Resolving disputes in China using Mediation

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Dispute prevention

As in any country good preparation is the secret to avoiding disputes in China. Investors should make certain the project is economically viable and then choose their business partners very carefully. However even in the US business world, where parties have a common culture and language, communication problems and disputes can be an inevitable consequence of working with others. In the Chinese business world the use of a trusted third party "zhong jian ren" is one of the key elements of negotiation and mediation. Acting through an intermediary the parties can save face "mianzi" and social relations "guanxi" should the negotiations fail or disputes arise. The risk of confrontation is much reduced by minimising direct face-to-face communication by the negotiating parties. Communications through a trusted intermediary or “mediator” also reduces the need for emotional responses which may create potential conflict.

Different cultures view the purpose of negotiation differently; a good example of this is the contrasting views of what a contract represents. The goal of most US negotiations is to walk away with a binding written contract containing the terms of the agreement. In Asia however the contract is often regarded as merely a framework, which guides the relationship between the parties. The relationship is the agreement not the contract. So the key to on-going business dealings is the interaction within the parties’ relationship. This can lead to disagreements as non-Chinese may have great difficulty in accepting what appears to be a process of perpetual negotiation.

Handling a dispute

Knowing how to effectively manage a business dispute should be an important component of every successful China business strategy. The best approach to dealing with individual disputes will vary from case to case, however mediation is often one of the most effective processes for handling business disputes in the Chinese market. It may be that the appropriate solution to a serious dispute is for parties to try and extricate themselves from the deal, minimising any potential damage to either side. If however this is not possible or desirable, using negotiation or mediation rather than seeking to litigate sends a signal that there is a strong desire to put the business relationship back on track on a basis acceptable to both sides. The commencement of judicial or arbitration proceedings is nearly always understood as the final breaking off of a relationship.

In the author’s experience, working as a Manager many years ago in a Chinese company, during a dispute with a supplier, where it appeared that there was a very strong legal case, when litigation was suggested, the boss “laoban” rejected the idea out of hand. He

2 The author has worked in China and South East Asia as a businessman, lawyer and mediator for nearly 30 years and speaks Mandarin fluently.
explained that it was not just the fact lawyers would have to be paid but in his view there had to be a better way to deal with it, which would not result in the other party perhaps becoming his enemy for life and his getting a bad reputation in the market place, as someone who resolved his business/contractual problems by litigation rather than using third parties to mediate a resolution to the dispute.

**Historical background**

China has throughout its history cultivated a national system of institutional mediation which has its roots in Chinese custom and philosophy. In the Qing dynasty if a dispute arose the local judge would often return the complaint and request the parties mediate in order to discourage unnecessary litigation. This ethos continues to this day with Chinese Judges and Arbitrators being empowered to employ mediation as part of their practice in dealing with cases.

The philosophy of Confucius has had an immense influence throughout South East Asia. As well as China it has impacted heavily on Japanese, Korean, Vietnamese and Thai culture. This philosophy that sets out to give guidance to society, from the ruler to the ruled, on how to live also had important things to say about both conflict avoidance and dealing with conflict.

In Confucianism concepts such as harmony (*he*) and yielding to others (*rang*) were highly valued whereas aggression and argument seen as character defects. This emphasis on harmony *he* is reflected in Chinese social interaction and conflict resolution. Confucius believed in a society governed by the principles of *li* (right behaviour) not *fa* (law). Recourse to law or argument amounted to a complete failure by the parties involved to observe ethical principles and amounted to a severe loss of face. As a well-known Japanese proverb goes “In a quarrel both parties are to blame”

The use of the law "*fa*" rather than ethical conduct "*li*" to resolve disputes is still regarded as a last resort. In Taoism, another influential Chinese thought system, Lao Tze said that the key to life was to find the way between opposing forces involving a compromise. This allows parties to hold equally valid positions rather then arguing over whose truth or legal rights should win. The Tao states, “The qualities of flexibility and suppleness are often superior to rigidity and strength” and “Harmony seeks agreement where justice seeks payment”.

This deeply embedded distaste for confrontation in relationships still reverberates strongly in China today. In fact non-confrontational mediation is still widely used throughout South East Asia, according to the Dispute Mediation Experts Group of APEC, the lower popularity of arbitration as opposed to mediation in Asia is due to the

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3. Asia Pacific Economic Cooperation Group
fact “that arbitration like litigation is adversarial and tends to produce winners and losers which have the capacity to destroy viable business relationships\(^6\).

However it should not be deduced from the above that litigation is not accepted or used as a means of resolving disputes in China. As parties engage in trade and business with others on a more formal, modern and contractual basis recourse to the courts to settle business disputes has risen across the Asian region. Parties are becoming increasingly rights conscious and more willing to sue than previously. The number of cases filed each year has continued to rise.\(^7\) The number jumped from 31 cases per hundred thousand in 1978 to 345 in 2002.\(^8\) In Intellectual Property Right cases it has been truly dramatic, last year IP cases totalled 39,913 — a year-on-year jump of 64\%
\(^9\).

It is submitted that the increase has come from factors such as, quite simply there are now many more trained lawyers and judges, there is a generational change underway and a modern legal system has been created plus to a small degree the popularity of Western television programmes featuring court room dramas has made litigation more acceptable.

There is also a perception in some quarters that stand alone mediators\(^10\) should not be involved in the legal system. This is often due to a belief that mediation is a soft process and unskilled and that therefore the law should be the preserve of skilled legal specialists. Some commentators have suggested that the majority of young lawyers either returning from overseas legal study or the thousands currently graduating with law degrees from Chinese universities see mediation as being out of date, practiced by uneducated “Aunty Wu’s” in the villages and only used as a controlling mechanism during Mao’s day\(^11\) rather than as an effective dispute resolution process.

Also on a much broader level China has moved from the country into the city in what may be the largest internal migration of people in history. One effect of this has been the loosening of close community networks and links. It may be argued that this has lessened the degree to which the maintenance of peaceful relationships is regarded as being important. This increases the propensity to go to court as the loss of face usually associated with litigation is less important when one does not have a relationship with the other party. It may have contributed to an environment more favourable to litigation especially in the big cities.\(^12\)

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\(^6\) APEC website www.arbitration.co.nz accessed 7/10/1005.
\(^7\) Potter, Pitman, Legal Reform in China: Institutions, Culture, and Selective Adaptation, Law and Social Enquiry, Journal of the American Bar Foundation Volume 29, Number 2, Spring 2004 p484
\(^8\) Fen He Chinese Arbitration “Chinese Alternative Dispute Resolution” ADR p34 Association of International Arbitration.
\(^9\) China Daily newspaper, 27 December 2010, quoting figures released by the Supreme People’s Court. It should be remembered that it is only recently that Chinese companies have had intellectual property or brands of their own to protect so the vast majority of these cases involve local parties.
\(^10\) Stand-alone mediation as opposed to mediation combined with other processes such as arbitration, is where the mediation is conducted by a mediator who acts solely as a mediator and does not assume any other role during the attempted resolution of the dispute.
\(^11\) This perception comes principally from the widespread use of community mediation throughout the communist era where mediators tended to be party loyalists rather than independent professional mediators.
\(^12\) p30 AIA
So ironically Western countries encouraging China to establish the Rule of Law, where it has made great strides in the last 30 years, may have inadvertently impacted on traditional non-adversarial ways of resolving disputes. However, although using stand-alone mediators, which is the common practice in the US, is not yet popular in China, mediation still prevails in the modern Chinese legal system.

**Institutional Mediation**

US parties and their legal advisers should be prepared for Chinese courts or tribunals to introduce mediation sessions into their proceedings often with little warning. A US party may refuse to mediate but this may be unwise given that it could be portrayed as showing an unwillingness to try and settle in a “principled way” or in a spirit of cooperation.

**Med-Arb or Arb-Med during Arbitration Proceedings**

Arbitration proceedings in China incorporate mediation into their hearings. Both domestic and international arbitration permits mediation before commencing arbitration. Even where the dispute is set down to be arbitrated arbitrators may suggest and encourage the use of mediation. US legal advisers must keep in mind that the arbitrator may seek to mediate at any stage of the process if the tribunal is so minded.

A key feature of Chinese arbitration is that the arbitrator and the mediator are often the same person. This causes a great deal of debate outside China especially in common law countries where it is thought that these roles are not compatible. One of the central aspects of facilitative mediation is that in order to reach a settlement agreement parties are encouraged to discuss their disputes openly, and to indicate their practical objectives to the mediator, usually in a private session. So in the event the parties do not settle, the mediator-arbitrator may well have received information that the parties would not have been willing to disclose to an arbitrator under normal circumstances. There is also the risk of a breach of due process since in a private session one party may state “facts” which the other party has no knowledge of and therefore is unable to respond to appropriately. It is also thought it could potentially impact negatively on the mediation phase, for the same reasons noted above, and as a consequence the mediation process itself could be far less effective.

However the use of arb-med debate is not the subject of this paper and it will have to suffice for now to say that in spite of the criticisms of the Chinese arbitration-mediation model it is widely practiced and many lawyers just accept it as the model that one encounters in China.

One potential benefit may be noted in passing however and that is in the area of enforcement, CIETAC rules, for example, allow for the rendering of a mediation

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13 CIETAC, the Beijing Arbitration Centre and the Hong Kong International Arbitration Centre all have rules covering this situation.
settlement agreement into an arbitral award enforceable under the New York convention.\textsuperscript{14}

Mediation during Litigation Proceedings

What is called “mediation” in China today can cover a range of processes, from the purely facilitative to essentially adjudicative. In Chinese courts, mediation is generally not separate and distinct from the court trial and the judge has far more discretionary power to direct the parties in a certain direction.\textsuperscript{15} The court mediation process allows the judge-mediator to use the evaluative power inherent in his office to a degree unheard of in most Western mediation practice, however it does allow for greater flexibility in arriving at a decision. The judge-mediator is able to propose practical and common-sense ideas to settle rather than relying on working within a set of rules or statutes. The court’s mediation process may resemble more closely what some mediation bodies refer to as Early Neutral Evaluation\textsuperscript{16} (where a judge gives a clear indication to the parties as to their prospects at trial with the parties deciding whether they wish the evaluation to be binding or not) than facilitative mediation.

Of course the same disquiet may be voiced about the judge and mediator being the same as is noted above in regard to arbitration. Also if parties encounter a judge untrained in mediation or one unable to separate the judge-mediator role the parties may well feel the mediation settlement is really no choice at all something more resembling “agree to what I think settlement should look like now in mediation or delay the inevitable for long enough for me to force you to agree to these same settlement terms when I rule on this in court later”\textsuperscript{17}

Stand-alone mediation in China

In China in recent years, there has been a re-examination of the value of Western mediation processes, primarily the stand alone facilitative mediation model.\textsuperscript{18} The development of mediation in commercial disputes in other countries has been closely followed. China has not just noted developments in the US and UK but also in places closer to home like Hong Kong and Singapore.

The support for stand-alone mediation in both these jurisdictions has been extremely strong. In 1997 the then Chief Justice of Singapore Yong Poon How stated that it was time to “relearn mediation from the West” but then develop a model that “suits our culture and diverse ethnic backgrounds”\textsuperscript{19} In Hong Kong which has recently made sweeping changes to its civil procedure rules to accommodate mediation the Secretary of

\textsuperscript{14} Article 13 Combination of Mediation with Arbitration
Where the parties have reached a settlement agreement, for the purpose of making the terms thereof legally enforceable, any of the parties may, pursuant to the arbitration clause in the settlement agreement, apply to CIETAC under Article 41(1) of its Arbitration Rules to promptly render an arbitral award on the terms of the settlement agreement.

\textsuperscript{15} Court Mediation in China, Past and Present, Philip C. C. Huang, University of California, Los Angeles People's University of China

\textsuperscript{16} Centre for Effective Dispute Resolution (CEDR) www.cedr.com.uk

\textsuperscript{17} F Peter Phillips Commercial Mediation in China: Article, “The Challenge of Shifting Paradigms”


\textsuperscript{19} Chief Justice Yong Pung How, Opening speech Singapore Mediation Centre 1997.
Justice Wong Yan Lung said recently “It has been suggested that there is something distinctly Asian about mediation, as there is a strong element of compromise and harmony. So in promoting mediation, we may well be embarking on a process of cultural awakening.”

A sign of this awakening interest in China is becoming evident, for example, important dispute resolution bodies, like the CCPIT (China Council for the Promotion of International Trade) Mediation Centre in Beijing, have conducted training in modern commercial mediation processes and offer mediation services to foreign companies. Also CIETAC branches throughout China are reviewing their approach to mediation with a view to offering stand-alone mediation as well as Arb-Med. Most recently the Shanghai Commercial Mediation Centre (“SCMC”) was established which, will hold a conference inviting bodies from Hong Kong and overseas to participate early in 2012. Further impetus is coming from the rising cost of litigation and arbitration in China which is making mediation a much more economical alternative.

Conclusion

In the author’s view it seems to be a question of “when” rather than “if” modern stand-alone commercial mediation as practiced in common law countries, will play a more central role in dispute resolution in China. However it should not surprise anyone if it emerges with “Chinese characteristics” (Zhong Guo Te Se) as it flows through the deep well of rich Chinese traditional mediation concepts.

Current availability in China of mediation services for US businesses

There are now many opportunities for US businesses to access mediation in China and via Hong Kong. The Centre for Effective Dispute Resolution in London has now opened an office, CEDR Asia Pacific, in Hong Kong and offers mediation throughout the region, as does HKIAC. In China the CCPIT Mediation Centre has a new panel of mediators and has moved to new premises in the CIETAC building and is able to provide mediation to interested parties.

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20 In October 2011 mediation courses will be held for lawyers and other dispute resolution professionals in Beijing, the training will be conducted by CEDR Asia Pacific in conjunction with the Beijing CCPIT Mediation Centre.

21 Established January 8, 2011 with the approval of the Shanghai Commission of Commerce and the Shanghai Administration Bureau of NGOs

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