August 6, 2012

The Influence of Confucianism, Taoism, Sun Tsu and The Thirty Six Stratagems on Current Chinese Contract Law

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Abstract: This article explains the legal irritants to the Westernization of the Chinese contract law system by examining how Chinese culture and traditions based on Confucianism that has evolved in China over millennia. This article explains the influence of Chinese rule of men v. American rule of law on contract law. The historical examination demonstrates that the legal transplant of the Western contract law system in China conflicts in many ways with its millennia cultural and philosophical legal structure. Overall, the author argues that the examination of the historical influence of millennia ancient Chinese philosophy of law, Confucianism, Taoism, Sun Tzu’s Art of War and the Thirty-Six Stratagems provides significant explanations for the legal irritants of Western contract law in China, and also explains the challenges for the Sino-American bargaining and contract formation process for practitioners.

Key words: Chinese contract law, Comparative law and Cross-cultural contract bargaining.
A. The Historical Influence of Confucianism

To understand the Westernization of the Chinese contract law system, it is important to examine Chinese culture and traditions based on Confucianism that have evolved in China over millennia.¹ This historical examination will demonstrate that the legal transplant of the Western contract law system in China conflicts in many ways with its millennia cultural and philosophical legal structure.² The dichotomy between the American legal culture and traditions acquired over only the past two decades, in comparison with the Chinese culture and traditions acquired over millennia Confucian civilizational history (China has the first civilization in the world) demonstrates the challenging task of implementing the legal transplant of Western laws in non-Western cultures. This historical and cultural dichotomy, also, “provides a paradigmatic example of law without law, a normative order that falls radically short of real law, the kind that exists under the configuration we often call the “rule of law.”³ American and Chinese negotiators and lawyers have to always remember that this historical and cultural dichotomy continues to affect current cross-cultural Sino-American business contracts.

The philosophy of law of Confucius has influenced the development of Chinese law and society since the second century.⁴ Confucianism can be described as a Chinese philosophical and ethical system developed from the teachings of the Chinese philosopher Confucius (551–479 BC).⁵ Confucianism has been historically observed for determining contractual relationships in Chinese society before the Westernization of Chinese contract law.⁶

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⁴ Matheson Convergence, Culture and Contract Law in China, Supra n. 2 at 372.


⁶ Mo Zhang, Chinese Contract Law: Theory and Practice 26-27 (2006) (discussing that in ancient China, contract law was a moral duty and that the word “law” was normally interpreted as Xing or “penalty” or “punishment”).
Historically, China’s society and legal system have been based on the ideal of the Rule of Men (Ren-Zhi) rather than the Rule of Law that Westerners are accustomed to. Under the Rule of Men, power is concentrated in a few men. Since ancient times and even since the transplant of Western laws, the Chinese operated “clan corporations”, or relatively large commercial enterprises organized in the guise of the family. The members of these large “clan corporations” stayed together not merely out of affection for their kinfolk, but also to accumulate capital and to pursue profit more efficiently. The acceptance of the rules dictated by the corporate leaders of these “clan corporations” derives from their authority to govern from superior virtue for the benefit of the “clan corporation.” As David Hall and Roger Ames stated in their study of Chinese political system, “Westerners cannot think of the “Rule of Men” as anything other than an invitation to despotism”. Arguably, the millennia Confucian Rule of Men in traditional China has been a crucial factor in the successful legal transplant of an autocratic Communist legal system in Socialist China. For example, Mao Zedong tried to wipe out Confucianism, but in the meantime his own rule contained strong Confucian elements.

The Confucian Rule of Men can also be evidenced by China rating high in the Power Distance Index (PDI) according to Geert Hofstede’s cross-cultural empirical research.

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7 Ruskola Law Without Law, Supra n. 3 at 659-660.

8 Teemu Ruskola, Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective, 52 STAND.L.REV.,1599, 1605-1606 (2000) (discussing China’s recent Company Law in a broader historical and cultural perspective. Explaining that Chinese corporations have been organized as family businesses since ancient China up until today.) [hereinafter Ruskola Conceptualizing Corporations in China].

9 Id.

10 Id.

11 Ruskola Law Without Law, Supra n. 3 at 659


13 Id.
society.\(^\text{14}\) PDI also explains the extent to which the less powerful members of Chinese negotiators and organizations are more accepting of authority figures, thus they are more accepting than Americans that power could be distributed unequally in the negotiation process or between the organizations.\(^\text{15}\) On the other hand, the low PDI in the United States\(^\text{16}\) is arguably a result of a nation which emerged from a war for independence against the British Royal Empire. Despite the commonalities between British and American legal foundations\(^\text{17}\), the American legal system has crystallized into a system which adopts a more radical form of individualism and equalitarianism than the British. This individualism and equalitarianism resonates from the thinkers of the 1776 Declaration of Independence and American Constitution and is also vibrantly alive in the current legal foundations of American society. Thus, the solid legal foundations of the American contract law system are based on individualism and liberalism and democracy (e.g. freedom of contract and party autonomy), foundations which are diametrically opposed to the high PDI and collectivist foundations of Confucian Chinese philosophy of law.

The United States also later enacted its Antitrust-laws\(^\text{18}\) to restrain the commercially powerful and to create a monopoly that could disrupt the natural balance of the American free

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\(^{14}\) Hofstede’s Five Cultural Dimensions, Supra n. 12.

\(^{15}\) Id. at 61.

\(^{16}\) Id. at 82.

\(^{17}\) Hofstede’s Five Cultural Dimensions’ official web site: [http://www.geert-hofstede.com/hofstede_dimensions.php?culture1=95&culture2=94#compare](http://www.geert-hofstede.com/hofstede_dimensions.php?culture1=95&culture2=94#compare) (last updated 2009) (illustrating with empirical data the cultural differences between United States and United Kingdom, particularly the greater importance of power distance in United Kingdom as a constitutional monarchist society).

\(^{18}\) The Anti-Trust laws are fundamental to understanding the spirit of American “free” capitalism. The word “anti-trust” was commonly used to denote large corporations particularly in the form of manufacturing conglomerates which were existed in great numbers in the 1880s and 1890s. The Anti-Trust laws started with the Interstate Commerce Act of 1887 which started a shift towards federal rather than state regulation of big business. It was followed by the Sherman Antitrust Act of 1890, the Clayton Antitrust Act and the Federal Trade Commission Act of 1914, the Robinson-Patman Act of 1936, and the Celler-Kefauver Act of 1950. The Anti-Trust laws now comprise what the Supreme Court calls a "Charter of Freedom", designed to protect the core republican values regarding free enterprise in America SEE Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933). The American legal concept of Antitrust was recently also transplanted in China. The Anti-Monopoly Law was passed on 30 August 2007 and took effect on 30 August 2008, See Patricia Blazey and Kay-Wah Chan, The Chinese Commercial Legal System 376-73 (2008) [hereinafter Chinese commercial legal system].
economic markets. As a high PDI country\textsuperscript{19}, China has historically accepted a more unequal commercial legal system based on the Confucian principles of the Rule of Men.\textsuperscript{20} The Chinese Confucian view of efficient management of socio-economic relations has been to centralize political and economic power in the hands of a few state men and businessmen.\textsuperscript{21} This being said, despite the Chinese natural acceptance of the concentration of corporate and commercial power, as the first and oldest civilization, it is important to note traces on Anti-Trust law going back to the ancient China.\textsuperscript{22}

Under the Confucian Rule of Men, political and business leaders have to lead by virtue, like benevolent autocrats or good fathers.\textsuperscript{23} The Confucian Rule of Men may appear to be a strange Eastern legal philosophy, incompatible with Western conceptions of democracy. However, I argue that this Confucian legal principle is deeply rooted in the history of the American legal system by the historic institution of judicial review in American constitutional law:

“In the early nineteenth century, no facet of U.S. law distinguished American law more from civilian legal systems - indeed, from many common law systems – than did the institution of judicial review, the idea that courts have the authority to review the acts of legislature or officials and to declare void statutes and orders that conflict with the Constitution.”\textsuperscript{24}

\textsuperscript{19}Hofstede’s Five Cultural Dimensions, Supra n. 12 at 80.


\textsuperscript{21}I believe in the virtue of feminism seeking equality between men and women, and therefore I am using the word “men” not on a discriminatory basis but on an intentional basis to illustrate that China was historically (and still is to a large extent) a very masculine society rating high on the masculinity index (MAS) in the cross-cultural empirical research of Hofstede, See Hofstede’s Five Cultural Dimensions, Supra n. 12 at 141. However, it is important to note from Hofstede’s empirical cross-cultural research, that both China and the U.S. are masculine-oriented societies (see Hofstede’s Five Cultural Dimensions, Supra n. 12 at 141). Evidently, in both American and Chinese society, “emotional gender roles are clearly distinct: men are supposed to be assertive, tough, and focused on material success, whereas women are supposed to be more modest, tender, and concerned with the quality of life” (See Hofstede’s Five Cultural Dimensions, Supra n. 12 at 140). This masculine orientation toward business life necessarily has a strong impact on gender roles during Sino-Americans contract negotiations.

\textsuperscript{22}Ruskola Conceptualizing Corporations in China, Supra n. 8 at 1629 (describing that the ancient Chinese states also feared local corporations power and influence being too concentrated in agnatic kinship groups).

\textsuperscript{23}Hofstede’s Five Cultural Dimensions, Supra n. 12 at 76.

\textsuperscript{24}George P. Fletcher and Steve Sheppard, American Law In A Global Context the Basics 132-149 (2005) [hereinafter Fletcher & Sheppard American Law in a Global Context].
Chief Justice Marshall paradoxically states in *Marbury* that, “the government of the United States has been emphatically termed a government of laws, and not of men.”25 However, the Chief Justice arguably created either intentionally or accidently a “government des juges”26 by instituting the concept of judicial review which follows a similar philosophical thinking to the Confucian Rule of Men. Chief Justice Marshall saw the U.S. Constitution as a superior, virtuous paramount law, unchangeable by ordinary means or ordinary men. Chief Justice Marshall also believed in the separation of powers between the legislators, elected officials and judges. According to Chief Justice Marshall, judges were the only virtuous men in American society to, “close their eyes on the virtue of the U.S. Constitution, and see only the law”27 in a virtuous way. Judges were the only ones capable of making decisions from a right-based approach and based on the Constitution rather than on a partisan, political, interest-based approach. Evidently, in analyzing the legal reasoning of Chief Justice Marshall in *Marbury* there are similarities between his philosophy of law and society and the conception of the Confucius Rule of Men that, “if all men remain in within their established roles, the rule of man will be sufficient”28. Chief Justice Marshall stated that,

“the distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.[…] Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.”29


27 Fletcher & Sheppard American Law in a Global Context, Supra n. 24 at 132-149 (analyzing Marbury and the institution of judicial review in American law).

28 Matheson Convergence, Culture and Contract Law in China, Supra n. 2 at 372.

29 Fletcher & Sheppard American Law in a Global Context, Supra n. 24 at 142-143.
Under judicial review, the courts, “must close their eyes on the virtue of the Constitution, and see only the law” 30; however, the courts are ultimately led by men 31 who are not infallible to their own personal and political values and opinions. Therefore, the difference between judicial review and the Confucian Rule of Men seems less distinguishable. Just like the Confucian Rule of Men, where Chinese rulers must rule with ultimate authority deriving from virtue, the rulings of the American judges are subject to their own interpretations, power and authority. Arguably, Chief Justice Marshall used the word “courts” and carefully avoided the word “judges” to avoid appearing as though he intended to increase the power of judges in the American democratic system. For some legal philosophers, this goes against “The Spirits of Laws” of Montesquieu which stipulates that judges should only be bouche de la loi (“the mouthpiece of the law”). 32

Another interesting and controversial comparative legal argument on the similarity between the American Rule of Law and the Chinese Rule of Men is that the American Constitution itself is based on the Rule of Men:

“China’s political culture is usually classified negatively as “stagnation”, a similar lack of change in the American case represents the positive quality of “stability”: not slavery to tradition but an admirable fidelity to who

30 Fletcher & Sheppard American Law in a Global Context, Supra n. 24 at 142-143.

31 Again, I believe in the virtue of feminism, and therefore I am using the word “men” on a non-discriminatory and intentional basis to illustrate the historical and current “Rule of Men” in the American judicial system and the current underrepresentation of women at the U.S. Supreme Court. As of Oct. 13, 2011, there have only been four female Supreme Court justices:

I. Justice Ginsberg was appointed by President Clinton in 1993 (active);
II. Justice O’Connor was appointed by President Reagan in 1981 and retired in January, 2006;
III. Justice Sotomayor was appointed by President Obama in August 2009 (active);
IV. Justice Kegan was appointed by President Obama in August 2010 (active).


32 Charles de Secondat, Baron de Montesquieu, The Spirit of Laws, Book 11, chapter 6 (1748) (reprinted Cambridge: Cambridge University Press, 1989) (arguing against judicial review and that the national judges should be no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor).
We the People “really” are. Indeed, consider the tremendous amounts of scholarly energy that constitutional Originalists, for example, devote to explaining why contemporary Americans ought to be ruled by an agreement hammered out by a group of property owning white men in Philadelphia in 1789. The expectation that these men should be able to rule us from their graves is surely as much a form of ancestor worship as any advocated by Confucius, yet here it is one that confirms Americans’ identity as essentially, solidly American.”

Another revealing example of the resemblance in law-in-action and “law-in-minds” between the Rule of Men and Rule of Law is constructed on American feminist legal scholars have long argued that the interpretation of the concept of “reasonable man” under American tort law bears a striking resemblance to the judges themselves, most of whom continue to be white males from wealthy backgrounds. They further argue that American tort law consequently tends to unfairly favour white, affluent males. As illustration when Justice Ginsburg took her oath in 1993 as the second woman to ever become a bencher at the U.S. Supreme Court, she said that “diversity in the judiciary will increase” (the diversity (or lack thereof) of the American or Chinese judiciary is an interesting issue which is beyond the scope of this article).

In conclusion, the similarities listed above between the Chinese Confucian philosophy of law and the American law are intriguing because they illustrate how the distinctions made between the two “are often too moralistic and too black and-white to be of analytic utility”.

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34 See L Bender, A Lawyer’s Primer on Feminist Theory and Tort, 38 J. of Legal Education (1988).
35 Id.
36 John M. Broder, Los Angeles Times (Aug. 11, 1993) available at http://articles.latimes.com/1993-08-11/news/mn-22710_1_supreme-court-justice (discussing Justice Ginsburg taking her oath for the Supreme Court and her statement that diversity in the U.S. judiciary should increase by the presence of a woman at the Supreme Court. The diversity (or lack thereof) of the American judiciary is an interesting issue which is beyond the scope of this article.
37 Ruskola Law Without Law, Supra n. 3 at 656.
B. Understanding The Influence Of Chinese Rule Of Men V. American Rule Of Law On Cross-Cultural Contract Negotiation And Dispute Resolution

Western legal systems are largely based on the ideal of universal laws applied equally to all members of the society, while Confucian Chinese philosophy of law, and life, is premised on obedience to superiors within a hierarchy. Therefore, hierarchy and the role of an individual as primarily a collective member of an organization is part of the heritage of Confucian thinking which arguably influences Chinese contract negotiators today. This premise is also evidenced by the empirical cross-cultural research of Charles Hampden-Turner and Fons Trompenaars on the cultural dimensions of universal business societies (i.e. US is more right-based oriented society) versus particular business societies (i.e. China is a more interest-based and power-based society). While Americans tend to be more contract-oriented and build business relationships on a universal basis following a more right-based basis, as Particularists, the Chinese tend to focus more on the exceptional nature of relationships and present circumstances. Therefore, Chinese tend to build business relationships on a more interested-based or power-based basis. The Chinese will more often see the other contracting party, as a friend, family, or person of unique importance to them, with special claims on their love, indifference or hatred. For example, a Chinese negotiator will be more likely to say: “I must sustain a relationship on the basis of these special claims, no matter what the words of the contract state. As Universalists, Americans may lose trust in a Chinese party if he is constantly seeking to re-negotiate the contractual terms and conditions already agreed upon and/or deviate from them.

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38 Ruskola Law Without Law, Supra n. 3 at 661.
39 Hofstede’s Five Cultural Dimensions, Supra n. 12 at 80-83.
40 Charles M. Hampden-Turner & Fons Trompenaars, Riding the Waves of Culture, Understanding Cultural Diversity in Global Business 29-51 (2nd Ed. 1998) [Hereinafter Hampden-Turner Trompenaars 7D Model]
41 Id.
42 Id. at 29-51 (discussing cross-cultural formation of relationships and rules such as Universalism for American v. Particularism philosophical orientation for Chinese).
43 Id.
44 Id.
45 Id.
Particularists, the Chinese may comment on American Universalists that, “you cannot trust these Americans because they will always refer to the contract and will never want to adapt it to the nature of present circumstances and our relationship.” Arguably, due to cultural differences, both Chinese and American negotiators may view the other contracting party as mistrusting in contractual relationships.

This cultural dimension is one of the most crucial factors which can help to explain the difficulty of implementing the legal transplant of Western contract law in China and compare American v. Chinese formation of contractual relationships. The Chinese Confucian philosophy of law is marked by a strong Particularist legal system, whereas the American democratic and liberal philosophy has strong Universalist historical legal foundations. The practical effects of this diametrical opposition are well known by international business practitioners: American are contract-oriented and Chinese are more relationship-oriented when establishing business relationships.

C. The Historical Influence Of Taoism

Taoism has also had a significant influence on the philosophy of law and the historical development of the Chinese civilization. Lao Tzu lived in the 4th century BC and was a mystic philosopher of ancient China author of the Tao Te Chiang and founder of Taoism. Taoism stresses an individual search for spiritual self-fulfilment though a rejection of false desires. This component of Taoism has also contributed to the successful legal transplant of Communism in China and the rejection of materialistic desires of the Western world. However,

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46Hampden-Turner Trompenaars 7D Model, Supra n. 40 at 29-51 (discussing cross-cultural formation of relationships and rules such as Universalism for American v. Particularism philosophical orientation for Chinese).

47 Id.

48 Matheson Convergence, Culture and Contract Law in China, Supra n. 4 at 372.


50 Hereinafter Pattinson & Herron, Supra n.1 at 480.

51 Id.
the Taoist rejection of false desires has weakened since ancient China and old communist China. The modern, more market-oriented China is now a strong consumerist society, where the *nouveaux riches* crave expensive, luxurious Western products. The adherence of the Chinese people to the Taoist values of non-materialism and self-effacement might change with the new socio-economic conditions caused by the current Chinese market-oriented economy.52

In encouraging a search for self-fulfillment and following the natural Way53, Taoism rejects the intervention of written laws and adjudication of laws so as not to disrupt the natural social harmony.54 Thus, under Taoism, turning to the courts and the enforcement of laws by adjudication may be viewed as a weakness and social disorder, rather than an adherence to the Natural Way.55 Therefore, evidence of the influence of Taoism on modern Chinese contract law is arguably demonstrated by the Chinese historical and cultural preference for Alternative Dispute Resolution (ADR) mechanisms such as negotiation, conciliation or mediation in commercial disputes over court or arbitral litigation.56

The historical influence of Taoism has also contributed to the flexibility and vagueness of modern Chinese contract.57 According to the empirical cross-cultural research of Charles

52 Although it is important to note the duality between the impact of economic conditions and national culture on norms and values, a cross-cultural study reveals that Chinese are thought to have a modesty bias: see J. Farh G. and B. Cheng, Cultural Relativity in Action: A Comparison of Self-Rating Made By Chinese and U.S. Workers, 44 Personnel Psychology129-47 (1991). Now the question should be whether the historical modesty bias of Chinese influenced by Taoism will soon disappear with the radical socio-economic changes currently happening in the Chinese society?


54 Matheson Convergence, Culture and Contract Law in China, Supra n. 4 at 372.


Hampden-Turner and Fons Trompenaars Americans tend to see the world in a more linear way (e.g. “wrong or right” or on basis of race, “black or white.” For instance, the strict application of the Parole Evidence Rule in the interpretation of contracts in American case law demonstrates the predisposition for a more linear way of legal thinking. On the other hand, the historical influence of Taoism has caused modern Chinese contract law to develop in a more flexible and

58 See Hampden-Turner Trompenaars 7D Model, Supra n. 40 at 29-50 (discussing the natural cultural tendency of Americans to embrace linear-thinking as Universalists).

Regarding the fact that Americans tend to see the world in a more linear way such as “black or white” on the basis of race, the history of African-American slavery and racial tensions between the Blacks and Whites in the American society have arguably lead Americans to often attribute socio-economic and legal problems to linear “black” or “white” racial factor analyses. The United States is infamous for its past of enslave African-Americans and its ongoing racial discrimination (mainly against Blacks and also now against Hispanics). However, both Canada and United States are nations where European immigrants have colonized and deprived Aboriginal people of their land and committed acts of genocide. Unlike the United States, which acknowledges and recognizes the atrocities committed against Native Americans and African-Americans slaves, Canadians are usually silent or reluctant to discuss crimes against humanity committed by the Canadian government against Aboriginal people and also against African slaves during slavery in Canada. Therefore, it appears that Americans are more willing to engage in discussions about slavery and oppression. The American people’s decision to elect President Obama as their first Black President, despite a racist past against Blacks, provides a sense of hope for future equality. Unfortunately, race and/or ethnicity is too often a crucial factor for building trust and respect in cross-cultural negotiations. Since this article addresses the influence of culture and history on law and society in the field of cross-cultural contract negotiations, it is fundamental to understand that despite all the often wrongful accusations of ethnocentrism and racism against Americans (mainly against White Americans) by international negotiation practitioners (especially in the diplomatic and political arena), there are significant historical points where Americans have not acted racist or ethnocentric ways. Despite the tendency of Americans to see racial issues in a linear way, Americans may be able to more efficiently integrate people of different cultures into their laws and society compared to other nations such as: Canada, Western and Eastern European nations or Asian nations like China (I will argue at least from an economic justice perspective). Therefore, Americans may be able to see past race (and racial stereotypes) in international business contract negotiations.

*See the controversial research from Ian Ayres, Fair driving: gender and race discrimination in retail car negotiations. 104 Harv. L. R. 817-872 (1991) (this research discussed “the struggle to eradicate discrimination on the basis of race and gender has a long history in American law. Based on the widely held belief that such discrimination will occur only in markets in which racial or gender animus distorts competition, regulatory efforts have been limited to areas in which interpersonal relations are significant and ongoing, such as housing and employment. In this Article, Professor Ayres offers empirical evidence that seriously challenges faith in the ability of competitive market forces to eliminate racial and gender discrimination in other markets. His Chicago-based research demonstrates that retail car dealerships systematically offered substantially better prices on identical cars to white men than they did to blacks and women”Abstract from LegalTrac. Web. 13 Oct. 2011).

59 Melvin Aaron Eisenberg, The Bargain Principle and its Limits, 95 Harv. L. Rev. 741, 741-801 (discussing the limits of the bargain theory for the formation of contract in American contract law such that the principle of unconscionability often justifies limitations on the bargain principle when the assumption of a perfect market is relaxed. In particular, he sets out four categories of contracts involving the exploitation by one party of another's distress, transactional incapacity, susceptibility to unfair persuasion, or ignorance about prices).
vague way, so that contract law can conform more to the Natural Way and to, “seek fairness by treating all cases on their special merits.”

The “Yin and Yang” symbol below illustrates the Particularist legal thinking behind modern Chinese contract law based on the ancient philosophy of Taoism.

![Yin and Yang Symbol](image)

This symbol is the best known East Asian symbols in North America which illustrates the Chinese philosophical principle of Dualism. This symbol defines the way polar opposites or outwardly contrary forces are interconnected and interdependent in the Natural Way. Opposites thus only exist in relation to each other. For the Chinese, the flexibility and vagueness of their modern contract law system is one of its major strengths. The Chinese historical and cultural perception of flexibility and vagueness as major strengths of their contract law system can be attributed to the philosophical thinking of Taoist principle of “the strength of weakness”. In summary, this Chinese philosophy seeks reason and fairness by treating all cases on their special merits.

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60 Matheson Convergence, Culture and Contract Law in China, Supra n. 4 at 378 (discussing the vagueness of Chinese contract law influenced by the Chinese philosophy of dualism).

61 Hampden-Turner Trompenaars 7D Model, Supra n. 40 at 50.

62 Tony Fang, Chinese Business Negotiating Style, 30 (2000) [hereinafter Fang Chinese Business Negotiating Style]. (defining the Chinese philosophical principle of dualism in the symbol of Yin and Yan. This symbol represents qualities inherent in all things in the universe. Yin and Yan are both necessary and complementary if universal events are to be created, maintained and developed in a harmonious way).

63 Id.

64 Id.

65 Matheson Convergence, Culture and Contract Law in China, Supra n. 4 at 372.
D. The Historical Influence Of Sun Tzu And The Thirty Six Stratagems

Another major influence on the Chinese philosophy of law and modern contract law is the military and conflict strategies of Sun Tzu, author of the Art of War.66 The Art of War is one of the oldest and most successful books on military strategy and conflict management philosophy in both the Eastern and Western worlds. For more than two thousand years it remained the most important military treatise in Asia.67 It has had an influence on Eastern military thinking, society, commerce, philosophy of law, and beyond. The Art of War philosophy has been applied to many fields in the West and East such as: politics, diplomacy, business68, law, negotiation69, dispute resolution and litigation70, for top executives71 and even sports such as American football72. The universal admiration for Sun Tzu largely comes from the teaching that, “the best way to accomplish more is to do the least.” The Art of War promotes the use of powerful psychological tools to outwit, outsmart and deceive opponents in order to turn weakness into strength and achieve the desired outcome without shedding blood and fighting.73 A central theme is also the

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66 The Thirty-Six Stratagems (also mistakenly called the Thirty-six strategies) are a series of stratagems used in politics, war, as well as ancient Chinese folklore. These stratagems can be viewed as unorthodox or deceptive means to achieve goals. The Stratagems are often misnamed as “Strategies”. However, the word “stratagem” is more appropriate because this word is synonymous with “ruse” as opposed to “strategy”. In the context of negotiation, stratagem could be interpreted as a tactic: See Tony Fang, Chinese Business Negotiating Style, Supra 62 at 372-73.


69 Fang Chinese Business Negotiating Style, Supra n. 62 at 155-164 (discussing the influence of Sun Tzu on Chinese negotiating style).


72 See for example Michael Holley, War Room: The Legacy of Bill Belichick and the Art of Building the Perfect Team (2011).

73 Pattinson & Herron, Supra n.1 at 482.
power of adaptation to a changing environment with speed, surprise and flexibility.\textsuperscript{74} This historical philosophy of war has had a major influence on the crafting of deceptive negotiation strategies. The teachings of Sun Tzu are too often misinterpreted, causing many Americans to believe in a Chinese tendency to be deceptive in business contract negotiation. However, the teachings of Sun Tzu have also been adopted in the West. For instance, the Art of War can be linked with the well-known North American saying that, “diplomacy and negotiation is the art of having some else have your way” and also with the famous quote by President Abraham Lincoln, “Am I not destroying my enemies when I make friends of them?” Another concrete example is the counterstrategy against positional bargaining taught by the school of principled negotiation or “win-win” negotiation from the Harvard Negotiation Project at Harvard Law School, which derives from the teachings of Sun Tzu.\textsuperscript{75} For instance, the school of Principled Negotiation at Harvard Law School promotes the “Negotiation Jujitsu” strategy to deal with adversarial and positional bargaining or more powerful negotiators.\textsuperscript{76} Essentially, “Negotiation Jujitsu” means to avoid playing the positional bargaining game and deflecting the powerful attack of the other side to the actual negotiation and conflict problem.\textsuperscript{77}

The most influential ancient Chinese philosophy of war after Sun Tzu’s Art of War is arguably the Thirty-Six Stratagems\textsuperscript{78}. These stratagems are currently applied to business and law

\textsuperscript{74} Id. \\
\textsuperscript{75} See Roger Fisher and William Ury, \textit{Getting to Yes, Negotiating Agreement Without Giving In} (2\textsuperscript{nd} 1991) [Hereafter Fisher & Ury Getting to Yes]

\textsuperscript{76} Fisher & Ury Getting to Yes, Supra n. 144 at 107-28 (discussing the Negotiation Jujitsu theory). I will argue that a wise negotiator should learn \textbf{Mixed Martial Arts (MMA) Negotiation} instead and move away from Negotiation Jujitsu when possible. As a practicing corporate lawyer and professor of Negotiation and Dispute Resolution, I feel believe that applying Negotiation Jujitsu to the negotiation process is a strategic necessity but does not always prepare negotiators to negotiate effectively in the real world. Competitive and adversarial behaviours too often dominate negotiations in the real world. Therefore, MMA Negotiation can be a superior style of fighting/negotiating by accepting this logic: MMA wisely mixes and blends martial art disciplines which allow a more holistic, flexible and situational approach to fighting/negotiating. The 'traditional' school of principled negotiation from the Harvard Negotiation Project only teaches Negotiation Jujitsu. My school of MMA Negotiation will train negotiators and lawyers to improve in all negotiation styles (i.e. not just integrative (win-win) and relational negotiations like for Negotiation Jujitsu, but also for competitive or adversarial negotiations). An in-depth discussion of my MMA Negotiation theory is beyond the scope of this article and is currently under research.

\textsuperscript{77} Id. \\
\textsuperscript{78} Matheson Convergence, Culture and Contract Law in China, Supra n. 2 at 372-373.
in China.\textsuperscript{79} The stratagems are a collection of tactics that can be applied to very different situations.\textsuperscript{80} The author(s) of the stratagems is unknown, but the stratagems originated from the civil wars in China either during the Warring States Period (403-221 B.C.) or the Three Kingdom Period (220-265).\textsuperscript{81} The stratagems are still part of the Chinese folklore and children learn them like American children learn nursery rhymes.\textsuperscript{82} The stratagems are taught in schools, found in literature, popular, folk opera, and sometimes even in television programs\textsuperscript{83}. Some argue that these strategies are part of the “collective unconscious” of most Chinese People.\textsuperscript{84} John Barkai, goes as far as to argue that, “just about anyone who has “grown up Chinese” (meaning that they have grown up in a Chinese home that respects and teaches Chinese traditions) knows these Thirty-Six stratagems.”\textsuperscript{85} The stratagems may be reflected today in the Chinese approach to business, especially with foreigners.\textsuperscript{86} For example, a common Chinese expression is, “the marketplace a battlefield.”\textsuperscript{87} Therefore, for many Chinese businesspeople, the analogy between war and business is still relevant. Western management theorists have also developed management theory based on the Thirty-Six Stratagems such as the modern Western management theory of Competitive Intelligence.\textsuperscript{88}


\textsuperscript{80} Barkai A Perspective on Cross-cultural and Dispute Resolution, Supra 38 at 436-444.

\textsuperscript{81} Id. at 436.

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Barkai A Perspective on Cross-cultural and Dispute Resolution, Supra 38 at 436.

\textsuperscript{85} Id.

\textsuperscript{86} Id. at 439.

\textsuperscript{87} Id.

\textsuperscript{88} Competitive intelligence can be defined as a management theory that focuses on lawful ways (without using industrial spying) to define, gather, analyze, and distribute intelligence about products, customers, competitors and any aspect of the environment of business competitors in order to support business managers in making the best strategic decisions for an organization See A. Barnea, \textit{Creating More Value to the Competitive Intelligence Function}, 13 Competitive Intelligence Magazine (2010).
Evidently, despite ancient origins, the Thirty-Six Stratagems are still relevant and important for contract negotiations today. As previously discussed, Chinese philosophy of law has evolved over a long history of violence and civil war.\textsuperscript{89} In contrast, the United States has only had one civil war. This historical fact may translate into a superior ability for the Chinese to use deception in contract negotiations and business tactics in general.\textsuperscript{90} Ruskola states that: “law is not just a structure of belief and political imagination. It is also a system of organized violence backed by force. But belief and force are hardly independent; we have far greater incentives to believe those who possess force.”\textsuperscript{91} Therefore, a history marked by many civil wars may have also contributed to the crystallization of the philosophy of law of “Guanxi”\textsuperscript{92} (good social relationships) in the collective cultural programming of the Chinese people. The constant civil warfare in ancient China has contributed to the reinforcement of the concept of friendship along with the concept of enmity in their political and social relations. Moreover, as mentioned earlier in this article, the historical Western exploitation and war crimes committed by fascist Japan against the Chinese during the Second World War have also contributed to the reinforcement of the concept of friendship and enmity in current Chinese social relations and philosophy of law.

E. Conclusion

In summary, the examination of the historical influence of millennia ancient Chinese philosophy of law, Confucianism, Taoism, Sun Tzu’s Art of War and the Thirty-Six Stratagems provides significant explanations for the legal irritants to the transplant of Western contract law in China, and also explains the challenges for the Sino-American bargaining and contract formation process for practitioners.\textsuperscript{93}

\textsuperscript{89} Barkai A Perspective on Cross-cultural and Dispute Resolution, Supra 44 at 439.
\textsuperscript{90} Id.
\textsuperscript{91} Ruskola Law Without Law, Supra n. 23 at 665.
\textsuperscript{93} Pattinson & Herron, Supra n.1 at 459-506 (providing an overview of how cultural traditions in China effect current contract law). Ruskola Law Without Law, Supra n. 24 at 655-669 (providing an overview of the argumentaire of weak legal transplant of Western laws in China).