

COMMERCIAL ARBITRATION IN JAPAN:
CONTRIBUTIONS TO THE DEBATE ON
“JAPANESE NON-LITIGIOUSNESS”

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* Assistant Professor, School of Law, University of Warwick. The author would like to give particular thanks to Mark West, both for providing his original introduction to Japanese law and for repeated assistance given since then. The author would also like to thank White & Case LLP, where all work on this article was performed, for its remarkable level of support both in giving time to write the article and in subsidizing the expenses of research. Thanks are also due to Paul Friedland, David Case, Robert Grondine, and Steve Bond.

I. INTRODUCTION

Academic discussions of Japanese law, both within Japan and in Western academia, have long focused on Japan's low litigation rate and what it illustrates about the status of law in contemporary Japan. While it is accepted by all sides that civil disputes in Japan are indeed taken to court with less frequency than in most comparably developed countries,¹ explanations for this statistic vary from generalized discussions of Japanese character to detailed examinations of obstacles to litigation in Japanese courts.² While "institutionalists" argue that Japan's low litigation rate can be explained by elements of the Japanese legal system that make litigation an undesirable option, "culturalists" insist that even were such obstacles removed, Japan's litigation rates would still remain low, as Japanese people will freely choose to resolve their disputes through non-confrontational means rather than through the highly confrontational process of court litigation.

This Article aims to develop this discussion through an examination of Japanese commercial arbitration. While numerous studies have been undertaken on the low rate of litigation in Japanese courts, few commentators have attempted to explain the parallel low usage by Japanese businesses of arbitration as an alternative to court litigation.³ However, if institutional obstacles are indeed responsible for the Japanese avoidance of court litigation, the similarly low usage of an arbitration system without such obstacles is difficult to explain.

Rather than merely illustrating the difficulties that Japanese commercial arbitration presents for the institutionalist view, this Article also presents what will be called a social-cultural explanation that, it is argued, both adequately accounts for the observable data and avoids the weaknesses of prior culturalist theories.⁴ Specifically, the theory advanced in this Arti-

1. John O. Haley, *Litigation in Japan: A New Look at Old Problems*, 10 WIL-
LAMETTE J. INT'L L. & DISP. RESOL. 121, 123 (2002) [hereinafter Haley, *Litiga-
tion*] (describing as a matter of consensus that "[r]esort to court is statisti-
cally less frequent in Japan than in comparable industrial societies in Europe
as well as, it appears, in the industrialized states of East Asia").

2. See *infra* Part II.

3. One exception is Haley, *Litigation*, *supra* note 1, at 141.

4. The term "social-cultural" has been adopted as a means of emphasizing the distinctive place given in this theory to the role of social relations, as opposed to the traditional culturalist emphasis on alleged psychological

cle is that Japan's low litigation rates can be best understood not by mere invocation of an alleged non-confrontational preference on the part of Japanese people, but by recognition of a disjunction that exists between Japanese social interactions and Japanese law. Due to this disjunction, while court litigation in Japan can provide the parties with a determinate result, it cannot resolve their dispute. Consequently, rates of litigation in Japan will remain low so long as this disjunction exists.

The theory advanced here accords with the institutionalist view that the structure of litigation in Japan is a fundamental obstacle to its use by Japanese parties. However, unlike an institutionalist theory, this theory does not predict that Japanese people will litigate more regularly if certain institutional barriers to litigation are removed. Rather, it posits that the centrality of Western-style confrontational dispute resolution techniques to Japanese litigation is itself a primary institutional cause of Japan's low litigation rates. That is, while a formal and even oppositional⁵ litigation system could indeed be constructed that would willingly be used by Japanese people, this theory predicts that unless Japanese society undergoes a significant structural change, no Western-style litigation system will ever be widely used even if all institutional barriers are removed. Not every resolution is equal, and the mere fact that litigation produces a result does not mean that the underlying dispute has thereby been resolved. Consequently, no formal dispute resolution system will be widely used where it does not conform to the social relations it is allegedly resolving. This Article argues that such a disjunction between law and social relations still exists in Japan, and that it is this disjunction, rather than institutional barriers, that provides the most compelling explanation for Japan's continuing low rates of litigation and arbitration.

characteristics of Japanese individuals. However, as should be clear from the discussion in this Article, the theory advanced here is truly a variation on the culturalist explanation rather than a third explanation to set alongside culturalism and institutionalism.

5. "Oppositional" is used here as opposed to "confrontational," *infra* note 6, to suggest a system that would allow the strong assertion of rights and obligations, beyond that usual in mediation, but nonetheless would not require the intense conflict and victor/vanquished result of traditional litigation.

On the other hand, while the social-cultural theory proposed here is offered as a form of culturalist theory, it is nonetheless significantly different from traditional culturalist theories in that it does not place any reliance upon notions of Japanese “character” or allege the existence of a uniform Japanese aversion to litigation. Rather, I argue that Japan’s low litigation rates are best understood as resulting primarily from the combination of a long-standing disjunction between Japanese law and social rules and the incorporation within those social rules of a variety of rules against confrontational dispute resolution, with a different rule coming into operation depending on the specific relationship between the disputing parties.

Part II of the Article introduces the basic elements of the academic debate on Japan’s low litigation rates. It briefly describes both the institutionalist and culturalist positions, paying particular attention to the standard-setting institutionalist arguments made by John Haley and Mark Ramseyer.

Part III introduces the legal structure of commercial arbitration in Japan as it existed prior to the 2004 entry into force of Japan’s new arbitration law (the “2003 Law”⁶). Focusing primarily on decisions by Japanese courts, it argues that few institutional obstacles existed prior to the adoption of the 2003 Law that could explain the low use of arbitration in Japan. It notes, however, that the low rate of international, rather than domestic, commercial arbitration may be attributable to elements of Japanese legal practice that indeed reflect a cultural aversion to confrontational dispute resolution, such as the acceptance of *ex aequo et bono* decisions and the willingness of Japanese arbitrators to actively encourage settlement. While these factors are also characteristic of Japanese courts, and so would provide no reason to prefer court litigation to arbitration, they would provide an incentive for foreign parties to insist that any arbitration occur in a forum other than Japan.

6. “2003 Law” is used rather than “2004 Law,” because although the law entered into force in 2004, it was passed in 2003 and is officially designated as Law No. 138 of 2003. See Chusai Ho [Arbitration Law], Law No. 138 of 2003, translated in The Japan Commercial Arbitration Ass’n, Arbitration Law (Law No. 138 of 2003), <http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/kaiketsu-e/civil.html> [hereinafter 2003 Law].

Part IV lays a factual foundation for the subsequent theoretical argument by examining official dispute resolution techniques adopted in Japan from the Edo-era through contemporary times. While highlighting the long-standing prominence of non-confrontational dispute resolution processes in the Japanese legal system, it argues that the reality of these processes is sharply inconsistent with the traditional culturalist argument that Japanese people will avoid confrontation whenever possible. Rather, this history illustrates that Japanese people have long happily embraced dispute mechanisms that require a strong assertion of rights and responsibilities. Consequently, no explanation for Japan's low litigation rates can be acceptable that centers upon an alleged Japanese desire for "harmony" in social relations, and contemporary institutionalist theorists are correct in rejecting such traditional culturalist arguments.

Part V builds on this rejection of traditional culturalist theories by developing a new culturalist theory that is not dependent on the same assumptions as the traditional version. Through a discussion of the work of Takeyoshi Kawashima, the most prominent proponent of the culturalist theory of Japan's low litigation rate, and Eugen Ehrlich, a major influence on Kawashima, I develop a theory that seeks to avoid generalizations about psychological characteristics of Japanese people and instead concentrates on distinctive elements of Japan's social structure and legal history. I argue that this theory can successfully explain the historical evidence described in Part IV and thus that it is preferable to previous culturalist theories.

Part VI then addresses the empirical evidence used by institutionalist theorists to defend the view that Japan's low litigation rates have been caused by obstacles to litigation rather than by cultural aversion. I argue that the data presented, when closely analyzed, fail to support the institutionalist explanations offered and is more consistent with the social-cultural theory advanced in this Article. The superior explanatory power of the theory here advanced is also illustrated with respect to the low rate of arbitration in Japan.

Part VII concludes the Article by suggesting that recent changes in both Japan's arbitration law and the rules of Japan's major international commercial arbitration center, the Japan Commercial Arbitration Association, provide an important opportunity for further empirical testing of both institu-

tionalist and culturalist theories. While an institutionalist theory would most likely predict that the new law and rules will enhance the appeal of Japanese arbitration both domestically and internationally and thereby increase rates of arbitration in Japan, the social-cultural theory offered in this Article predicts that these changes will not by themselves lead to any substantial new role for arbitration in Japan. Instead, arbitration rates will only increase if the procedures adopted for domestic and international arbitration are sharply distinguished, with international arbitration conforming to the dominant international standards and domestic arbitration conforming more closely to the distinctive elements of Japanese social (and business) relations.

II. INTRODUCTION TO THE ACADEMIC DEBATE

As noted above, academic commentary on Japanese non-litigiousness has substantively split into two broad camps, the culturalist and the institutionalist. This section will provide a brief overview of the fundamental elements of these two theories in order to delineate clearly what is at stake in discussions of Japanese litigation rates.

Prior to the late 1970s, discussions of the relation between Japanese people and the Japanese legal system were unquestionably dominated by the culturalist view of Japanese non-litigiousness. Widely accepted both in Japan and abroad and promoted by Japan's most famous legal theorist, Takeyoshi Kawashima, the culturalist view essentially holds that Japan's low litigation rates can be attributed to an alleged inconsistency between confrontational methods of resolving disagreements and Japanese culture's emphasis on the need for harmony in social relations.⁷ In the words of one of the most prominent culturalist articles, *The Law of the Subtle Mind*, "disputes are regarded [in Japan] as abnormal disruptions of the natural harmony of life, not to be foreseen in human affairs,

7. Although the phrase "confrontational dispute resolution systems" is somewhat awkward, it will be used throughout this article as a clear means of referring to the combination of arbitration and litigation that exhibits the "confrontational" aspects that Japanese people allegedly want to avoid.

human affairs being secured by bonds of love and benevolence.”⁸

According to the culturalist theory, then, as a result of being raised in a culture that strongly emphasizes consensual dispute resolution over confrontational dispute resolution, Japanese people, whether ordinary citizens or sophisticated businesspeople, actively attempt to avoid confrontation. Consequently, even if presented with a situation in which they will maximize both their long-term and short-term benefit by engaging in confrontational dispute resolution, Japanese people will seek out mediation, sacrificing potential gain for the sake of social harmony.⁹ Proponents of this view could draw support not only from the prominence given this interpretation of Japanese culture by the Japanese themselves,¹⁰ but also from the wide variety of formal non-confrontational dispute resolution mechanisms offered by the Japanese legal system¹¹ as well as from the parallel emphasis on the negotiated resolution of disputes in Japan’s criminal law.¹²

8. Chin Kim & Craig M. Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT’L & COMP. L.Q. 491, 510 (1979).

9. For a classic statement of this view, see *id.*; see also Mitsukuni Yasaki, *Legal Culture in Japan, Modern-Traditional*, in TRADITION AND PROGRESS IN MODERN LEGAL CULTURES 191 (Stig Jorgensen et. al. eds., 1985). For an interesting discussion of these ideas, see Richard B. Parker, *Law and Language in Japan and in the United States*, 34 OSAKA U. L. REV. 47 (1987) (explaining the difference in attitude toward law and rights between Japanese and Americans by reference to the “reification” of certain concepts and categories by Americans). For a nuanced and insightful discussion on a closely related topic, addressing the connection between Confucianism and South Korean “legal culture,” see Chaihark Hahm, *Law, Culture and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253 (2003).

10. This emphasis on Japanese uniqueness has resulted in its own distinctive literature, called *Nihonjinron*, that includes claims relating not only to Japanese social uniqueness but also to biological uniqueness. See generally Peter Dale, THE MYTH OF JAPANESE UNIQUENESS (1988); Chris Burgess, *Maintaining Identities: Discourses of Homogeneity in a Rapidly Globalizing Japan*, ELECTRONIC J. CONTEMP. JAPANESE STUD. (2004), <http://www.japanesestudies.org.uk/articles/Burgess.html>.

11. See *infra* Part IV.

12. In Japan’s criminal justice system, confessions are routine before any prosecution, and sentences are very lenient if the accused has acknowledged his or her wrongdoing. In 90% of all criminal cases tried by Japanese courts, the defendant has agreed to plead guilty. In 2002, 66.7% of defendants found guilty received a suspended sentence, with only 10.1% of those individuals being placed on parole. Of those defendants actually sentenced to

The aspect of the culturalist theory that is most essential and that serves most clearly to distinguish it from the institutionalist theory is its “internal” emphasis. That is, while culturalists can agree that Japanese people will litigate as long as the benefits of litigation outweigh the costs, for a culturalist such references to benefits must be taken to mean not only “external” benefits, such as monetary rewards, social status, etc., but also “internal” benefits such as happiness with one’s own behavior. The essence of the traditional culturalist view is not merely that Japanese society is constructed in such a way that an evaluation of external costs and benefits leads Japanese people to avoid litigation, but rather that Japanese people themselves find the confrontation involved in litigation inherently unacceptable. As a result, even if an evaluation of external benefits would lead any rational individual to choose litigation, the additional internal costs to a Japanese person of such a confrontational process will instead cause the same rational evaluation process to lead to mediation or conciliation (or indeed a complete abandonment of the claim).

Institutionalist theorists adopt precisely the opposite view, arguing that Japan’s low litigation rate can be understood entirely by reference to elements completely external to the individuals in question. This position was originally advanced in the classic 1978 article by John Haley, *The Myth of the Reluctant Litigant*,¹³ in which Haley, while not denying the strong emphasis of Japanese culture on consensual dispute resolution, argued that Japan’s low litigation rate could nonetheless be attributed primarily to a series of institutional barriers to litigation in Japanese courts. Focusing on capacity limitations arising from the small number of Japanese judges,¹⁴ limited remedies available to courts,¹⁵ and the length of even a simple trial

jail time, 94.5% received a sentence of 3 years or less. UNITED NATIONS ASIA AND FAR EAST INSTITUTE FOR THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, CRIMINAL JUSTICE IN JAPAN 27, 29 (2005), available at <http://www.unafei.or.jp/english/pages/CriminalJusticeJapan.htm>.

13. John Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978) [hereinafter Haley, *Myth*].

14. “[T]he ratio of judges to the population has declined from one judge to 21,926 persons in 1890 to one judge to 52,800 persons in 1926 and one judge to 56,391 persons in 1969.” *Id.* at 381.

15. “The limited range of remedies available to Japanese courts and the lack of contempt power to enforce their decisions are equally serious.” *Id.* at 387.

in Japan,¹⁶ Haley concludes that litigation in Japan is simply overly expensive, very time consuming, and often unsatisfactory in outcome. Consequently, Japan's low litigation rate demonstrates little about the psychological make-up of the Japanese people, as even a "litigious" American faced with the Japanese court system would choose to resolve her dispute through other processes.¹⁷

The institutionalist argument received a further important boost from a 1988 article by Mark Ramseyer, *Reluctant Litigant Revisited*,¹⁸ in which Ramseyer argued that the strong emphasis on consistency by Japanese judges, both between decisions and between courts, means that litigation is simply unnecessary in certain regularly recurring types of suits. Indeed, Ramseyer noted, in the case of automobile accident litigation, Japanese judges had taken the initiative to create and apply formulae for the determination of monetary awards.¹⁹ This consistency means that there is little incentive to litigate

16. "The simplest trial can take over one year at the district court level, and the average is two years. . . . If there are appeals, the case will take about five years, but proceedings that continue for eight to ten years are not uncommon." *Id.* at 381.

17. For an extended treatment of this controversy, paying particular attention to the role and influence in Japanese society of legal rules and institutions, see FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987).

18. Mark Ramseyer, *Reluctant Litigant Revisited*, 14 J. JAPANESE STUD. 111 (1988).

19. *See id.* at 117:

The wide fluctuations in the awards for automobile accidents in the late 1960s, for example, apparently troubled the judges of the major urban trial courts. To deal with the 'problem,' they compiled elaborate formulae showing the amounts judges should award for various injuries. Because judges generally follow the formulae, lawyers can now more easily predict verdicts in personal injury cases.

However, Ramseyer inappropriately minimizes the importance of the variation in awards prior to the conscious efforts of the judges to bring stability to the system. This variation suggests that Japanese judges are actually less consistent than Ramseyer's argument implies, and that in areas in which there have been no significant efforts to create consistency, there may be great variation. However, this variation would be demonstrable only for lawsuits regularly occurring with a great deal of factual similarity—the exact kind of lawsuit that is most likely to be subjected to a generalized pressure for consistency. Thus, it is unlikely that any statistical evidence will be able to resolve the accuracy of Ramseyer's claim insofar as it relates to litigation in general rather than to particular forms of lawsuits.

certain types of claims, as it is possible to predict the court's judgment with great accuracy. Both plaintiff and defendant, therefore, will benefit by settling outside of court and avoiding the trouble and expense of litigation.

By contrast to the culturalists, who attribute Japan's low litigation rates to an aversion to litigation on the part of Japanese people, the institutionalists maintain that speculation as to Japanese psychological characteristics is simply unnecessary. Instead, Japan's low litigation rate merely reflects rational choices made by individuals in a distinctive institutional environment, choices that would have been replicated by individuals from any other culture if faced with the same obstacles to litigation.²⁰

While Haley and Ramseyer's arguments have resulted in a series of articles further developing the institutionalist explanation for Japan's low litigation rate,²¹ little attention has been paid to the parallel low rate of arbitration. Yet not only does Japan have a long history of formal dispute settlement mecha-

20. See, e.g., John O. Haley, *Dispute Resolution in Japan: Lessons in Autonomy*, 17 CAN-U.S. L.J. 443, 444 (1991) [hereinafter Haley, *Dispute*] (acknowledging the strong role of communal relationships in dispute resolution in Japan, but attributing this prominence to the weakness of the Japanese court system and the corresponding need to rely on family and associates for support).

21. Although this new wave of thinking has had little direct impact in Japan itself, Japanese scholars themselves have nonetheless also begun reevaluating their commitment to the idea of a distinctively Japanese "mind." Ramseyer, *supra* note 18, at 111-112; see, e.g., Frank K. Upham, *What's Happening in Japan Sociolegally*, 23 LAW & SOC'Y REV. 879, 884-85 (1989) (surveying a Japanese conference on "legal consciousness" at which there were calls for a reevaluation of the traditional understanding of the term but no calls for its rejection). This is not to say, however, that Haley's argument has been completely ignored in Japan. For one example of a direct response to Haley by a Japanese scholar, but in a Western journal, see Hideo Tanaka, *The Role of Law in Japanese Society: Comparisons with the West*, 19 U. BRIT. COLUM. L. REV. 375, 382 (1987) ("Criticisms by Professor Haley, Ohki and others are much to the point in this respect. However, I fear that they are tainted with over-emphasis.") and also see Setsuo Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, 21 LAW & SOC'Y REV. 219 (1987); Masao Oki, *Japanese Rights' Consciousness*, LOOK JAPAN, Jan. 10, 1984, at 4 ("Thus, the development of the system of mediation in Japan was brought about by the success of private conciliation to offset the inadequacy of the Japanese judicial system. This phenomenon is not strongly related to the establishment of Confucian philosophy in the Far East 2,500 years ago.").

nisms located outside the court system,²² but Japanese law has made explicit provision for the arbitration of disputes since 1890 (the “1890 Law”).²³ Consequently, if Haley is correct that Japanese parties avoid court litigation because of institutional blockages, they might be expected to embrace an arbitration system that avoided such problems. Moreover, while Ramseyer’s emphasis on the predictability of courts would give litigants in certain regularly recurring types of cases little reason to turn to arbitration, his argument cannot explain a low rate of arbitration of more complex disputes or of those raising novel issues. Finally, whether or not arbitration was broadly used domestically in Japan, Japan’s traditional status as a “meeting point” between Asian and European cultures combined with the international respect accorded to its legal professionals would suggest that it should have attained a position as a leading center for international arbitrations. Yet commercial arbitration, whether international or domestic, is rarely used in Japan.²⁴

Before directly addressing the facts and arguments relating to Japanese non-litigiousness, it is necessary to establish that an examination of arbitration will indeed present worthwhile insights for the discussion. Consequently, Part III of this Article will examine the treatment of arbitration by Japanese courts since the passage of the first arbitration law in 1890 as a means of demonstrating that no significant institutional blockages exist to account for the low use of arbitration by Japanese parties.

III. COMMERCIAL ARBITRATION IN JAPAN IN THE TWENTIETH CENTURY

While Japan has had a national arbitration law since 1890, few arbitrations occur in Japan, whether international or do-

22. See *infra* Part IV.

23. Koji saikoku tetuzuki oyobi chusai tetuzuki ni kansuru holitsu [Law Concerning Procedure for General Pressing Notice and Arbitration Procedure], Law No. 29 of 1890, available at <http://www.jcaa.or.jp/e/arbitration-e/kaiketsu-e/civil.html> [hereinafter 1890 Law].

24. For example, in 2004, only 21 cases were filed with the Japan Commercial Arbitration Association, Japan’s primary international commercial arbitration body. Yoshimasa Furuta & Hideo Tsukamoto, *Japan Enters a New Era*, ASIA L. & PRAC. 121, 123 (2006), available at http://www.andersonmoritomotsune.com/whatsnew/pdf/060111_1-1.pdf.

mestic.²⁵ Although some critics have attributed arbitration's lack of success in Japan to the inadequacy of the 1890 Law, which remained unchanged until 2004, I will attempt to demonstrate in this Part that such an explanation is inadequate. In fact, the textual limitations of the 1890 law were supplemented by a series of court decisions that brought Japanese arbitral law largely into accord with international standards even before the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law-based²⁶ 2003 Law, making implausible any claim that the text of the 1890 law itself bears responsibility for the unpopularity of arbitration in Japan. This Part of the Article will provide a brief survey of the support given to arbitration by Japanese courts as a means of illustrating the difficulties of providing any institutional explanation for Japan's low rates of arbitration.

Adopted as part of the 1890 Code of Civil Procedure, the 1890 Law was a literal translation of Book X of the 1887 German Code of Civil Procedure.²⁷ As such, it was state of the art for its time. However, as might be expected from an early arbitration law, it includes minimal detail, particularly concerning the process of arbitration, and evinces more interest in clarifying the permissible borders of arbitration and its interaction

25. For a general survey of the legal texts relating to arbitration, not including the new 2003 Arbitration Law, see Hironori Tanimoto, *Sources of Law Relating to Maritime Arbitration in Japan*, 12 J. INT'L ARB. 101 (1995) (survey of legal texts relating to arbitration). For a description of the basic practice of the main Japanese arbitral organizations, see Yasuhei Taniguchi, *Commercial Arbitration in Japan*, in ARBITRATION IN SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES INVOLVING THE FAR EAST AND ARBITRATION IN COMBINED TRANSPORTATION 29, 37-41 (P. Sanders ed., 1989) [hereinafter Taniguchi, *Commercial Arbitration*]; Toshio Sawada, *Practice of Arbitral Institutions in Japan*, 4 ARB. INT'L 120 (1988); Note, *The Japan Commercial Arbitration Association*, 22 LAW & POL'Y INT'L BUS. 603 (1990). For an extremely negative evaluation of arbitration in Japan, see generally Charles R. Ragan, *Arbitration in Japan*, 7 ARB. INT'L 93 (1991). For a mild defense of Japanese practice, see Toshio Sawada, *On Mr. Ragan's Lessons on Arbitration in Japan*, 7 ARB. INT'L 121 (1991).

26. The Model Law was adopted in 1985 and has subsequently been used as the basis for numerous national arbitration laws. See generally HENRI C. ALVAREZ, NEIL KAPLAN & DAVID W. RIVKIN, MODEL LAW DECISIONS: CASES APPLYING THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985-2001) (2003); *infra* note 46 and accompanying text.

27. Yoshiaki Nomura, *Some Aspects of the Use of Commercial Arbitration by Japanese Corporations*, 33 OSAKA U. L. REV. 47, 49 (1986).

with the courts than in facilitating its operation.²⁸ As a result, by the end of the twentieth century, Japan's arbitration law was not merely old, but was also in a form that had long been superseded and is now largely regarded as inadequate.

The textual limitations of the 1890 Law, however, should not be seen as displaying limitations of the legal structure of Japanese arbitration itself. While the 1890 Law may have left many important practical issues unaddressed, this merely provided Japanese courts with the opportunity to address those issues directly through case law. An understanding of Japanese arbitral law in the twentieth century therefore requires close attention not just to the text of the law itself but also to subsequent judicial decisions.²⁹

As might be expected given Japan's substantial use of non-court based dispute resolution,³⁰ Japanese courts have shown little reticence in supporting arbitration. The Japanese Supreme Court, for example, strictly enforcing the text of the 1890 law,³¹ ruled as early as 1918 that an arbitration award was to be treated as having the full legal force of a court judgment.³² Similarly, although Japan's post World War II Constitution³³ guarantees citizens the right to a court

28. One way of viewing the law is that it is designed to regulate, rather than assist, arbitration. *Id.* at 51.

29. Moreover, the text of the 1890 Law cannot by itself provide any real insight into the Japanese attitude to arbitration due to its wholesale importation from German law. At most, it is possible to conclude that Japanese legislators in the late nineteenth century regarded it as an adequate law to address a dispute resolution system that had little practical relevance at the time. As the details of the legislation were not adjusted by the legislators, no real conclusions can be drawn from the 1890 Law's text regarding the attitudes of Japanese officials toward arbitration itself.

30. See *infra* Part IV.

31. 1890 Law art. 800.

32. The Supreme Court stated: "An arbitral award made in accordance with the agreement shall have the same effect as a final and conclusive judgment of a Court of Justice." Takao Tateishi, *The Enforcement of the Arbitration Agreement Under Japanese Law*, 39 JSE BULL. 2 (Sept. 1999), available at http://www.jseinc.org/en/bulletin/list_of_nos.html [hereinafter Tateishi I] (quoting Great Court of Cassation, Apr. 15, 1918, 24 Daihan Minroku 856).

33. For a wonderful guide to the events behind the adoption of this Constitution, including copies of original documents (official documents, communications, and even children's books of the period designed to explain the new Constitution), see National Diet Library, Birth of the Constitution of

trial,³⁴ Japanese courts have held that an agreement to arbitrate does not violate this right.³⁵ Indeed, in a 1987 ruling, the Osaka High Court³⁶ held that an arbitration agreement should be enforced even if the plaintiff was clearly unaware that by agreeing to arbitrate he was simultaneously waiving his right to bring suit in court.³⁷

In addition to this basic recognition of the legitimacy of arbitration as a binding form of dispute resolution, Japanese courts have also repeatedly endorsed standards consistent with those adopted by the international arbitral community, even when not required to do so by the text of the 1890 Law. For example, in 1975 the Supreme Court endorsed the doctrine of the separability of an arbitration clause,³⁸ according to which an arbitration clause will still be enforced even though the contract in which it is contained has been terminated or its validity is in question.

Japan, <http://www.ndl.go.jp/constitution/e/index.html> (last visited Sept. 6, 2007).

34. Article 32 of the Japanese Constitution provides that “[n]o person shall be denied the right of access to the courts.” KENPO, art. 32.

35. Tateishi I, *supra* note 32, at 7 (quoting Osaka High Court, Jun. 26, 1987, 795 Kinyu Shoji Hanrei 24) (“It has nothing to do with the validity of the arbitration agreement whether the parties expressly agreed to waive their right to bring suit. The validity of the arbitration agreement shall not be impaired if one of the parties, unaware of its effect of blocking suit, concluded the arbitration agreement, because such ignorance or belief to the contrary does not constitute an element of a judicial act but only represents a mistake of a motive.”). See also Takao Tateishi, *The Enforcement of Foreign Arbitral Awards in Japan*, 40 JSE BULL. 1, 12-13 (Mar. 2000), available at <http://www.jseinc.org/en/bulletin/issues/Vol.40.pdf> [hereinafter Tateishi II]; Tateishi I, *supra* note 32, at 3.

36. One of Japan’s eight appellate courts. See generally Supreme Court of Japan, *Overview of the Judicial System*, <http://www.courts.go.jp/english/system/system.html#03> (last visited Sept. 6, 2007).

37. Tateishi II, *supra* note 35, at 7.

38. Tateishi I, *supra* note 32, at 4 (quoting Supreme Court, Jul. 15, 1975, 29 Minshu 1061) (“The effect of an arbitration agreement incorporated into the main contract shall be judged independently of the main contract unless otherwise expressly agreed between the parties and any defect in the formation of the main contract would not affect the validity of the arbitration agreement.”); see also Tateishi I, *supra* note 32, at 4 (quoting Tokyo District Court, Jan. 25, 1958, 9 Kakyu Minshu 111) (“The arbitration agreement is separable from the main contract under Japanese law and it is still valid after the termination of the contract of sale.”).

Similarly, Japan has recognized the right of arbitrators to determine their own jurisdiction.³⁹ As a result, even a party denying that it has a contractual obligation to arbitrate must raise its objections to arbitration before an arbitral tribunal rather than before a court. Only if the arbitral tribunal itself finds that it has no jurisdiction will the complaining party be free to bring a suit in court. Japanese courts have held that, should a party attempt to circumvent this procedure and bring a lawsuit in court on an issue claimed to be subject to an arbitration agreement, the court must dismiss that action in favor of arbitration.⁴⁰ Indeed, the arbitral tribunal need not even halt its proceedings pending the court's resolution of the issue, but may continue even so far as to render a final award.⁴¹

Japanese law has also recognized the right of parties to select the governing law for their relations, as enshrined in Japan's 1898 *Horei* ("Act on the Application of Laws").⁴² While the *Horei* does not explicitly apply to arbitration, referring only to "juristic acts,"⁴³ Japanese courts have nonetheless held that this rule applies in arbitration.⁴⁴ As a result, even if an arbitration is held in Japan and involves one or more Japanese par-

39. Tateishi I, *supra* note 32, at 5.

40. The court may not dismiss on its own motion, but rather only if the opposing party raises the arbitration agreement as a defense. Teruo Doi, *Arbitration: Law and Practice, and Proposed Legislation in Japan (I)*, 28 J. INT'L ASS'N FOR PROTECTION INTELL. PROP. JAPAN 67, 75 (2003). Moreover, unlike in the United States, where a court will merely stay proceedings while an arbitration takes place, a Japanese court will actually dismiss the case. Tateishi II, *supra* note 35, at 2.

41. Doi, *supra* note 40, at 76.

42. Ho no tekiyo ni kansuru tsusokuho [Act on the General Rules of Application of Laws], Law No. 10 of 1898, art. 7, translated in Kent Anderson & Yasuhiro Okuda, *Horei, Act on the Application of Laws*, 3 ASIAN-PAC. L. & POL'Y J. 230, 234 (2002) ("(1) The formation and effect of a juristic act shall be governed by the law intended by the parties. (2) Where it is uncertain what law was intended by the parties, the law of the place where the act was done (*lex loci actus*) shall govern.")

43. *Id.* arts. 7, 9, 15, 22.

44. See, e.g., Tateishi II, *supra* note 35, at 8 (quoting Nagoya District Court, Feb. 26, 1987, Showa 60 (wa) 239; 645 Hanrei Times 239; 1232 Hanrei Jiho 138):

The law governing the formation and effect of an arbitration agreement should be decided in accordance with Article 7 of the *Horei*; i.e. the law designated by the parties, or, failing which, the law of the place of conduct. The law governing the arbitral procedure and the award should, unless otherwise specifically agreed upon be-

ties, the parties are free to select the law of another country to apply to their dispute.

Indeed, in at least one respect, the endorsement of arbitration by Japanese courts has extended beyond the conventional international standard. While the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴⁵ (the “New York Convention”) and the UNCITRAL Model Law on International Commercial Arbitration⁴⁶ (the “Model Law”) both only require the recognition of written arbitration agreements,⁴⁷ Japanese courts have traditionally been willing to enforce even purely oral agreements.⁴⁸ Though this practice has been eliminated under the 2003 Law, which adopts the Model Law’s requirement of a written arbitration agreement, an expansive interpretation regarding what constitutes a “writing” has been retained.⁴⁹

tween the parties or save special circumstances to the contrary, be the governing law of the agreement.

45. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 1, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

46. U.N. Comm’n on Int’l Trade Law, UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17 (June 21, 1985) [hereinafter UNCITRAL Model Law].

47. Notably, UNCITRAL is currently studying a revision to both the New York Convention’s and the Model Law’s requirement of a written agreement. See U.N. Comm’n on Int’l Trade Law (UNCITRAL), Working Group II (Arbitration) 44th Sess., Jan. 23-27, 2006, Annotated Provisional Agenda § III(4)(8), U.N. Doc. A/CN.9/WG.II/WP.140 (Nov. 14, 2005) (addressing the New York Convention); UNCITRAL, Working Group II (Arbitration) 44th Sess., Jan. 23-27, 2006, *Settlement of Commercial Disputes: Preparation of Uniform Provisions on Written Form for Arbitration Agreements: Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, U.N. Doc. A/CN.9/WG.II/WP.139 (Dec. 14, 2005) (addressing the New York Convention); UNCITRAL, 39th Sess., June 19-July 7, 2006, *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Third Session (Vienna, 3-7 October 2005)*, ¶¶ 76-97, 104-12, U.N. Doc. A/CN.9/589 (Oct. 12, 2005) (addressing the Model Law); UNCITRAL, Working Group II (Arbitration), 43rd Sess., Oct. 3-7, 2005, *Settlement of Commercial Disputes: Preparation of a Model Legislative Provision on Written Form for the Arbitration Agreement*, U.N. Doc. A/CN.9/WG.II/WP.136 (July 19, 2005) (addressing the Model Law). For an excellent discussion of the “writing requirement” controversy, see Alan Uzelac, *Arbitration Agreement: Written Form of the Arbitration Agreement: Towards a Revision of the UNCITRAL Model Law*, 12 CROAT. ARB. Y.B. 111 (2005).

48. Tateishi I, *supra* note 32, at 5.

49. 2003 Law, art. 13.

Japanese courts have been similarly supportive of the enforcement of arbitral awards, whether international or domestic, once an arbitral award has been delivered. Japan was an early signatory to the New York Convention, the primary international mechanism for the enforcement of international arbitration awards, and prior to that it had already committed to the enforcement of foreign arbitral awards under both the Geneva Convention⁵⁰ and specific bilateral treaties.⁵¹

Consistent with this legislative endorsement of arbitration, Japanese courts have traditionally demonstrated a great reluctance to overturn any properly rendered arbitration decision,⁵² whether from a domestic or international proceeding.⁵³ Indeed, according to Takao Tateishi, former Adminis-

50. Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302.

51. See, e.g., Treaty of Friendship, Commerce and Navigation Between the United States of America and Japan, U.S.-Japan, Apr. 2, 1953, 4 U.S.T. 2063, 106 U.N.T.S. 143.

52. Kazuyoshi Yamane, *Resolving Disputes in U.S.-Japan Trade: The Japanese Perspective*, 39 ARB. J. 10 (1984) ("Based upon Japan's historical amenability to the enforcement of foreign arbitral awards and a knowledge of the workings of the Japan legal systems, it must be concluded that arbitral awards duly rendered and enforceable in the United States are basically enforceable in Japan."). Japanese courts will, of course, set aside a domestic award if they find that no agreement to arbitrate was actually reached. Tateishi II, *supra* note 35, at 13 (quoting Supreme Court, May 2, 1977, 548 Kinyu Shoji Hanrei 41). Indeed, as in many other countries, under Japanese law third party assignees of rights can enforce awards:

An arbitral award shall have the same effect as a final judgment of the court under the Arbitration Act and such effect should remain the same with the third parties after the rights and duties under the award have been transferred to them. . . . The binding effect of an award extends to an assign so that the person can lawfully bring an action to have the award enforced.

Id. at 16-17 (quoting Tokyo District Court, Oct. 20, 1967, 18 Kakyu Minshu 1033). However, in the context of a promissory note, the Osaka High Court rejected this position: "An arbitration agreement exists only between the drawer and the drawee of the notes. . . . The award should not be binding on a bona fide endorsee of the notes." *Id.* at 17 (quoting Osaka High Court, Aug. 26., 1971, 533 Hanrei Times 166).

53. *Id.* at 2 (Japan makes no distinction between domestic and international awards with regard to strictness of enforcement), 8 (quoting Tokyo District Court, Jul. 20, 1993, 1494 Hanrei Jihō 126):

Article 802 of the Arbitration Act should apply *mutatis mutandis* to foreign awards because domestic and foreign awards are no different in substance in the sense that both are resolution by third party

trator of the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange,⁵⁴ there were as of 1997 no reported cases of a Japanese court refusing enforcement of a foreign arbitral award under the New York Convention.⁵⁵ Similarly, Tateishi was unable to locate a single case in which an award rendered in an international commercial arbitration taking place in Japan had even been challenged in a Japanese court.⁵⁶

When arbitral awards have been challenged, Japanese courts have refused to address the substance of the award, restraining their review to procedural irregularities that might indicate unfairness in the arbitral process.⁵⁷ Indeed, while nations have traditionally reserved the right to refuse enforcement of awards that violate their public policy,⁵⁸ at least one Japanese court has held that “where a foreign arbitral award was properly rendered in accordance with the agreement between the parties, if the award has become final and enforcea-

arbitrators of the disputes between private persons in accordance with their agreement. . . . In the end Article 802 of the Arbitration Act should apply to the instant case and on the facts it is recognised that the award was rendered without any irregularities or contradiction so as to invoke the provisions for refusal of enforcement.

54. The Tokyo Maritime Arbitration Commission is one of Japan’s two primary organizations for international commercial arbitration, the other being the Japan Commercial Arbitration Association. Overview of the Tokyo Maritime Arbitration Commission, http://www.jseinc.org/index_en.html (last visited Sept. 13, 2007) [hereinafter Overview]. Tateishi’s articles in WaveLength: The Bulletin of the Japan Shipping Exchange are a wonderful resource for anyone wishing to learn about arbitration in Japan. The complete text of every edition of WaveLength, stretching back to 1964, is available online at WaveLength, The Bulletin of the Japan Shipping Exchange, <http://www.jseinc.org/en/bulletin/index.html> (last visited Sept. 13, 2007).

55. Tateishi II, *supra* note 35, at 1.

56. *Id.* at 18 (“I trust it is not because Japanese parties hardly lose in international arbitrations in Japan but they comply with the awards rendered in such arbitrations.”).

57. In one recent case in the Tokyo District Court, a Japanese party attempted to fight enforcement of a Chinese award on public policy grounds, claiming that the arbitrators were partial and ignored their submissions. The court did consider the public policy claim, rejecting it without evaluating the reasoning of the panel. *Id.* at 3-4. A similar decision came in a 1994 Tokyo District Court case in which the court explicitly refused to examine the merits of the award. *Id.* at 5 (quoting Tokyo District Court, Jan. 27, 1994, 853 Hanrei Times 266).

58. *See, e.g.*, New York Convention, *supra* note 45, art. V(2)(b).

ble under the law of the place of arbitration, the enforcement in Japan would not be contrary to public policy.”⁵⁹

With such seemingly strong institutional support for arbitration, it might appear surprising that arbitration, whether international or domestic, has been so unpopular in Japan. After all, case law strongly supports the conclusion that an arbitral agreement will be enforced, that parties will be allowed to construct their arbitral procedures in accordance with their own wishes, and that any resulting award will be granted enforcement absent serious irregularities. Thus, while there may be enough obstacles to litigation in Japanese courts to give the institutionalist argument traction in explaining Japan’s low litigation rates, these obstacles simply do not exist in the arbitral sphere.

Any alleged Japanese cultural aversion to arbitration will display itself quite clearly with respect to domestic commercial disputes through a low rate of arbitration between Japanese parties.⁶⁰ However, the analysis is more complex with regard to international arbitration. The popularity of arbitration in international business means that any alleged Japanese aversion to arbitration is unlikely, by itself, to result in significantly reduced rates of international commercial arbitration, as foreign parties can be expected to insist on arbitration clauses and to bring arbitrations when a dispute arises. More probative in this case, therefore, is the fact that, while the participation of Japanese parties in arbitrations not located in Japan is lower than would be expected given Japan’s economic promi-

59. See, e.g., Tateishi II, *supra* note 35, at 8-9 (quoting Nagoya District Court, Feb. 26, 1987, Showa 60 (wa) 239; Hanrei Times No 645 p 239; Hanrei Jiho No 1232 p 138 (addressing the Treaty of Friendship, Commerce and Navigation between Japan and the United States, *supra* note 51)).

60. Such low rates of domestic arbitration might also be explained by the traditionally long-term relationships that have characterized Japanese business. See generally KENICHI MIYASHITA & DAVID W. RUSSELL, *KEIRETSU: INSIDE THE HIDDEN JAPANESE CONGLOMERATES* (1994). But see Yoshiro Miwa and J. Mark Ramseyer, *The Fable of the Keiretsu*, 11 J. ECON. & MGMT. STRATEGY 170 (2002) (challenging the existence of the coordinated and collusive behavior alleged to be displayed by *keiretsu*). However, the lower rate of participation by Japanese parties in international commercial arbitrations, see *infra* note 61, in which such long-term relationships are less likely to occur, indicates that this characteristic of Japanese business cannot be the primary cause of Japan’s low arbitration rates in the world sphere.

nence,⁶¹ international commercial arbitration within Japan is almost non-existent.⁶²

This disparity can be explained in culturalist terms through an emphasis on the form in which arbitration takes place in Japan. Commentaries by foreign practitioners consistently criticize Japan's arbitral practice because of its strong emphasis upon settlement,⁶³ such as attempts by arbitrators to mediate, including via the use of *ex parte* communications.⁶⁴ Indeed, the practices described by these commentaries are not merely informally tolerated within Japan, but have been formally endorsed in the context of arbitration by Japan's judiciary.⁶⁵ The concern expressed by foreign practitioners about

61. This statement is based on analysis of statistics drawn from the ICC International Court of Arbitration Bulletin (on file with author; collation of statistics not performed by author).

62. "[O]nly twelve international arbitrations were filed with the JCAA in 1997, and only eight per year were filed in 1996 and 1995—for a total of only fifty-six international cases from 1995 to 1999. In comparison, the China International Economic and Trade Arbitration Commission (CIETAC) received 3,750 international cases during the same period, the International Chamber of Commerce (ICC) International Court of Arbitration received 2,307, the American Arbitration Association received 1,609, the Hong Kong International Arbitration Centre received 1,096, the Singapore Centre 237, the Korean Commercial Arbitration Board 204, and the Kuala Lumpur Regional Centre for Arbitration received 59 international cases." David A. Livdahl, *Cultural and Structural Aspects of International Commercial Arbitration in Japan*, J. INT'L ARB., Aug. 2003, at 375.

63. See, e.g., Robert T. Greig, *International Commercial Arbitration: A User's Report*, J. INT'L ARB., Dec. 1989, at 21; Ragan, *supra* note 25.

64. Greig, *supra* note 63, at 24:

Most Japanese arbitrators take it for granted that they are free to advise the parties to settle and to participate actively in the settlement process. Settlement initiatives by the arbitrators, including *ex parte* communications with the parties, are believed to be consistent with proper procedure and the impartiality of the arbitrator.

See also Kenji Tashiro, *Conciliation or Mediation During the Arbitral Process—A Japanese View*, J. INT'L ARB., June 1995, at 119. This practice is carried over from judicial practice in Japanese litigation. *See generally* Shunko Muto, *Concerning Trial Leadership in Civil Litigation*, 12 L. IN JAPAN 23 (1979). However, it is important to avoid any attempt to characterize this as in any way a significantly "Asian" approach to confrontational dispute processes, as these practices are also common in Germany. Perhaps not coincidentally, Japan has relied heavily upon Germany as a model for its own legal structure, as will be discussed *infra*.

65. For example, while the ability of arbitrators to decide *ex aequo et bono* has long been restricted in many countries unless expressly consented to by

the incorporation of such practices into Japanese arbitration offers a clear explanation for the apparent unwillingness of foreign parties to arbitrate in Japan,⁶⁶ and thus explains the low rate of international arbitration with Japan as the situs.⁶⁷

Therefore, while institutionalist theories of Japan's low litigation rates have difficulty explaining the parallel low rates of arbitration in Japan, a social-cultural theory can explain not only the fundamental fact of Japan's lower arbitration rates,

the parties, the Japanese Supreme Court explicitly stated in a 1928 decision that, "unlike a judgment of court, an arbitral award may be rendered not supported by legal provisions alone but from a viewpoint of impartiality and equity in consideration of the facts and circumstances." Tateishi II, *supra* note 35, at 15 n.37 (quoting Great Court of Cassation, Oct. 27, 1928, 7 Minshu 848). The continued support enjoyed by that view in Japan is demonstrated by its reaffirmation by at least one lower court as recently as 1993. Tateishi II, *supra* note 35, at 14 (quoting Kobe District Court, Sept. 29, 1993, 1517 Hanrei Jiho 128). While the 2003 Law now precludes *ex aequo et bono* decisions not based upon the consent of the parties, this restriction was directly imported from the UNCITRAL Model Law. 2003 Law, arts. 36(3), 28(3). Consequently, its adoption provides no information on contemporary Japanese arbitral practice, but merely displays the desire of Japanese legislators to conform Japan's written arbitration law to the current international standard.

66. Another potential factor in the unpopularity of arbitration in Japan in the twentieth century is the fact that it was generally believed that arbitrators in Japan could not order interim measures. No provision in Japanese law allowed interim measures to be ordered by an arbitrator and enforced by courts and, while the 1890 Law provided for court assistance to an arbitration, the request had to receive the support of both parties. 1890 Law art. 796. Moreover, in the only case in which a court considered the issue, the court was generally understood to have held that arbitrators lack the power to order interim measures. Takao Tateishi, *Japanese Interim Measures of Protection Available to Parties to Arbitration*, 42 JSE BULL. 1, 12-13 (Mar. 2001), available at <http://www.jseinc.org/en/bulletin/issues/Vol.42.pdf> [hereinafter Tateishi III] (quoting Tokyo District Court, Jul. 19, 1954, Showa 29 (mo) 6554; 5 Kakyu Minshu 1110, at 1125 (1954)). Tateishi, however, has noted that Japanese courts have long been willing to issue protective orders of their own in support of arbitration under the Law of Civil Conservation. *Id.* at 5-6.

67. Importantly, while this explanation may appear to invoke certain "institutional" Japanese arbitral practices, it is fundamentally a culturalist explanation as those terms were explained in Part II of this article. While these practices are described as creating an incentive for foreign parties not to arbitrate, that "obstacle" to arbitration consists primarily in objections to the form of arbitration rather than to the acceptability of the ultimate result. Thus it invokes the "internal" disincentive characteristic of a culturalist explanation, rather than the "external" disincentive characteristic of an institutional explanation. See *supra* Part II.

but also specific observable variations in those rates depending on the parties involved. A social-cultural emphasis on the need for compatibility between formal dispute resolution procedures and the social relations of the parties to the dispute is therefore able to offer a more complete explanation for Japan's low rates of litigation and arbitration than is an institutionalist focus solely on institutional disincentives. While institutional obstacles to litigation clearly have long existed in Japan,⁶⁸ a real explanation of Japan's low litigation and arbitration rates must ultimately attend to the realities of Japanese social relations and legal practice and not merely to the formalities of institutional obstacles.

Part IV of this Article will lay a foundation for a closer examination of the social-cultural view proposed here through a discussion of the dispute resolution procedures traditionally favored in Japanese society, which have consistently rejected the confrontational approach required by both litigation and arbitration.

IV. DISPUTE RESOLUTION PROCESSES IN JAPAN

This section presents a short overview of the history of official dispute resolution processes in Japan. While the goal of this Article as a whole is to develop and defend a social-cultural explanation of Japan's low litigation and arbitration rates, it must be acknowledged that there have long existed very substantial obstacles to litigation in Japan. It is therefore necessary to address this history in order to determine to what extent it does and does not support either an institutionalist or a culturalist theory.

As this section will demonstrate, it is overly simplistic to argue that the long prominence within Japan of non-confrontational dispute resolution processes reflects a clear cultural preference for avoidance of confrontation, as the official emphasis on mediation has often been enforced from above rather than voluntarily adopted by parties to a dispute. Nonetheless, the long-standing acceptance and endorsement of these procedures by the Japanese people suggests their conformity with the norms of dispute resolution actually operative

68. See generally Tom Ginsburg, Japanese Legal Reform in Historical Perspective (2002) (unpublished paper on file with author).

in Japanese society. Thus, while an historical survey cannot by itself establish the correctness of a culturalist explanation of Japan's low litigation and arbitration rates, this section will provide the necessary factual background for the theoretical discussion undertaken in Section V.

A. *Dispute Resolution and the Japanese "Mind"*

As discussed above, culturalist arguments have traditionally centered on the claim that Japanese people, whether regular citizens or sophisticated businesspeople, possess an aversion to confrontational dispute resolution so significant that they are willing to avoid confrontation even if confrontation is the only means to secure their goals. On this view, then, even businesspeople in Japan should be unwilling to assert their rights in a confrontational manner, since to do so would contradict strongly held cultural values of "harmony", "love" and "benevolence."⁶⁹

Many aspects of business in Japan might seem to support this understanding, such as the traditional emphasis placed upon long-term relationships between companies and the apparent willingness of Japanese parties to renegotiate even clear contractual language if a dispute actually arises.⁷⁰ However, arguments centering upon such observations often fail to adequately acknowledge the different behavior displayed by Japanese parties when the other party to a dispute or transaction is non-Japanese. That is, while it is broadly accepted that Japanese parties are, for example, willing to continue negotiations far longer than most Western parties,⁷¹ as Japanese companies have gained experience in dealing with Western businesses, their behavior in disputes with Western parties has changed significantly. Thus, while domestic business relationships in Japan may retain a significant element of vagueness, Japanese corporations dealing with Western parties increasingly place

69. Kim & Lawson, *supra* note 8, at 510.

70. David A. Livdahl, *Arbitration in Japan*, in INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA, at 4, 4-40 (Philip J. McConaughay ed., 2002) [hereinafter Livdahl, *Arbitration*].

71. See, e.g., Taniguchi, *Commercial Arbitration*, *supra* note 25, at 5; Livdahl, *supra* note 62, at 382 ("Certainly, the Japanese can be incredibly legalistic in the event of a difference of opinion as to the interpretation of a contract, but they tend to be more willing than Americans to spend time and effort to talk things through.").

great emphasis upon precise contractual language both after a dispute has arisen and during initial negotiations.⁷²

Traditional culturalist views are, therefore, plainly inadequate as an explanation of Japanese contracting and dispute-resolution behavior as displayed in contemporary Japan, since the reliance upon an alleged aversion to confrontation cannot explain the apparent disappearance of this aversion whenever Western parties appear in a relationship. It certainly remains true that Japanese parties are less willing than Western parties to invoke confrontational dispute resolution mechanisms, and thus that Japanese parties tend to be respondents in arbitrations rather than claimants.⁷³ However, the evolving willingness of Japanese parties to display more “contentious” behavior when dealing with Western businesses indicates that the traditional Japanese reluctance to litigate or arbitrate is at least partially related to expectations of reciprocal behavior from the other party to the dispute rather than to any innate inability or unwillingness to become involved in a confrontation.

Nonetheless, while prior versions of the culturalist argument may have over-stated the role of “innate” Japanese characteristics in Japanese dispute resolution practices, this does not justify a complete rejection of the culturalist approach. Rather, it merely indicates that an acceptable culturalist theory of Japanese “non-litigiousness” must pay adequate attention to the social context in which disputes arise rather than making blanket assertions about the behavior of all Japanese people in all disputes.

The following two sections of this Article will attempt to provide at least the basic factual background necessary for an informed discussion of Japanese “non-litigiousness” through a presentation of historical evidence relating to Japanese contracting behavior and dispute resolution procedures, includ-

72. Livdahl, *supra* note 62, at 382 (“Even commentators who conclude that Japanese domestic contracts are either purposefully ambiguous or unnecessary acknowledge that the Japanese are changing their behavior in the international business context.”).

73. Yasuhei Taniguchi, Speech at the Biennial Conference of the International Federation of Commercial Arbitration Institutions: Mediation in Japan and Mediation’s Cross-Cultural Viability (Oct. 24, 1997), *available at* <http://www.wipo.int/amc/en/events/conferences/1997/october/taniguchi.html> [hereinafter Taniguchi, IFCAI].

ing the process by which arbitration came to be officially incorporated into Japanese law.

B. *Edo-Era Dispute Settlement Processes*

The culturalist argument typically places a great deal of emphasis upon the village-based structure of pre-twentieth century Japan as the basis for Japan's alleged cultural aversion to confrontational dispute processes. While one can certainly question to what extent contemporary, highly-urbanized Japan can be seen as a mere continuation of Japan's feudal, village-dominated past, this section of the Article will attempt to demonstrate enough consistency in Japanese institutional practice to support attributing some form of continuity to Japanese attitudes regarding dispute resolution over this period. Certainly Japan's history must be invoked cautiously in any discussion of contemporary Japanese attitudes, but it should not be ignored completely. Nonetheless, as will be shown below, the view of traditional Japanese society often invoked by culturalist theorists, in which contracts are avoided and all disputes are willingly mediated, is simply inaccurate. Despite the prominence of non-confrontational dispute resolution processes, these were often imposed by force, and historical evidence indicates a full awareness on the part of ordinary Japanese citizens of both the nature of their rights and of their ability to enforce them through clear contractual language.

In Japan's Edo period, prior to the late-nineteenth century attempts to "modernize," eighty percent of Japanese people lived in small rural villages often geographically isolated from any large city.⁷⁴ As a result of this isolation, though Japan as a nation was by this point under the control of a single ruling group, villages were largely left to manage their own affairs so long as the village's tax obligations were met.⁷⁵

74. Dan Fenno Henderson, "Contracts" in *Tokugawa Villages*, 1 J. JAPANESE STUD. 51, 54 (1974) ("[D]uring the Edo period . . . eighty per cent of the population lived in villages."). For an excellent and hugely informative description of life in a traditional rural Japanese village, see Thomas C. Smith, *The Japanese Village in the Seventeenth Century*, 12 J. ECON. HIST. 1 (1952).

75. Henderson, *supra* note 74, at 62 ("As a matter of jurisdiction, the Tokugawa village was empowered and obligated by the feudal authorities to manage its own internal affairs, in accordance with its customary law with minimal intrusions from the law of the overlord (*hatto*) so long as the tax was

Moreover, migration between villages was rare,⁷⁶ meaning that village interactions took place within a group of individuals highly familiar with one another and with an assurance that further interactions would take place in the future. It is not surprising that, in such a context, villages generally evolved a system of consensual mediation in which great emphasis was placed upon resolving disputes in a way that would minimize future friction rather than merely determine which party was in the right.⁷⁷

This is not to suggest that a system of confrontational dispute resolution was not available if required, as a developed court system was maintained by the Tokugawa Shogunate.⁷⁸ However, such significant obstacles were placed in the way of ordinary citizens wishing to access this forum that it played little role in ordinary village life other than as a weak background threat.⁷⁹

For example, even if an individual was willing to go through the practical difficulties involved in the long trek to a city-based courthouse as well as the long delays involved in the litigation process, he could not bring suit at all without the official approval of the headman of his village.⁸⁰ This requirement made bringing any lawsuit a highly charged issue for power relations in the village. The headman would feel pressure to minimize the number of lawsuits reaching the court, lest his superiors outside the village decide that he was unable to perform his function of restraining dispute within the vil-

paid."); *see also id.* at 59 ("Conversely, the overlord's law, if precise and intensive in tax matters at the village level, was not intended to reach within the village in private civil matters; the village was to care for its own and see that its members performed in accordance with custom their duties to each other."). Indeed, Henderson adds that "[e]ven criminal matters were compromised at the village level and kept from becoming a 'public' matter with the overlords." *Id.* at 63.

76. Smith, *supra* note 74.

77. *See generally* Henderson, *supra* note 74.

78. *See generally id.*

79. *Id.* at 60 ("In a word, the system did not encourage civil petitions to superior authority above the village level. When such a petition did occur, it seldom went beyond the first instance (Deputy), making the Deputy the first, as well as final 'court' of appeal.")

80. *Id.* at 62 ("To encourage self-reliance, the overlord denied the village access to his courts or police for enforcement of civil law, except in cases verified by the headman's seal.")

lage. He would also experience significant pressure not to grant his approval to claims made against influential members of the village, a particular obstacle to litigation given that the position of headman was often associated with a specific family.⁸¹ As a result, the politics of the village would ensure that the least powerful residents of the village, those most likely to need the support of the courts, were precisely those least likely to receive it.

Even if the headman's permission was given, the court system itself imposed further obstacles. Substantive limitations were placed upon the kinds of suits that could be brought, including a wholesale rejection of suits on *nakamagoto* ("private matters").⁸² In addition, claims involving land received preferential treatment to general disputes, which in turn received preferential treatment to suits seeking the payment of money.⁸³ The latter were subject to a series of bans under which no money suits were permitted to be brought before the courts.⁸⁴

As an additional obstacle, court procedure was highly complex and strictly applied,⁸⁵ and plaintiffs were subject to

81. Smith, *supra* note 74, at 8.

82. Henderson, *supra* note 74, at 63 ("And, there were indeed 'private matters' (*nakamagoto*), including joint enterprises, theatrical promotions, and mutual financing (*mujinkin*), which were not deemed appropriate subjects for suit by Shogunate policy, and therefore were rejected at court.").

83. *Id.* at 70.

84. Tetsuji Okazaki, *Limitation of Legal Governance and Role of Private Institutions: Some Historical Examples*, para. 3 (2004), available at <http://www.rieti.go.jp/jp/events/04011601/pdf/okazaki.pdf> (describing *Aitai Sumashi Rei*, the ban on bringing commercial suits before the courts). The most likely explanation for these moves appears to have been a simple inability of the courts to handle the large number of claims being brought. Henderson, *supra* note 74, at 78; Okazaki, *supra*, at para. 3. In fact, these rules are best interpreted as an attempt to force settlement to take place outside the court system rather than as an attempt to deny the enforcement of money claims altogether. This is evidenced by the fact that, while these "Mutual Settlement Decrees" were in force, there were criminal penalties in place for individuals that had the ability to pay but refused to do so in reliance upon the plaintiff's inability to bring a court case. Henderson, *supra* note 74, at 78.

85. Disputes were assigned into a specific category before any facts were heard, based solely on the documentation in question. As a result, in order to avoid having the case scuttled by a bad assignment, great care was required in the formalization of documents. Henderson, *supra* note 74, at 76.

continual pressure to settle, including repeated adjournments to facilitate negotiations.

Unsurprisingly given this system, dispute resolution was indeed predominantly handled within the village, and as culturalist theorists argue, ordinary Japanese were most familiar with a consensual, mediation-based form of dispute resolution rather than the confrontational one central to the Western-style court-based system.

Rather than merely relying on the existence of a mediation-based system to establish that Edo-era Japanese must have preferred non-confrontational dispute processes, a culturalist argument can also appeal to the rationale offered for this system by the Shogunate. It could certainly be the case that ordinary citizens would have preferred confrontational dispute processes but were denied them by a self-interested government. However, the Shogunate government's proffered justification for its insistence upon this system offers an insight into the kind of rationale that ordinary citizens would have found acceptable. It is, therefore, highly revealing that the justification given by the Shogunate was not that it simply wished to delegate authority to the village level, but rather that voluntary settlement within the community was virtuous and desirable.⁸⁶ Whether this rationale is seen as a genuine expression of the Shogunate's official views, or a mere mask for continued domination, it nonetheless indicates that such a rationale was expected to be acceptable to general Japanese society, particularly when seen in the light of the Shogunate's clear desire not to become involved in regular enforcement actions at the village level.

While this history supports the culturalist view that traditional Japanese culture strongly emphasized consensual dis-

86. *Id.* at 77-78:

Actually the Shogunate rules seemed to rationalize the policy in terms of virtue. Private promises were based not only on voluntary acts but on interpersonal trust (*jitsui*), and problems of nonperformance should be handled on the same basis without involving the officials. From this position flowed also the specific principle that the Shogun's courts took cognizance of contract suits strictly as an avocation (*yogi*) and as a matter of grace, not because the parties had a right to a "day in court," hence the unctuous phraseology in the pleadings (*osorenagara*, etc.).

(citations omitted).

pute resolution and the maintenance of relationships, a further aspect of the legal practice of Japan's villages sharply contradicts the traditional culturalist argument. One of the most consistent features of the culturalist position has been that Japanese people dislike the use of precise contracts in transactions. Instead, it is argued that due to their culturally-based emphasis on relationships over strict delineations of rights and duties, Japanese people prefer vagueness and flexibility, leaving any complications to be addressed through negotiations at the appropriate time.

This is an important argument to address in the present context, because if such an aversion to contracts was indeed characteristic of Japanese interactions, it should certainly, by the culturalists' own admission, be found in Edo-era village life. Historical research, however, has indicated that this picture of contract avoidance in village life is simply inaccurate. Instead, as Dan Henderson has convincingly demonstrated, ordinary village life was intimately entwined with the creation of written contracts.⁸⁷

Through an extensive examination of original records, Henderson has demonstrated that while not all types of agreements were routinely put into written form,⁸⁸ those with special significance were. Moreover, and particularly importantly in the present context, agreements were put into writing with the explicit intention that they could subsequently be used as a reference to illustrate the parties' respective commitments.⁸⁹ While it is clear that to some extent a written form was adopted to facilitate possible future appeals to the court system,⁹⁰ the difficulty of gaining such an appeal makes it implau-

87. Indeed, on Henderson's view, contracting was so essential to ordinary village life that it can be regarded as a means of consensual governance. *Id.* at 59.

88. To have had all agreements in written form would have been remarkable even in a Western society of the same period, or indeed even in the United States today. Moreover, Henderson notes that "oral agreements there were, apparently even enforceable ones." *Id.* at 62 (citation omitted).

89. *Id.* at 55 (noting that these written agreements included "major kinds of the transactions, which the rural people of the period customarily reduced to writing as aids to future memories and guides for future behavior").

90. *Id.* at 56-57 ("Once agreement was reached, it was then documented in a more or less standard form The standardization reflected the growth of enforcement possibilities in the courts.") (citation omitted).

sible that this was the dominant motive for such a common practice.⁹¹ Rather, the agreements must be understood as primarily serving to bind the parties within the village by creating a record that could subsequently be used as a source of negotiation pressure if a dispute arose.

Certainly the emphasis in village life on negotiated settlement makes it likely that enforcement of such agreements was itself a subject of negotiation, but this should not be taken to indicate that the contracts themselves held no binding power. While their primary purpose may have been to give a significant boost to one party's negotiating position on some point in the event of a subsequent dispute rather than to ensure precise compliance, this itself is one of the primary purposes of written contracts. Indeed, few contemporary Western businesspeople would sign a contract expecting that, in the event of a dispute, they will receive everything promised rather than enter into a settlement. These early Japanese agreements, then, were indeed binding on the parties, even if they could not easily be enforced in court.⁹²

Moreover, Henderson's work makes clear that while there were some written agreements intended primarily to serve as a simple record of terms, many agreements were clearly written with the possibility of future court enforcement kept in mind. Indeed, Henderson notes that the driving force behind the increasingly standardized form of certain types of contract was the rigorous form requirements of the Shogunate courts. Likewise, in contracts that did not lend themselves to the adoption of a standardized form, "[t]o ensure performance there was great ingenuity in the documentation, and in creating devices for self-enforcement by the creditor or substitute performance by the debtor."⁹³

91. *Id.* at 63 ("[N]egotiated settlements documented by agreement (*wabijo* and *sumikuchi shomon*) for the future were such a predominant means of resolving conflicts that 'adjudication' occurred only as an extreme measure.") (citations omitted).

92. Western businesspeople, after all, would hardly deny that their contracts were "binding" merely because they recognized that any breach would require some renegotiation. The term "binding" merely states that the contract restricts the parties' freedom, not that the terms are "set in stone" and inflexible.

93. Henderson, *supra* note 74, at 65-66.

The historical evidence relating to the traditional Japanese approach to dispute settlement, then, is simply inconsistent with the classical culturalist insistence that contracts were disfavored and the clear delineation of rights and obligations avoided. Non-confrontational dispute settlement was certainly favored by both the government and individuals, but it took place within a context of full awareness of rights and duties. The distinctiveness of Japanese dispute settlement in this period existed not in an embrace of vagueness, but in a willingness to negotiate instead of fight.

C. *Non-Confrontational Dispute Resolution Processes in the Twentieth Century*

While the picture just presented of Edo-era village life does not fully align with the view of Japanese culture conventionally adopted by culturalist theorists, it does offer support for the argument that traditional Japanese culture strongly emphasized consensual settlement over confrontation. However, given the changes in Japan since the Edo era, some support must be offered for any assertion that this emphasis has been continued in a meaningful way to the present day.

It is certainly not difficult to find evidence of the continued prominence in Japan of non-confrontational dispute resolution mechanisms. However, it is worth providing at least some detail, as the prominence and variety of these systems is indeed notable.

With the advent of the Meiji era in 1868, Japan sought to align its legal processes, at least formally, with those of Western countries. While initial discussions centered upon the adoption of a French-based code of civil procedure, ultimately the German code was found more suitable for already-existing Japanese norms.

Prior to the adoption of the German-based code in 1890, a new court-based mediation system was instituted. Adopted in 1875, *kankai* was based upon the French *conciliation préliminaire*.⁹⁴ However, a new procedure does not, of course, automatically change the behavior of the actual participants in the legal system, and *kankai* operated in a manner similar to

94. Taniguchi, IFCAL, *supra* note 73.

Edo-era litigation, with strong pressure placed upon parties to reach a settlement.⁹⁵

More notable, then, were the procedural rules adopted in the 1884 *Kankai Ryakusoku* (“Conciliation Summary Rules”).⁹⁶ Under these new rules, each magistrate’s court was required to have available two assistant judges with the responsibility of assisting parties in *kankai*. Moreover, though *kankai* is often depicted solely as an oppressive means of forcing settlement, these new rules required that one of the assistant judges be a respectable member of the local community. Such a requirement certainly doesn’t eliminate pressure on parties to settle, but it indicates a clear desire by the Japanese authorities that settlements be accepted by the parties rather than simply imposed.⁹⁷ Moreover, it indicates that parties were more likely to accept pressure to settle when such pressure came from a respected member of their community than when it came from non-local judicial officials.

With the adoption of the German-based Code of Civil Procedure in 1890, *kankai* was replaced with a system allowing both in-court mediation before trial and mediation during trial, thus instituting the process that has continued in Japan to the present day.⁹⁸ Civil and commercial mediation were separated and, as previously discussed,⁹⁹ the Code also included Japan’s first “arbitration law,” giving rise to Japan’s first arbitration before the end of the nineteenth century.¹⁰⁰

Further changes to Japan’s non-confrontational dispute resolution processes occurred in the early 1920s, when economic problems led to an increasing number of disputes. To address this problem, the government created a series of independent, court-related mediation systems specializing in par-

95. Yasunobu Sato, *Cultural Conflict in Dispute Processing under Globalisation: International Cooperation for Legal Aid in Asia* 12 (2000), <http://www.gsid.nagoya-u.ac.jp/project/apec/outcomes/paper00/36/Sato.pdf>.

96. *Id.* at 13.

97. Takao Tateishi, *Mediation as a Pre-Stage to Arbitration: Is it the Way Ahead of ADR in Japan?*, 41 JSE BULL. 17, 18-19 (2000) [hereinafter Tateishi IV] (emphasizing that the parties were not legally bound by the settlement agreement). However, given the court’s involvement in the process, a party subsequently rejecting the settlement and attempting to litigate would be likely to receive less than favorable treatment from the court.

98. Taniguchi, IFCAL, *supra* note 73.

99. *See supra* p. 40.

100. Tateishi IV, *supra* note 97, at 19.

ticular subject matters that were seen as requiring quick resolution, such as land-lord tenant disputes (1922), commercial disputes (1926), and loan-based claims (1932).¹⁰¹ One commentator has argued that the creation of these special dispute resolution boards was required by contemporary social changes that had resulted in a loss of individuals with sufficient authority to serve as mediators.¹⁰²

Japan's legal system was famously overhauled yet again after World War II, when an American-based legal structure was put in place. As part of these changes, the dispute resolution system was altered with the passage in 1951 of the Law of Civil Conciliation.¹⁰³ This new law consolidated civil and commercial mediation into a single system¹⁰⁴ and set up conciliation commissions within the courts as a means of mediation before trial within the court system.¹⁰⁵ However, the American authorities saw no need to eliminate or minimize Japan's emphasis on mediation over litigation, viewing this as not inconsistent with the norms of the new legal system.¹⁰⁶

Since the adoption of the new American-based legal system, Japan's emphasis on mediation has not only continued but expanded. Indeed, since the 1970s, private enterprise has taken a central role in the creation of non-confrontational dispute systems, the most famous being the Automobile Accident

101. Taniguchi, IFCAI, *supra* note 73.

102. *Id.* ("What was mediated by a neighborhood landlord had to be taken care of by the court through mediation.").

103. It has been argued that one reason Japan took so successfully to the imposition of Western-style law was that the local system was able to adjust the law to suit local conditions, such as through different interpretations of human rights norms than would be given in an American court, even though America was the source of the terminology. Philip Alston, *Transplanting Foreign Norms: Human Rights and Other International Legal Norms in Japan*, 10 EUR. J. INT'L L. 625, 632 (1999):

In the process of imposing an alien constitution on Japan, the ability of the Japanese Government to insist on the translation of terms signifying potentially radical reforms, such as 'the people' and 'sovereignty,' in ways that made their meaning much less problematic than would have been apparent in the English version, was crucial.

104. Excluding family disputes, which were now mediated by the newly created Family Court. Taniguchi, IFCAI, *supra* note 73.

105. Tateishi IV, *supra* note 97, at 19. There are still some discrete areas that have separate boards controlling conciliation, e.g. labor and construction. *Id.* at 19 n.12.

106. Taniguchi, IFCAI, *supra* note 73.

Dispute Settlement Center.¹⁰⁷ Similarly, Japanese Bar Associations have recently begun creating mediation centers, offering the participation of lawyers in the role of mediator.¹⁰⁸

Nonetheless, as already acknowledged, a mere demonstration of the long-standing Japanese use of non-confrontational dispute resolution mechanisms cannot by itself support the conclusion that there is anything distinctly “non-litigious” about Japanese culture. Instead, some attempt must be made to offer a convincing explanation for this dominance in a way that does not rely upon appeals to governmental policy or on the simple unavailability of practical alternatives. In the Edo era, as I discussed *supra*, even individuals wishing to bring a case to court were faced with such significant obstacles that few would have attempted to do so. Institutionalists assert, based upon the same history, that contemporary Japan’s low litigation rates can be attributed predominantly to institutional blockages. Thus, it is necessary to add some detail to the social-cultural picture that is being defended here. After all, vague invocations of “culture” add little to a discussion, and often serve no purpose greater than hiding the inability of the writer to construct a defensible explanation for the observed phenomena.

The next two Parts of this Article will therefore attempt to present the foundations for a theory of Japanese non-litigiousness, drawing from the work of Eugen Ehrlich and Takeyoshi

107. *Id.* (“The private sector also created some systems with or without the support of the government. Most successful is the Automobile Accident Dispute Settlement Center established in a joint effort by insurance companies, academics and willing members of the bar.”). These initiatives have not been entirely business-driven, however, as the Japanese government itself actively promotes such efforts. For example, after the passage of the 1993 Product Liability Law, as part of Japan’s renovation of its legal system, the government actively encouraged manufacturers’ associations to set up out-of-court dispute settlement mechanisms. Taniguchi notes that, as a result, most industries have a centralized location for the receipt of claims, with attorneys most commonly acting as mediators. *Id.*

108. *Id.*; see also Tateishi IV, *supra* note 97, at 21:

According to the statistics of the Arbitration Center at the Tokyo Lawyers’ Association (No 2), it accepted 1,295 applications for mediation from its inception in March 1990 until the end of December 1999. In 785 cases the other party responded, with 440 cases settled and arbitral awards rendered in only 29 cases (the rest were pending).

Kawashima. The position developed will then be subjected to the arguments put forth by proponents of the institutionalist view to illustrate that the social-cultural position here advanced offers a more persuasive explanation than would a pure institutionalist theory. The Article will then conclude with an examination of Japan's new arbitral regime, including a discussion of what effect the social-cultural theory here defended predicts this new regime will have upon arbitration in Japan.

V. A PROPOSED SOCIAL-CULTURAL EXPLANATION

Part IV has demonstrated that Japan has long emphasized non-confrontational dispute resolution mechanisms. However, this history by itself cannot provide an explanation for Japan's low litigation rates. As the institutionalists argue, Japanese people may traditionally have avoided litigation for the simple reason that other forms of dispute resolution have long been encouraged, with consequent disincentives to litigate. In order to rebut this response, Part V develops the social-cultural theory, which, as argued throughout this Article, provides the most convincing explanation for Japan's historically low rates of litigation and arbitration. Section A develops a general account of the relation between law and society based upon the work of Eugen Ehrlich, a turn-of-the-twentieth-century legal theorist. Section B relates Ehrlich's work to the scholarship of Japanese legal theorist Takeyoshi Kawashima, demonstrating how Kawashima's work can be understood as an application of Ehrlich's thought to the specific social and historical facts of Japan. Section C then presents a social-cultural explanation of Japan's low litigation rates that gives full recognition to the complexity of interactions between society and the law.

A. *The Thought of Eugen Ehrlich*

[I]f English law should be introduced anywhere on the Continent of Europe, the family, the corporations, ownership, the real rights, and the contracts would remain what they had been until then; and even though they should be adjudged according to English law, they would not become English legal re-

lations. Legal relations are created by society, not by legal propositions.¹⁰⁹

The “Free Law” movement arose in German-language jurisdictions in the late nineteenth century largely as a response to the codification movements then predominating in Europe. With the propagation of elaborate written codes, great emphasis came to be placed upon the idea that judges should be strictly bound by written legal provisions and lacked the authority to rule based on natural law or social norms. The Free Law movement explicitly rejected this conception of the judicial role, arguing instead that judges should concern themselves not just with the technical requirements of the law, but also with justice and the social realities underlying the cases before them.¹¹⁰

It is Eugen Ehrlich, however, who provided the version of Free Law theory most useful in the current context due to his recognition not only of the central role of social relations in determining the true content of the law, but also of the complex network of such relations, within which a single individual may exist.¹¹¹ This section will explicate Ehrlich’s ideas on

109. EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 356 (Walter L. Moll trans., Harvard Univ. Press 1936) (1913) [hereinafter EHRLICH, *FUNDAMENTAL*].

110. JAMES E. HERGET, *CONTEMPORARY GERMAN LEGAL PHILOSOPHY* 111 (1996) (“[Free Law theorists] maintained that abstract doctrine did not determine cases, that law could not be understood in a vacuum, that judges had to take into account social, psychological, and economic factors in making their decisions.”). In this respect, the Free Law movement served as a clear fore-runner to American Legal Realism. See, e.g., James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987). Ehrlich, for example, describes as “judicial sophistry” the practice of judges appearing to rely on statutes. In reality, he argues, cases are too varied in their factual and legal details to be determinable through appeal to statutory law. Consequently, such appeals by judges must be illusory and merely covering the creation of law by judges. Eugen Ehrlich, *The Sociology of Law*, 36 HARV. L. REV. 130, 140-41 (1922) [hereinafter Ehrlich, *Sociology*]. For a comparison specifically of the work of Eugen Ehrlich and Roscoe Pound, see Assaf Likhovski, *Czernowitz, Lincoln, Jerusalem, and the Comparative History of American Jurisprudence*, 4 THEORETICAL INQUIRIES IN L. 621 (2003).

111. For an overview of Ehrlich’s theory from late in his life, see Ehrlich, *Sociology*, *supra* note 110 (discussing the nature and sources of law) and also see Eugen Ehrlich, *Judicial Freedom of Decision: Its Principles and Objects*, in SCIENCE OF LEGAL METHOD 47 (Ernest Bruncken & Layton B. Register trans.,

these matters as a general theoretical foundation for the Japan-specific discussion to follow.

In Ehrlich's view, the term "law" is properly applied not just to the pronouncements of legislators and judges, but also to the social norms that control ordinary interactions.¹¹² That is, for the subject of "law" to have the broad interest and relevance that it has attained, it cannot consist solely of the formal pronouncements of courts and governments. It is, after all, quite possible to conceive of a nation in which the judicial and legislative systems are so divorced from the realities of everyday social life that official pronouncements by those bodies would have little effect.¹¹³ In such a case, it would remain possible to discuss "the law" solely in terms of the inert pronouncements of the official "legal" bodies, but that discussion would have nothing more than a formal similarity to legal discussions as they actually occur in contemporary law-based societies. That is, discussions of "law" are best understood as concerning not merely the pronouncements of official "legal" bodies, but instead as a specific form of social ordering in which such bodies conventionally have a central role.¹¹⁴ The

MacMillan 1921). See generally P. H. Partridge, *Ehrlich's Sociology of Law*, 39 AUSTRALASIAN J. PHIL. 201 (1961).

112. Partridge, *supra* note 111, at 208 (quoting Ehrlich):

Wherever the legal norm attracted the attention of the sociologist . . . it has always been found in the company of other social norms. Nevertheless, there can be no doubt that there is an unmistakable difference between it and the non-legal norms. It is as impossible to deny the existence of this difference as it is difficult, in view of the present state of the science of law, to indicate precisely wherein it consists.

Ehrlich's own manner of distinguishing between law and other social rules is to emphasize an alleged psychological difference attached to their respective transgressions, emphasizing specifically that something obligatory, rather than merely expected, has not been done. *Id.* at 208-09. Partridge rightly expresses skepticism at the adequacy of this approach, but it will not be addressed here, as it is not an element of Ehrlich's work upon which this article relies.

113. Ehrlich memorably states that "[a]n oriental despot can, if he pleases, level a city to the earth or condemn a few thousand human beings, but he cannot introduce civil marriage into his kingdom. . . . It is not enough that a statute is passed; it must be capable of being enforced." Ehrlich, *Sociology*, *supra* note 110, at 137-38.

114. Ehrlich argued that it was possible to have law without any form of official legal system, "if only for the reason that society is older than Legal

consequence of this recognition of the breadth of law is that “the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.”¹¹⁵

However, Ehrlich did not constrain himself to simple invocations of the importance of ordinary social relations to the true content of the law, but provided a well-developed conception of this interaction. To this end, Ehrlich created a distinction between what he termed a “law” and a “legal provision.”¹¹⁶ The former were those social norms that actually controlled ordinary social interaction, while the latter was “an instruction framed in words addressed to courts as to how to decide legal cases (*Entscheidungsnorm*) or a similar instruction addressed to administrative officials as to how to deal with particular cases (*Verwaltungsnorm*).”¹¹⁷

Legal provisions, Ehrlich noted, are often isolated from the reality of everyday social interactions, and even in the most “legalistic” society will necessarily be an incomplete catalogue of the norms that govern such interactions. Moreover, even when a legal provision can indeed be seen as governing a social interaction, it usually does not do so via the threat of legal punishment for its breach, but rather because it displays a social norm to which the individuals in question subscribe. As Ehrlich noted, “the order of human society is based upon the fact that legal duties are being performed, not upon the fact that failure to perform them gives rise to a cause of action.”¹¹⁸

For Ehrlich, this greater importance of social norms over legal sanctions, even where a legal provision is indeed applicable, indicates the importance of what he terms the “living law,”¹¹⁹ which exists “in contradistinction to that which is be-

Provisions and must have had some kind of ordering before Legal Provisions came into existence.” *Id.* at 132.

115. EHRlich, *FUNDAMENTAL*, *supra* note 109, at Foreword.

116. Ehrlich, *Sociology*, *supra* note 110, at 132.

117. *Id.* at 132.

118. EHRlich, *FUNDAMENTAL*, *supra* note 109, at 23. For example, if it was necessary to rely upon the possibility of legal sanctions to ensure the return of borrowed money, small amounts would never be lent. Partridge, *supra* note 111, at 205.

119. Although this should not be understood as meaning that only the living law is relevant. Partridge, *supra* note 111, at 213 (“Norms for decision and legal propositions eke out the ‘living law’ and may often transform it; they provide norms and rules for dealing with trouble situations concerning

ing enforced in the courts and other tribunals. The living law is that which dominates life itself even though it has not been posited in legal propositions.”¹²⁰ As a result, a judge applying the law to a dispute should not merely identify the relevant legal provisions and apply them to the facts, but must instead identify the “laws,” the actual governing social norms, and apply these to resolve the dispute.¹²¹

The central importance of the “living law” does not mean that mere “legal provisions” are irrelevant. While some proponents of Free Law insisted that judges should apply the relevant social rules even if they were inconsistent with the written law,¹²² Ehrlich rejected this view. Instead, according to Ehrlich, a judge may reject the application of the “living law” and instead reach a decision by applying a legal provision, by generalizing from other similar situations, or even by formulating a guiding proposition himself while reasoning through the case.¹²³

Ehrlich’s explanation for this ongoing relevance of legal provisions, even in the face of apparently conflicting “living law,” provides an element of the understanding of the interac-

which ‘living law’ has nothing to say; in this and many other senses ‘lawyers’ law’ plays an important creative role.”).

120. EHRlich, *FUNDAMENTAL*, *supra* note 109, at 493.

121. As a result, a judge attempting to adhere to Ehrlich’s theory could not merely listen to the factual accounts given by the parties and then apply the law as she understood it. Rather, she must gain an understanding of the factual situation in which the dispute arose, and particularly of the nature of the relationship between the disputing parties. An account of Ehrlich’s own description of this process indicates the extent of this requirement:

The investigator of the living law among the peasant communities is to begin with the older persons whose experience is greater. He must distinguish carefully between the actual customs by which the people live and their moral views, which may be very different from their actual customs, but which they are likely to give as abstract propositions. . . . In an industrial neighborhood, Professor Ehrlich would urge the investigator to make an exhaustive study of the organization of the different forms of manufacturing and business which are carried on there.

William H. Page, *Professor Ehrlich’s Czernowitz Seminar of Living Law*, in *READINGS IN JURISPRUDENCE* 825, 831 (Jerome Hall ed., 1938).

122. For example, Hermann Kantorowicz argued that judges should even ignore a clear statute if it contradicted the “just law.” Jacob Dolinger, *A Civil Law Lawyer Looks at a Common Law Lawyer’s Views on Civil Law: John Henry Merryman’s “The Civil Law Tradition,”* 17 *BROOK. J. INT’L L.* 557, 562 (1991).

123. Partridge, *supra* note 111, at 210.

tion between law and social relations that will be used in this Article to explain Japan's comparatively low litigation rates.

On Ehrlich's account, legal provisions themselves, whether legislation or judicial decisions, are ultimately derivative of the social norms embodied in the "living law."¹²⁴ Judicial decisions, of course, only emerge from concrete cases, and hence are inherently dependent on social interactions, which are in turn governed by social norms.¹²⁵ However, Ehrlich also emphasizes that the mere existence of a judicial decision does not create a legal provision; rather, some further level of connection to social norms must exist. Judicial decisions create legal provisions only insofar as they create a norm for future judicial decisions.¹²⁶ However, since most judicial decisions are by minor courts addressing matters of little general importance, they are largely ignored and no legal provision results.¹²⁷ Consequently, only those disputes that are based upon a prominent social norm will occur often enough to be addressed in sufficient detail for a legal provision to develop. What judicially-decided legal provisions exist is therefore fundamentally determined by the social norms existing in the society at large.¹²⁸ Laws, in the narrow sense, may be decided

124. In Ehrlich's words, "[t]he Legal Provision is thus dependent upon society both for its existence and for its content." Ehrlich, *Sociology*, *supra* note 110, at 142.

125. "Only state institutions are created through statutes, but the great mass of Legal Provisions are made not through statutes but in judicial and juristic law, and not through forethought but through afterthought; for in order that the judges and jurists may become occupied with a juristic dispute, the institution involved must already have its existence in life and must have given rise to the dispute." *Id.* at 139.

126. "Thus those persons who master the learning of the [judicial] decisions achieve a great influence in the development of the law; they become jurists who, occasionally as judges, but more often as writers of opinions and counsellors, determine the course of decisions. In this way judicial decisions become Legal Provisions for they contain the norms for the decision of future cases." *Id.* at 134-35.

127. It might be thought that the availability of decisions on Westlaw and LEXIS undermines this position somewhat. But while decisions of, for example, the Federal District Court of North Dakota may well be cited by a New York court if nothing else is available, the reality is that it will not be treated as in any way establishing a norm. It will only have an effect on the court's decision insofar as it is persuasive, rather than because it has any normative force.

128. Ehrlich's own description of the process emphasizes academic commentary in a way that is more accurate for civil law than common law. Ehr-

and imposed by trained legal professionals, possibly attempting a strict application of detailed legal codes, but the content of their decisions is fundamentally decided by social norms developed through the interactions of ordinary people.

Ehrlich reiterates this view in his discussion of legislative acts, which he argues should also be understood as ultimately derivative of pre-existing social norms. Legislatures do not work at random, but instead only legislate in response to social conditions that have reached a high enough degree of importance to be worth addressing.¹²⁹ Thus, a legislature adopting a rule is not addressing a merely academic issue, but is reacting to a situation that has already arisen in society.¹³⁰ On Ehrlich's view, then, legislatures are best understood not as laying down completely new rules to be followed by regular citizens, but instead as adopting solutions to problems forced upon them by the realities of those citizens' social interactions. Since that interaction is itself controlled by norms indepen-

lich, *Sociology*, *supra* note 110, at 141 ("Finally, it must be borne in mind that Legal Provisions are naturally lacking for new legal situations because it necessarily takes some time until a sufficient number of legal disputes involving them reach the point of judicial decision and until they are forced upon the attention of juristic writers.").

129. *See id.* at 140 ("This need is served in large measure in our times through legislation. But this comes about as an afterthought, after the thing has become obvious enough to set the legislative machinery in motion."). Indeed, Ehrlich argues that the primary generator of legal provisions can in many cases be seen as decisions by judges. For example, he claims that even the "Codes" generated throughout Europe in the nineteenth century are best understood as primarily cataloguing prior judicial decisions.

They are chiefly collections of already existing juristic law. Even in those cases in which their promulgators attempted to find a solution for a particular case which had never yet been decided, a rather unusual occurrence, they were only doing what jurists had long been in the habit of doing. Thus they gave us chiefly juristic law. . . . The statute books have, of course, the form of state-made statutes, but so far as their content is concerned, they are almost entirely works of juristic law.

Id. at 136.

130. Ehrlich does, though, note an important exception, in which the law is not traceable back to general social interactions, namely the administrative laws through which the state controls its officials. *Id.* at 137 ("State law consists for the greater part of rules of administration (instructions addressed to administrative officials). Still it includes also rules of decision (instructions to the judge as to how to proceed and how to decide in litigation).").

dent of legislative action, the legal provisions created by legislatures are properly seen as also being derivative of pre-existing social norms.¹³¹

Nonetheless, while Ehrlich certainly emphasizes the priority of social norms over legal provisions, it is important to recognize that he does not regard the influence as unidirectional. He recognizes, for example, that legislative and judicial decisions can have a central role in "clearing the path" for newly evolving social norms, through the removal of institutions that no longer function well in society or by granting early recognition to the new norm.¹³² Moreover, norms can flow directly from the structure and actions of the legal system "to the extent that it protects, gives form and shape to, modifies, or perhaps abolishes" certain social norms.¹³³ For Ehrlich, the relation between legal provisions and social norms is not one of the complete subjugation of the former to the latter, but is rather a complex counter-influencing.

One additional element of Ehrlich's thought is necessary to acknowledge, as the discussion of Ehrlich's theory thus far has merely invoked "social" norms without clarifying the kinds of social groupings that Ehrlich is considering. After all, each social grouping has norms, even if only as basic as "one

131. As a practical matter, the consequence of the subjugation of both judicial and legislative decisions to the prior existence of social norms is that these norms are properly seen as controlling the interpretation of legal provisions created by legislative acts and prior judicial decisions. *See id.* at 142. Where a legal provision explicitly precludes a judge from reaching a particular holding, the judge is indeed bound, and should not reject that provision regardless of the particular social reality he is confronting. However, even in such cases, the social reality is never ignored, as the unavoidable vagueness and holes in legal provisions mean that some degree of interpretation will always be required, and that interpretation must be done in accordance with the social norms evolved in the particular association in question. *Id.* at 143. As a result, while two communities that are both subject to the same legal system, but that operate under different social rules, will always have the same legal provisions applied to them, the reality of the application may differ. Indeed, interpretation of those provisions will lead to different understandings of the meanings of the provisions in the contexts of those differing communities. *Id.*

132. EHRlich, *FUNDAMENTAL*, *supra* note 109, at 185.

133. *Id.* at 197. Moreover, Ehrlich acknowledges that ordinary social interactions simply cannot not create the abstract, generalized rules that underlie the effectiveness of law. Partridge, *supra* note 111, at 215.

doesn't cheat at chess club." Ehrlich, however, takes a very broad view, acknowledging the relevance of "all sorts of organizations, including those which are recognized by the law, and, indeed, those which are disapproved of by the law."¹³⁴

Ehrlich, then, did not maintain that there was any uniform, generalized living law governing all members of society. Rather, whatever society-wide binding norms there may be, the living law also consists of the rules of the various social groupings in which each individual is involved. Consequently, two individuals living within the same nation may nonetheless live under starkly different laws due to the differing social groupings to which they belong. Even more specifically, a single individual will be subject to different social norms depending on her social relationship to the individual with whom she has a dispute.

The theory of law developed by Ehrlich therefore includes two elements that can be used to address Japan's historically low rates of litigation. Firstly, the pronouncements of courts and legislatures will only have real relevance where the norms governing those pronouncements were developed in the kind of legal-social give-and-take described by Ehrlich rather than artificially installed by governing bodies or legal elites. Secondly, society, insofar as it is relevant to law, is not a uniform, cohesive single entity consisting of all individuals subject to the jurisdiction of the courts, but is instead a complex network of organizations of varying size, governed by a great diversity of norms. The following section will address these elements in the context of the culturalist theory of Takeyoshi Kawashima.

B. *The Thought of Takeyoshi Kawashima*

Takeyoshi Kawashima is unquestionably the most famous proponent of the culturalist explanation for the prevalence of non-confrontational dispute resolution mechanisms in Japan.¹³⁵ However, his own view on the litigiousness of contem-

134. Eugen Ehrlich, quoted in Page, *supra* note 121, at 825.

135. Importantly, although Kawashima is most famous for his sociological work on "legal consciousness," he actually adopted a wide variety of approaches through the course of his career. See generally Yoshiyuki Matsumura, *The Works of Takeyoshi Kawashima*, 22 LAW & SOC'Y REV. 1037 (1988).

porary Japan was ambiguous, veering from assertions that ordinary Japanese lacked any real connection to the law¹³⁶ to the claim that only “traditional” Japanese were non-litigious, and contemporary Japan little different from a Western society in this regard, with even mediation approached as merely a way to secure legal rights rather than as a process of negotiation.¹³⁷ This section of the article will introduce Kawashima’s own culturalist views, addressing them in the context of the prior discussion of the work of Eugen Ehrlich.

With the opening up of Japan to the outside world in 1854,¹³⁸ Japan began a process of “Westernization” that ultimately led to the adoption of Western-inspired Codes in the 1880s. Although both the French and the German legal systems were highly influential in the formation of the new legal system,¹³⁹ by the time the Civil Code was adopted in the 1890s the influence of the German legal system had become dominant.¹⁴⁰ Similarly, although both a French Law Section and a

For an example of Kawashima’s statistics-based empirical work, see Takeyoshi Kawashima, *Individualism in Decision-Making in the Supreme Court of Japan*, in *COMPARATIVE JUDICIAL BEHAVIOR: CROSS-CULTURAL STUDIES OF POLITICAL DECISION-MAKING IN THE EAST AND WEST*, at 103 (Glendon Schubert & David J. Danelski eds., 1969).

136. Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY*, at 41, 43 (Arthur Taylor von Mehren ed., 1963) [hereinafter Kawashima, *Dispute*].

137. “Mediation today is no longer a means for *avoiding* the legal settlement of disputes; it has become a substitute for the lawsuit, a way of *achieving* a legal settlement at less cost in time and money.” Takeyoshi Kawashima, *Some Reflections on Law and Morality in Contemporary Societies*, 21 *PHIL. E. & W.* 493, 498 (1971) [hereinafter Kawashima, *Reflections*].

138. The Treaty of Kanagawa was signed on March 31, 1854. It was then followed by treaties with Britain, France, Russia and Holland. MERVILL DEAN, *THE JAPANESE LEGAL SYSTEM* 57 (2nd ed. 2002) (“Extracted in the face of overwhelming military power, these ‘unequal treaties’ not only set up a system of unilateral customs agreements, but established the principle of extraterritoriality for the Western nations, to be administered through consular jurisdiction.”). The famous “black ships” had arrived on July 8, 1853. *Id.* A smaller fleet of American ships had arrived in Japan in 1846, but did not achieve Perry’s success. *Id.* at n.11.

139. The English legal system also had a role, though a lesser one. *Id.* at 62.

140. The Code originally proposed was French-inspired. However, it was rejected and a German-inspired Code ultimately adopted. *Id.* at 66. For an account of the long-term and continuing influence of German legal thought on Japanese legal thought, see Junichi Aomi, *The Main Currents of Legal Phi-*

German Law Department were set up at the Imperial University in the 1880s,¹⁴¹ German scholarship ultimately came to dominate Japanese legal academia.

Arguably the greatest force in importing German ideas into Japanese legal thinking was Theodor Sternberg, a German appointed at the University of Tokyo in 1913 to teach “German Law.”¹⁴² Remaining at the University until his death in 1950, Sternberg taught several of the most important Japanese legal thinkers of the twentieth century, including Takeyoshi Kawashima.¹⁴³ Sternberg was a proponent of the Free Law movement, and, according to Kawashima, “did not teach civil or commercial law article by article, but underlined the elements and their social, economic and comparative nexuses.”¹⁴⁴ Sternberg’s impact upon Kawashima is not difficult to discern, as Kawashima’s own work famously distinguishes between the technicalities of law and social realities. Additionally, Sternberg’s teachings undoubtedly served as a foundation for Kawashima’s known appreciation of the work of Eugen Ehrlich.¹⁴⁵

A useful introduction to Kawashima’s ideas comes from his likening of Japanese society to a “*denka no hoto* (a sword handed down from ancestors as a family treasure), not for actual use, but for symbolic effect.”¹⁴⁶ That is, while Kawashima acknowledges that law was indeed relevant in traditional Japanese interactions, he maintains that it was not directly used by

losophy in Japan, 44 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 557, 557-558 (1958) (“One of the salient features of this process of Westernization was the predominant influence of German influence in almost all branches of higher learning. This was, and still is, true of law and medicine in particular. . . . Indeed, many of the articles on lego-philosophical subjects appearing in Japanese law journals are hardly translatable into any foreign language except the German.”).

141. The French Law Section was established in 1885, and the German Law Department in 1887. English law had actually been taught there since the beginning of the Meiji era. DEAN, *supra* note 138, at 69-70.

142. For an overview of Sternberg’s work and his role in the development of Japanese law, see Mario G. Losano, *Il Diritto Libero di Theodor Sternberg dalla Germania al Giappone*, 28 SOCIOLOGIA DEL DIRITTO 115 (2001).

143. *Id.* at 133.

144. *Id.* (translation by author).

145. Matsumura, *supra* note 135, at 1037 (“Initially, [Kawashima] was inspired by the theory of living law (*das lebende Recht*) associated with Eugen Ehrlich.”).

146. Kim & Lawson, *supra* note 8, at 505.

individuals in the ordering of their personal interactions. Rather, laws served merely to display certain principles as normatively desirable, with the actual implementation of those principles left to the individuals involved in any given interaction. Kawashima's rationale for this position is that law is fundamentally the product of power:¹⁴⁷

The basic determinants for the differentiation or emergence of "law" I would presume are: (1) the growth of the power of the political ruler, which enables him to interfere with and enforce his control upon certain spheres of the social life of his subordinates; (2) functional decay of the means of social control on the level of smaller social units such as families, villages, guilds and other professional groups, religious organizations, etc.; and (3) the

147. Kawashima's view of law was as merely one set of norms used in the ordering of society, similar to but distinct from morality, which he divided into "subjective morality" and "objective" morality. For Kawashima:

[Objective] [m]orality" refers to norms of conduct whose legitimacy is justified on the grounds that they are "good" or "right" or "necessary for social welfare or social life." Such legitimacy encourages the members of a particular society to perform acts prescribed by these norms and alleviates psychologically the social pressure or pain deriving from them.

Kawashima, *Reflections*, *supra* note 137, at 493. On the other hand, "subjective morality" refers to those norms of conduct that have been internalized by an individual to such an extent that observance results "not through the compulsion of sanctions imposed upon the actor, but spontaneously by the 'autonomous' decision-making (motivation) of the actor exercising his own 'free will' vis-à-vis what the moral norms postulate." *Id.* Kawashima himself cites William Sumner, Max Weber, and Theodor Geiger for this picture of morality. However, any legal theorist will undoubtedly be struck by the similarity between this characterization and the picture of law presented by H.L.A. Hart in *THE CONCEPT OF LAW* (1961). (Hart himself denied being influenced by Weber, but his close acquaintance with at least some of Weber's work has been clearly demonstrated. NICOLA LACEY, *A LIFE OF H.L.A. HART* 230 (2004). Indeed, Nicola Lacey has argued that Hart's annotations in a book by Weber "suggest strongly that there was a Weberian undertow in *The Concept of Law*." *Id.*)

Interestingly, Kawashima insisted that traditional Japan had no conception of morality, but operated on a shame basis, in which social rules were followed simply because they were rules, with no internalization or justification in terms of right and wrong. Kawashima, *Reflections*, *supra* note 137, at 500.

emergence of a power equilibrium between the political ruler and his subordinates.¹⁴⁸

For Kawashima, then, law is simply a governmental exercise of power, effective only as a result of the prior breakdown of effective social regulation by more traditional social groups.¹⁴⁹

This image of law as generated and imposed by a force external to the social group to which it applies can easily be attached to Edo-era village life, in which Shogunate law not only was not drawn from the realities of social life, but did not even attempt to address them. What is important for the present discussion, however, is that it is also applied quite readily to subsequent Japanese legal history until the late twentieth century.¹⁵⁰ For example, the Meiji era alterations to the legal system arose from a wholesale adoption of foreign law selected by legal officials.¹⁵¹ In turn, the legal restructuring occurring after World War II was again the imposition of foreign law on the basis of power.¹⁵²

A comparison of this picture of Japanese legal history with Ehrlich's theory of law is revealing. As discussed above, while Ehrlich similarly viewed the law of legal texts as imposed by the government and judiciary, he nonetheless saw legal provisions and social norms as constantly interacting in the generation of the law.¹⁵³ Legal officials may have relied upon their power in instituting their decisions, but ultimately the issues they addressed and the light in which those issues appeared were controlled by ordinary social interactions, thus binding their decisions inextricably to social norms.¹⁵⁴

148. Kawashima, *Reflections*, *supra* note 137, at 495.

149. Where the installation of law is successful, it gives rise to a "law-abiding spirit," which is "the state of mind whereby an individual follows legal prescriptions simply for the sake of law without considering the sanctions of law." *Id.* at 494.

150. See generally Wilhelm Röhl, *Foreign Influences, in HISTORY OF LAW IN JAPAN SINCE 1868*, at 23 (Wilhelm Röhl ed., 2005).

151. *Id.*

152. See generally KOSEKI SHOICHI, *THE BIRTH OF JAPAN'S POST-WAR CONSTITUTION* (Ray A. Moore trans., 1997) (acknowledging the "imposition," but avoiding simplification of the active role of the Japanese in developing and interpreting the law as adopted).

153. Ehrlich, *Sociology*, *supra* note 110, at 134-35.

154. See *id.* (discussing the developing and changing nature of legal provisions and the norms which develop as a result).

Kawashima essentially rejects this picture as an inaccurate depiction of the relation between law and society in Japan, and produces instead a view of law that solely emphasizes its hierarchical, power-based nature. Kawashima's theory of the place of law in Japan, then, can best be understood as emphasizing the alienation of the norms governing ordinary social interactions in Japan from the norms generated by Japanese legal officials. It is in this sense that Japanese law resembles a "*denka no hoto*."¹⁵⁵ Law is authoritatively pronounced by respected members of the society and thus has symbolic power, but it is incapable of resolving the disputes to which it is supposedly addressed. As a result, its authoritativeness brings its pronouncements normative force, but its mechanisms for enforcement are capable only of delivering a verdict and not of resolving the underlying dispute.¹⁵⁶

Of course, this understanding of the disjunction between Japanese law and society cannot by itself explain Japan's low litigation rates. After all, simply because social and legal systems have evolved separately does not guarantee that they will be so different that the kind of disconnect Kawashima sees in Japan will result. However, a further element of Ehrlich's theory can complete this explanation: namely, the complex web of social relations in which individuals exist.

Many proponents of the culturalist argument characterize Japanese people and culture in terms such as the following: "[T]he emotional, intuitive Japanese temperament, with its aversion to precise logical distinctions, is clearly antithetical to

155. "[A] sword handed down from ancestors as a family treasure), not for actual use, but for symbolic effect." Kim & Lawson, *supra* note 8, at 505 (citing Takeyoshi Kawashima, *The Status of the Individual in the Notion of Law, in THE JAPANESE MIND: ESSENTIALS OF JAPANESE PHILOSOPHY AND CULTURE*, at 262, 267 (Charles A. Moore ed., 1967) [hereinafter Kawashima, *Status*]).

156. In Kawashima's words:

Litigation presupposes and admits the existence of a dispute and leads to a decision which makes clear who is right or wrong in accordance with standards that are independent of the wills of the disputants. Furthermore, judicial decisions emphasize the conflict between the parties, deprive them of participation in the settlement, and assign a moral fault which can be avoided in a compromise solution.

Kawashima, *Dispute*, *supra* note 136, at 43. For an early discussion of the difference between the social and legal approaches to contractual relationships in Japanese society, see Henderson, *supra* note 74.

any systematic and conceptually arranged system of rights and duties.”¹⁵⁷ While some of Kawashima’s own positions resemble this type of extreme over-simplification,¹⁵⁸ he also emphasizes the centrality to dispute resolution of social obligations in a way that supports a more substantive explanation for the disjunction between Japanese society and Japanese law.¹⁵⁹

In his discussions of Japanese social relations, Kawashima places a great deal of emphasis upon the desire for “harmony,” noting that in this context, “[h]armony consists not in making distinctions; if a distinction between good and bad can be made, there *wa* (harmony) does not exist.”¹⁶⁰ For Kawashima, then, Japanese social relations can be characterized by an inherent vagueness.¹⁶¹ The rationale for this vagueness accord-

157. Kim & Lawson, *supra* note 8, at 500.

158. See, e.g., J.C. Smith, *Ajase and Oedipus: Ideas of the Self in Japanese and Western Legal Consciousness*, 20 U. B.C. L. REV. 341, 369 (1986) (internal citations omitted):

Professor Takeyoshi Kawashima, relying in part on [Jerome] Frank’s Freudian analysis of law, contrasts the western view, which he terms ‘paternalism’, with that of the Japanese, which is paternalism moderated by the psychology of *amae* which he terms ‘maternalism.’ According to Professor Kawashima, this is the source of the Japanese dislike for the rigid application of rules and the desire to achieve social harmony through warm human relations. For him, at least, there appears to be no conflict between *amae* and autonomy.

159. Notably, this disjunction is also recognized by Kawashima’s major critic, John Haley, who emphasizes the role of law “as a means of establishing the legitimacy as principle of certain rules and standards.” See John O. Haley, *The Role of Law in Japan*, 18 KOBE U. L. REV. 1, 18-19 (1984).

160. Kawashima, *Status*, *supra* note 155.

161. The term “vagueness” is being used here in accordance with philosophical literature on vagueness. “Bald” for example, is a vague term. Someone with no hair is clearly bald, while someone with a full head of hair is clearly not. However, there is a range in between those extremes, where there simply is no answer to the question: “Is that person bald?” (For example, Homer Simpson, with three hairs on his head.) In general terms, then, describing Japanese social relations as “vague” means that there are situations in which there simply is no clear rule to be either observed or broken, but only a general sense of what is socially required. It is not that both parties know what is required but neither wishes to cause a fight by asserting it, but rather that the rules in question are unresolved, so there is no answer available. For an excellent collection of articles addressing “vagueness,” see VAGUENESS: A READER (Rosanna Keefe & Peter Smith eds., 1996).

ing to Kawashima, is that it “serves to maintain amicable or cooperative relationships.”¹⁶²

Kawashima’s point here is more than the simple observation that, where duties are unclear, it is difficult to fight over their breach. This becomes clear when his comment is seen in the light of a further assertion he makes, that in Japanese social interactions “the actual value of social obligation depends upon the good will and favor of the obligated person.”¹⁶³ While Japanese society is perfectly familiar with the notion of social obligations and does not depend on mere amicability and cooperation, the mere performance of required actions nonetheless does not suffice to fulfill one’s social role. Instead, the attitude expressed while performing an obligation is as important as the performance of the obligation itself: “[T]he Japanese traditionally expect that in principle social obligations will be fulfilled by a voluntary act on the part of the person under obligation, usually with particular friendliness or benevolence.”¹⁶⁴ As I argue *infra*, this notion of social rules against confrontation and litigation, varying in accordance with the different social connections between parties to dis-

162. Takeyoshi Kawashima, *Nihonjin no ho-ishiki* [Japanese Law Consciousness] 139 (1967), translated in Masayuki Yoshida, *The Reluctant Japanese Litigant*, Discussion Paper 5, ELECTRONIC J. CONTEMP. JAPANESE STUD. (2003), <http://www.japanesestudies.org.uk/discussionpapers/Yoshida.html> (last visited Oct. 25, 2007). For an extreme endorsement of the “harmony”-based understanding of Japanese non-litigiousness, see Smith, *supra* note 158, at 347. Smith draws on Freud to make the claim that the Japanese emphasize “harmony” due to their psychological need for a place within their society (“To the Japanese, as to Gandhi, business relationships arise out of human relations. The aim of dispute settlement is the restoration of social harmony. Thus harmony rests in a sense of identity within a community which is generated mainly by emotional means.”). For an insightful discussion of the contemporary relevance of “rights” in Japan, see Eric A. Feldman, *Patients’ Rights, Citizens’ Movements and Japanese Legal Culture*, in *COMPARING LEGAL CULTURES*, at 215 (D. Nelken ed., 1997) [hereinafter Feldman, *Patients’ Rights*]; see also Eric A. Feldman, *Legal Transplants, Organ Transplants: The Japanese Experience*, 3 SOC. & LEGAL STUD. 71, 73-75 (1994). For a more extended treatment of the subject, see ERIC A. FELDMAN, *THE RITUAL OF RIGHTS IN JAPAN* (2000).

163. Kawashima, *Status*, *supra* note 155, at 263.

164. *Id.*; see also Kim & Lawson, *supra* note 8, at 500 (“Social obligations are ideally to be filled by a voluntary act suffused with *ninjo* [“natural human affection” or “human feeling”], with particular friendliness or benevolence.”).

putes, underlies the social-cultural explanation for Japan's low litigation rates offered here.

C. *Outline of a Social-Cultural Theory*

This Part of the Article applies contemporary philosophy and legal theory to Kawashima's insights into Japanese social relations and the relation between society and law in Japan as a means of developing a defensible social-cultural explanation for Japan's low litigation rates. I highlight two elements in order to explain the apparent Japanese avoidance of litigation: (1) the consequences of Japan's long history of wholesale importation of laws from other legal systems; and (2) the explanatory power of social rules against litigation in certain contexts.¹⁶⁵

1. *The Historical Disjunction Between Japanese Law and Society*

As Ehrlich notes, mere passage of a law does not guarantee that the law will actually be effective.¹⁶⁶ This will be particularly true, however, where the law in question is what H.L.A. Hart has called a "power conferring" law, which makes an individual "competent to determine the course of the law within the sphere of his contracts, trusts, wills, and other structures of rights and duties which he is enabled to build."¹⁶⁷ A government can have some direct effect on social relations through vigorous enforcement of a criminal law, as punishment for violations of the law can be strengthened to the point that citizens structure their relationships in order to avoid such a breach. However, "power conferring" laws that are inconsistent with the realities of the social relations in the society to which they are applied will simply be ineffective, at most followed only in form and to the extent necessary to ensure the legal effectiveness of a transaction.¹⁶⁸ However, it is precisely

165. It should be reiterated that nothing in this theory is inconsistent with the claim that there have historically been significant obstacles to litigation in Japan. Rather, the position maintained here is simply that these obstacles do not suffice to explain Japan's low litigation rates.

166. EHRlich, *FUNDAMENTAL*, *supra* note 109.

167. HART, *supra* note 147, at 41.

168. For example, passage in a Muslim community of a law stating that only marriages performed by a Christian priest will receive legal recognition may result in a series of Christian legal ceremonies, but it is unlikely to eliminate the performance of Muslim ceremonies involving the same couples,

these “power conferring” laws, such as the right to enter into contractual relations, that are central to civil litigation and hence to the litigation rates at issue in the dispute between culturalists and institutionalists.

In a society such as Japan, which has historically lacked the intimate interaction between social relations and the passage of laws described by Ehrlich, it is to be expected that appeal to law as a means of resolving disputes would be disfavored, as the laws invoked would simply not reflect the social realities underlying the dispute. A lawsuit can deliver an enforceable judgment, but it cannot deliver a satisfying resolution, as the decision will have been delivered in accordance with different standards than those at issue between the disputants.¹⁶⁹

It is in this historical disjunction between Japanese law and Japanese social relations that the first element of a social-cultural explanation for Japan’s low litigation rates can be found. Litigation has traditionally been avoided because the laws that would be applied to any given dispute could not lead to its resolution or to the validation of one party’s claims.

2. *Japanese Social Rules Against Confrontational Dispute Resolution*

The second element of Ehrlich’s theory that contributes to an explanation of Japan’s low litigation rate is his emphasis on the existence of complex networks of social groupings. Descriptions of Japanese social relations such as those put forth by Kawashima, that “social obligations [must] be fulfilled by a voluntary act on the part of the person under obligation, usu-

who will regard the Muslim ceremony as their true wedding. The situation would, that is, parallel the contemporary distinction drawn by Christian couples between the minister stating “I now pronounce you man and wife” and the obtaining of a formal marriage license. Few, if any, couples believe they were married when issued a license by the state, rather than at their wedding ceremony.

169. Consider, as an extreme example, a law stating that where family members dispute ownership of a piece of property, ownership will be awarded to the father as guardian of all the family’s property. Such a law would certainly provide a means to resolve all questions of legal ownership, but it would hardly serve to resolve the dispute between the parties—each of whom would now simply blame the other for costing him his rightful ownership.

ally with particular friendliness or benevolence,"¹⁷⁰ are often combined in culturalist literature with assertions that Japan is in some way distinct from Western countries in this respect. However, an understanding of the kind of relationship being described by Kawashima can actually be gained from contemporary discussions in Western social philosophy. One of the consistent strains of communitarian philosophy is that friendships and families are simply inappropriate places for the assertion or even recognition of "rights."¹⁷¹ While the relationships in question could certainly be described in such terms, doing so will distort their true character.¹⁷² For example, though there may be compelling arguments for the proposition that a child has a moral right to receive care from her parents, the mere physical fulfillment of this obligation would clearly be a failure of the parent-child relationship. Parents fail to live up to their role obligations if they raise their offspring merely because children have a right to be raised. Rather, such duties should "be fulfilled by a voluntary act on the part of the person under obligation, usually with particular friendliness or benevolence."¹⁷³

There would certainly be a stark implausibility in any claim that all relationships in Japanese society have the inti-

170. Kawashima, *supra* note 155, at 263; *see also* Kim & Lawson, *supra* note 8, at 500 ("Social obligations are ideally to be filled by a voluntary act suffused with *ninjo* ["natural human affection" or "human feeling"], with particular friendliness or benevolence.").

171. For an insightful and helpful discussion of the contemporary Western philosophical conception of a "right," see Joseph Raz, *On the Nature of Rights*, 93 *MIND* 194 (1984), *reprinted in* JOSEPH RAZ, *THE MORALITY OF FREEDOM* 165 (1986). Kawashima's understanding of "rights" is reflected in the following passage: "A 'contract' expresses an agreement between two or more persons with respect to the rights and duties between them. . . . [M]utual rights and duties are generally created or extinguished only in cases where individuals who are parties to a relationship agree of their own free will." Takeyoshi Kawashima, *The Legal Consciousness of Contract in Japan*, in *JAPANESE LAW AND LEGAL THEORY* 19, 19 (Koichiro Fujikura ed., 1996).

172. *See, e.g.*, Michael J. Meyer, *Rights Between Friends*, 89 *J. PHIL* 1992 (criticizing this view, and arguing that unasserted rights have an important role in any friendship). For a discussion of the dangers of the rejection of "rights consciousness" in the defense of "Asian values," and the claim that respect for rights may actually be supportive of "public spiritedness" in Asia, see Daniel A. Bell, *A Communitarian Critique of Authoritarianism*, 32 *Soc'y* 38 (1995).

173. Kawashima, *Status*, *supra* note 155, at 263.

macy characteristic of familial relationships. Instead, a more nuanced understanding of this idea can be developed by returning to Ehrlich's recognition that a single individual will simultaneously participate in a wide variety of social groups, each involving differing social norms. Thus, the social obligations entailed in the relationship between neighbors will be significantly different than those entailed in the relationship between a customer and the proprietor of a busy city store.

Moreover, Kawashima's insistence that Japanese social norms require a voluntariness in the performance of obligations does not require that actual intimacy and good will exist between the individuals in question. Rather, insofar as what is involved is the *performance* of social obligations, all that is required is that the external behavior displayed be appropriate. For example, while the relationship between the customer and proprietor mentioned in the previous paragraph is unlikely to be genuinely intimate, Kawashima's account of Japanese social relationships will be accurate so long as both are required by the relevant social norms to act as though such intimacy existed. They need not act as family members or as friends, but when fulfilling responsibilities they must recognize the importance of appearing to be doing so with a particular "friendliness or benevolence."¹⁷⁴ In turn, the recipient of that performance must not behave in a manner indicating that she has a "right" to the performance, but instead acknowledge the value of the voluntariness of the act, no matter how voluntary its performance may or may not actually have been.¹⁷⁵

174. *Id.*

175. One famous argument that Kawashima offers in defending his claim of the non-right based nature of Japanese society is that before the creation of the German-based Codes in the 1890s there was no Japanese term translatable as "right." Kawashima, *Status*, *supra* note 155, at 263. Indeed, the term *kenri* had to be specifically created at that time in order to allow discussion of legal "rights." The first major problem with this claim is, of course, that the term for duty, *gimu*, also did not exist before the German-based Codes, but Kawashima makes no corresponding claim that the concept of "duty" did not exist before then. Yoshida, *supra* note 162, (citing Masao Ohki, *Nihonjin no ho-kannen* 234 (1983)); *see also* Feldman, *Patients' Rights*, *supra* note 162, at 218-19 (discussing the difficulties in relying upon the invention of the term *kenri*). While arguments are often heard that traditional Japan lacked the concept of rights, something in the culture was sufficiently rights-oriented for an American visitor to Japan in the nineteenth century to remark that "there was probably no country in the world where the mass of

Though the intimacy and good will in question is only formal, it should not be understood as illusory. That is, these external norms are not observed simply out of fear of criticism or punishment if one's behavior is inappropriate. Rather, these norms are observed because such behavior is "appropriate" to the relationship one has with the other individual. A useful explication of this idea can be found in H.L.A. Hart's famous discussion of the internally binding nature of social rules.¹⁷⁶ As Hart notes, while the breach of a social rule will lead to criticism by other members of the relevant social group, a rule that is obeyed solely due to such external punishments does not fulfill the criteria of a social rule. Rather, a social rule will only exist where the members of the relevant social group, *inter alia*, adopt a "reflective critical attitude" to the behavior in question¹⁷⁷ and feel that they are personally "bound" to behave in accordance with that rule.¹⁷⁸ To return to the example above, while the customer would indeed be criticized, and thereby punished, if his behavior toward the store-owner was inappropriate, this is not the reason that he conforms his behavior to the required norm. Instead, he behaves appropriately because he acknowledges his position in a particular social relationship and recognizes the rules of behavior in question as binding on him as a result.

For example, while a Japanese person might in some cases avoid litigating with a neighbor due to the harsh criticism that could result, the existence of this criticism is usually not necessary to ensure obedience to the social rule that one should not litigate with one's neighbors. Instead, self-identification as a member of Japanese society, along with recognition that such a rule exists in that social group, means that Japanese themselves will avoid such litigation as an inappropriate response to such a dispute.

people, down to the smallest farmer in the possession of a few square yards of land, were more familiar with their rights and duties." Kim & Lawson, *supra* note 8, at 498, (quoting DUANE B. SIMMONS, *LAND TENURE AND LOCAL INSTITUTIONS IN OLD JAPAN* 50 (1891)).

176. HART, *supra* note 147, at 54-57. For an excellent commentary on and critique of Hart's understanding of social rules, see Margaret Gilbert, *Social Rules: Some Problems for Hart's Account, and An Alternative Proposal*, 18 L. & PHIL. 141 (1999).

177. HART, *supra* note 147, at 56.

178. *Id.* at 56-57.

It is this conception of binding social norms that offers the second element in a social-cultural explanation of Japan's low litigation rates. As illustrated by the discussion above of Japanese legal history, Japan has long emphasized non-confrontational alternatives to Western-style litigation. Consequently, it should be unsurprising if, even where there is little real connection between Japanese individuals, there remains a generalized Japanese social norm opposing the use of confrontational dispute resolution mechanisms.¹⁷⁹ Ehrlich's theory, however, offers an explanation for this general aversion to litigation that does not depend on any alleged inability of Japanese people to become involved in confrontation. Moreover, Ehrlich's theory offers a far more nuanced understanding of this aversion, as it makes the degree of aversion to litigation dependent upon the specific relationship in question. It simply takes more to justify litigation in the context of some relationships than others, as the social norm opposing litigation varies in strength depending on the relationship in question.¹⁸⁰

A social-cultural view combining Ehrlich's general theory of law with Kawashima's view of Japanese law and society¹⁸¹ provides a highly nuanced and yet powerful explanation for

179. This statement is based on analysis of statistics drawn from the ICC International Court of Arbitration Bulletin (on file with author; collation of statistics not performed by author).

180. This situation is, of course, certainly not itself distinctly Japanese. Even "litigious" Americans will require far greater justification for suing a family member than a party in a business transaction.

181. Kawashima also makes other, sometimes seriously questionable, arguments in his writings aside than the ones addressed here. For example, Kawashima argues that Japanese laws are inherently uncertain, both in their language and their application, and that this is at least partly due to a Japanese linguistic tendency not to resolve things precisely. Kawashima, *Status*, *supra* note 155, at 267, 271, 285; cited in Yoshida, *supra* note 162. However, as shown above with respect to the arbitration law, Japanese courts have been only too willing to fill in gaps in written legislation. Insofar as Japanese laws may indeed be uncertain, this does not seem to support any particular notion of "legal consciousness," but at most reflects a practice of adopting broadly framed laws which are then given precision through application. However, the current Article is not an attempt to lay out the details of Kawashima's thought, but merely to explicate a plausible conception of the relationship between Japanese people and the law that is able to withstand the criticisms offered by institutionalist theorists. Thus, these other elements of Kawashima's thought will not be addressed here.

Japan's comparatively low litigation rates. It offers not only an understanding of why Japanese litigation rates are low in general, but also a consistent explanation for why litigation rates are higher in some kinds of disputes than others. This latter is an essential element of any culturalist theory, as some of the primary attacks upon the culturalist position have relied upon studies of litigation arising from traffic accidents.¹⁸² Yet such accidents are unlikely to involve individuals with any form of real social connection. As a result, a social-cultural theory would predict that they would be far more likely to be litigated than most types of disputes, thereby making them a very poor proxy for any study of Japanese litigation as a whole.¹⁸³

182. Haley, *Myth*, *supra* note 13, at 364; *see also* J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989); Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOC'Y REV. 651 (1990); John O. Haley, *Discussion After the Speech of Jack O. Haley*, 17 CAN.-U.S. L.J. 449, 452-53 (1991) [hereinafter Haley, *Discussion*] (discussing the reasons for the high litigation rates of automobile accident cases in Japan).

183. For this criticism of the Ramseyer/Nakazato article, see Daniel Foote, *Resolution of Traffic Accident Disputes and Judicial Activism in Japan*, 25 L. IN JAPAN 19, 30-31 (1995) and Ramseyer & Nakazato, *supra* note 182, at 265. Moreover, an additional problem can also be recognized in Ramseyer and Nakazato's reliance upon traffic accident litigation. They argue that the 80-95% rate of insurance recovery for fatal traffic accidents since the early 1970s "suggests that neither ethical values nor high costs dull the willingness of victims to assert their legal rights." Ramseyer & Nakazato, *supra* note 182, at 273. However, this conclusion ignores that, in the 1960s, recovery rates had been as low as 61.6%. *Id.* More importantly, a stark increase in recovery rates occurs in 1971, the year Japan introduced its first Fundamental Traffic Safety Program. Traffic Safety Policy Office, White Paper on Traffic and Safety in Japan '98, http://www8.cao.go.jp/koutu/taisaku/h10-haku_e/990618a.htm#1111 (last visited Oct. 28, 2007) (referencing Figure 1, illustrating the Program's success in causing a stark decrease in the number of traffic accidents, fatal and otherwise). Thus, one possible suggestion for the high recovery rates since 1971 is that fewer accidents can now be attributed to the fault of the victim, increasing both the willingness of family members to litigate their claim and increasing the strength of their bargaining position. Detailed information on the numbers of traffic accidents is also available in English in the Traffic Safety Policy Office's annual White Paper on Traffic Safety in Japan, *available at* <http://www8.cao.go.jp/koutu/taisaku/kou-wp.html> (last visited Oct. 28, 2007). Thus, not only will traffic accident litigation involve claimants and defendants with no social connection, but, since 1971, it may also involve claimants with an enhanced willingness to litigate and a low risk of social criticism (since their disputes implicate no social ties and the validity of their claims are clear).

Part VI of the Article will address in greater detail the strongest institutionalist criticisms of culturalist theories to illustrate that the social-cultural theory elaborated here not only withstands the arguments proffered but indeed provides a more satisfactory explanation of the evidence invoked than does an institutionalist theory.

VI. THE EMPIRICAL EVIDENCE

A. *Criticisms of the "Culturalist" Argument*

Part VI examines several institutionalist attempts to explain both Japan's traditionally low litigation rates and its low arbitration rate. In this Part, I conclude that while there is indeed strong evidence that institutional obstacles to litigation have existed in Japan, the evidence also indicates that these obstacles are insufficient to explain Japan's comparatively low litigation rate. Moreover, institutionalist explanations for Japan's low arbitration rate are entirely inadequate, often resting on fundamental misunderstandings about the advantages and disadvantages of arbitration.

The most potent critics of the culturalist position have eschewed disputes about Japanese "character," attacking Kawashima's position instead through the use of statistics intended to suggest that when certain barriers to litigation in courts are removed, Japanese people are as willing to litigate as any other nationality. This Part addresses two of the most important critiques made of the culturalist view: the original institutionalist arguments made by John Haley and a recent statistics-based argument by Tom Ginsburg and Glenn Hoetker. It argues that a social-cultural theory of the type advanced in this Article can satisfactorily account for all the data alleged to be inconsistent with a culturalist view of Japanese non-litigiousness.

While not disputing that Japan's litigation rates are lower than in many countries, institutionalist critics reject any form of appeal to Japanese culture as an explanation. Rather, while the specific arguments vary between critics, they generally highlight certain institutional aspects of the Japanese court system that they argue make litigation in Japan an unattractive option. These have included the extremely long time re-

quired to conclude a court case in Japan,¹⁸⁴ the delays caused by the requirement that judges be rotated every three years,¹⁸⁵ the large fees required to lodge a case,¹⁸⁶ the requirement of Japanese lawyers that a significant fee be paid in advance,¹⁸⁷ the ultimate predictability of the decisions reached by the courts,¹⁸⁸ and the minimal discovery available.¹⁸⁹

While it would be a mistake to describe Kawashima as unaware of or rejecting such possible explanations of Japan's low litigation rates,¹⁹⁰ the evidence gathered by his critics establishes the viability of these arguments to a degree that Kawashima did not appreciate. Nonetheless, it will be argued

184. Haley, *Myth*, *supra* note 13, at 381.

185. Livdahl, *supra* note 62, at 381 n.38.

186. Taniguchi, IFCAL, *supra* note 73, pt. 2 (“[A] relatively high filing fee (about 1/400th of the amount claimed)”); Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 Nw. U. L. REV. 1436, 1463-65 (1994) (discussing the requirement that claimants purchase revenue stamps, at a cost determined by the amount in dispute, a rule limited in 1993 with respect to derivative suits).

187. West, *supra* note 186, at 1459 (describing the use by Japanese lawyers of a “nonrefundable retainer” of 10% of the amount in controversy); *see also* Hiroshi Karawazaki, Lawyer’s Fee Calculator, <http://www.asahi-net.or.jp/~zi3h-kwrz/lawyfeecal.html> (last visited Oct. 6, 2007).

188. Indeed, Haley has argued that predictability in Japanese courts has reached such an extent, due to publication of findings by judges, that judges will simply use actuarial tables to determine what should be awarded. Haley, *Myth*, *supra* note 13, at 453; *see also* Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant?: An Empirical Analysis of Japan’s Turn to Litigation*, 35 J. LEGAL STUD. 31, 35 (2006) (“Japan has no juries to add unpredictability.”). While the use of such tables is clearly notable, the relevance of discretion in factual interpretation should not be ignored. As common law judges have demonstrated, even the interpretation of the facts can be the source of a great deal of variation in legal decisions.

189. Ginsburg & Hoetker, *supra* note 188, at 41 (“Finally, the lack of discovery prevents ‘fishing expeditions’ whereby the lawyers can pursue low probability claims in the hope that the discovery process will produce some information increasing the probability of a victory.”).

190. Kawashima, *supra* note 136, at 43:

On the one hand, litigation takes time . . . and is expensive but this seems to be true in almost all countries having modern judicial systems and can hardly account for the specifically strong inclination of the Japanese public to avoid judicial procedures. Or one might point out that monetary compensation awarded by the courts for damage due to personal injury or death in tragic accidents is usually extremely small. . . . A more decisive factor is to be found in the socio-cultural background of the problem.

here that adequate social-cultural responses to these arguments are indeed available.

In the classic original challenge to Kawashima's arguments, the 1978 article "The Myth of the Reluctant Liti-gant,"¹⁹¹ John Haley surveyed historical data on litigation rates in twentieth century Japan, noting that:

[L]itigation has been *less* frequent in absolute numbers in the postwar years than the period from 1890 to the outbreak of the Sino-Japanese War in 1937. Relative to population, the contrast is even more startling. In 1934, for example, 302 new civil cases involving formal trial proceedings were initiated in courts of first instance per 100,000 persons, while in 1974 there were 135 such cases per 100,000 persons.¹⁹²

Haley is certainly correct that this statistic is difficult to explain through those culturalist arguments that attribute Japan's low litigation rates to something intrinsic in Japanese "character." Haley's bare use of statistics, however, designed as it is to address this psychological version of the culturalist argument, fails to address adequately the nature of the connection between society and the law in each of these periods. According to the social-cultural theory described above, the installation of a new foreign legal system, as happened in both 1890 and after World War II, would be expected to result in a significant fall in litigation rates¹⁹³ due to the stark disjunction that would be created between the laws in force and the rules by which Japanese society actually operated. Litigation rates would then increase over time as interaction between society and the legal institutions increased and social norms and legal rules gradually coincided. Consequently, whatever force Haley's observation may have against traditional culturalist ar-

191. Haley, *Myth*, *supra* note 13; see also John O. Haley, *The Implications of Apology*, 20 L. & SOC'Y REV. 499 (1986) (discussing the role of apology in Japanese society); John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions*, 8 J. JAPANESE STUD. 265 (1982) (emphasizing the role of social sanctions as a replacement for the legal sanctions used in Western societies).

192. Haley, *Myth*, *supra* note 13, at 368.

193. Absent a significant difference in obstacles to court access before and after the change.

guments, it is in fact precisely what would be predicted by a social-cultural theory.

In the same article, Haley describes the relationship between Japanese courts and Japanese society in the following terms:

The period from about 1905 through the early 1920s was one of the most creative eras in Japanese jurisprudence. The judiciary was extraordinarily innovative in adapting the new European-based codes to the Japanese environment, rationalizing traditional norms within the framework of Western law. In a series of cases, the courts recognized the right of the citizen to sue the government for damages in the ordinary courts, expanded the liability of private industry for pollution, restricted the arbitrary power of the househead, limited the exercise of private property rights where it would cause undue economic harm to the community, recognized traditional security devices and redefined the law on leases to insure fair treatment of tenants. Although in some of those instances the courts' decisions were contrary to what we today might consider a "conservative" position, in fact, often despite the thrust of the new Japanese codes, the courts adhered to a traditional scheme of values that gave priority to community welfare over individual interests and placed emphasis on social obligations and duties rather than legal rights.¹⁹⁴

While Haley offers this observation as a criticism of Japanese courts of the period, it nonetheless offers an explanation for what Haley depicts as a rate of litigation higher than would be predicted by a culturalist argument. While 1890 did indeed witness the wholesale importation of a foreign legal system into Japan, and thus the creation of a disjunction between law and society, the effect of this change, as Haley notes, was mitigated by the proactive role taken by Japanese courts in adjusting the new system to the social realities of Japanese life. Moreover, German procedural law had been chosen to be the foundation for Japan's new Code of Civil Procedure due to the

194. Haley, *Myth*, *supra* note 13, at 375-76.

perception that it better suited Japanese norms than French procedural law.¹⁹⁵

This situation is markedly different, however, from the post-World War II Americanization of Japanese law. In this instance, Japanese legislators had no power to reject the U.S. system, and had limited opportunity to ensure that legislation adopted was compatible with traditional Japanese norms. Such norms, after all, were viewed by the American occupational forces as largely responsible for Japan's role in the war. From the perspective of a social-cultural theory, then, it is unsurprising that, as Haley notes, litigation rates were actually higher in the period prior to World War II than after it. In the earlier period, courts possessed the power to actively reduce the disjunction between the new laws and the actual operations of Japanese society, whereas after World War II this option was not available.

Of course, Japanese courts still possessed some freedom to affect the nature of the laws imposed upon the country through their ability to interpret legal provisions in accordance with Japanese norms. In fact, they exercised this power with respect to the new Constitution.¹⁹⁶ However, the effect this ability of courts to adjust the new laws to traditional Japanese norms could have on Japanese litigation rates was largely undercut by a concurrent post-World War II change in Japanese society that significantly expanded the group of individuals with whom it would be inappropriate for a Japanese person to litigate.¹⁹⁷

As argued by Japanese sociologists, "a company-centered social structure took shape in Japan" after World War II.¹⁹⁸ As a result, the social bonds that Kawashima argued hindered litigation in Japan not only received renewed life, but were extended further so that they now encompassed not only those persons with whom an individual lived and directly interacted, but also any other persons in some way connected with the

195. See discussion *supra* pp. 59-60 regarding the movement from contemplation of a French-based Code to adoption of a German-based Code.

196. Alston, *supra* note 103.

197. In accordance with element 2 of the theory proposed above.

198. Seigo Hirowatari, *Post-War Japan and the Law: Mapping Discourses of Legalization and Modernization*, 3 SOC. SCI. JAPAN J. 155, 162 (Moriya Fumiaki trans., 2000).

corporation at which the individual worked. As one Japanese commentator has described this relation:

Where corporate communities are very strongly entrenched, they can dominate civil society. Employees of a firm identify themselves so strongly with the corporate community that they lose the sense of being members of civil society and become completely absorbed in their roles as members of the corporate community; consequently firms, rather than employees, constitute civil society. On paper, a company employee can have a variety of identities: as a sovereign member of a nation; as a resident of a local community; perhaps as spouse to his partner and parent to his children as a member of a family; and, at a more general level, as a citizen involved in public affairs The problem is that many Japanese corporate employees are so fully subjugated to the values and norms of the corporate community that they lose their awareness of the possible, variegated identities.¹⁹⁹

According to this understanding of post-World War II Japanese society, strong social rules against confrontational dispute resolution no longer only existed only with respect to family, immediate acquaintances, and neighbors, but now also extended to individuals with whom no real connection existed other than employment with the same or related corporations. Moreover, in a further intensification of the disjunction between Japanese law and society created by the installation of a foreign-based legal system, the power of Japanese corporations in post-war Japan ensured that laws adopted would strongly favor their interests, an influence not likely to be challenged by an American administration already familiar with a strong corporate influence over the law.²⁰⁰ As a result, those individuals not “members” of a corporate community nonetheless also found their litigation opportunities to be significantly reduced due to unfavorable laws.²⁰¹

199. *Id.* at 163.

200. *Id.* at 164.

201. This single element, of course, is consistent with an institutionalist explanation for Japan’s low litigation rates. However, as it constitutes only one element of a larger explanation, its presence is fully consistent with the

In comparison to the pre-World War II period, post-World War II Japan was characterized by a combination of a newly installed foreign-based legal system and the broad movement of society toward a form of organization that actively discouraged court litigation. Both of these elements would be predicted by the social-cultural theory presented in this article to reduce litigation rates. Haley's observation that litigation was less common after World War II than before is therefore unsurprising.²⁰²

In the wake of Japan's economic collapse in the years around 1990, the Japanese legal system underwent yet another major transformation. Unlike previous transformations, however, there was this time no wholesale adoption of a foreign legal system.²⁰³ Instead, a series of reforms was instituted with the process still continuing today, resulting in what is at least on the surface a major transformation of Japan's legal system.²⁰⁴ Removal of institutional obstacles to litigation has been one of the primary motivations behind the legal reforms adopted since 1990, with business associations successfully

social-cultural theory advanced in this Article, which does not deny that some institutional obstacles to litigation have long existed in Japan.

202. However, in support of the claim that Japanese law is currently moving away from its "corporate" form towards a more recognizably American model, see R. Daniel Kelemen & Eric C. Sibbitt, *The Americanization of Japanese Law*, 23 U. PA. J INT'L ECON. L. 269, 321-23 (2002):

Japanese legal style is becoming Americanized in important respects This Americanization, however, should not be overemphasized Litigation has increased, but not to anywhere near the "adversarial legalism" of the United States With the forces of economic liberalization and political fragmentation in Japan being too powerful to ignore, however, the Americanization of the Japanese legal system will only continue.

For a rejection of this conclusion, addressing the "pollution" cases that are often taken as demonstrating an increasingly "individualistic" Japanese society, see Frank K. Upham, *Litigation and Moral Consciousness in Japan*, 10 LAW & SOC'Y REV. 579 (1976); see also Koichiro Fujikura, *A Comparative View of Legal Culture in Japan and the United States*, 16 LAW IN JAPAN 129, 134 (1983) (noting that the distinctive characteristics of American legal culture "are also present in Japanese society if we search for them, although they may have ceased to develop at a certain point").

203. Just as German law was the source of the civil procedure laws adopted in the 1890s, including the arbitration law, it has also been argued that the 1990s reforms were driven by the German civil procedure reforms undertaken in the 1970s. Ginsburg, *supra* note 68, at 9.

204. See generally Ginsburg, *supra* note 68.

pressing legislators²⁰⁵ to increase the attractiveness of courts as a forum for the settlement of business disputes.²⁰⁶

Even more importantly for the present discussion, however, litigation rates in Japan have also risen significantly over this period.²⁰⁷ These changes in Japanese law and litigation rates have provided scholars of Japanese law with substantial new evidence relating to the attitude of Japanese people to litigation. In particular, institutional theorists have highlighted the alleged correlation between growing litigation rates and the removal of institutional obstacles to litigation.

Perhaps the most important work using these changes to address the question of “Japanese litigiousness” is a recent study by Tom Ginsburg and Glenn Hoetker.²⁰⁸ The authors undertook a detailed statistical analysis of the relationship between Japan’s litigation rate from 1986 through 2002 and a variety of institutional factors commonly alleged to influence the litigation rate, such as the availability of attorneys and judges, the institution of legal changes, and whether new litigations were filed in urban or rural areas.

Notably for the present discussion, of Ginsburg and Hoetker’s two primary conclusions, one is that “perhaps more important” than institutional factors in explaining Japan’s low litigation rates relates to “relationships between the economy

205. *Id.* at 9:

Taniguchi traces three forces behind the civil procedure reforms. First was German influence, specifically the reform of German civil procedure in the 1970s. Second was the support of some elements of the bar, in the context of more cooperative relations between the bar and the judiciary. Third was pressure by Keidanren and Keizai Doyukai, the peak business associations in Japan, which became interested for the first time in facilitating litigation. Against these interests were certain elements of the bar that preferred slower procedures: a concentrated trial, while easier on the judge, requires more preparation by the lawyer. Furthermore, some lawyers had been charging by the appearance, so concentrating the trial deprived them of income.

206. *Id.* (“Reforms included a shift toward more concentrated trial procedure; expanded power of judges to order production of documents (which might encourage litigation by making proof easier to obtain); the introduction of small claims procedure; and the introduction of a discretionary appeal to the Supreme Court.”).

207. *Id.* at 9.

208. See Ginsburg & Hoetker, *supra* note 188.

and litigation.”²⁰⁹ That is, in the period under discussion, a significant correlation is evident between downturns in the Japanese economy and increases in the number of new litigations commenced.²¹⁰ As the authors note, Japan is hardly distinctive in this respect,²¹¹ as “economic stress breaks relationships, leading to more disputes that become salient enough to resolve through courts.”²¹² What is notable, however, is that while this observation is not inconsistent with institutionalist theories, it is positively predicted by the social-cultural theory developed in this Article.²¹³ Difficult economic times bring to the fore that not all social ties are equal, presenting individuals with the reality that forgiving the default of one person will mean defaulting oneself to another.²¹⁴ When the social norms governing the social group one shares with one party are less tolerant of litigation than those of the group one shares with the second party, the social-cultural theory presented in this article predicts some form of enforcement action against the second party. Thus, Ginsburg and Hoetker’s conclusion is precisely in line with the theory presented here.

Ginsburg and Hoetker’s second conclusion is a more direct challenge to a culturalist theory, as the statistical analysis they perform indicates that the limited number of judges and lawyers in Japan, along with traditional procedural obstacles to litigation, have demonstrably constrained litigation rates.²¹⁵

209. *Id.* at 57.

210. *Id.* at 56.

211. *Id.*

212. *Id.*

213. *Id.*

214. Or indeed forcing one to evaluate the extent of one’s own suffering that is justified by the need to respect social rules against litigation.

215. Ginsburg & Hoetker, *supra* note 188, at 52 (“Our empirical analysis supports Haley’s arguments about capacity.”). While Ginsburg and Hoetker’s work is the most impressive statistical analysis of this issue, there has been a significant amount of survey-based work on the question of whether Japanese people would litigate where external disincentives were removed. However, beyond the usual questions that can be raised about the reliability of surveys, the particular surveys undertaken have not adequately appreciated the importance of the cultural element in Japanese litigation. For example, in *Myth of the Reluctant Litigant*, Haley describes a survey in which Japanese people were asked the question: “What would you do if a civil dispute arose and despite discussions with the opposite party you could not settle it?” Haley, *Myth*, *supra* note 13, at 368. Haley cites as “further support for rejecting the orthodox [i.e. culturalist] view” that 64% of the

While Ginsburg and Hoetker conclude that “[o]ur empirical analysis supports Haley’s arguments about capacity,” this statement is stronger than their results support. Though Ginsburg and Hoetker find a statistically significant correlation between the number of new attorneys added to a prefecture and an increase in the rate of litigation in that prefecture, they concede that the increase made per attorney is “fairly small, just over two additional cases per year.”²¹⁶ They add that nonetheless “it does add up,”²¹⁷ such that 8,622 new common actions brought in 2001 can be attributed to an increase in available attorneys since 1986. However, if attorney availability was indeed a *primary* cause of Japan’s low litigation rates, it is unclear why “adding up” would be necessary to make the argument persuasive. Simply put, a new attorney who generates only two new cases per year can hardly be considered to have entered a market that was sorely needing his or her services, as potential clients were already avoiding litigation primarily because they could not find an attorney.

More persuasively, Ginsburg and Hoetker note that, if increases attributable to additional judges and to the entering into effect of the new Code of Civil Procedure in 1998 are also

respondents stated that they would go to court in such a situation. *Id.* However, the social-cultural theory proposed in this article would in fact predict precisely the result Haley cites, as the question posed essentially asks the respondents what they would do if their relationship with the opposing party in a dispute broke down. That is, it does not ask “If a dispute arose, would you take the other party to court,” but rather “If a dispute arose, and the other party was so obstinate in his claims that you could not resolve the problem, would you go to court?” The fact that Japanese people are willing to go to court if it is necessary to settle a dispute is only a challenge to a view that argues that the Japanese are intrinsically averse to open conflicts. A theory such as the one advanced in this Article makes no such claim. This problem is similarly evidenced in a recent article that bases its rejection of the culturalist argument on a survey asking Japanese business and law students how they would behave in a contractual dispute with an Australian company—a situation unlikely to involve the kind of relationship to which a social-cultural argument is properly applied. See Michael K. Young, Masanobu Kato & Akira Fujimoto, *Japanese Attitudes Towards Contracts*, 34 GEO. WASH. INT’L L. REV. 789 (2003). On the particular question of the place of contracts in Japanese business relationships, see Whitmore Gray, *The Use and Non-Use of Contract Law in Japan*, 17 L. IN JAPAN 98 (1984); Veronica L. Taylor, *Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan*, 19 MELB. U. L. REV. 352 (1993).

216. Ginsburg & Hoetker, *supra* note 188, at 49.

217. *Id.* at 49-50.

considered, institutional improvements can be credited for an increase in new litigation by almost twenty percent.²¹⁸ There is no question that this provides strong support for the conclusion that institutional blockages to litigation indeed existed and continue to exist. The difficulty with Ginsburg and Hoetker's argument, though, is that this point was never one that culturalists needed to deny.²¹⁹ That is, culturalists need not deny that institutional obstacles to litigation exist in Japan, but instead only that these obstacles suffice to explain Japan's comparatively low litigation rates. Yet even a twenty percent increase in litigation fails to bring Japan's litigation rates near those of most other industrialized countries.²²⁰ Thus Ginsburg and Hoetker's evidence in itself provides no obstacle to a culturalist theory.²²¹

An additional complication with Ginsburg and Hoetker's contention that their evidence supports an institutionalist theory arises from their acknowledgement in a footnote that "loan and debt collection constitutes the bulk of the increase in litigation in Japan."²²² Collection claims are a form of litigation that even a culturalist theory can admit will increase significantly in the midst of the extreme economic difficulties faced by Japan in the period of Ginsburg and Hoetker's study.²²³ Thus, once the substance of the litigation increase is

218. *Id.* at 50.

219. Indeed, Kawashima himself explicitly acknowledged these institutional obstacles in the midst of making his culturalist argument. Kawashima, *supra* note 136, at 43.

220. Alan MacFarlane, *Law and Custom in Japan: Some Comparative Reflections*, 10 *CONTINUITY & CHANGE* 369, 372 n.29 (1995) (noting that even a 100% increase in Japan's litigation rates "would not bring the level anywhere near that in most industrial countries").

221. Ginsburg and Hoetker attempt to dismiss Kawashima's culturalist theory as inconsistent with their evidence by arguing that urban areas (where social bonds are arguably less tight) are not demonstrably more litigious than rural areas. Ginsburg & Hoetker, *supra* note 188, at 55. However, the social-cultural theory advanced in this Article entails no claim that litigiousness will necessarily be greater in urban areas, as such areas nonetheless retain a vast assortment of social groupings and indeed are far more likely than rural areas to be influenced by the "corporate" element of Japanese culture, argued previously to have had a significant effect upon Japan's low post-War litigation rates.

222. *Id.* at 51 n.19.

223. See, e.g., Paul Blustein, *Rates Fall Below Zero in Japan*, *WASH. POST*, Nov. 7, 1998 (noting that Japan's economic difficulties had worsened to the ex-

understood, it is clear that Ginsburg and Hoetker's evidence fails to demonstrate a willingness of Japanese people to litigate disputes when institutional obstacles are removed. It merely confirms that even Japanese people will resort to litigation over financial matters when faced with enough financial hardship. As already argued, a social-cultural theory need not challenge this claim.

Certainly, if institutional obstacles are further removed, still more litigation increases may occur. However, the lack of a "litigation explosion" in the face of the significant changes already made to Japan's legal structure strongly suggests that mere institutional changes are unlikely to bring Japan's litigation rates to a level comparable to those of its economic peers.

The next Part of the Article will address proposed institutionalist explanations for Japan's traditionally low arbitration rate, again concentrating on work by Owen Haley.

B. *The Social-Cultural Theory and Japan's Low Arbitration Rate*

Arbitration is widely valued in Western countries because of the control that it gives to the parties, allowing them to direct almost every aspect of the dispute resolution process. Thus, if the Japanese avoid court litigation simply because of the institutional difficulties associated with the court system, it might be expected that they would wholeheartedly embrace arbitration, where those difficulties demonstrably do not exist. However, while mediation has traditionally been popular in Japan, arbitration continues to be very rare.²²⁴ This section will offer a social-cultural explanation for the unpopularity of arbitration in Japan, emphasizing distinctive elements of arbitral practice and procedure rather than alleged institutional obstacles to arbitration's ability to serve as an effective alternative to litigation in Japan.

In addressing this low arbitration rate, an important distinction needs to be kept in mind between domestic and inter-

tent that government treasury bills at one point bore negative interest, such that investors were effectively paying the government to hold their money "because they didn't want to take the risk of depositing it in one of Japan's troubled banks").

224. See, e.g., Yamane, *supra* note 52, at 8 ("Arbitration of commercial disputes is not common in Japan, despite the fact that there are several established facilities for the arbitration of cases.").

national commercial arbitration. While the two are treated identically under Japanese law, the involvement of a foreign party in a dispute significantly reduces the probability that the dispute will involve the kind of ongoing relationships addressed by the social-cultural model. As a result, the question of Japan's low arbitration rate will be addressed separately for international and domestic arbitration, despite their legal equivalence.

With respect to domestic arbitration, John Haley has argued that the primary obstacle to arbitral success in Japan is institutional, deriving from certain inherent aspects of arbitration.²²⁵ According to Haley, arbitration is unpopular as an alternative to litigation in Japan because while the court system may be slow and expensive, it is no more so than arbitration.²²⁶ Moreover, courts have the benefit of being both highly predictable²²⁷ and highly respected,²²⁸ while there are few highly regarded arbitrators in Japan and arbitral awards are inherently unpredictable.

Haley is unquestionably right that the Japanese court system greatly emphasizes consistency in judgment as a professional goal. Moreover, he is certainly correct that this characteristic is not possessed by arbitration, in which awards are often kept confidential and arbitrators feel little need to match awards given in other comparable disputes. However,

225. Haley, *Dispute*, *supra* note 20, at 444.

226. *Id.*

227. *Id.* (“[W]ithin the system, certainty of legal rules and decisional uniformity are fundamental values. Unlike most common law systems, considerable effort is made to ensure that Judges throughout Japan decide like cases alike.”).

228. *Id.* (“Japanese judges enjoy the highest degree of public trust of any officials in Japan. The courts have long been arbiters of the most significant political and social issues.”); *see also* Haley, *Litigation*, *supra* note 1, at 141:

Finally, the Japanese experience teaches us that arbitration—to the extent perceived to produce less predictable outcomes—is a less-preferred means of dispute resolution than litigation. Almost always more costly and often more time consuming, as private adjudication, arbitration is not a transparent process. The outcomes produced are not necessarily consistent or certain. They are unpredictable by definition. Arbitration thus inhibits settlement and thereby produces unnecessary social costs.

Haley has also argued that the unpopularity of arbitration can be attributed to a Japanese dislike for giving up control to a third party. Haley, *Discussion*, *supra* note 182, at 450.

in making this argument, Haley confuses consistency and predictability in a way that undermines his conclusion. A party examining the predictability of court awards must look at the consistency of decisions between judges, as she cannot choose the judge that will be assigned to her case or in many cases even be assured in which judicial district the case will be heard. Arbitration, in contrast, provides precisely this level of control, thus significantly reducing the need for consistency between arbitrators. Moreover, while few arbitrators have substantial, accessible “track records” upon which parties can rely in making their decision, arbitrators are subjected to significant background research before being selected for participation on a panel. As a result, even where prior awards are not available for examination, conclusions can be drawn regarding how a proposed arbitrator will approach the central issues of the dispute.

Where an arbitration uses a three-arbitrator panel, as is common in commercial arbitration, each party has the right of direct selection of a single arbitrator, and the two arbitrators selected usually have joint responsibility for the selection of a third. As a result, each party is ensured that there is at least one representative on the panel reflecting his own desired approach to the subjects in dispute with a second having no significant objections to it. On the other hand, if a single arbitrator is used in a dispute, he will usually be selected through agreement of the parties, again allowing both parties to ensure that their views will receive full consideration. While Haley is certainly correct that Japanese courts will be more predictable than an arbitration, he significantly underestimates the ability parties have to secure predictability in arbitration and as a result overestimates the appeal predictability gives to court litigation.

Even more importantly, Haley ignores the difference between having a predictable adjudicator and having a favorable one. That the court system will predictably rule in a way unfavorable for a given party can hardly serve as a reason for that party to choose litigation over arbitration. Of course, arbitration agreements are overwhelmingly entered into at the time of contracting, rather than after a dispute has arisen, so the parties will not know the substance of any future court litigation or their own position on that dispute. This merely serves, however, as further reason to choose arbitration, since it gives

parties the ability to ensure that even a minority view receives a respectful hearing rather than being rejected outright as against the grain of prior decisions.

Similarly, Haley's emphasis on the high reputation of Japanese judges ignores the central issue relating to reputation: whether the judge in question is highly regarded by the specific parties involved in the dispute. However high the general public standing of the Japanese judiciary, not every individual possesses an equally high opinion of every judge. As a result, parties litigating in court have no assurance that they personally will have a high opinion of the particular judge in question, rather than viewing him negatively or merely neutrally. Arbitration, however, avoids this problem, as the parties are free to select arbitrators that they respect highly whatever the estimation of the public at large.²²⁹

Moreover, while a judge may possess an amorphous social prestige, parties entering arbitration have the ability to pick arbitrators with expertise or at least familiarity with the substance of the dispute. This is a clear benefit for disputes involving technical issues, but has a special relevance in the Japanese business context, characterized as it is by long-term relationships and vague agreements. Japanese parties entering arbitration can choose arbitrators that understand the kind of relationships characteristic of the business in question, including what is and is not conventionally expected of each side in an agreement. By contrast, a judge appointed to their court litigation would be unlikely to possess such "insider" knowledge, however esteemed he may be in a more general sense. By winning an arbitration, then, Japanese parties not only receive an award based upon an understanding of their business, but also one that could serve as a validation of their business practices. The benefits to be gained from such an award for a company that must continue operating in a relationship-domi-

229. Moreover, the evidence regarding the prestige of Japanese judges is at least conflicting. See David J. Danelski, *The People and the Court in Japan*, in *FRONTIERS OF JUDICIAL RESEARCH* 45, 71 (Joel B. Grossman & Joseph Tanenhaus eds., 1969) ("Today the Japanese Supreme Court has some visibility and prestige, but neither is especially high.").

nated business after having gone through a confrontational dispute resolution process are sizeable.²³⁰

Nonetheless, it should be acknowledged that this image of confrontational dispute resolution as a form of "validation" for one's practices also presents a reason for Japanese parties to prefer litigation over arbitration. The long-term nature of domestic Japanese business relationships raises an expectation that, in the event of a dispute, negotiations will continue until successful. As a result, invoking confrontational dispute mechanisms signifies a substantial breach in the relationship. While arbitration provides the opportunity for superior validation of one's behavior through an award from an individual held in prestige by the parties, it also carries a significant risk insofar as Japan has endorsed the principle that arbitration awards are largely unappealable. While the non-appealability of an arbitral award is often seen as a benefit of arbitration, providing finality, when the parties are seeking validation for their conduct rather than solely monetary compensation, the lack of appeal significantly raises the apparent risks of a negative decision. This risk would be enhanced further by the industry-specific prestige of the arbitrators, as the award could not be downplayed as a simple legal ruling, not reflecting the realities of the business in which the parties operated.

Thus, while Haley's emphasis on the predictability and prestige of Japanese judges is unable to explain the observed preference of Japanese parties for court litigation over arbitration, the social-cultural emphasis on the importance of the social situation provides some insight. When considering confrontational dispute mechanisms, Japanese parties are faced not with a choice between a prestigious court system and an unfamiliar arbitration system. Rather, they are faced with a choice between a predictable institution applying law external to the relationship of the parties versus a decision specifically tailored to the conduct and circumstances of the parties. When the parties are concerned with validation of their behavior, the predictability of the court system allows them to ascertain the likelihood of a loss before the final verdict, thereby giving them the opportunity to settle the dispute and avoid a

230. Similarly, the confidentiality of arbitration, as opposed to litigation, would certainly be desirable in a business environment focused on long-term relationships.

negative ruling. Moreover, even if settlement is not achieved, an award from a court can be downplayed as based upon an inadequate understanding of the business realities underlying the dispute. Then an appeal can be taken that will further delay final resolution of the dispute, potentially until several years after the events that gave rise to the litigation, at which point the reputational consequences of a negative decision have significantly reduced. Thus, a social-cultural emphasis upon the social realities of Japanese business is able to explain Japan's low domestic arbitration rate to a degree not possible for an institutionalist theory.

Of course, not all commercial disputes in Japan are between domestic corporations, and Japan's past economic successes have given it a significant place in the global economy. Moreover, the high international regard in which the Japanese legal system is held, along with its traditional endorsement of arbitration, would suggest Japan as a common place for international arbitrations relating to disputes arising throughout Asia. Yet international commercial arbitration has been just as unpopular as domestic arbitration. Furthermore, the explanation offered above for the unpopularity of domestic arbitration cannot explain this unpopularity. Parties to an international arbitration are unlikely to be participants in the distinctive form of long-term relationship characteristic of the Japanese business world. As a result, one or both parties will be more concerned with achieving a victory in the dispute at hand than with any form of "validation" for their behavior.²³¹

Nonetheless, a social-cultural explanation is also available to explain Japan's unpopularity as a situs for international commercial arbitration. As noted already, both Japanese judges and Japanese arbitrators actively promote settlement in the cases before them, to the extent that "such intervention is not only expected, but almost required by the law and by the litigants."²³² Since such practices are apparently welcomed by Japanese parties, they will have little impact upon domestic arbitration. However, foreign parties have traditionally criticized

231. This will particularly be true for any foreign party coming from a country, such as the United States, in which commercial litigation and arbitration occurs regularly even between parties involved in ongoing business arrangements.

232. Livdahl, *supra* note 62, at 384 n.51.

such behavior, suggesting it as a reason to avoid arbitration in Japan.²³³ As a result, since parties involved in an international transaction with a Japanese party in Japan can nonetheless agree to arbitrate their disputes in another country, there has traditionally been little incentive for foreign parties to agree to arbitrate in Japan rather than require the Japanese party to arbitrate abroad. Similarly, parties involved in a transaction with no connection to Japan would be unlikely to select Japan as the situs for any resulting arbitration.

The low rates of arbitration in Japan thus provide significant support for a social-cultural explanation for the low usage of confrontational dispute resolution mechanisms in Japan. While institutional blockages have unquestionably played some role in Japan's low rate of court litigation, such blockages simply did not exist in arbitration. As a result, only a social-cultural model of Japanese non-litigiousness is able to explain the parallel low rate of arbitration.

VII. THE FUTURE OF ARBITRATION IN JAPAN

In the last four years, Japan's arbitral system has undergone profound changes, including the adoption of both a new arbitration law and new rules for arbitrations under the Japan Commercial Arbitration Association. The final Part of this Article discusses certain provisions of the new law and JCAA rules relevant to the current discussion and uses the social-cultural model presented above to examine the likely effect of these changes on the practical reality of arbitration in Japan. I will argue that these structural changes are unlikely in themselves to have any significant impact on the popularity of arbitration in Japan, since arbitration's popularity has a culturalist and not an institutionalist foundation. Instead, arbitration will only become an attractive alternative to litigation once changes are adopted in the practice of arbitration that allow the proceedings to more closely match the dispute processes characteristic of the relationship between the parties.

233. See, e.g., Ragan, *supra* note 25.

A. *Japan's New Arbitration Law*

Beginning in the late 1980s,²³⁴ a series of projects were commenced with the goal of reforming Japan's arbitration law. As early as 1989, the Arbitration Law Study Group, a private group consisting of attorneys and businesspeople, drafted a proposed new arbitration law.²³⁵ However, while this law received much scholarly attention, it did not result in any alterations to Japan's arbitration law at least in part because of the extensive legal reforms that were undertaken in other areas of the law after the crash of the Japanese economy in 1990.²³⁶

Subsequently, in 1992, the Japanese Ministry of International Trade and Industry and the Japan Commercial Arbitration Association combined to support a Study Group for the Advancement of International Commercial Arbitration, chaired by Professor Akira Mikazuki.²³⁷ Although Professor Mikazuki became Minister of Justice in 1993, no new law resulted.²³⁸ In 1997, the Ministry of Justice²³⁹ and the Japan Federation of Bar Associations (*Nichibenren*) established yet another study group, producing a report in 1999.²⁴⁰

Ultimately, while each of these efforts was undoubtedly important in keeping the question before the attention of legislators, the critical source for the new arbitration law was a governmental body established in December 2001, the Cabinet-based Office for Promotion of Justice System Reform.²⁴¹ Through the work of this office, a new arbitration law was fi-

234. Undoubtedly spurred by the adoption in 1985 of the UNCITRAL Model Law. See UNCITRAL Model Law, *supra* note 46.

235. Livdahl, *supra* note 62, at 376-77.

236. Ginsburg & Hoetker, *supra* note 188, at 36:

A wave of reforms to fundamental legislation and legal institutions followed [the economic crash], including, *inter alia*, reforms of civil procedure and corporate law; an overhaul of financial law; passage for the first time of legislation on administrative procedures, information disclosure, and products liability; and, most recently, efforts to overhaul the system of legal education and professional training.

237. Livdahl, *supra* note 62, at 377.

238. *Id.*

239. No longer led by Mikazuki.

240. Livdahl, *supra* note 62, at 377.

241. Tatsuya Nakamura, *Salient Features of the New Japanese Arbitration Law Based upon the UNCITRAL Model Law on International Commercial Arbitration*, JAPAN COM. ARB. ASS'N NEWSL. (Japan Commercial Arbitration Ass'n, Tokyo, Japan), Apr. 2004, at 1, 1-2. For an overview of the development of this

nally adopted in August 2003,²⁴² to be effective on March 1, 2004.²⁴³ The new law is largely a transcription of the UNCITRAL Model Law and applies to both domestic and international arbitration, whether commercial or non-commercial. With limited exceptions, it applies only to arbitrations taking place in Japan.²⁴⁴

Of course, the law is most revealing about Japan's developing attitude to arbitration in the ways in which it deviates from either the UNCITRAL Model Law²⁴⁵ or from recent trends in international arbitration.²⁴⁶ From this perspective,

office, see Prime Minister of Japan and His Cabinet, http://www.kantei.go.jp/foreign/policy/sihou/enkaku_e.html (last visited Sept. 18, 2007).

242. Nakamura, *supra* note 241, at 1.

243. See 2003 Law.

244. *Id.* art. 3. The exceptions relate to the dismissal of court cases in favor of arbitration, requests for interim measures from a court, recognition of awards, and court intervention if the place of arbitration has not been determined by the parties (if there is a possibility that the arbitration will take place in Japan, and the general forum of either the applicant or counterparty is in Japan). *Id.* arts. 3, 8, 14(1), 15, 45-46. With respect to the meaning of "general forum", under Japanese law:

[The] general forum of a person is determined by his address, in case he does not have address in Japan or his address is not detected, by his residence, and in case he does not have residence in Japan or his residence is not detected, by his last address A general forum of a legal person or other association or foundation is determined by its principal office or place of business, and in case it has no office or place of business, by the address of the representative in Japan or a leading person in charge of the business in question. Notwithstanding the preceding paragraph, a general forum of foreign association or foundation is determined by the principal office or place of business in Japan, and if there is no such office or place of business in Japan, by the address of the representative or a leading person in charge of the matter in question.

Minsoho [Code of Civil Procedure], Law No. 109 of June 26, 1996, art. 4, paras. 1-6, available at <http://www.japanlaw.co.jp/procedure/civilcode.html> (last visited Oct. 15, 2007) (unofficial English translation).

245. Interestingly, when the new law differs from the UNCITRAL Model Law, it often seems to be in a way that agrees with the new German arbitration law, indicating a continuing connection between the Japanese and German legal systems. See, e.g., Nakamura, *supra* note 241, at 3.

246. For example, as one commentary notes,

Article 36 of the New Law slightly modifies the provisions of the UNCITRAL Model Law and provides that unless the parties have agreed on the applicable rules of law, the arbitral tribunal shall apply the law of the State with which the dispute has the closest connection without referring to any conflict in the rules of law. This is

the most significant element of the new law is unquestionably the provisions seriously limiting the arbitrability of consumer and employment disputes. These restrictions were not originally contemplated; however, shortly before the committee finalized its proposal, it received substantial public expression of support for protection of the right of consumers and employees to bring claims before a court.²⁴⁷ As a result, the law includes interim measures that effectively grant consumers and employees the right to avoid arbitrations, even if they originally signed an arbitration agreement.²⁴⁸ While the measures are expressly labeled as interim measures, there is no reason to think that public support for such provisions will rapidly decrease. They should thus be viewed as at least a medium-term feature of Japan's arbitral landscape.²⁴⁹ That these provisions

the recent trend in many countries and, for instance, the German Arbitration Act also takes this position.

Id. Similarly, in recognition of modern developments, the new law allows courts to recognize an arbitration agreement as "in writing" even if made by electronic means, such as e-mail. 2003 Law art. 13(4).

247. Nakamura, *supra* note 241, at 5:

[T]he Expert Group of the Reform Office, at the latter stage of its considerations, received a significant number of public opinions that consumers and individual employees should not be deprived of their right to bring a matter before a national court and that both a consumer arbitration agreement and individual employment arbitration agreement should be invalid.

248. Article 3, addressing these exceptions, begins: "For the time being, until otherwise enacted." 2003 Law art. 3.

249. Particularly since, as is discussed *infra*, rather than simply banning arbitrations involving consumers (and maybe employees), the power of whether or not to hold an arbitration is placed in the consumer's hands. The adopted provisional measures, then, are likely to increase support for such protections. The consumer protection provisions occur in article 3 of the 2003 Law, which grants a consumer the right to unilaterally cancel any arbitration agreement he has entered into with a business, "the subject of which constitutes civil disputes that may arise between them in the future," with no requirement that unconscionability be shown. *Id.* The consumer loses the right to cancel the arbitration agreement if he or she is the claimant. *Id.* *supp.* art. 3(2). If, despite these clauses, a business nonetheless commences an arbitration, the consumer is under no obligation to attend and challenge the arbitrators' jurisdiction. Instead, prior to commencing general proceedings, the arbitrators must schedule a special hearing, sending a written notice of the hearing to the consumer that states in "simple" language: (1) the date, time and place of the hearing; (2) that the award will have the same status as a final and conclusive court judgment; (3) that the existence of an arbitration agreement would preclude the filing of a court

grant consumers and employees the right to cancel arbitrations even when they knowingly signed an arbitration agreement²⁵⁰ indicates a significant ongoing public skepticism in Japan about arbitration²⁵¹ and not just a desire to protect consumers and employees from sophisticated and powerful corporations.

Other than these provisions, the law relating to the practice of arbitration is substantively identical to that of the UNCITRAL Model Law and is thus in conformity with current international arbitral norms adopted largely to facilitate and encourage the use of arbitration.²⁵²

Significant changes have been made, however, to Japanese law relating to the enforcement of awards rendered, enhancing the enforceability of arbitration awards, whether domestic or international. While previous Japanese practice required the court to hold an oral hearing before ruling on the enforceability of an arbitral award, thereby significantly delaying enforcement, under the new law a court may dispense with

action on the same matter; (4) that the consumer has the right to cancel the arbitration agreement; and (5) if the consumer does not attend the hearing, the arbitration agreement will be deemed to have been cancelled. *Id.* at supp. art. 3(5). If the consumer attends the hearing, items 2-4 must be reiterated. *Id.* at supp. art. 3(6). Moreover, even attending the hearing without objecting will not bind the consumer to the final award. Instead, the arbitration agreement is held to have been cancelled unless an explicit waiver was obtained. *Id.* Similarly, article 4 of the new law (also “[f]or the time being until otherwise enacted”), *id.* supp. art. 4, provides that any arbitration agreement between an employer and an individual employee (including a person seeking employment, Nakamura, *supra* note 239, at 6) that deals with disputes to arise in the future, is “null and void.” 2003 Law art. 4. Notably, unlike consumer arbitration agreements, such agreements are void rather than merely voidable.

250. And thus not merely where they signed an agreement that happened to include an arbitration provision hidden in its text. *See* 2003 Law supp. art. 3(2).

251. This contrasts with the consistent support given to arbitration by the Japanese legal system itself. *See supra* Part III.

252. An additional minor deviation is that the new law allows a court to assist parties in written communications, so that, for example, a party having difficulty delivering a written notice may request the court to serve it. 2003 Law art. 12(2).

the oral hearing, allowing for more expeditious proceedings.²⁵³

Furthermore, the 2003 Law includes no reciprocity requirement, under which enforcement of a foreign arbitral award would require that the award was made in the territory of a country that would itself enforce an award made in Japan. This is an important development for the enforcement of international arbitral awards in Japan because while Japan is a signatory to the New York Convention, it made precisely such a reciprocity reservation to its obligations under the Convention.²⁵⁴ However, since article 46 of the 2003 law applies substantively identical grounds for refusing enforcement as those listed in the New York Convention, but applies without a reciprocity requirement, it provides a mechanism for the enforcement of awards where reciprocity might be a complication.²⁵⁵ Indeed, since the 2003 law does not include the New York Convention's requirement that a copy of the original arbitration agreement is required for enforcement, it even creates a more favorable enforcement environment for awards delivered in countries signatory to the New York Convention.

While these provisions of the new law further enhance Japan's arbitration-friendliness, the most notable aspects of the new law address new limitations placed on the powers of arbitrators. Article 38(4), for example, allows that the arbitral tribunal may attempt settlement between the parties, but restricts this power by requiring the consent of the parties.²⁵⁶ Similarly, article 36(3) of the new law prevents arbitrators deciding *ex aequo et bono* unless "expressly authorized" by the parties.²⁵⁷ Since, as discussed above, efforts by Japanese arbitrators to encourage settlement and avoid an all-or-nothing decision have played a significant role in the unwillingness of foreign parties to arbitrate in Japan, if this provision is successful in influencing Japanese arbitral practice, it will significantly increase the appeal to foreign parties of arbitration in Japan.

253. *Id.* supp. art. 6; *see also* Nakamura, *supra* note 241, at 4 ("These simplified court proceedings are a deviation from the current proceedings under the Old Law that always required an oral hearing.").

254. Livdahl, *Arbitration*, *supra* note 70, at 4.

255. 2003 Law art. 46(8).

256. *Id.* art. 38(4).

257. *Id.* art. 36(3).

Even more importantly, however, since the new arbitration law draws no distinction between domestic and international arbitrations, this restriction on arbitral settlement powers will also apply in domestic arbitration. Thus, while domestic parties already familiar with the settlement-directed efforts of Japanese courts are likely to be less interested in objecting to unsolicited settlement attempts or *ex aequo et bono* awards than foreign parties, they nonetheless now possess a mechanism that will allow them to object if they wish.

One potential difficulty is that the provision merely requires the consent of the parties rather than requiring that they (rather than the arbitrator) initiate the settlement process or propose an *ex aequo et bono* award. Particularly given the traditional emphasis upon settlement within Japanese litigation and arbitration, there must surely be genuine concerns that any party rejecting an arbitrator's efforts to encourage settlement will offend and alienate the arbitrator.

Moreover, further significant questions exist relating to how this provision will be interpreted and applied by courts. Courts could largely eliminate the apparent strength of this provision by construing narrowly what constitutes an effort by the arbitrator to achieve an amicable settlement. Courts could, for example, hold that so long as there was no clear violation of the "no settlement-efforts" rule (e.g., forcing the parties to settle or using threats, rather than just actively encouraging the parties to settle), efforts by the arbitrator to make settlement appear attractive to the parties do not fall under the prohibition of the law.²⁵⁸

B. *The New JCAA Rules*

Corresponding with the adoption of the new arbitration law, the Japan Commercial Arbitration Association (JCAA), Japan's primary international commercial arbitration body, recently revised its own rules, which had also been criticized by

258. A similar willingness to restrain the traditional broad hand given to arbitrators in Japan is seen in the penalties for corruption described in articles 50-55. 2003 Law arts. 50-55. Whereas the old law also included such provisions, their applicability has now been extended to acts occurring outside Japan, so long as the arbitration itself is taking place in Japan. Nakamura, *supra* note 241, at 5; 2003 Law arts. 3(1), 55.

foreign arbitral professionals.²⁵⁹ Given the JCAA's position as Japan's most important arbitral organization, along with its new commitment to extending its role in domestic arbitration in Japan, the new JCAA rules are a strong indicator of views among Japanese arbitral professionals regarding the proper procedure for arbitration.

Indicating a clear goal to increase the JCAA's international prominence, rule 42 extends the JCAA's reach worldwide, allowing arbitrations to take place under the JCAA's auspices anywhere in the world.²⁶⁰ However, rule 11 requires that the arbitrations take place in either Japanese or English or both.²⁶¹

In line with the 2003 Law's willingness to reduce the power of arbitrators, the new JCAA rules have deleted a provision of the old rules that allowed an arbitral tribunal to reject a party's choice of representative for good cause.²⁶² When the power in question is one that will enhance the process of arbitration, however, the new rules show a willingness to increase the power of arbitrators, such as by allowing them to order the production of documents in a party's possession²⁶³ and to take interim measures of protection, including requiring the posting of security.²⁶⁴

Without question, though, the most important rules are those addressing the substance of the arbitrators' decision and settlement powers. Specifically, in parallel with the 2003 Law's restriction on the ability of Japanese arbitrators to decide *ex aequo et bono*, under rule 41 of the new rules this can only be done upon an express request of the parties.²⁶⁵ The use of the word "request" is significant here and clearly improves upon the use of "consent" in the 2003 Law, as by its terms it pre-

259. The Japan Commercial Arbitration Association Commercial Arbitration Rules, as Amended and Effective on March 1, 2004, available at <http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/shouji-e.html> [hereinafter New JCAA Rules].

260. *Id.* rule 42.

261. *Id.* rule 11.

262. Gerald McAlinn, *New Rules for International Commercial Arbitration in Effect from March 1, 2004*, JAPAN COM. ARB. ASS'N NEWSL. (Japan Commercial Arbitration Ass'n, Tokyo, Japan), Apr. 2004, at 6, 7.

263. New JCAA Rules, *supra* note 259, rule 37.

264. *Id.* rule 48.

265. *Id.* rule 41(3).

cludes parties from merely acquiescing in an arbitrator's suggestion. It remains to be seen, of course, how this provision will be interpreted by the Association, but reason for optimism can be drawn from the distinction in language between this provision and the new rule addressing settlement efforts by arbitrators. Parallel to the 2003 Law, rule 47 of the new rules provides that arbitrators may assist parties to settle, if all parties "consent."²⁶⁶ This provision, of course, retains the potential problems recognized above, in that it only requires that the parties consent to settlement and not that they initiate the settlement process. However, as *ex aequo et bono* decisions are regarded far less positively within international commercial arbitration than settlement efforts, rule 41 at least provides a means of eliminating one significant obstacle to Japan attaining a regular place as a venue for international commercial arbitrations.

C. *The New Legal Structure of Japanese Arbitration*

The theory advanced in this Article predicts that if courts fail to distinguish between international and domestic arbitration, domestic commercial arbitration will remain unpopular in Japan, as the social rules relating to confrontational dispute resolution between Japanese and foreign parties are unlikely to match those relating to a dispute between two Japanese parties. Similarly, it predicts that the 2003 law and new JCAA rules will not themselves suffice to enhance Japan's popularity as a situs for international commercial arbitration. Instead, such an increase will only occur when it becomes clear that Japanese arbitral practice has altered, as it is the practice and not the law that has been the primary obstacle to the success of international commercial arbitration in Japan.

While it is unquestionable that the 2003 Law and the new JCAA rules are significant developments for arbitration in Japan, it is as yet unclear to what extent they constitute a revolution or a mere revision to the rules. As argued above, due to consistently pro-arbitration court decisions, the primary obstacles to the success of arbitration in Japan have remained cultural rather than legal.

266. *Id.* rule 47.

In this respect, the text of the 2003 Law and new JCAA rules represent a significant change, as they appear to place new restraints on the power of Japanese arbitrators. However, until the provisions in question have been subjected to interpretation, it remains unclear to what extent these restraints will genuinely have an effect on the practice of Japanese arbitration.

Nonetheless, the provisions as written, along with the close adherence of the 2003 Law to the UNCITRAL Model Law, clearly indicate a desire on the part of the Japanese legal community to achieve a more prominent place in international commercial arbitration. As a result, there is reason to be optimistic that these rules will be interpreted in a manner consistent with the norms of international arbitration rather than with Japan's traditionally equity- and settlement-directed approach to confrontational dispute resolution mechanisms.

However, an important complication results from what may well turn out to be the most significant aspect of the new arbitration law: its failure to distinguish between international and domestic arbitration. Although this distinction has traditionally been ignored in Japanese law, it has the potential to create problems for the success of arbitration in Japan, as an interpretation of the 2003 Law's provisions intended to bring Japan into conformity with the conventions of international arbitration would also be applied to the arbitration of domestic disputes. Similarly, increased efforts by the Japan Commercial Arbitration Association to achieve a prominent role in domestic arbitration, if successful, will further push domestic arbitration towards the model of international commercial arbitration, upon which the Association's rules are based. As a result, domestic commercial arbitration can be expected to conform to the norms demanded by foreign parties for international commercial arbitration, rather than norms broadly accepted within the Japanese business community.

According to the social-cultural theory advanced here, however, arbitration will only be used in Japan when it matches the form of dispute resolution regarded as appropriate to the relationship underlying the dispute. Yet while confrontational dispute resolution may be appropriate in disputes between Japanese and foreign parties where there is little real social connectedness between the parties, it is likely to be far less acceptable in a dispute between two Japanese parties. The

theory advanced in this article, then, predicts that if courts do indeed fail to distinguish between international and domestic arbitration, or to attend even more specifically to the realities of the relationship between the disputing parties, domestic commercial arbitration will remain unpopular in Japan. In addition, it predicts that the 2003 law and new JCAA rules will not themselves suffice to enhance Japan's popularity as a situs for international commercial arbitration. Instead, such an increase will only occur when it becomes clear that Japanese arbitral practice has altered and become more consistent with Western arbitral norms, as it is the practice and not the law that has been the primary obstacle to the success of international commercial arbitration in Japan.

However, if the Japanese legal community adopts differing practices in domestic and international commercial arbitration, judicial deference to arbitration will result in a system that properly recognizes the importance of culture in domestic Japanese commercial disputes. Arbitration will then be able to emerge fully as a viable and desirable alternative to litigation in Japanese courts.

VIII. CONCLUSION

Discussion of Japan's low litigation rates has been long-standing, both within and outside Japan. Nonetheless, this article has attempted to demonstrate that while recent work by institutionalists such as John Haley and Mark Ramseyer has certainly improved the rigor and insightfulness of the debate, a social-cultural theory nonetheless provides the most convincing explanation for Japan's traditionally low rates of both litigation and arbitration. While much culturalist work has previously contented itself with generalized and idealizing claims regarding an alleged innate Japanese love of harmony and vagueness in relationships, a social-cultural interpretation of Japan's low litigation rates avoids such over-simplifications, producing instead a model that provides explanations for both observed behavior and falsifiable predictions.

Moreover, while the details of the social-cultural argument presented here rely upon social and historical facts specific to Japan, the underlying theory, based upon the work of Eugen Ehrlich, does not. Along with offering a solution to a long-standing dispute in Japanese legal studies, therefore, this

Article has also attempted to lay the foundations for a theory of the interrelation between social relations and the legal system that can be applied outside Japan. It has attempted to argue not just for a particular interpretation of Japanese non-litigiousness, but for a particular understanding of the connection between society and the law.