if their advertising leads to an invasion of privacy, or if all parties so request, or a disorder occurs and disturbs the serenity of justice (administration).⁷⁹

It seems that, prior to appearance before public scrutiny, parties are able to articulate why the subject matter at hand should be confidential or not, giving discretion to the court.⁸⁰ This logic encompasses the enforcement of a potential arbitration clause, which may determine that the matter should not be in court at all and instead should be resolved privately before an arbitral tribunal.

3. Germany

Rounding out the civil law jurisdictional analysis is another well-established legal regime, Germany. Generally, unlike the other countries discussed in this piece, in Germany the public is not able to observe or inspect court proceedings without petitioning the court with a specific interest in the case.⁸¹ When asked about public access to civil proceedings in Germany, one German practitioner observed:

Civil court filings are not generally open to the public. Instead, in order to be allowed to inspect a court file, a specific legal interest in the inspection must be

⁷⁸ See CODE DE PROCÉDURE CIVILE [C.P.C.] art. 435 (Fr.).

⁷⁹ *Id.* at art. 1016.

⁸⁰ See Alexandre Bailly & Xavier Haranger, *supra* note 77.

⁸¹ See Richland Kreindler, Johannes Schmidt, & Thomas Kopp, *Litigation: German*, GLOBAL ARB. REV. (June 29, 2017), <https://globalarbitrationreview.com/jurisdiction/1000215/germany>.

demonstrated. By contrast, oral hearings are generally open to the public, except for certain situations, for example, to protect privacy or business secrets. However, given the strong emphasis on detailed and substantiated written submissions, cases are often not discussed in detail during an oral hearing. Specifically, there is no comprehensive oral presentation of the case as is common in the Anglo-American procedural tradition. TV cameras and the taking of pictures or the use of recording devices is not allowed. The operative parts of the judgments are pronounced in open courtroom.⁸²

Aside from this general observation, the sentiments seem to be echoed upon analysis of relevant German law. Unlike the other examples provided, there is no mention of a right to public access or of open court hearings in either the Constitution of the Federal Republic of Germany or in its Rules of Civil Procedure.⁸³ Instead, the German Rules of Civil Procedure discuss when and how a third-party may obtain access to the hearings or evidentiary materials *if* they have legal interest in the case at hand.⁸⁴

Applied to the confidentiality of arbitral proceedings, there is little risk that the public would gain access to materials covered by an arbitration clause via court proceedings. A third-party would need to meet the necessary burden before the courts to gain any access to the proceeding at all.⁸⁵

B. SUMMARY

After completing an examination of a handful of common law and civil law jurisdictions around the world and their varying treatment of the public's right to access court proceedings and records, this discussion turns to a review of the balancing factors between confidentiality and arbitration in a broader sense.

⁸² *Id.*

⁸³ *See* ZIVILPROZESSORDNUNG [ZPO] [Civil Code] (Ger.).

⁸⁴ *Id.* at §§ 63-77.

⁸⁵ *Id.*

The key question that remains after examining the different approaches to public access to court proceedings is determining which is preferable: A U.S. style system that favors the right of public access from the beginning without initial regard for confidentiality rights, or a more centrist approach which restricts public access until it is determined that it is either necessary, or that the confidentiality portion of an arbitration clause does not apply?

IV. CONFIDENTIALITY AND ARBITRATION

A. *GENERALLY*

“Most parties to arbitration assume that the private nature of the process will ensure that the evidence, the proceedings[,] and the award will be kept private and confidential and that sensitive or embarrassing records and activities will not be subjected to public view.”⁸⁶ This presumption of confidentiality is a driving force for many parties who select arbitration as an alternative to dispute resolution in more open judicial forums.⁸⁷ Thus, it is worth considering briefly how the matter of confidentiality has been treated in various jurisdictions.

B. *U.S. FEDERAL AND STATE LAW*

There is no specific requirement under the U.S. Federal Arbitration Act that provides for the confidentiality of arbitral materials.⁸⁸ Absent federal guidance, it is up to state jurisdictions to determine the issue of confidentiality among its courts. Notably, the Revised Uniform Arbitration Act (RUAA), which seventeen

⁸⁶ Claude R. Thompson & Annie M. K. Finn, *Confidentiality in Arbitration: A Valid Assumption? A Proposed Solution!*, 62 DISP. RESOL. J. (2007).

⁸⁷ *See id.*

⁸⁸ *See* Federal Arbitration Act, 9 U.S.C. (2012).

states and the District of Columbia have adopted,⁸⁹ provides: “an arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.”⁹⁰

This move towards greater confidentiality by those jurisdictions is taken a step further by some states. For example, Missouri law holds:

Arbitration . . . proceedings shall be regarded as settlement negotiations. Any communications relating to the subject matter of such disputes made during the resolution process by any participant, mediator, conciliator, arbitrator or any other person present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.⁹¹

Section 75 of New York’s C.P.L.R. makes no provision of confidentiality in arbitration—that said, the New York Supreme Court held in *City of Newark v. Law Department of City of New York* that “orders issued by arbitration panels should be accorded the same deference and have the same force of law as judicial officers . . . an arbitrator is a judicial officer, invested with judicial functions, and

⁸⁹ States include: Alaska, Arizona, Arkansas, Colorado, District of Columbia, Florida, Hawaii, Michigan, Minnesota, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington State, and West Virginia.

⁹⁰ UNIF. ARBITRATION ACT § 17(e) (revised 2000).

⁹¹ MO. ANN. STAT. § 435.014 (West 2008).

acting in a quasi-judicial capacity.”⁹² While this statement might raise questions of the judicial immunity of arbitrators, it seems to suggest that, in New York, confidentiality requests issued by arbitrators should protect the confidentiality of the parties.⁹³ Alternatively, the courts of South Carolina, via the South Carolina Uniform Arbitration Act, have no express provisions for confidentiality in arbitrations and have not provided guidance as to the deference given to arbitrators.⁹⁴

Based on the wide variety of ways U.S. jurisdictions may address the topic of confidentiality, it seems that best practices to ensure total private confidentiality would be to provide such language in the arbitration agreement.⁹⁵ Practitioners can achieve this by explicitly stating that the dispute shall be resolved in arbitration in a confidential manner.⁹⁶

C. INTERNATIONAL COMPARISON

Australia: The Australian Commercial Arbitration Act, 1984, does not contain any express reference to confidentiality.⁹⁷

In *Esso Australia Resources Limited and Others v. Plowman (Ministry for Energy and Minerals) and Others*, the court was tasked with determining whether confidentiality was an essential attribute of arbitrations. The court determined that confidentiality was not

⁹² *City of Newark v. Law Dep't of N.Y.*, 194 Misc. 2d 246, 246 (Sup. Ct. 2002) *aff'd as modified and remanded*, 305 A.D.2d 28 (N.Y. App. Div. 2003).

⁹³ *See id.*

⁹⁴ *See* S.C Code Ann. §§ 15-48-10-240 (2009).

⁹⁵ *See* Thomas N. Pieper, *Drafting Arbitration Clauses*, ABA-NYSBA INT'L PRACTICE BOOT CAMP 2014, (Apr. 1, 2014), https://www.americanbar.org/content/dam/aba/events/international_law/2014/04/aba-nysba-international-boot-camp/CrossBorder11.authcheckdam.pdf.

⁹⁶ *See id.*

⁹⁷ *See Esso Austl. Res. Ltd. v Plowman*, [1995] 128 ALR 391 (Austl.).

essential, and thus must be explicitly contemplated by the parties to enforce it.⁹⁸

Canada: Arbitration is generally confidential, if the parties so elect. In the federal context, the restrictions on divulging information and the requirement to disclose information pursuant to the *Privacy Act* and the *Access to Information Act* must be complied with.⁹⁹

Though typically, the grounds for asserting confidentiality should be found in the above cited actions rather than a provision in the arbitration clause.¹⁰⁰

United Kingdom: England's Arbitration Act of 1996 does not contain any provisions addressing confidentiality in arbitrations.¹⁰¹ However, the courts have determined that an implied undertaking of confidentiality applies to arbitration proceedings.¹⁰²

In *John Forster Emmott v. Michael Wilson and Partners Limited*, the court recognized that there was a general obligation of confidentiality in arbitration agreements.¹⁰³ The court found that if the parties explicitly desired to disclose documents then it would honor that desire.¹⁰⁴

China: Article 40 of the Arbitration Law of the People's Republic of China states that when there is an arbitration tribunal, the tribunal may not hear a case in open session unless otherwise agreed upon by the parties to the tribunal.¹⁰⁵ However, the details

⁹⁸ *See id.*

⁹⁹ *See* Privacy Act, R.S.C. 1985, c. P-21; Access to Information Act R.S.C. 1985, c. A-1.

¹⁰⁰ *See id.*

¹⁰¹ *See John Forster Emmott v. Michael Wilson & Partners Ltd.*, [2008] EWCA (Civ) 184 (Eng.).

¹⁰² *See id.* at 73.

¹⁰³ *See id.* at 80.

¹⁰⁴ *See id.* at 184.

¹⁰⁵ *See* Peter J. Wang, *Confidentiality in Asia-Based Int'l Arbitrations*, JONES DAY COMMENTARY (2012)

of the duty of confidentiality are left to the arbitration institutions, such as the Chinese International Economic and Trade Arbitration Commission (CIETAC), Beijing Arbitration Commission (BAC), and China Maritime Arbitration Commission (CMAC).¹⁰⁶

France: Article 1464(4) of the French Codes of Civil Procedure provides, in relation to domestic arbitration, that "subject to legal requirements and unless otherwise agreed by the parties, arbitral proceedings shall be confidential."¹⁰⁷ Curiously, this provision has no equivalents for international matters, and thus, the parties must explicitly agree to confidentiality among the proceedings.¹⁰⁸

Germany: Generally, German law does not provide for an explicit confidentiality obligation.¹⁰⁹ Section 43 of the German Institution of Arbitration (DIS) Rules contains a broad confidentiality compulsion obligating all parties involved not to disclose information regarding the proceedings.¹¹⁰

Again, it appears that various national jurisdictions are split between a presumption of confidentiality and a necessity that the parties explicitly agree to the confidentiality of the proceedings. Until there is a clearer rule or presumption across jurisdictions, it appears that best practices would suggest to unambiguously stipulate for confidentiality in the arbitration agreement to ensure the highest protection of sensitive information.¹¹¹

https://www.jonesday.com/Confidentiality_in_Asia-Based_International_Arbitrations/.

¹⁰⁶ *Id.*

¹⁰⁷ CODE DE PROCÉDURE CIVILE [C.P.C.] art. 1464(4) (Fr.).

¹⁰⁸ See Garry B. Brown, INT'L ARBITRATION: DOCUMENTARY SUPPLEMENT, 146 (2nd ed. 2015).

¹⁰⁹ See Francis Bellen, A GUIDE TO INTERNATIONAL ARBITRATION, 50 (2018), <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017>.

¹¹⁰ *See id.*

¹¹¹ *See id.* (statistical data or general information may be published, but parties and arbitration may not be identifiable).

D. SUMMARY

To underscore the point of how critical confidentiality is in the practice of commercial arbitration, one scholar observed:

The issue of confidentiality is key to the successful practice of international commercial arbitration. The confidentiality of arbitration proceedings is a reason for resorting to arbitration, as distinct from litigation. It is a collateral expectation of parties to an arbitration that their business and personal confidences will be kept.¹¹²

This right must be protected even when balanced against the right to public interest.

V. RIGHT OF PUBLIC ACCESS AND RIGHT TO CONFIDENTIALITY

Now, with an understanding of public interest and confidentiality in the U.S. and other jurisdictions around the world, it seems productive to examine the balance between a right to public interest and the right to confidentiality. There are instances where freedom to contract should be paramount; however, the pendulum often swings the other direction regarding legitimate public interest in dispute and its resolution at hand.

A. FREEDOM TO CONTRACT

“The first principle of a civilized state is that power is legitimate only when it is under contract.”¹¹³ The right of the freedom to contract—the ability to enter into whatever type of legally binding agreement one wishes with no legal limitations other than being of

¹¹² Leon E. Trakman, *Confidentiality in International Commercial Arbitration*, 18 *ARBITRATION INT’L L*, (2002).

¹¹³ Walter Lippmann, *ESSAYS IN THE PUBLIC PHILOSOPHY*, 167 (Transaction Publishers, 1955).

legal age and capacity to do so—is virtually a universal concept in jurisdictions around the globe.¹¹⁴ Without this freedom, the rights of the parties to provide the contemplated goods and services are greatly diminished.¹¹⁵

Legal regimes that permit for a circumvention of the parties' wishes jeopardize party autonomy to decide when and how to contract.¹¹⁶ Given the analysis of the jurisdictions provided above, it is easy to imagine a scenario where a party in the U.S. could ignore the contractual duty of confidentiality, even if overtly stated, and file an initial complaint with confidential documents attached that would be public record, with no recourse afforded to the non-disclosing party.¹¹⁷ This attribute is one unique to the U.S., and one that seems to be absent in other countries where there is greater scrutiny before allowing public access to potentially damaging records.¹¹⁸ Again, the primary concern is that this sort of invasive disclosure can exist regardless of express consent of the parties to maintain confidentiality throughout the resolution of the dispute.¹¹⁹

B. *PRIVACY VS. CONFIDENTIALITY*

“Privacy” means that no third party can attend arbitral conferences and hearings, “confidentiality” refers to non-disclosure of specific information in public. Private hearings do not

¹¹⁴ See *Freedom of Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹¹⁵ See *id.*

¹¹⁶ See Mayank Samuel, *Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?* KLUWER ARBITRATION BLOG (2017), <http://kluwerarbitrationblog.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/> (choosing a governmental arbitral law to ensure confidentiality protection is preferred).

¹¹⁷ See *id.* (“Parties have the autonomy to decide if they wish to disclose details of arbitration and award. Confidentiality is frequently violated by parties and witnesses in the US.”).

¹¹⁸ See *id.*

¹¹⁹ See *id.*

necessarily attach confidentiality obligations to the parties to arbitration.”¹²⁰ This point of delineation maintains parallels to the open court systems that many jurisdictions permit. In a courtroom, a party may be permitted to sit and observe proceedings in open court, and they may be provided access to review evidence and other court documents. However, there are instances where attending the hearing may be prohibited, but access to case documents would be permitted. This would be a situation of privacy without confidentiality.¹²¹ Conversely, in arbitrations, the proceedings are rarely, if ever, open to the public, and the documents involved are likely not available for third-party scrutiny.¹²² This scenario is one of both privacy and confidentiality. Proponents on either side of this discussion may agree at different points as to what should be private, what should be confidential, and what should fall somewhere in between.¹²³

C. INVESTOR STATE ARBITRATION

I. Overview

This piece generally contemplates commercial arbitral disputes, wherein the parties are two private actors that have contracted together and seek confidentiality in the dispute’s resolution. However, the question becomes appreciably more complex when one of those parties is not a private actor and is instead a State government with assets and resources that are not solely the purview of the State and the other contracting parties, but also of public interest. Considering this, the questions begin to multiply—Is there a right to confidentiality when there are public assets and interest involved? Who makes the determination as to whether confidentiality should be maintained or not? Can the right to confidentiality be modified within the context of disclosing some,

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *See id.*

¹²³ *See id.*

but not *all* materials? —the questions go on and on. Therefore, it is necessary to consider the change in circumstances regarding Investor State Dispute Settlement (ISDS).¹²⁴

ISDS is a system through which individuals or organizations can sue countries for alleged discriminatory and injurious practices.¹²⁵ One of the seminal cases highlighting the practice was *Phillip Morris v. Uruguay*, where a tobacco company sued Uruguay—which had recently enacted strict laws aimed at promoting public health—because of perceived damage to its brand and reputation.¹²⁶ Specifically, ISDS is a mechanism of public international law and provisions are contained in a number of bilateral treaties such as NAFTA,¹²⁷ CETA,¹²⁸ and perhaps most relevantly, the Energy Charter Treaty.¹²⁹ In summation, ISDS is a relevant mechanism for resolving complex disputes on behalf of private entities with perceived grievances against State actors.¹³⁰

¹²⁴ See Christopher M. Campbell, *If You Build it They Will Come: China's OBOR Cements the Future of Investor State Dispute Resolution*, CHINA DAILY (June 5, 2017, 10:37 AM), http://www.chinadaily.com.cn/opinion/2017beltandroad/2017-06/05/content_29618550.html.

¹²⁵ *FACT SHEET: Investor-State Dispute Settlement (ISDS)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> (accessed October 5, 2018).

¹²⁶ See *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decisions on Rectification (2016).

¹²⁷ North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289.

¹²⁸ Comprehensive Economic and Trade Agreement, EU-Can., §§ 3-4, Sept. 21, 2017.

¹²⁹ Energy Charter Treaty, December 17, 1994 (1998) OJ L 69.

¹³⁰ See The Basics, STOP INVESTOR-STATE DISPUTE SETTLEMENT, <https://isds.bilaterals.org/?-the-basics-> (last visited Sept. 17, 2018).

2. Confidentiality Concerns in ISDS

In contrast to most other types of arbitration, transparency is universally held to be a positive thing as it pertains to State matters.¹³¹ In fact, there is the obvious concern that arbitrations in such context are carried out by trade lawyers who face neither public scrutiny nor accountability for decisions that may affect national economies¹³² or other important human rights concerns.¹³³

While it is true that the World Bank's International Centre for Settlement of Investment Disputes (ICSID) publishes, with party consent, a large number of awards that would otherwise be confidential; there are still a substantial number of cases that are *not* public.¹³⁴ In an effort to address public demands for insights into these disputes brought before the tribunals, ICSID, even without party consent, publishes excerpts of the award in order to satiate the public's demand.¹³⁵

¹³¹ See Calamita, Jansen N., *The Changing Landscape of Transparency in Investor-State Arbitration: The UNCITRAL Transparency Rules and Mauritius Convention*, AUSTRIAN YEARBOOK ON INT'L ARBITRATION (2016), https://www.researchgate.net/publication/316641559_The_Changing_Landscape_of_Transparency_in_Investor-State_Arbitration_The UNCITRAL_Transparency_Rules_and_Mauritius_Convention.

¹³² See Gus Van Harten, *OECD Document Discusses Investor State Dispute Settlement*, NETWORK FOR JUST. IN GLOBAL INV. (May 2011) <http://justinvestment.org/2011/05/oecd-document-discusses-investor-state-dispute-settlement/>.

¹³³ See *id.*

¹³⁴ See *Tables of Decisions in ICSID Cases*, ICID, <https://icsid.worldbank.org/en/Pages/resources/Tables-of-ICSID-Decisions.aspx>; *Special Update on Investor-State Dispute Settlement: Facts and Figures*, INT'L INV. AGREEMENTS (2017), https://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf.

¹³⁵ See *Award - ICSID Convention Arbitration*, ISCD, <https://icsid.worldbank.org/en/Pages/process/Award-Convention-Arbitration.aspx> (last visited May 05, 2017).

Taking a more extreme position, the International Chamber of Commerce (ICC) requires that all aspects of an ISDS arbitration be confidential.¹³⁶ Although this is not an explicit necessity, the ICC issued statements advising parties on how to increase confidentiality in favor of making proceedings less observable.¹³⁷

There has been contentious debate regarding increasing confidentiality and the public's right to observe these sorts of disputes.¹³⁸ One academic writes:

High-profile environmental disputes have led the public to question how governments are handling matters of public interest—issues concerning human rights, public health and safety, and labor and environmental standards—in the context of private arbitration. They have also invited inquiry into whether or not such processes undermine a sovereign's regulatory authority and pose a threat to democratic governance.¹³⁹

¹³⁶ See Catherine Yannaca-Small, *Transparency and Third-Party Participation in Investor-State Dispute Settlement Procedures*, WORKING PAPERS ON INT'L INVESTMENT (2005), https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf.

¹³⁷ See States, State Entities and ICC Arbitration, ICC COMMISSION REPORT, 3 (2014), <https://cdn.iccwbo.org/content/uploads/sites/3/2015/10/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities-under-the-ICC-Rules-of-Arbitration-2012.pdf>.

¹³⁸ See *A Response to Criticism Against ISDS*, European Federation of Investment Law and Arbitration (2015); Nurnaningsih Amriani and P.L. Rija Fatimah, *Confidentiality versus Transparency of ICSID Arbitration Award: Sustainability of The Quality Practice for Good Governance and Investor to Support Public Accountability*, 2 INT'L J. OF ADVANCED STUD. IN HUMAN. & SOC. SCI. 223, 223-231 (2014).

¹³⁹ Valerie Li, *Protecting Confidentiality in Investor-State Arbitration*, INT'L ARBITRATION L. (2017), http://internationalarbitrationlaw.com/blog/protecting-confidentiality-in-investor-state-arbitration/#_ftn2.

Discussion and analysis of the merits of ISDS are of a complex and vast nature and are indeed beyond the pale of the purposes of this piece. They are articulated here as a brief counter-example of a substantial topic wherein it is debatable if there should be an unfettered right to confidentiality even in scenarios where the parties desire as much.

D. INSTITUTIONAL ARBITRATION RULE COMPARISON

This discussion would be remiss if it did not consider the primary mechanisms that facilitate resolution of arbitral disputes—the arbitral institutions. While this piece discusses the laws regarding confidentiality in national court jurisdictions, it is pertinent to consider the rules of the various regional arbitral institutions as well. While there are far too many institutions to consider them all, a handful of some of the more prominent and regularly utilized organizations are considered below.

1. American Arbitration Association (AAA)

The AAA, a popular institution across the Americas and across the globe, does not explicitly provide for the confidentiality of arbitral materials and records.¹⁴⁰ Instead, the rules provide for a passive approach: explicitly mandated privacy, but only the *allowance* for an order of confidentiality from an arbitrator.¹⁴¹ Rule 25 provides that the arbitrator “shall maintain the privacy of the hearings unless the law provides to the contrary.”¹⁴² With regard to confidentiality given arbitrator discretion, Rule 23 states “[t]he arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient, and economical resolution of the case.”¹⁴³

For the same reasons articulated earlier, discretionary and reactionary confidentiality create exposure to parties that could

¹⁴⁰ See Commercial Arbitration Rules and Mediation Procedures including Procedures for Large, Complex Commercial Disputes, 2017 WL 7791572 at 28 (Oct. 1, 2017).

¹⁴¹ See *id.* at 12.

¹⁴² *Id.*

¹⁴³ *Id.*

potentially allow one party to exploit another by breaking the proceeding's confidentiality.

2. *Hong Kong International Arbitration Center (HKIAC)*

On the other hand, Rule 42.1 of the HKIAC explicitly provides for confidentiality by stating: “[u]nless otherwise agreed by the parties, no party may publish, disclose[,] or communicate any information relating to: the arbitration under the arbitration agreement(s); or an award or Emergency Decision made in the arbitration.”¹⁴⁴ This unambiguous statement allows for total protection of each party's sensitive materials during and after the arbitration proceedings.¹⁴⁵ However, the parties have the ability to waive confidentiality, or a party can provide a sufficient reason for the arbitrator or judicial system to lift confidentiality.¹⁴⁶

3. *International Chamber of Commerce (ICC)*

The ICC Rules make hearings private and the workings of the ICC Court confidential¹⁴⁷, but otherwise allow arbitrators to make orders in relation to confidentiality upon the application of one of the parties.¹⁴⁸ In relevant part, the ICC Rules hold: “[u]pon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.”¹⁴⁹

It is the stance of this paper that the AAA rules are too permissive because they leave the decision to request confidentiality to the parties or the arbitrator. Instead, the AAA should require confidentiality from the outset but allow the parties to remove the veil of confidentiality at a later point if they so choose.

¹⁴⁴ HKIAC Arbitration Rules, art. 42.1 (2013).

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See* ICC Arbitration Rules, art. 26.3 (2013).

¹⁴⁸ *See id.* at art. 22.3.

¹⁴⁹ *Id.*

4. *London Court of International Arbitration (LCIA)*

The LCIA Rules are undoubtedly pro-confidentiality and explicitly dictate:

The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.

The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26[,] and 27.¹⁵⁰

Unambiguously, the LCIA rules protect the confidentiality of the parties explicitly through black letter provisions.¹⁵¹

5. *United Nations Commission on International Trade Law (UNCITRAL)*

The UNCITRAL Rules vary from the other rules cited; in that, the UNCITRAL does not administer and facilitate the resolution of arbitral disputes.¹⁵² However, it seems to fall somewhere in the

¹⁵⁰ London Court of International Arbitration Rules, art. 30 (2014).

¹⁵¹ *See id.*

¹⁵² *See* FAQ - UNCITRAL and Priv. Disp./Litig. (2018), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html (UNCITRAL does not participate in the actual arbitration).

middle on the spectrum of passivity and explicit protection of confidentiality.¹⁵³ The UNCITRAL Rules provide:

Hearings shall be held in camera unless the parties agree otherwise¹⁵⁴

. . . .

An award may be made public with the consent of all parties or where and to the extent disclosure is required of the party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.¹⁵⁵

Here the awards are made private but not necessarily confidential.¹⁵⁶ Practitioners utilizing these rules should ensure that their arbitration provisions explicitly provide for confidentiality of all aspects of the arbitral proceedings.¹⁵⁷

6. *Singapore International Arbitration Center (SIAC)*

The SIAC has the most exhaustive and protective set of rules with regards to confidentiality. Therefore, the entirety of the SIAC Rules has been provided below as the model of what this piece considers best practices regarding institutional rules for protecting party confidentiality.

Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as

¹⁵³ *See id.*

¹⁵⁴ UNCITRAL Arb. Rules art. 38, para. 3, G.A. Res. 68/109, U.N. Doc. A/RES/68/109 (Apr. 1, 2014).

¹⁵⁵ *Id.* art. 34, para. 5.

¹⁵⁶ *See id.*

¹⁵⁷ *See id.*

confidential. The discussions and deliberations of the Tribunal shall be confidential.

Unless otherwise agreed by the parties, a party or any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall not, without the prior written consent of the parties, disclose to a third party any such matter except:

- a. for the purpose of making an application to any competent court of any State to enforce or challenge the Award;
- b. pursuant to the order of or a subpoena issued by a court of competent jurisdiction;
- c. for the purpose of pursuing or enforcing a legal right or claim;
- d. in compliance with the provisions of the laws of any State which are binding on the party making the disclosure or the request or requirement of any regulatory body or other authority;
- e. pursuant to an order by the Tribunal on application by a party with proper notice to the other parties; or
- f. for the purpose of any application under Rule 7 or Rule 8 of these Rules.¹⁵⁸

The rules from the SIAC go through great effort to ensure that users of the rules are clear as to what material is protected and that no party related to a dispute should break confidentiality without agreed written consent.¹⁵⁹ So thorough are the SIAC rules that they

¹⁵⁸ Singapore Int'l Arb. Ctr. Rules, art. 39 (2016).

¹⁵⁹ *See id.*

also provide for specific instances wherein confidentiality may be breached. The SIAC rules balance the right of the public to access records in some instances while simultaneously protecting the confidentiality of the parties.¹⁶⁰ This standard should be adopted by other institutions to protect private discussions between commercial actors; instead, institutions allow gaps in confidentiality protection.¹⁶¹

E. SUMMARY

As shown in this analysis, institutional arbitral organizations around the globe approach confidentiality in a number of ways. These institutions are constantly in competition with one another to attract new users. Therefore, their rules must provide an adequate balance between cost, efficiency, timeliness, and protection. This consideration of protection encompasses confidentiality, and it is reasonable to conclude that institutions which offer explicit protections will gain an advantage against more passive institutions.

VI. PROPOSALS FOR U.S. ARBITRATION LAW REFORM

Transparency in both substance and procedure are cornerstones of the rule of law¹⁶² that allow citizens to not only understand the law, but also observe the law in order to ensure its equitable enforcement. Definitively, there is merit to the U.S. system of allowing public access to nearly every manner of record filed in public court.¹⁶³ This approach makes sense when a party is seeking justice from the government. However, in a private transaction

¹⁶⁰ *See id.*

¹⁶¹ *See id.*

¹⁶² *See What is the Rule of Law?*, WORLD JUSTICE PROJECT, (last visited May, 6 2017), <https://worldjusticeproject.org/about-us/overview/what-rule-law> (uses the “Four Universal Principles” to show the importance of transparency).

¹⁶³ *See generally* Federal Arbitration Act, 9 U.S.C. (2012) (speaking generally about the U.S. system of arbitration according to the Federal Arbitration Act).

between parties who have agreed prior to any dispute arising that they will resolve their conflicts in a confidential manner, the U.S. approach seems to fall short.¹⁶⁴

The proposed scenario, that a party with U.S. jurisdiction and a party to a confidential contract could circumvent the confidentiality provision of certain materials by filing certain documents in open court, means that even if a party is compelled to go to arbitration and their case is dismissed, the documentation is still a matter of public record. This notion is not merely fantasy but has in fact already occurred.

Consider the case of media personality Tomi Lahren. Ms. Lahren, an employee of TheBlaze, had a dispute with her employer, and decided to file suit.¹⁶⁵ In her lawsuit, Ms. Lahren was able to file sensitive documents, despite there being an arbitration clause that precluded the dispute from being resolved in open court.¹⁶⁶

Further, one may consider the recent controversy involving United States President Donald J. Trump and Ms. Stephanie Clifford, also known as adult-film actress Stormy Daniels.¹⁶⁷ Ms. Clifford and then-candidate Trump entered into a non-disclosure agreement that included an arbitration clause requiring “binding

¹⁶⁴ See generally *id.* (speaking generally about the U.S. system of arbitration).

¹⁶⁵ See Samantha Schmidt, *Tomi Lahren Sues Glenn Beck, Claims the Blaze Retaliated Against Her for Views on Abortion*, THE WASHINGTON POST, (Apr. 10, 2017) (Tomi Lahren claimed publicly that she was terminated from her position because of her personal views on abortion rights).

¹⁶⁶ See Complaint, *Tomi Lauren v. Glenn Beck and The Blaze, Inc.*, No. DC-17-04087 (Dist. Ct. Tex. Apr. 7, 2017) (Lahren filed this complaint with a detailed record of what she believed led to her termination from her employment with The Blaze).

¹⁶⁷ See Dylan Matthews, *Stormy Daniels' Legal Battle Against Donald Trump, Explained*, VOX (Mar. 13, 2018), <https://www.vox.com/policy-and-politics/2018/3/13/17109656/stormy-daniels-donald-trump-lawsuit-affair-porn-adult-arbitration-michael-cohen-payoff> (referencing the general story between POTUS and Stormy Daniels).

confidential arbitration of all disputes which may arise between them.”¹⁶⁸ While arguably a bit too broad, this clause should have protected then-candidate Trump from having to fight this dispute in the public domain.¹⁶⁹ Furthermore, had there been presumptive confidentiality, which the parties to the agreement contemplated, this matter may never have seen the light of day.¹⁷⁰

Another potentially dangerous opportunity for disclosure of materials in U.S. courts appears at the conclusion of the arbitral proceeding.¹⁷¹ Upon submission of a positive decision from the tribunal, the victorious party will likely seek enforcement of the arbitral award from the courts of the relevant jurisdictions, potentially a U.S. federal or state court.¹⁷² The risk is that the victorious party in their enforcement filings may disclose details from the arbitral proceedings that are not presumptively or explicitly protected by specific statute or regulation.¹⁷³ One practitioner cautions, “[b]ut such a filing provides the winning party an opportunity to perform a public end-zone dance and publicize the verdict reached and often the underlying allegations—exactly what most corporate clients sought to avoid through arbitration.”¹⁷⁴ Again, this is likely not what either party anticipated when crafting and agreeing to the arbitration agreement.

¹⁶⁸ See generally Complaint for Declaratory Relief, Stephanie Clifford a.k.a. Stormy Daniels a.k.a. Peggy Peterson, an individual, v. Donald J. Trump a.k.a. David Dennison, an individual, Essential Consultants, LLC, a Delaware Limited Liability Company, and Does 1 through 10, inclusive, BC696568 (March 6, 2018) (references the complaint filed by Stormy Daniels against Donald Trump).

¹⁶⁹ See *id.*

¹⁷⁰ Matthews, *supra* note 167.

¹⁷¹ See John C. C. Sanders, *So You Think That Your Arbitration is Confidential Better Think Again*, LEXOLOGY (April 18, 2014), <https://www.lexology.com/library/detail.aspx?g=57a1e87c-bb91-4885-bd74-18de7f1a98ee>.

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

The U.S. need not go as far as Germany—essentially only permitting access to court records upon valid interest in the case at hand at the court’s discretion—to achieve a result that would be more equitable to the parties to the arbitration agreement.¹⁷⁵ Instead, the U.S. could take an approach that would allow courts to review the alleged confidentiality provisions of an arbitration clause prior to allowing access to the public. In the case that the confidentiality, if any, does not apply, then there is no issue and the documents can be released to the public. In the inverse, the parties would not have to be concerned with dissemination of sensitive confidential information that they presumed would be protected by their arbitration clause. Below are proposed solutions that the U.S. could implement at both the federal and state levels to ensure the interest of the parties are satisfied.

A. STATUTORY CHANGES

Although there are two tiers of the American legal system, federal and state, the approach should be similar between the two. As mentioned earlier, the Federal Arbitration Act does not explicitly address the issue of confidentiality.¹⁷⁶ As the primary piece of legislation regarding arbitration in the U.S., an amendment to the act should resolve this issue. Such an amendment could read:

I. Amendment 1

When a cause of action, where an arbitration clause may be enforced, is brought before a federal court, it shall be presumed to be confidential and a non-party shall not have the right to view such documents unless one of the following scenarios applies:

- a. Express finding by a federal judge that, in the interest of justice to the parties or sufficient public interest, there is a

¹⁷⁵ See Kreindler, *supra* note 81.

¹⁷⁶ See Federal Arbitration Act, 9 U.S.C. (2012).

reason in the interest of justice to not keep the proceedings confidential,

- b. Order by federal judge pursuant to an alleged breach of confidentiality by one of the parties or relevant entities to an arbitration, or
- c. Express consent in writing by the parties to the arbitration to waive confidentiality.

2. *Amendment 2*

Any and all filings pertaining to a matter which has already been submitted to or may be subject to filing in an arbitral proceeding shall be sealed and prohibited from non-party scrutiny *unless* a federal judge finds sufficient reason, in the interest of justice, to remove said seal.

While it is noted that confidentiality in arbitration typically arises from the explicit intention of the parties, these two relatively short amendments would be paradigm shifts: changes in position in jurisprudence that would offer better protection for parties to arbitration and increase the competition of the U.S. as a potential arbitral seat.¹⁷⁷ Indeed, foreign parties who wish to include arbitration agreements would appreciate the assurance that their confidential information shall remain obscured by public view unless one of the stated exceptions is met.¹⁷⁸ The proposed amendments to the Federal Arbitration Act seen above would likely resolve the issues of confidentiality at the federal level.

B. IMPLEMENTATION

Bringing similar changes and amendments to state jurisdictions is more of a complex and lengthy endeavor. While the language

¹⁷⁷ See Latham & Watkins, GUIDE TO INT'L ARBITRATION (2014) (the location of the seat of an arbitration also provides the default law).

¹⁷⁸ See *id.*

should remain relatively the same, substituting references to federal judges in favor of state-level district court judges would have the same practical effect. The difficulty arises in getting each individual state to accept these amendments. Thus, there appears to be at least several options for recruiting states.

First, consider adding these amendments to the Uniform Arbitration Act, which has already been adopted. By getting states that have already adopted this act to agree to amend the statute, the starting point would be with eighteen states rather than zero.

Second, teach the bar associations of each state about the benefits of the amendments and allow them to become advocates for amending the current state arbitration bill. This activity is particularly important since local bar associations are more likely to be attuned to any localized dispute resolution rules. Additionally, this would be the most practical and effective means of amending said rules.

Third, target state chambers of commerce and business or industry groups. Arbitration is, by its nature, a function of the demands of the clients. If they can be shown that they are potentially vulnerable under the current system, and begin requesting greater confidentiality language, this will put combined pressure on legal advocates and eventually the legislature to amend the state arbitration act.

Fourth, engage the American Bar Association about the benefits to practitioners and clients of increased confidentiality.

Fifth and finally, solicit statements from institutional arbitration organizations that already have confidentiality rules. Organizations like the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS) are two ideal potential champions for the suggested amendments. This shows desire from the legal community and provides for a wide audience in the support of great confidentiality language.

The list of strategies to elicit state approval could go on, however, it is not the intention of this piece to become a discussion of how to effectively lobby for state statutory state amendments. It is sufficient to say that the shine of these proposed amendments is their ability to allow greater choice, and perhaps more importantly, provide more protection to the parties to commercial arbitration.

There is a risk in this instance that a presumption of confidentiality, given these proposed amendments, is now forced upon the parties when that may not have been their intention. However, perhaps equally plain, if the parties do not want confidentiality or do not care one way or another, they are free to waive that right and allow public access to the matter at hand. These amendments instead make the right to public access reactive to the resolution of private matters instead of open forum observation.

C. *NON-U.S. JURISDICTIONS*

There is no unifying body of international law as it pertains to commercial arbitration.¹⁷⁹ Thus, the same tactics described above would not be useful. However, given the fact that many arbitral institutions already have rules concerning confidentiality,¹⁸⁰ the best recommendation is to encourage parties to explicitly spell out the level of desired confidentiality when crafting their arbitration clause. This way there is no ambiguity or confusion as to how the tribunal and the court should treat potentially sensitive matters, if and when disputes arise.

D. *MISCELLANEOUS*

Although not directly on point, is a recent action taken by the Supreme Court of South Carolina. That action is the amendment to Rule 8 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules.¹⁸¹ The court's amendment specifically applies to mediation, but the author firmly believes that it should be extended to apply to arbitration.¹⁸² The beginning of the amendment reads:

¹⁷⁹ See Latham, *supra* note 177 (there are many different bodies of international commercial arbitration law).

¹⁸⁰ See generally, LCIA Rules, *supra* note 150; China Int'l Econ. and Trade Arb. Comm'n Arb. Rules (January 1, 2015); World Intellectual Property Organization Rules (June 1, 2014). (Referencing a few of the many different arbitral institutions that already have rules concerning confidentiality in place).

¹⁸¹ See *Amendments to South Carolina Appellate Court Rules, THE SUPREME COURT OF SOUTH CAROLINA 8* (January 31, 2018).

¹⁸² See *id.*

(a) Confidentiality. Any mediation communication disclosed during a mediation, including, but not limited to, oral, documentary, or electronic information, shall be confidential, and shall not be divulged by anyone in attendance at the mediation or participating in the mediation, except as permitted under this rule or by statute. Additionally, the parties, their attorneys and any other person present or participating in the mediation must execute an Agreement to Mediate that protects the confidentiality of the process. The parties and any other person present or participating shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation, which shall include, but not be limited to...¹⁸³

This amendment demonstrates a concern by the South Carolina judiciary to affirmatively protect the confidentiality of the parties.¹⁸⁴

With the above anecdote and this recent amendment in mind, one can see that the author of this piece is not alone in considering vulnerabilities in the U.S. legal system and its approach to confidentiality in arbitration.

VII. CONCLUSION

Ultimately, commercial arbitration is about party autonomy.¹⁸⁵ The parties to an arbitration opt for arbitration particularly because they seek an alternative to the relevant judicial court systems.¹⁸⁶

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See generally* Perepelynska, *supra* note 1 (party autonomy has always been important in commercial arbitration).

¹⁸⁶ *See id.*

Commercial parties certainly have information that they likely do not want to be widely distributed or available to the public, so they expect confidentiality in the proceedings (which is afforded to them by many arbitral institutions).¹⁸⁷ To allow for a scenario where a party could unilaterally destroy confidentiality seems to violate the very spirit of arbitration.

The United States should follow the examples set by other national legal systems, and the arbitral institutions themselves, and amend its laws to afford an inherent confidentiality and privacy to actions involving an arbitration clause. This right of public access should be balanced against party confidentiality. In the U.S., this effect could be achieved either with the recommended course of action in this piece or some similar procedure and amendment language, which would ultimately allow for greater justice for parties who have chosen commercial arbitration.

¹⁸⁷ *See id.*