

ARBITRATING HARMONY: 'MED-ARB' AND THE CONFLUENCE OF CULTURE AND RULE OF LAW IN THE RESOLUTION OF INTERNATIONAL COMMERCIAL DISPUTES IN CHINA

CARLOS DE VERA *

I. INTRODUCTION -----	150
II. THE MEDIATION-ARBITRATION DICHOTOMY -----	152
A. "MUTUALLY ACCEPTABLE AGREEMENT" VERSUS "SURROGATE FOR LITIGATION"? -----	152
B. "MEDIATION NO DOUBT MERGING INTO ADJUDICATION": THE MED-ARB PROCESS -----	155
1. <i>Advantages</i> -----	156
2. <i>Disadvantages</i> -----	157
III. "RULE OF <i>LI</i> " AND RULE OF LAW IN CHINESE DISPUTE RESOLUTION -----	162
A. CULTURAL INCLINATIONS AND IMPERATIVES -----	162
1. <i>Li</i> (礼) <i>versus Fa</i> (法) -----	162
2. <i>The Rule of Li: Informal Social Control through Social Sanctions</i> -----	165
3. <i>The Recent Arrival of Positivist Private Law</i> -----	168
B. MEDIATION AND ARBITRATION "WITH CHINESE CHARACTERISTICS" AND CHINESE LEGAL CULTURE -----	170
1. <i>Chinese mediation</i> -----	173
2. <i>Chinese arbitration</i> -----	175

* B.A. (Yale, 1997), M.A. (University of Toronto, 1999), LL.B., B.C.L. (McGill, 2004). Student-at-Law, Baker & McKenzie LLP (Toronto). Author e-mail: carlos.devera@aya.yale.edu. Sincere thanks to Professor Fabien G  linas, Faculty of Law, McGill University, for his supportive observations and commentary on this paper written for his *Resolution of International Disputes* class in Winter 2003, and to Professors Armand de Mestral and David Lametti for their guidance and friendship during law school at McGill University.

IV. WHERE CULTURE AND DISPUTE RESOLUTION MEET: MED-ARB AND THE INSTITUTIONAL ARBITRATION REGIMES OF CHINA AND HONG KONG -----	178
A. BLENDED APPROACH: CHINA'S ARBITRATION LAW AND THE CIETAC MED-ARB PROCESS-----	178
1. <i>Tribunal's control over the CIETAC Med-Arb Process</i> -----	183
2. <i>Impartiality of the CIETAC Med-Arbitrator</i> -----	185
B. "WATERTIGHT" APPROACH: HONG KONG'S ARBITRATION ORDINANCE AND THE HKIAC -----	187
1. <i>The Hong Kong Arbitration Ordinance</i> -----	187
2. <i>The Hong Kong International Arbitration Centre</i> -----	190
V. CONCLUSION-----	193

It is better to die of starvation than to become a thief;
it is better to be vexed to death than to bring a lawsuit.¹

I. INTRODUCTION

Culture can profoundly affect a dispute resolution process. For indeed, far from merely a function of practical and procedural efficiency contemplated by disputing parties, the choice of a dispute resolution mechanism—whether mediation (调解), arbitration (仲裁) or litigation—within the forum of a certain society is strongly influenced by the peculiarities of tradition, culture, and legal evolution of that society. Such is the case in China. A heightened awareness of the theoretical and practical issues found in cross-cultural negotiations and arbitrations has taken hold among legal practitioners and the business elite, as the worldwide community increasingly interacts through commercial globalization and economic integration, and diverse societies at variegated levels of legal development confront each other with commercial disputes. Especially in China, disputing parties from different cultures now face a critical balancing act, weighing the positives and negatives when deciding between mediation or arbitration.

Of course, within the context of cross-cultural commercial dispute resolution, selecting a particular mechanism to resolve a dispute need not

¹ Chinese proverb as quoted in Urs Martin Lauchli, *Cross-Cultural Negotiations, With A Special Focus on ADR with the Chinese*, 26 WM. MITCHELL L. REV. 1045, 1062 (2000).

be an either-or choice. A blended approach (i.e., combining mediation and arbitration into one distinct process with two phases) can be a viable option for parties, depending on whether the *lex arbitri* or the institutional arbitration regime allows for such a blending. Allowing this blending to occur (and truly benefiting from it) will depend, *inter alia*, on the nuances of tradition, culture, and legal evolution.

Such nuances make China and Hong Kong's position regarding the blending of mediation and arbitration so interesting. China and Hong Kong share the same traditions, but each possesses divergent histories from the other. Both are at very different levels of legal evolution and economic development. However, despite their inherent differences under 'one country, two systems,' both entities have standing arbitration laws enabling a mediator (or 'conciliator') to also play the role of arbitrator to the same dispute. Yet, when it comes to implementing this law in the two most prominent institutional arbitration regimes in China and Hong Kong—the China International Economic and Trade Arbitration Commission ('CIETAC') and the Hong Kong International Arbitration Centre ('HKIAC') respectively—each has a distinct approach in allowing mediation to be blended with arbitration and addresses the potential cross-cultural issues differently. CIETAC allows for 'Med-Arb' for international commercial dispute resolution, while the HKIAC does not—though Hong Kong law explicitly permits it.

In this paper, I will first examine what I call the 'mediation-arbitration dichotomy,' that is, the debate over the pros and cons of mediation and arbitration, and the practical advantages and drawbacks of a blended Med-Arb process. I will then survey the Chinese situation and how the Confucian ethical tradition, the social imperatives in the 'rule of *li* (礼),' and evolving legal culture influence how a dispute is ideally resolved. Lastly, I will focus on where the mediation-arbitration dichotomy and local culture converge through the divergent Chinese institutional approaches to Med-Arb in China and Hong Kong. I will delve into how their respective rules attempt to address commentator concerns of the practical drawbacks of Med-Arb. A good grasp of Chinese tradition and culture is necessary in comprehending how and why Med-Arb is allowed and considered advantageous in many instances.

We will see that the varying institutional approaches are a reflection of each forum's evolution towards the Rule of Law.

II. THE MEDIATION-ARBITRATION DICHOTOMY

A. "Mutually Acceptable Agreement" versus "Surrogate for Litigation"?

In their magisterial treatise on international commercial arbitration, Alan Redfern and Martin Hunter observe that there are many ways of settling a commercial dispute. The simplest way is directed negotiations between the parties or their advisers. Failing this, the intervention of a "disinterested third party" may be helpful. Redfern and Hunter observe that it is "increasingly common for parties to an international contract to stipulate that, before embarking upon arbitration, the parties will endeavor to settle any dispute by negotiation or some other form of alternative dispute resolution."²

Mediation or conciliation (调解),³ then, lies "at the heart of ADR."⁴ Parties can turn to a mediator: an independent third person who will listen to an outline of the dispute and then meet each party separately to try to moderate their respective positions. Redfern and Hunter observe that the "task of the mediator is to attempt to persuade each party to focus on its real interests, rather than on what it conceives to be its contractual or legal entitlement."⁵ This 'interest-based' focus is a critical distinction that differentiates mediation from arbitration and litigation, a dispute resolution mechanism that should only be the final option.

According to James Peter, mediation is generally understood as a non-binding, voluntary (dispute) settlement process which enhances "the possibility that the parties will settle their dispute by way of mutually acceptable agreement, rather than by a binding third-party order."⁶ International arbitration, on the other hand, is considered a "substitute for court adjudication," aimed to overcome the dangers and problems related to international litigation. John Shijian Mo has emphasized that the "major difference between mediation and arbitration is whether the

² Alan Redfern & Martin Hunter, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 31 (3rd ed., 1999).

³ The terms "mediation" and "conciliation" are used interchangeably, with no general agreement as to how they should be individually defined. Redfern and Hunter observe that historically, in private dispute resolution, a conciliator was seen as someone who went a step further than the mediator, so to speak, in that the conciliator would draw up and propose the terms of an agreement that he or she considered represented a fair settlement. *Arguendo*, in the Chinese case to be examined below, what is known as mediation should properly be called "conciliation" when applied to the Chinese dispute resolution given that culture's emphasis on preserving relationships and re-establishing harmony.

⁴ Redfern & Hunter, *supra* note 2, at 33.

⁵ *Id.*

⁶ James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83 (1997).

neutral and impartial third party has the power to impose a decision upon the parties in order to resolve the dispute concerned.”⁷ Peter takes it a step further, asserting that one should aim for a combination of these processes to achieve the best of both systems in resolving international disputes.⁸

The search for a unanimous and mutually acceptable agreement is central to the preference for mediation over arbitration. There are, Peter observes, other hidden motivations to mediation that put it at an advantage over arbitration.⁹ These include: efficiency in terms of time and money, party autonomy in contrast to adjudication, reaching creative solutions with win-win results, empowerment, and reconciliation.¹⁰

In contrast, arbitration is much more adversarial in its proceedings when compared to mediation. Arbitration as a process is also different from litigation, and the difference is significant enough for certain parties to readily choose arbitration over litigation. The major differences between arbitration and litigation are that the parties can choose the applicable substantive law (or expressly grant “*amiable compositeur*” powers to the arbitrator, who may then decide on the basis of equity), parties are less fettered by procedure, parties are judged by an arbitrator who is more often a peer of their trade, and the decision is final and binding. The fundamental and generally accepted principles of international arbitration are: the parties must agree to have the dispute arbitrated (i.e., the contractual basis of arbitration which determines the dispute’s arbitrability),¹¹ the proceedings must be confidential, the arbitrators must be impartial and neutral,¹² due process requirements must be complied with, and the award must be enforceable.¹³

However, contrary to a common assumption about arbitration, it is “not necessarily a cheaper method of resolving disputes than litigation.”¹⁴

⁷ John Shijian Mo, ARBITRATION LAW IN CHINA 343 (2001).

⁸ Peter, *supra* note 6, at 83.

⁹ *Id.* at 84-85.

¹⁰ *Id.*

¹¹ *Id.* at 87.

¹² *Id.* at footnote 28 observes that “impartiality is not a sacred requirement. Its extent and outline is not quite clear.” Impartiality cannot be regarded in an absolute way which would exclude preconceptions, because “decision makers who have lived in the world at all will invariably come to a case with perspectives and beliefs and preconceptions that bear the stamp of their past experiences,” in Alan Scott Rau, *Integrity in Private Judging*, 38 S. Tex. L. Rev. 537 nn.183, 188. This is an important point when we consider Chinese approaches to Med-Arbitrator impartiality in Med-Arb.

¹³ *Id.* at footnote 29 observes that the 1958 New York Convention is an important guideline to what objections an arbitral award may be exposed to when enforcement is sought. Although the New York Convention does provide uniform standards for the validity of arbitration agreements and the recognition of arbitral awards, the interpretation of the Convention remains with the national courts.

¹⁴ Redfern & Hunter, *supra* note 2, at 24.

International arbitration is "simply another form of litigation which is more suited to the needs of international commerce and avoids the pitfalls of litigation in national courts; and [...] it does not operate as, nor is it intended to be, a categorically different 'alternative' kind of settlement procedure."¹⁵

However, arbitration remains "the generally accepted method of resolving international business disputes" most certainly when Western parties are involved, and also amongst parties from diverse legal and cultural backgrounds.¹⁶ One need only consider the many prominent institutional arbitration regimes to recognize its predominance as the dispute resolution mechanism of choice for corporations doing business abroad. Lord Mustill summarized this long-standing link between arbitration and commerce when he observed that

[c]ommercial arbitration must have existed since the dawn of commerce. All trade potentially involves disputes, and successful trade must have a means of dispute resolution other than force. From the start, it must have involved a neutral determination, and an agreement, tacit or otherwise, to abide by the result, backed by some kind of sanction. It must have taken many forms, *with mediation no doubt merging into adjudication*. The story is now lost forever. Even for historical times, it is impossible to piece together the details, as will readily be understood by anyone who nowadays attempts to obtain reliable statistics on the current incidence and varieties of arbitrations. Private dispute resolution has always been resolutely private.¹⁷ [Emphasis added]

And yet, despite arbitration's dominance, mediation and alternative dispute resolution appear to have struck a chord with businessmen, lawyers, judges, and governments. Redfern and Hunter explain this phenomenon in two ways. First, the critical question of time and money demands the search for a dispute resolution mechanism that is quick and inexpensive. Second, a non-adversarial approach, that is, resolving disputes through non-confrontation, is becoming an important consideration for parties seeking to maintain friendly relations and secure a potentially profitable business relationship.¹⁸

¹⁵ Peter, *supra* note 6, at 87.

¹⁶ Redfern & Hunter, *supra* note 2, at 1.

¹⁷ Lord Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 43 (1989).

¹⁸ Redfern & Hunter, *supra* note 2, at 41.

However, despite the benefits in terms of time, cost, and relationship-building, there are certain substantive drawbacks to mediation that Redfern and Hunter also mention. First, mediation is likely to work better when the parties and the mediator come from the same country, or have the same ethnic background. Second, because mediation's fundamental aim is compromise, it fails when it tries to resolve certain commercial disputes that cannot and should not be compromised. Third, mediation may foster injustice for those cases where one party is wholly right and another wholly wrong. Right and wrong cannot be in the "eye of the beholder," and as such, why should a wholly right party be expected to take 50% (or less) of its proper entitlement? Fourth, delaying tactics by a party in mediation and settlement may quickly result in it becoming a waste of time and money. Lastly, despite well-meaning efforts, the mediation process may still fail, adding to the delay and expense of reaching an effective resolution to the commercial dispute.¹⁹

B. *"Mediation No Doubt Merging Into Adjudication":
The Med-Arb Process*

Lord Mustill's reference to mediation in the quote above—"with mediation no doubt merging into adjudication"—reveals the intricate relationship between mediation and arbitration. Mustill's statement evinced that parties did not likely go directly to arbitration whenever a commercial dispute arose: parties first tried to resolve their dispute among themselves, and failing that, resorted to arbitration. It always seemed to be in the better interests of the parties to resolve the dispute early through some form of inter-party negotiation, whether mediated or not, rather than deal with the unexpected outcomes (and costs) of adjudication through arbitration or court proceedings.

Today, however, we have the impression that mediation and arbitration (i.e., dispute resolution through the parties' mutual agreement or through a neutral arbitrator) have evolved into mutually exclusive and independently-perceived mechanisms. The mediation-arbitration dichotomy for disputing parties weighing the pros and cons of these seemingly exclusive (though not necessarily so independent and "watertight") approaches to dispute resolution thus takes on an added layer of complexity when a domestic law enables parties to move beyond pure mediation or arbitration. After all, as Mo has observed: "the differences between mediation and arbitration are artificial, largely

¹⁹ *Id.* at 42.

depending on how much decision-making power a third party—the mediator or arbitrator—may exercise during the process of dispute settlement.”²⁰ One innovative approach, among many,²¹ is the blended mechanism known as “Med-Arb.”

1. Advantages

The Med-Arb process is intended to allow the parties to profit from the advantages of both dispute settlement procedures. However, as a feature of the mediation-arbitration dichotomy, its unique drawbacks also raise serious issues of whether it is a viable alternative for disputing parties.²²

Med-Arb is a combination of mediation and arbitration. A third-party neutral works with the disputing parties towards a settlement first using the techniques of mediation. If this is unsuccessful, the “Med-Arbitrator” then “changes hats” and becomes an arbitrator.²³ The mediation phase occurs before the arbitration phase and both phases are clearly distinct. However, the same person who conducts the mediation phase becomes, if necessary, the arbitrator for the second phase.

Because of the role of the Med-Arbitrator, the Med-Arb process is more efficient than if mediation and arbitration were pursued separately. If the parties do not settle their dispute through mutual agreement, the arbitrator does not have to start afresh since he is already aware of the issues in dispute.²⁴ “This, however, is certainly true if the parties reach a partial agreement where they dispose of factual or legal issues during the mediation part of the proceedings.”²⁵

Med-Arb is enhanced where the parties reach an agreement to settle their dispute in a cooperative manner. Such an agreement alters the issues to be decided and may require the parties and the arbitrator to look into the parties’ future. Moreover, the process shifts from “rights arbitration” to “interest arbitration.”²⁶ Where the arbitration focuses on the parties’ future commercial relationship, Med-Arb’s efficiency becomes even more crucial to the parties. To find an adequate resolution

²⁰ Mo, *supra* note 7, at 343.

²¹ Among such innovative approaches in non-arbitration alternative dispute resolution are the “mini-trial,” “baseball arbitration,” “Mediation and Last Offer Arbitration (Medaloo),” “court-annexed arbitration,” and “summary jury trials.” For details, see Redfern & Hunter, *supra* note 2, at 36-38.

²² Peter, *supra* note 6, at 89.

²³ *Id.* at 90-91.

²⁴ David C. Elliott, *Med/Arb: Fraught with Danger or Ripe with Opportunity?* 34 ALTA. L. REV. 163, 164 (1995).

²⁵ Peter, *supra* note 6, at 90.

²⁶ *Id.*

in the arbitration phase of the process, the Med-Arbitrator will use his understanding of the relationship between the parties during the mediation phase, or use his prior knowledge of their respective underlying interests.²⁷ This particular advantage is the strongest point in Med-Arb's favor; it is critical when considering why Chinese culture and current Chinese domestic legislation appear predisposed towards the Med-Arb process in resolving commercial disputes.

2. Disadvantages

The Med-Arb process has been challenged with the serious concern as to whether the mediation and the arbitration phases of the process can both remain valid when conducted by the same person. The problem stems from the inherent differences between mediation and arbitration, which originally evolved as mutually-exclusive dispute resolution mechanisms.²⁸ What results are a series of disadvantages to Med-Arb.

a. *Can the Med-Arbitrator remain impartial?*

The impartiality and independence of an arbitrator is easily the *sine qua non* of arbitration and of mediation. "It is a fundamental principle in mainstream international commercial arbitration that an arbitrator must be and remain impartial and independent." Redfern and Hunter observe that the requirement of independence and impartiality is emphasized by the provisions of the UNCITRAL Rules, the ICC Rules, the ICSID Rules, and the LCIA Rules.²⁹ The 2004 International Bar Association Guidelines on Conflicts of Interest in International Arbitration articulates this expectation further: "Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has

²⁷ *Id.*

²⁸ Peter, *supra* note 6, at 91. See Lon Fuller, *Collective Bargaining and the Arbitrator*, 3 WIS. L. REV. 23 (1963).

²⁹ Redfern & Hunter, *supra* note 2, at 211-12. Implicit in Article 12(2) of the UNCITRAL Model Law is the mandatory provision that parties may not derogate from the requirement that an arbitrator be independent and impartial. Article 10 of UNCITRAL Rules provide for the challenge of an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. Article 2(8) of the ICC Rules provides for the challenge of an arbitrator for a lack of independence or otherwise. Article 3 of the LCIA Rules specifies that all members of the arbitral tribunal must remain independent and impartial and may not act as advocates of the parties.

otherwise finally terminated."³⁰

Not surprisingly, the predominant concern of the Med-Arb process raised by arbitration specialists is that, as a result of his active involvement in both the mediation and arbitration phase of the process, the Med-Arbitrator loses his impartiality by becoming privy to confidential information which would never have been disclosed to a pure arbitrator. This concern is further highlighted when private caucuses were used during the mediation stage. The role of the arbitrator demands that he determine the law or at least that he "do justice as he sees it, applying his own sense of law and equity to the facts as he finds them."³¹

The arbitrator should decide a case only on facts which are generally perceived as relevant for a decision.

When a dispute is to be resolved by an arbitrator, the parties must present all the facts they deem relevant. It is difficult to believe that the Med-Arbitrator will remain unaffected as an arbitrator after engaging in caucuses and becoming privy to confidential, perhaps intimate, emotional, personal, or other "legally" irrelevant information.³²

Most serious of all, while discussing confidential matters with the parties, it is possible that the Med-Arbitrator will become (consciously or unconsciously) empathetic towards one of the parties or otherwise involved with the subject matter.³³ This may not be a problem while acting as a mediator, but when called on to make discretionary decisions as an unbiased arbitrator, one can hardly ignore information disclosed

³⁰ General Principle in the IBA Guidelines on Conflicts of Interest in International Arbitration, as approved on 22 May 2004, available at <http://www.ibanet.org/images/downloads/guidelines%20text.pdf>. Note that General Standard 2 relating specifically to "Conflicts of Interest" further expands on what the IBA meant:

(2) Conflicts of Interest

(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent.

(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4).

(c) Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in the matter at stake.

³¹ Peter, *supra* note 6, at 91.

³² See *id.* at footnotes 51 and 52.

³³ *Id.* at 92. See Barry C. Bartel, *Comment: Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, WILLIAMETTE L. REV. 664, 685 (1991).

during the mediation stage. It may be true that even an arbitrator in pure arbitration—or for that matter, a judge in a national court—is affected and influenced by what he sees, hears and believes. But a Med-Arbitrator becomes privy to far more than an arbitrator would, because such information was exclusively told to the Med-Arbitrator for mediation purposes.³⁴ The Med-Arbitrator is therefore more exposed to this danger than an arbitrator. It cannot be expected that a Med-Arbitrator can merely consciously or subconsciously “blockout” any critical information gained in the mediation process, even if the parties agree to limit the decision-making to only certain key facts. Being aware of certain information may bias the Med-Arbitrator towards one side and thus bias the outcome of the process.

Further, this concern raises the practical problem of a Med-Arbitrator’s skills. Given the radically different natures of mediation and arbitration, the skills of a mediator are different from those of an arbitrator. Combining both functions is certainly possible, but it is simply more difficult to find capable professionals who have the requisite knowledge and experience in both areas to make Med-Arb a reliable and effective dispute resolution mechanism.³⁵

b. Are ex parte caucuses violations of due process?

Confidential private caucuses with one party arguably violate due process since they deny the other party the opportunity to challenge whatever is said or presented as evidence to the Med-Arbitrator, who can use it to reach a judgment.³⁶ A lingering question remains of whether it is possible for parties in the Med-Arb process to effectively waive their due process rights if the information provided during private caucus is intended to remain confidential.

c. Can the Med-Arbitrator coerce the parties towards settlement?

The value of the mediation is compromised when a mediator, knowing he could decide a dispute as a Med-Arbitrator, coerces the parties into a settlement.³⁷ “What appears to be a negotiated resolution may be perceived by the parties as an imposed one, thus diminishing the

³⁴ Peter, *supra* note 6, at 92.

³⁵ *Id.* at 97.

³⁶ *Id.* at 94.

³⁷ Fuller, *supra* note 28, at 27.

degree of satisfaction and commitment.”³⁸ The further concern that a settlement not necessarily based on the true “free will” of the parties, arguably the *sine qua non* of mediation, is thus raised when improper coercion and pressure are involved.³⁹

d. Can parties be candid in the mediation phase of a Med-Arb Process?

To guide the parties in exploring areas of mutual gain, a mediator relies on the parties' candor and openness in order to be made aware of their true intentions, underlying interests and preferences, and business background. This is in sharp contrast to an arbitrator's adjudicative role where, much like litigation without the procedural minutiae, each party focuses on persuading the decision-maker that its side is “right.” In Med-Arb's combined approach, the parties will not reveal any weaknesses during the mediation or even enable the Med-Arbitrator to explore the background of the case. The result is that the parties are not as candid and forthright as they should be, because they realize that the Med-Arbitrator possesses adjudicative power and fear that the Med-Arbitrator will use any confidential disclosures against them.⁴⁰ This concern effectively weakens one of the major advantages of mediation: the safe exploration of mutual gain without the risk of conveying confidential information to the party's own detriment.⁴¹

e. Will a Med-Arb award be enforced like an arbitration award?

One lingering question for Med-Arb relates to its “award” enforcement. According to Peter, “a mediated agreement shall be as enforceable as an agreement recorded in an arbitral award. A mediated agreement in a ‘pure’ mediation is generally enforceable as a contract.”⁴² However, Peter also observes that such a settlement is not covered by the New York Convention.⁴³ As such, courts will not give a mediated

³⁸ William L. Ury, Jeanne M. Brett & Stephen B. Goldberg, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT*, 1ST ED. 49 (1988).

³⁹ Peter questions whether there can ever be a “free will,” because every dispute settlement is to some extent the result of the parties' understanding that what they claim does not necessarily equal the outcome of an adjudicative process. This by itself may be perceived as some sort of pressure. Peter, *supra* note 6, at 95.

⁴⁰ Peter, *supra* note 6, at 97.

⁴¹ Peter, *supra* note 6, at 97.

⁴² *Id.* at 88.

⁴³ *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10,

agreement the same deference they give an arbitral award. The question, therefore, is whether a mediated settlement in the general Med-Arb process be enforceable like an arbitral award.⁴⁴ If the settlement agreement terminates an arbitration process already in progress, it is generally assumed, but not undisputed, that the settlement agreements which are recorded in the award are enforceable under the New York Convention.⁴⁵ Assuming the court concerned with this question considers the New York Convention to not cover such settlement agreements, Peter asserts that "the enforcement thereof then depends on whether the national law of the country in which enforcement is sought recognizes such settlement agreements as a surrogate for an arbitral award."⁴⁶

In China's case, Mo observes that based on Article 51 of China's 1994 Arbitration Law, a "mediation settlement document" is "a form of arbitral award made by an arbitral tribunal on the basis of a mediation settlement agreement reached by parties through mediation ... [it is] packaged in the form of an order issued or decision made by an arbitral tribunal for the purpose of vesting legal effect on the settlement reached by the parties."⁴⁷

However, such a document is an essential characteristic of dispute settlement in China, and is likely not the norm elsewhere. It is unlikely that a mediated settlement agreement will be enforced other than as a contract if the mediation phase of the Med-Arb proceedings occurs apart from and before the arbitration phase of the process.⁴⁸ Arguably, if the arbitration phase has not started by the time the settlement has been reached, the settlement will not be integrated into an arbitral award. The settlement has to be reached over the course of the Med-Arb process and it has to be recorded in the award in order to become binding. However, as with Hong Kong, some jurisdictions provide for enforcement of the settlement agreement even if the mediation portion is totally separate from the arbitration portion. Thus, if mediation is merely a part of the entire

1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [New York Convention].

⁴⁴ Peter, *supra* note 6, at 88-89. John Shijian Mo argues that in China, the answer is yes. According to MO, *supra* note 7, a mediation settlement document is a "mediation settlement agreement packaged in the form of an order issued or decision made by an arbitral tribunal for the purpose of vesting legal effect on the settlement reached by the parties."

⁴⁵ Klaus Peter Berger, *INTERNATIONAL ECONOMIC ARBITRATION* 582 (1993).

⁴⁶ Peter, *supra* note 6, at 89.

⁴⁷ Mo, *supra* note 7, at 348. Article 51 of the 1994 *Arbitration Law* in China provides that if parties reach a mediation settlement agreement, the arbitral tribunal concerned shall make either a mediation settlement document or an arbitral award pursuant to the terms of the mediation settlement agreement. See Pieter Sanders, *ADR in Civil Law Countries*, 61 *ARBITRATION* 35-36 (1995).

⁴⁸ W. Laurence Craig, William W. Park & Jan Paulsson, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 683 (2nd ed., 1990).

Med-Arb process, a settlement reached during mediation can just be recorded in the arbitral award.

III. "RULE OF *LI*" AND RULE OF LAW IN CHINESE DISPUTE RESOLUTION

A. *Cultural Inclinations and Imperatives*

How a society adopts or utilizes the means to resolve disputes will depend on its available resources and, as Goh Bee Chen argues, its cultural inclinations, imperatives, and philosophic leanings.⁴⁹ Thus, given the aforementioned practical benefits and drawbacks to mediation, arbitration, and Med-Arb, when it comes to selecting a dispute resolution mechanism, one size does not, and cannot, fit all. The emphasis on the critical role played by culture and tradition in the selection of an appropriate and effective dispute resolution mechanism by parties was made by Holtzmann when he observed that:

In my view, modern dispute resolution techniques, although couched in the language of sociology—and indeed often in a jargon of their own—reflect techniques used by successful outsiders for centuries in settling disputes in many cultures and legal systems.⁵⁰

This observation is certainly true and consistent when we consider the case of China and Hong Kong in the establishment of effective dispute resolution mechanisms.

1. *Li* (礼) versus *Fa* (法)

To appreciate the Chinese approach to dispute resolution, we must recognize and contemplate its cultural roots in Confucian ethics. Confucian teachings continue to resonate strongly today, more than 2,000 years later, even with the ascendancy of Chinese Communism and China's tumultuous experience with the Cultural Revolution.⁵¹

⁴⁹ Goh Bee Chen, *LAW WITHOUT LAWYERS, JUSTICE WITHOUT COURTS: ON TRADITIONAL CHINESE MEDIATION I* (2002).

⁵⁰ Holtzmann, Workshop on *The Peaceful Settlement of International Disputes in Europe: Future Prospects*, Hague Academy of International Law, September 1990 as quoted in Redfern & Hunter, *supra* note 2, at 40.

⁵¹ Whether post-Mao China's recent embrace of capitalism and materialism managed to overthrow Confucian values remains to be seen (and remains for another paper to examine).

At the heart of Confucius' teachings was the belief that harmony was to be achieved among persons.⁵² Confucius identified five cardinal relationships that needed to be honored to achieve a stable social order: father and son, ruler and subject, husband and wife, elder and younger brother, and friend and friend. *Li*, or propriety, arose from the observance of these relationships.⁵³

Confucius disparaged *fa*, or law.⁵⁴ He believed that law can convict and execute people, but it cannot teach humanity, kindness, benevolence and compassion. He taught that if people are ruled by *li*, then *fa* is not necessary.⁵⁵ The following are quotes from his *Analects*:

I can hear a court case as well as anyone. But we need to make a world where there's no reason for a court case.⁵⁶

If you use government to show them the way and punishment to keep them true, the people will grow evasive and lose all remorse. But if you use integrity to show them the way and ritual to keep them true, they'll cultivate remorse and always see deeply into things.⁵⁷

Running counter to Confucius, however, was an opposing school of Chinese thought, the Legalists, who held that a nation's cohesion was secured by strict laws with harsh, draconian punishments.⁵⁸ Urs Martin Lauchli observes that such thought was exemplified by the first emperor of a unified China, Qin Shi Huang (秦始皇), who managed the construction of the Great Wall and who emphasized cruel and excessive punishment for those who dared to show even the slightest resentment.⁵⁹ Lauchli comments that "[j]ustice was meant to be certain, swift and harsh. When China adopted both a Confucian and Legalist view of law, laws were limited and when they were applicable, penalties were harsh."⁶⁰

Thus, the history of Chinese dispute resolution and law is the story of *li* and *fa*.⁶¹ Up until the 20th century when Western ideas of law

⁵² Lauchli, *supra* note 1, at 1058.

⁵³ Xin Ren, TRADITION OF THE LAW AND LAW OF THE TRADITION: LAW, STATE, AND SOCIAL CONTROL IN CHINA 20 (1997).

⁵⁴ *Id.* at 21.

⁵⁵ *Id.*

⁵⁶ Confucius as quoted in Lauchli, *supra* note 1, at 1059.

⁵⁷ *Id.*

⁵⁸ Ren, *supra* note 53, at 21.

⁵⁹ Lauchli, *supra* note 1, at 1059.

⁶⁰ *Id.* at 1059-1060.

⁶¹ For more detail on the Confucian-Legalist debate in dispute resolution, see also Bobby K. Y. Wong, *Traditional Chinese Philosophy and Dispute Resolution*, 30 HONG KONG L. J. 304 (2000).

were introduced to modern China, Chinese law was considered mainly penal in nature.⁶² It had highly developed criminal codes and procedures but private law was rare.⁶³ According to Lauchli, dispute resolution was chiefly performed in villages and through family elders, and the goal of dispute resolution was restoring harmony through compromise and granting concessions.⁶⁴

According to Chen, in Chinese society, disputes are generally shunned. This is because disputes fundamentally disturb the desire for social harmony emphasized by Confucius. Therefore, litigation runs counter to this and was to be avoided. Confucius observed:

In hearing litigation, I am no different from any other man. But if you insist on a difference, it is, perhaps, that I try to get the parties not to resort to litigation in the first place.

Arguably, the non-litigious outlook of most Chinese is linked to the corollary Chinese preference for mediation and conciliation in dispute resolution. We may observe that with the Chinese, it is dispute *dissolution* rather than dispute *resolution* that they hold dear. Chen notes that studies have shown that “[a]mong Chinese, one of the responsibilities of those in positions of power is to anticipate and defuse potential confrontations.”⁶⁵ In the tradition of imperial China, “somewhat greater importance was consistently attached to prevention of conflicts before they arose than to ways and means of resolving them after they had broken out.”⁶⁶ Dispute *dissolution*, rather than dispute *resolution* or decision, is supported by another observation:

A more striking feature of Chinese commercial behavior is the desire ... to avoid acknowledging that a serious dispute exists at all, not only due to the cultural patterns, and Chinese bureaucratic habits but due also to a genuine desire to make disputes ‘disappear’.⁶⁷

In modern-day China, Chen observes, there is a popular political slogan which states: “Combine mediation and prevention, and give

⁶² Lauchli, *supra* note 1, at 1060.

⁶³ Wang Chenguang & Zhang Xianchu eds., *INTRODUCTION TO CHINESE LAW* 4-5 (1997).

⁶⁴ Lauchli, *supra* note 1, at 1060.

⁶⁵ Chen, *supra* note 49, at 9.

⁶⁶ *Id.*

⁶⁷ Stanley Lubman & Gregory Wajnowski, *International Commercial Dispute Resolution in China: A Practical Assessment*, 4 AM. R. INT’L ARB. 107, 115 (1993).

primacy to prevention.”⁶⁸ There exists an expectation that “mediators are supposed not only to resolve disputes but also prevent their occurrence.”⁶⁹

2. The Rule of Li: Informal Social Control through Social Sanctions

Thus, with the *li-fa* dichotomy, there is “a general aversion to third-party adjudication and a predilection for conciliation.”⁷⁰ “According to Chinese thought and tradition, law has always played, and still plays, a secondary role.”⁷¹ The rules by which one measures the appropriateness of one's behavior lie in social imperatives upholding the natural order, and their enforcement could be called “informal social control.”⁷²

This “informal social control,” is found in every culture, including Western cultures where individual rights are paramount. However, a critical distinction is that the natural order of the Chinese system, enforced by a collectivism where “social relationships and group welfare dominate individual needs and desires,”⁷³ does not propagate individual rights as Western law and society does.⁷⁴

Considered within the purview of traditional Chinese society, it is not surprising that in the absence of a formal written law to govern private transactions, various social duties have evolved to ensure the dominance of *li* in regulating ordinary affairs and maintaining peace and order within

⁶⁸ Chen, *supra* note 49, at 9.

⁶⁹ *Id.*

⁷⁰ Peter, *supra* note 6, 106 n.115.

⁷¹ *Id.* at 106.

⁷² Johannes Trappe, *Conciliation in the Far East*, 5 ARB. INT'L 173, 176 (1989).

⁷³ Chen, *supra* note 49, at 7. Chen further observes that in Chinese collectivism, the group is thus seen as “the protector and regulator of individual behaviour and expected outcomes.” Such a group acts as “the central functionary which can be the family, society, community or country to which the person claims membership.” Collectivists also tend to differentiate between in-groups and out-groups, and it is the former which play an important socio-political role by exerting “a strong sphere of influence in respect of its members.” The major in-groups are one's family, work colleague, or educational institutions. This point on the individualism-collectivism dichotomy is critical in appreciating the differences between East and West, particularly as it relates to dispute resolution. See Harry C. Triandis, *Cross-Cultural Studies of Individualism and Collectivism* in John J. Berman, ed., NEBRASKA SYMPOSIUM ON MOTIVATION, 1989: CROSS-CULTURAL PERSPECTIVES 42 (1990). Triandis outlines the differences succinctly:

In individualist cultures most people's social behaviour is largely determined by personal goals that overlap only slightly with the goals of collectives, such as the family, the work group, the tribe, political allies, coreligionists, fellow countrymen, and the state. When a conflict arises between personal and group goals, it is considered acceptable for the individual to place personal goals ahead of collective goals. By contrast, in collectivist cultures social behaviour is determined largely by goals shared with some collective, and if there is a conflict between personal and group goals, it is considered socially desirable to place collective goals ahead of personal goals.

⁷⁴ Trappe, *supra* note 72, at 176-77.

the community. Such a 'rule of *li*,' that is, a normative expectation of social obligations—in sharp contrast to the supremacy of the "rule of law" in Western culture—can be summed up in the Confucian proverb: "*heqing, heli, hefa*" (合情, 合理, 合法), that is, "First follow your personal sentiment, then follow the dictates of reason, then follow the law."⁷⁵

The force of such informal sanctions, especially in a mediation process, raises questions regarding the "free will" of the parties when a settlement is reached. However, an awareness of these duties is necessary to understand the Chinese preference for mediation and their general avoidance of litigation or litigation-like processes. Moving beyond the dictates of obeying the collective, these social duties—and the sanctions attached to them—represent a strong and valid force comparable to that of law.

a. *Saving "Face"*

Perhaps the strongest of these social sanctions is found in the concept of "face." "Face" is the Chinese equivalent to "honor," defined by "one's accumulated moral and social prestige in the eyes of the community."⁷⁶ The fear of losing face is a strong reason behind the Chinese preoccupation with dispute prevention. "If an occasion arises which faintly hints at the souring of relationships, the Chinese party will normally tend to perceive this as an event antecedent to a dispute, and will try her hardest to smoothen any ill feelings and restore harmony."⁷⁷

b. *Granting favors because of ganqing*
(感情)

Another social principle which governs behavior in China's collectivist culture is the value of *ganqing*, or "good relations." This is defined by Van der Sprenkel as "a warm personal relationship between two otherwise unrelated individuals of unequal status."⁷⁸ It is linked to saving face and granting favors in that pressure could be exerted to obtain a favor by invoking *ganqing*, and the failure to grant that favor would make the party seeking the favor lose face.

⁷⁵ Chen, *supra* note 49, at 52.

⁷⁶ Hu Chang-tu, CHINA—ITS PEOPLE, ITS SOCIETY, ITS CULTURE 493 (1960).

⁷⁷ Chen, *supra* note 49, at 53.

⁷⁸ Sybille van der Sprenkel, LEGAL INSTITUTIONS IN MANCHU CHINA: A SOCIOLOGICAL ANALYSIS 25 (1972).

Chen demonstrates that *ganqing* can be practiced in the following manner:

It is invoked at the very outset of an impending dispute, or, when the dispute is a matter before the mediator, the mediator would request the disputants to dismiss the dispute and come to some amicable terms with one another on the basis of his *ganqing* with both of them. To take no heed of the mediator's request would amount to disparaging his "face."

c. Guanxi (关系) transactions

A common feature of Chinese business transactions, *guanxi* can be defined as a "special relationship" that "individuals have with each other in which each can make unlimited demands of the other."⁷⁹ Chen comments that *guanxi* can play a significant role in dispute settlement because the stronger the communal relationship is between two disputing parties, the more obligatory it is for these parties to settle their differences in an amicable way.⁸⁰ *Guanxi* can also operate preventatively, that is, whenever the concerned parties feel that some major difference is about to arise between them, they are ready to employ some subtle means to solve the problem themselves. Otherwise, if the situation gets out of control, the dispute will cause them to lose "face," which may mean a loss of face to the entire community.

d. Mediation through a *renqing* (人情) atmosphere

Renqing can be defined as "personal goodwill" as it relates to the imperative that one party grant a favor to another party based on the nature of their *guanxi*. The closer the relationship, the greater the expectation and obligation of fulfilling one's *renqing* with the other. According to Chen, one's social success in Chinese society is sometimes measured by the *renqing* one maintains with his fellow human beings. In contrast, Westerners normally perform a favor when they consider it convenient to do so and not a major imposition. With *renqing*, the Chinese do not appear to enjoy such a liberty.⁸¹

⁷⁹ Chen, *supra* note 49, at 55.

⁸⁰ *Id.*

⁸¹ *Id.* at 56.

As a social sanction, *renqing* can serve as an instrument for facilitating dispute resolution. Michael Moser observes that "in the process of mediating a dispute, it is important for third parties to establish a *renqing* atmosphere so as to terminate the bitterness and quarreling and lay the groundwork for a settlement."⁸²

e. *Attaining harmony through a willingness
to compromise*

Lastly, the notion of *rang* (让), or yielding, is rooted in the idea that communal peace and harmony can only be attained through parties' willingness to compromise and meet each other halfway. Chen comments that it is not the pursuit of individual rights or justice, but rather the restoration of social harmony that represents the desired result of conflict resolution. In Confucian ethics, "yielding suggests that one has the ability to look within oneself and acknowledge that one may not be completely faultless." A party's predisposition to yield in a dispute earns him much respect in the eyes of the community because such behavior exhibits "good moral upbringing," a highly regarded Confucian virtue.⁸³

3. The Recent Arrival of Positivist Private Law

We have examined how Chinese ethical principles exist to secure a sense of communal harmony. Such principles are translated into cultural dictates as to how parties should relate to each other. Such customary rules, considered to be unwritten Chinese private law, remain influential to this day, even when Western-style positivist black-letter law appears to have finally arrived in China.

On this point, Lauchli asserts that "Chinese society is neither built upon a constitution and a system of laws derived from it, nor on a theory of rights that is independent of interests, but by the 'internalization of Confucian ethical principles' as the result of thousands of years of socialization."⁸⁴ In China, the rule of man trumps the rule of law.⁸⁵ Thus, "*fa* is an outsider in a society sewn together by *li*."⁸⁶ *Fa* is often considered by the Chinese, and others, as an instrument of Communist Party leadership, much in the same way *fa* was employed by China's

⁸² Michael J. Moser, *LAW AND SOCIAL CHANGE IN A CHINESE COMMUNITY: A CASE STUDY FROM RURAL TAIWAN* 65 (1982).

⁸³ Chen, *supra* note 49, at 57.

⁸⁴ Lauchli, *supra* note 1, at 1062.

⁸⁵ Wang & Zhang, *supra* note 63, at 26.

⁸⁶ Lauchli, *supra* note 1, at 1062.

many emperors in antiquity.⁸⁷ In comprehending Chinese law, observers should recall the words of the famed American jurist and legal commentator Roscoe Pound when he remarked on the lack of Chinese juristic and legal terminology:

Such ideas as "administration of justice," the distinction between "law" and "a law," the conception of "a right" and the many distinctions developed in the latter part of the nineteenth and in the present century by analysis of "a right," the distinction of legal precepts as rules, principles, precepts defining conceptions, and precepts establishing standards, and the distinctions of "justice" as an individual virtue, as the ideal relation among men, as the end of law, and as a regime of adjusting relations and ordering conduct, are very hard to bring home to Chinese students in words with which they are familiar and thus make the teaching of the science of law a hard task.⁸⁸

Chinese history is replete with examples of how contact and economic engagement with foreigners resulted in China's attempts to adapt and evolve. More recently, in order to achieve economic development and greater contact with foreigners, the People's Republic of China ("PRC" or "China"), has aggressively established laws, rules and regulations that govern arbitration and litigation.⁸⁹ However, Lauchli asserts, "because of the Chinese disposition towards *li* and against *fa*, it will be a long time before Chinese society and practice adjusts to what has been legislated."⁹⁰ More likely, *fa* will adjust to a changing Chinese society.

The ongoing problem of incorporating *fa* into Chinese society is reflected in current legislative power regarding creating and interpreting laws. Stanley Lubman comments that the language and phrasing of Chinese legislation and rules allow broad administrative discretion in interpretation because a major goal of Chinese legislative drafting is "flexibility."⁹¹ As a result, Chinese legislation is intentionally drafted in

⁸⁷ Stanley Lubman, *Introduction: The Future of Chinese Law*, 141 THE CHINA Q., 1-2 (1995) [Lubman, *Future of Chinese Law*].

⁸⁸ Roscoe Pound, PROGRESS OF THE LAW IN CHINA 3 (1953) as quoted directly in Lauchli, *supra* note 1, at 1060.

⁸⁹ See Sam Blay, *Party Autonomy in Chinese International Arbitration: A Comment on Recent Developments* 8 AM. REV. INT'L ARB. 331, 331-39 (1997).

⁹⁰ Lauchli, *supra* note 1, at 1063.

⁹¹ Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 391 (2000) [Lubman, *Bird in a Cage*].

"broad, indeterminate language," which allows administrators to flexibly interpret the specific meaning of legislative language in different circumstances.⁹² Lubman further observes that standard drafting techniques include the use of "general principles, undefined terms, broadly worded discretion, omissions, and general catch-all phrases."⁹³ These problems suggest that the creation and interpretation of laws in China are marked by disorder, a potential for arbitrariness, and a profound lack of coherence. "Lawmakers exercise power to interpret rules of their own making, which are couched in indeterminate language."⁹⁴ There is little surprise that Perry Keller concludes:

The disparate mass of laws and regulations which makes up the formal written sources of Chinese law does not possess sufficient unity to be regarded as a coherent body of law. In their disarray, the sources of Chinese law seem barely capable of providing the basic point of reference which all complex systems of law require.⁹⁵

B. Mediation and Arbitration "with Chinese Characteristics" and Chinese Legal Culture

The choice of an effective dispute resolution mechanism in Chinese society depends not only on tradition, but also on the present-day realities of legal culture, such as whether an effective justice from the courts can be consistently relied on by the parties. This is a self-evident predicament when considering the legal-political context of the People's Republic of China.

Wang and Zhang observe that the current law of the PRC "follows the continental legal tradition, therefore, the sources of law are mainly statutes and written legal documents."⁹⁶ "The hierarchy of laws relates closely to the structure of the Chinese government."⁹⁷ Since the "Soviet era," the PRC has had four constitutions.⁹⁸ The PRC's socialist political structure revolves around a system of people's congresses which create

⁹² *Id.* at 391. See Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 750-52 (1994).

⁹³ Lubman, *Bird in a Cage*, *id.*

⁹⁴ *Id.*

⁹⁵ Keller, *supra* note 92, at 711.

⁹⁶ Wang & Zhang, *supra* note 63, at 15.

⁹⁷ *Id.*

⁹⁸ Lauchli, *supra* note 1, at 1061.

and supervise administrative, judicial and procuratorial organs at all levels.⁹⁹

Resulting from its late start in law-making and the ongoing link of law and legislation to party politics, laws are no sooner enacted than they are modified.¹⁰⁰ This has had a negative effect on foreign investment, where Western lawyers and business people are often unsure of their legal status and the efficacy of China's courts.¹⁰¹ These barriers to fair and effective dispute resolution may chill the potential of foreign commercial expansion in China. Foreigners who sign contracts find that failure of performance may indicate that the contract is secondary to personal and organizational relationships (*guanxi*) or other collective concerns.¹⁰² Philip McConaughay has expressed the Chinese (Asian) approach to contracts, a sharp contrast from Western rights-based understandings, when he observed that:

From a traditional Asian perspective, a "confer in good faith" or "friendly negotiation" clause represents an executory contractual promise no less substantive in content than a price, payment, or delivery term. It embodies and expresses the traditional Asian supposition that the written contract is tentative rather than final, unfolding rather than static, a source of guidance rather than determinative, and subordinate to other values—such as preserving the relationship, avoiding disputes, and reciprocating accommodations—that may control far more than the written contract itself how a commercial relationship adjusts to future contingencies.¹⁰³

In China, contract autonomy is undermined when such concerns take precedence over contractual obligations. Further, "if a Chinese court seeks to re-evaluate a contract, even immediately after it has been signed, a Chinese court may be much more sympathetic than a court in another

⁹⁹ Wang & Zhang, *supra* note 63, at 15.

¹⁰⁰ Lubman, *Future of Chinese Law*, *supra* note 87, at 1-3.

¹⁰¹ Lauchli, *supra* note 1, at 1061. See also Tahirih V. Lee, *Risky Business: Courts, Culture, and the Marketplace*, 47 U. MIAMI L. REV. 1335 (1993).

¹⁰² Lauchli, *id.* See Frank L. Acuff, HOW TO NEGOTIATE ANYTHING WITH ANYONE ANYWHERE AROUND THE WORLD 43, 61 (1997). See also Andrew Sagartz, *Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court*, 13 OHIO ST. J. ON DISP. RESOL. 675 (1998).

¹⁰³ Philip J. McConaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA. J. INT'L L. 427, 448 (2001). An excellent discussion on the differing perceptions and understandings of contract law between East and West.

country.”¹⁰⁴ Such idiosyncrasies to Chinese legal culture make it difficult to rely on its courts.

Since law is linked to politics, China's judicial organs cannot be considered autonomous entities when they carry out investigation, prosecution, and adjudication. Adjudication in the PRC is often policy-driven, and reflects a profound lack of judicial independence,¹⁰⁵ highlighting the long-standing historic suspicions of many Chinese towards *fa*.

As a result of traditional Chinese disdain for *fa* and the closing of law schools during the Cultural Revolution, it may be a while before there are a sufficient number of well-trained legal professionals to run China's courts.¹⁰⁶ Currently, many judges have no formal legal education. Moreover, they are appointed by standing committees of the appropriate People's Congress and have no special tenure or job security. This keeps judges, and their decisions, ultimately dependent on the party's favor.¹⁰⁷

Only since the death of Mao Zedong and the rise of Deng Xiaoping in the late 1970s have courts begun to concentrate more on civil rather than criminal disputes. Lubman has observed that the number of civil and economic disputes brought to the courts has risen yearly, from 2.4 million cases in 1990 to almost six million in 1997. Most of this increase is attributable to the rise in contract and property disputes, as well as suits arising out of what would be considered as torts in the West, such as claims for personal damages for injuries caused by negligence.¹⁰⁸ To Lubman, this “increasing activity of the courts reflects the slowly increasing willingness among many Chinese, especially in the coastal cities, to bring their disputes to court rather than to resort to informal mediation, which has traditionally been the preferred means for settling most civil disputes.”¹⁰⁹ Contracts and rights under them are continuing to grow in importance, as more economic transactions emerge involving parties who were not previously familiar to each other. Still, some 60% of the cases brought to the courts are currently resolved through judicial mediation rather than court adjudication of competing claims and rights.¹¹⁰

¹⁰⁴ Lauchli, *supra* note 1, at 1061.

¹⁰⁵ See Wang & Zhang, *supra* note 63, at 26.

¹⁰⁶ See Donald C. Clarke, *Dispute Resolution in China*, 5 COLUM. J. CHINESE L. 245, 257 (1991).

¹⁰⁷ See *id.* at 254-55.

¹⁰⁸ Lubman, *Bird in a Cage*, *supra* note 91, at 387.

¹⁰⁹ *Id.*

¹¹⁰ This percentage is a decline from the mid-1980s, when the rate of judicially mediated cases may have gone as high as 80% in some courts. Lubman, *Bird in a Cage*, *supra* note 91, at 387.

In fact, "an initial attempt must be made to mediate all civil disputes."¹¹¹ According to Lauchli, sometimes an adjudicative committee decides a case before trial. This practice of holding a mini-trial is called "first decide, then try."¹¹² As for enforcement, in a survey of judgments in 1987 through 1988, up to a troubling forty percent of judgments were not enforced in some provinces. "A critical reason for this failure to enforce court judgments, still problematic today is local protectionism, that is, local courts will not enforce another court's judgment if it adversely affects its local interests. This practice can easily lead to corruption where some provinces will not enforce judgments by other provinces."¹¹³

The gradually changing relationship between mediation and adjudication merits special attention. According to Lubman, a system of local committees created for the express purpose of mediating civil, family, and some property disputes has been active in China since 1949.¹¹⁴ Today, the greater accessibility and credibility of the courts are reflected by a decline in the number of disputes brought to mediation committees, from 7.4 million in 1990 to 5.5 million in 1997.¹¹⁵ Even more significantly, both the Chinese civil procedure code and policy today have departed from earlier policies, associated with Mao, which stressed mediation as the primary means of dispute settlement. Lubman asserts that current policy in China teaches that mediation should yield to adjudication, which clearly defines the rights, duties, and liabilities of parties in disputes.

The Maoist emphasis on using mediation to suppress social conflict and unite the masses to work to attain Socialism has disappeared, although the Ministry of Justice stresses that it continues to aid in detecting and controlling potentially criminal or otherwise socially disruptive behavior.¹¹⁶

1. Chinese mediation

Despite the rise in court-based dispute resolution, mediation has remained the preferred dispute resolution mechanism for parties. This is due to the dichotomy of *li* and *fa*, the traditional aversion towards

¹¹¹ Lauchli, *supra* note 1, at 1064.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Lubman, *Bird in a Cage*, *supra* note 91, at 387-88.

¹¹⁵ *Id.*

¹¹⁶ *Id.* On mediation before the Cultural Revolution, see the classic treatment by Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284 (1967).

litigation, and the realities of China's nascent legal culture. As noted earlier in this paper, there is cultural predisposition for *li*, emphasizing the "right ordering" of relationships, especially in dispute resolution. This is in contrast to *fa*, which is a black-letter legalism that seems to remove the human element to dispute resolution. Mediation may be conducted by people's mediation committees, administrative bodies, arbitral tribunals, or courts.¹¹⁷ Lauchli posits that "mediation is a natural extension of Confucian ethics, and therefore has the longest standing position in Chinese tradition, and is pervasive in China."¹¹⁸ Similar to the more general description of mediation previously outlined, parties mutually agree to a resolution with the guidance of an experienced and respected elder of the village or family and are willing to grant concessions for the goal of restoring harmony.¹¹⁹

The Chinese approach to mediation differs in that their method stresses agreement, respect, and right relationships. In China, the mediator's role is to investigate facts and "persuade and educate" the disputants, often leading to "self-criticism" and change by the disputants.¹²⁰ One mediation leader stated that the goal of the neighborhood mediation committees was to "make people happy" and to see that people "live in harmony."¹²¹

However, as agreeable mediation might be for Chinese culture, Randall Peerenboom emphasizes that we should not exaggerate the Chinese preference for mediation and other informal means of dispute settlement. He observes that litigation has increased gradually while mediation has decreased in the last two decades as the legal system has improved. The informality of mediation has led to the search for more formal channels, especially in resolving commercial disputes.¹²² Peerenboom further emphasizes that mediation is no substitute for a functioning court system that meets the basic requirements of the rule of

¹¹⁷ Lauchli, *supra* note 1, at 1066.

¹¹⁸ *Id.* at 1065-66.

¹¹⁹ Amanda Stallard, *Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 463, 477 (2002).

¹²⁰ Lauchli, *supra* note 1, at 1066. See Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and the People's Republic of China*, 10 TEMP. INT'L & COMP. L. J. 313, 325-26 (1996).

¹²¹ Perkovich, *id.* at 326-327. Perkovich presents some examples. In a marital dispute involving allegations of abuse by the wife, the mediator suggested that the couple go to Beijing for a holiday. "The matter was resolved when the husband expressed regret that he abused his wife." In another instance, after mediation, an unmarried woman who had become pregnant agreed to write a "self-criticism" and pay a fine. In a third instance, a grandson was angry with his grandmother over her living arrangements. The neighborhood mediation "committee met with the disputants and reminded the grandson that his grandmother, who was ninety-four years old, did not have long to live and that he should therefore try to make her happy."

¹²² Randall Peerenboom, CHINA'S LONG MARCH TOWARD RULE OF LAW 162 (2002).

law. He worries that the mediation preference may hinder China's legal development, namely, the perception that the court system is unreliable and lacks authority, and that lawyers need not rely on their legal training to resolve disputes.¹²³

Peerenboom's observation is important because it insists that China must adopt a reliable order built on the rule of law. An over-reliance on mediation, which some modern "Legalist" commentators might regard as feudal, holds back China's proper engagement with the West. However, Peerenboom's comments should be considered in light of Lubman's observations on the problems of Chinese legislative drafting and the realities of Chinese courts, and how developing both an effective legislature and definite, coherent laws goes hand-in-hand with improving the court system's enforcement mechanism of those laws.

2. Chinese arbitration

In China, arbitration is a growing area of dispute resolution because of the country's desire to participate in the world economy and the traditionally low-key role of its judiciary.¹²⁴ Individuals and groups had to find ways to reconcile their aversion for litigation and suspicions of party-dominated legal institutions with the necessity of resolving their disputes. Where Western arbitration involves a neutral third party deciding a dispute between two other parties, the principles and specific goals of arbitration "with Chinese characteristics" are similar to those in mediation and conciliatory negotiation, emphasizing the promotion of Chinese interests and long-term right relations. Ideally, "arbitration is suited to the resolution of a dispute in a friendly personal and business relationship; in some circles arbitration is appropriate because it is taboo to force the other party before a governmental tribunal."¹²⁵

Of course, mediation cannot work all the time, and another layer of dispute resolution must be applied. Chinese courts, while making promising progress, remain a problematic forum and should arguably be the last resort for parties engaged in dispute, especially in disputes where the foreign party is uncomfortable with the hold-your-breath unreliability of a local court. Therefore, arbitration is the next viable option for parties once mediation has failed. Arbitration enables a temporary bypass of the Chinese court system, at least in resolving the dispute. However, Chinese courts may still play a role in the enforcement of the arbitral award.

¹²³ *Id.* at 163.

¹²⁴ Lauchli, *supra* note 1, at 1067.

¹²⁵ *Id.* at 1066-67.

Fredrick Brown and Catherine Rogers stress that for foreign parties seeking to vindicate their rights through arbitration, obtaining a favorable arbitral award is only the first step in a long and precarious process. "The enforcement problems are legendary for victorious parties seeking to enforce awards in China."¹²⁶ Despite the limited grounds upon which a Chinese court can legitimately deny enforcement of an arbitral award,¹²⁷ prevailing parties are routinely unable to enforce arbitral

¹²⁶ Fredrick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in The People's Republic of China*, 15 BERKELEY J. INT'L L. 329, 341 (1997). Chinese courts may also enforce arbitration awards by foreign arbitration bodies located in a foreign country which is a member of the New York Convention. However, the chances of a court's enforcement of an arbitral award from a Chinese institution appear better. China's experience with the New York Convention is relatively young. It acceded to the New York Convention on 22 April 1987 with two reservations, the reciprocal reservation limiting recognition to awards issued in countries that are also signatories to the Convention and the commercial reservation, limiting enforcement to awards that involve commercial relationships. Where application is made to enforce a New York Convention award in China, the basis for refusal to recognize and enforce the award is found in Article V of the New York Convention.

Article V of the New York Convention specifies the only grounds on which a contracting nation "may" refuse recognition or enforcement of a foreign arbitral award. The grounds include:

1. the legal incapacity of a party or invalidity of the arbitration agreement (art. V.1.a),
2. the failure to provide the unsuccessful party with notice and an opportunity to be heard (art. V.1.b),
3. the rendering of an award that exceeds the scope of the arbitration agreement (art. V.1.c),
4. the arbitral procedure or composition of the tribunal did not comply with the parties' agreement or the law of the hosting jurisdiction (art. V.1.d),
5. the award already has been set aside by the country in which, or under the law of which, the award was made (art. V.1.e),
6. the subject matter of the award is not capable of arbitration in the enforcing jurisdiction (art. V.2.a), and,
7. recognizing or enforcing the award would violate the enforcing jurisdiction's public policy (art. V.2.b).

Further, Benjamin P. Fishburne, III and Chuncheng Lian, *Commercial Arbitration in Hong Kong and China: A Comparative Analysis*, 18 U. PA. J. INT'L ECON. L. 297, 334 (1997), observe that a number of foreign arbitral awards have been granted recognition and enforcement in China under the New York Convention. Nevertheless, when one looks at the published and unpublished record on P.R.C. enforcement of foreign arbitral awards, Chinese performance is mixed. Several problems of enforcement are said to have occurred in some cities that are not major international centers. A general lack of knowledge among Chinese judicial officials of the New York Convention and local protectionism are frequently cited as causes of such enforcement problems. As with many legal issues in China, consistent application of existing legal principles remains a problem. Enforcement of arbitral awards is no exception. On balance, however, China's reputation for enforcement is probably worse than it deserves.

¹²⁷ According to Sally A. Harpole, *International Arbitration in the People's Republic of China under the New Arbitration Law*, 6 ICC INT'L COURT OF ARB. BULLETIN 19, 24 (1995), the procedures for recognition and enforcement of an arbitral award in China generally do not permit the People's Court to review the substance of the dispute, except where the "social or public interests" of China are involved. Article 260 of the 1991 Chinese *Civil Procedure Law* provides other circumstances under which a People's court may vacate and/or refuse to enforce an arbitral award:

Article 260

awards.¹²⁸ In some instances, arbitral awards are denied enforcement because local courts come under significant pressure from local government authorities because of the detrimental effect on the local community or business that award enforcement may bring.¹²⁹ Other times, even if enforcement is not expressly denied, the practical effect is the same because the People's Court fails to actively enforce the award because of the influence of local interests who stand to lose. Even when the People's Court issues orders requiring enforcement of arbitral awards, such orders are only pieces of paper whose execution is dependent upon the often-elusive cooperation of local officials.¹³⁰

Thus, as Brown and Rogers declare, in spite of its popularity, arbitration in China's emerging marketplace is still subject to many of the limitations that plague China's court system—the same limitations that investors seek to avoid by choosing arbitration. “The key to the paradox is that, while arbitration in China is imperfect, it remains the best alternative for international investors.”¹³¹

Despite such serious concerns for foreign parties, the chief characteristic of Chinese arbitration that distinguishes it from non-Chinese arbitration is that if the Chinese parties so desire, conciliation may be used during the process of arbitration.¹³² This is demonstrative of

The people's court shall issue an order to refuse the enforcement of the award made by the foreign-related arbitration institution of the People's Republic of China if the party against whom the enforcement is sought has furnished the following proof to the people's court and the people's court has examined and verified through its collegial panel the proof that

- (1) the parties do not have an arbitration clause in their contract and have not subsequently concluded an arbitration agreement in writing; or
- (2) the party against whom the enforcement is sought was not given due notice as to the appointment of arbitrators or the conduct of the arbitration proceedings, or was unable to present his case for reasons for which he is not responsible; or
- (3) the formation of the arbitration tribunal or the arbitral procedure was not in conformity with the arbitration rules; or
- (4) the matters dealt with by the award fall outside the scope of the arbitration agreement or outside the power of the arbitration tribunal.

Enforcement of an arbitral award shall be disallowed if the enforcement of it goes against social and public interest.

¹²⁸ Among the reasons is a court's broad and unjust application of the “social and public interest” affected by enforcing the arbitral award. This has usually been a standard mask for local protectionism. For a comprehensive discussion of this and of arbitral awards enforcement in the PRC generally, see especially Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People's Republic of China*, 1 ASIAN-PACIFIC L. & POL'Y J. 12 (2000) and Randall Peerenboom, *Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249 (2001).

¹²⁹ Brown & Rogers, *supra* note 126, at 342. See Stanley Lubman, *Setback for China-Wide Rule of Law*, FAR E. ECON. REV. Nov. 7, 1996, at 38.

¹³⁰ *Id.* at 342.

¹³¹ *Id.* at 330.

¹³² Lauchli, *supra* note 1, at 1067. See Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV.

the traditional Chinese preference for mediation and the reasons for that preference as explored in this section. The adoption of the Med-Arb blended process for the resolution of international commercial disputes is at the heart of the singular approach of China's primary institutional arbitration regime. Critiques to the blended process are best understood in the context of China's cultural heritage and Confucian approach to dispute resolution.

IV. WHERE CULTURE AND DISPUTE RESOLUTION MEET: MED-ARB AND THE INSTITUTIONAL ARBITRATION REGIMES OF CHINA AND HONG KONG

A. *Blended Approach: China's Arbitration Law and the CIETAC Med-Arb Process*

Resulting from both the reforms of Deng Xiaoping in the 1970s through 1980s and the worldwide globalization of foreign direct investment and open markets, the volume of trade with and investment in the People's Republic of China has increased in recent years. This has quickly led to China's emergence as a major economic power, further enhanced by its recent accession to the World Trade Organization.¹³³ Accompanying the ever-increasing volume of transactions and economic competition is the corresponding (and inevitable) growth in the number of commercial disputes between Chinese and foreign entities. Arbitration is normally stipulated as the means for settling disputes in nearly all standard form contracts of China's private and state-owned corporations.

The legal framework for Chinese arbitration is governed by the Civil Procedure Law of 1991 and the Arbitration Law, which was adopted in 1994. Before these laws were enacted, arbitration was regulated by a combination of central government decrees, statutes, regulations and common practice. In Hong Kong and most other jurisdictions, a distinction is made between domestic and international arbitrations.¹³⁴

539, 539, 558 (1995).

¹³³ For an analysis of China's current problems with accommodating the WTO Directives given China's weak legal structures, see especially Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 399 (2002). For the potential problems which might be caused by China's legal structure, see also the latter portion of an article by Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 ASIAN-PACIFIC L. & POL'Y J. 13 (2000).

¹³⁴ What counts as "international" especially in CIETAC can have serious implications because it not only determines whether a particular tribunal has jurisdiction over a dispute, but it also determines which arbitration laws and rules apply. In China, if an arbitration is treated as an international arbitration, the CIETAC Rules and relevant provisions of the Arbitration Law become

Domestic arbitrations are conducted by local arbitration commissions scattered throughout China.

The China International Economic and Trade Arbitration Commission ("CIETAC") is the sole organization authorized to hear non-maritime commercial arbitrations between Chinese and foreign parties.¹³⁵ CIETAC's arbitrators include arbitrators from Hong Kong, Macau, other foreign countries, and mainland China. The newest crop of arbitrators is comprised of legal professionals. In general, parties to international transactions have the right to choose arbitration rather than litigation to resolve their disputes in virtually all situations. Parties have the right to decide who will arbitrate their case, and hearings are conducted at CIETAC headquarters or at one of its branches.¹³⁶

Mediation may be used as a process independent and distinct from subsequent arbitration. Ad hoc mediation always remains possible to parties pursuant to the 1980 UNCITRAL Conciliation Rules. If the conciliation is successful, a settlement agreement will be drawn up and signed by the parties. According to Cheng, Moser, and Wang, this settlement agreement is deemed to constitute a private contract under Chinese law, and is enforceable as such.¹³⁷ The agreement is non-binding, that is, the parties can renegotiate its terms to arrive at a new settlement. In light of the *li-fa* dichotomy which prevails in Chinese conceptions of law and order, I submit that court enforcement of parties' mediated agreements can go a long way in promoting a Rule of Law-based normative order in China.¹³⁸

applicable. If an arbitration is determined to be a domestic arbitration, however, CIETAC will have no jurisdiction over the case. Instead, the local arbitration association will have control. Therefore, the specific location of the domestic arbitration will determine the applicable arbitration rules because no uniform rules have been adopted for use by local arbitration associations.

Chinese law is less liberal than Hong Kong law in determining whether an arbitration is international or domestic. The Arbitration Law does not expressly define what constitutes an international or foreign-related arbitration or commercial dispute, even though the law contains a full chapter dealing with international or foreign-related arbitrations. The term "international or foreign-related" is, however, implicitly defined in the 1995 CIETAC Arbitration Rules. The CIETAC Arbitration Rules provide that CIETAC has jurisdiction to settle by means of arbitration: economic, trade and other disputes, whether international or foreign-related contractual or non-contractual, between foreign legal persons and/or natural persons and Chinese legal persons and/or natural persons, between Chinese foreign legal persons and/or natural persons, and between Chinese legal and/or natural persons in order to protect the legitimate rights and interests of the parties concerned and promote the development of domestic and foreign economic relations and trade. See Fishburne & Lian, *supra* note 126, at 309-13.

¹³⁵ The CIETAC provides an excellent introduction to the work of the Commission, available at: http://www.cietac.org.cn/english/introduction/intro_1.htm

¹³⁶ Lauchli, *supra* note 1, at 1067.

¹³⁷ Cheng Dejun, Michael J. Moser & Wang ShengCheng, INTERNATIONAL ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY, CASES AND MATERIALS 58 (1995).

¹³⁸ As observed earlier in this paper, a "mediation settlement document" from the mediation phase of

CIETAC can also conduct mediation services through a process where a mediator is selected by the CIETAC Secretariat from the Panel of Arbitrators.¹³⁹ If mediation fails, the parties normally refer the dispute to arbitration.

The arbitral proceedings and rules for international arbitration in China are governed by the CIETAC Arbitration Rules. In early 1992, the CIETAC drafting group studied rules used by arbitration institutions around the world, including the International Chamber of Commerce Arbitration Rules, the UNCITRAL Model Rules on International Commercial Arbitration, and the Stockholm Chamber of Commerce Arbitration Institute Rules.¹⁴⁰ On March 17, 1994, the China trade promotion body, the China Council for the Promotion of International Trade, formally adopted the revised CIETAC Arbitration Rules. The rules were amended in 1995 in accordance with the 1994 Arbitration Law,¹⁴¹ and the latest version was prepared in 2000.

Med-Arb will be recognized and enforced as an arbitral award as per Article 51 of the 1994 Arbitration Law.

Arguendo, in the non-Med-Arb context, the enforceability of settlement agreements as private contracts is important in parties' choosing mediation over arbitration. Arbitral awards, as observed in an earlier part of this paper, are subject to the various problems of enforcement related to legal culture and legal structures. This point on enforceability in China is thus affected by the mediation-arbitration dichotomy, that is, the pros and cons of choosing one mechanism of dispute resolution over another. A "win-win" mediated settlement, one that both parties want and have arrived at, is easier to enforce by courts as a private contract (unless both parties' free will are in sharp divergence with Communist Party policy), than a "winner-loser" arbitral award where the consequences of enforcing an award may be greatly detrimental to the Chinese party, and may seek a "public policy" reason from the local court not to enforce the award. Rather than try to insist on the Rule of Law taking hold in China through enforcing arbitral awards even if they adversely affect local parties, upholding the letter of the law, a better way to promote Rule of Law would be by securing the will of private parties in their freedom of contract, enforcing their mediated settlement agreements.

Perhaps this route to Rule of Law in China, upholding parties' relationships by promoting the private contracts that emerge, will manage to connect the *li* aspects of Chinese culture with Chinese law, instead of the *fa* aspects which can only be linked more to the absolutist approach to the enforcement of arbitral awards. *Arguendo*, you first need a "Rule of Law" between private parties (i.e., a contract) to be protected and enforced, before the "Rule of Law" between an individual and the state—historically a problem of the despotic and harsh application of *fa*—can be secured.

¹³⁹ In a process called "joint conciliation" a process conducted pursuant to arrangements established between Chinese and foreign disputes settlement bodies. For instance, the Beijing Conciliation Centre (BCC) has links to the Beijing-Hamburg Conciliation Centre in Hamburg, Germany to resolve commercial disputes between China and Germany.

¹⁴⁰ Fishburne & Lian, *supra* note 126, at 306.

¹⁴¹ *Arguendo*, we must emphasize the significance of the Arbitration Rules as part of a broader scheme within China to produce new laws to accommodate China's increasing status a global economic superpower. With the rapid development of domestic economic reform and international commerce, China recognized an urgent need for a comprehensive and uniform arbitration law governing both domestic and international arbitrations. To meet this need, the National People's Congress promulgated its first Arbitration Law on August 31, 1994. The Arbitration Law became effective on September 1, 1995. This legislation governs both international arbitrations conducted

Among the characteristic features of international arbitration through the CIETAC Arbitration Rules, Cheng, Moser, and Wang have emphasized the significance of "mediation and conciliation-oriented arbitration," where

[a]rbitrators may act as judge, middleman and 'peace talker' at different times in the same proceedings. Arbitrators who have acted as conciliators are not prohibited from resuming their appointed roles as arbitrators later if the conciliation fails.¹⁴²

This special feature is mentioned in Article 45 of the 2000 CIETAC Arbitration Rules which provides that:

If both parties have a desire for conciliation or one party so desires and the other party agrees to it when consulted by the arbitration tribunal, the arbitration tribunal may conciliate the case under its cognizance in the process of arbitration.¹⁴³

The combined role of mediator-arbitrator is common in other Asian countries and has been accepted by dispute resolution centers in the Pacific Rim.¹⁴⁴ However, while countries such as Indonesia and Korea suspend arbitration hearings while a conciliation is attempted, in China arbitration and conciliation are combined in an on-going process.¹⁴⁵ According to Wang Shengchang, combining arbitration with conciliation in China has long proved to be quite a successful mechanism, yielding a success rate of at least twenty percent each year. From 1990 to July 1997, CIETAC handled about 4,200 cases. Among these cases, at least 800 were settled by the parties through mediation performed by arbitrators.¹⁴⁶

The Chinese approach to Med-Arb stands in sharp contrast to the position adopted by other institution arbitration regimes and other jurisdictions where mediation and arbitration are considered as two entirely separate procedures, the mixing of which is believed to be

by CIETAC and domestic arbitrations conducted by various arbitration commissions organized throughout the country. Thus, the newly promulgated *Arbitration Law*, chapter 28 of the 1991 *Civil Procedure Law*, and the 1995 CIETAC Arbitration Rules constitute a comprehensive and modern legal framework for international commercial arbitrations in China.

¹⁴² CHENG, MOSER & WANG, *supra* note 137, at 12.

¹⁴³ CIETAC Arbitration Rules (2000), available at www.cietac.org

¹⁴⁴ Lauchli, *supra* note 1, at 1069.

¹⁴⁵ Lauchli, *id.*

¹⁴⁶ Wang Shengchang, *Practical Differences in Arbitration Procedures in China and Hong Kong: An Overview*, ICC INT'L COURT OF ARB. BULLETIN: INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA (SPECIAL SUPPLEMENT) 76, 81 (1998).

inappropriate. This concern raised by Western commentators such as James Peter is most relevant when considering the effects of the Med-Arbitrator's independence and impartiality should mediation fail.

To ensure the blending process is fair and reasonable, CIETAC arbitrators ought to adhere to seven principles as outlined by Cheng, Moser, and Wang.

1. Conciliation is not mandatory
2. Conciliation must be based on the free choice of the parties
3. Conciliation must be clearly separated from the arbitration
4. Conciliation must be conducted on the basis of clarifying the facts and distinguishing right and wrong
5. The conciliation settlement agreement must be clearly agreed by the parties
6. Conciliation proceedings may be terminated by either party at any time
7. Matters disclosed during the conciliation must be kept confidential and be disregarded if the conciliation fails.¹⁴⁷

However, while Cheng, Moser, and Wang argue that a Med-Arb process must meet these principles in theory, its practice is often more difficult, as observed in the telling critiques of the Med-Arb process in an earlier section of this paper.

When considering the CIETAC Med-Arb regime, and the critique of the blended process, I contend that we must accept it as a unique model that functions in the context of Confucian cultural predispositions. As such, concerns about parties' due process rights, privacy, and even the impartiality of the Med-Arbitrator—valid worries by outside commentators looking in—may not be regarded as serious problems for the Chinese and for those who opt for a blended process of Med-Arb. This assertion is most effective especially when “watertight” spheres of separate mediation and arbitration proceedings do exist as options for the same parties in CIETAC. It is in its alleged “flaws” that we find a reason why certain Chinese and foreign parties (represented by local Chinese counsel) will opt to resolve their dispute through the CIETAC Med-Arb process.

Cultural factors play a critical role in comprehending the CIETAC Med-Arb process and its perceived flaws and inconsistencies. Amanda Stallard emphasizes that the Chinese are dramatically influenced by Confucian ideals of harmony and compromise, and have been historically

¹⁴⁷ Cheng, Moser & Wang, *supra* note 137, at 61.

disinclined to seek adjudication in state courts.¹⁴⁸ "Members of these societies were taught to yield rather than fight, and airing conflicts publicly was the equivalent of admitting failure and hindering future reconciliation efforts."¹⁴⁹ Confucian teachings focus on reciprocity, loyalty, piety, duty, obedience, respect, and mutual faith and trust. The individual is de-emphasized and harmonious human relationships center around the common good.¹⁵⁰ Furthermore, "Asian cultures typically do not share Western values of privacy, favoring instead to handle conflict diplomatically and within the community."¹⁵¹

1. Tribunal's control over the CIETAC Med-Arb Process

Under the CIETAC regime, mediation can take place anytime prior to, or after the commencement of an arbitration procedure.¹⁵² The mediation proceeding is conducted by CIETAC if the arbitration tribunal has not yet formed.

After the tribunal is formed, the tribunal itself will conduct the mediation.¹⁵³ The mediation phase includes assisting the parties towards establishing and analyzing the facts, as well as making recommendations concerning the strengths and weaknesses of each side's case.¹⁵⁴

Based on Article 46 of the 2000 CIETAC Arbitration Rules, "[t]he arbitration tribunal may conciliate cases in the manner it considers appropriate." This provides the Med-Arbitrator with a great deal of influence over how the Med-Arb process is conducted. Most notably, it allows for *ex parte* private caucuses between himself and one of the parties. Western commentators contend that such a process compromises a party's due process rights. Furthermore, a Med-Arbitrator's Article 46 powers raises issues of coercion if an arbitral tribunal considers it "appropriate" to pressure parties towards settlement.

However, one way this issue of coercion may be defused is to consider the issue of the "amicable settlement," as outlined in Articles 48 and 49:

¹⁴⁸ Stallard, *supra* note 119, at 476.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 476-77.

¹⁵² Tang Houzhi, *Arbitration - A Method Used by China to Settle Foreign Trade and Economic Disputes*, 4 PACE L. REV. 519, 521 (1984).

¹⁵³ *Id.* at 521.

¹⁵⁴ James A. R. Nafziger & Ruan Jiafang, *Chinese Methods of Resolving International Trade, Investment, and Maritime Disputes*, 23 WILLIAMETTE L. REV. 619, 635 (1987).

Art. 48. If the parties have reached an amicable settlement outside the arbitration tribunal in the course of conciliation conducted by the arbitration tribunal, such settlement shall be taken as one which has been reached through the arbitration tribunal's conciliation.

Art. 49 The parties shall sign a settlement agreement in writing when an amicable settlement is reached through conciliation conducted by the arbitration tribunal, and the arbitration tribunal will close the case by making an arbitration award in accordance with the contents of the settlement agreement unless otherwise agreed by the parties.

Certainly, there will be times when an "amicable settlement" may be regarded as friendly when in fact the parties may have been coerced into settlement. Parties who are averse to adjudication by an arbitrator may do anything to avoid it and may feel compelled to agree to a "mediated" settlement. However, this problem can have a characteristically Chinese answer that makes the CIETAC Med-Arb approach suit China.

One way to justify "amicable settlements" is to understand that in Chinese culture, the restoration of harmony is the primary goal of the parties, which is primarily achieved through mediation. The respect and deference to the Med-Arbitrator, parallel to that given to a village elder in the past, enables greater flexibility and discretion as to how harmony is restored. This is favored regardless of whether this is achieved through a Med-Arbitrator's coercion or a Med-Arbitrator violating a party's rights to challenge in *ex parte* caucuses. Furthermore, the cultural dictates of saving face, *ganqing* (good relations), *guanxi* (relationships), *renqing* (personal goodwill) and *rang* (willingness to compromise) are themselves forms of socially-mandated coercion that cannot be easily disabled or ignored.

Indicative of the problems inherent in cross-cultural dispute resolution, this explanation would likely be unsatisfactory to Western commentators who maintain that the "free will" of parties is paramount and their rights must always be protected in international commercial arbitration. However, the dominance of cultural expectations over law in China strongly suggests that the Med-Arb process must be different. Once commercial parties agree to engage in mediation, whether by themselves or as part of a Med-Arb process, it is expected that they seek dispute resolution (or *dissolution*?) through the added benefits of cost-efficiency and the preservation of their business relationships (*guanxi*).

The effective CIETAC Med-Arbitrator—perhaps influenced by his traditional counterpart, the elder—is aware that the parties will almost always prefer a mediated resolution over an arbitrated and adjudicated one (or else they would go directly to arbitration or even litigation). After all, if the parties are not interested in a mediated resolution, as per Article 47 of the CIETAC Rules:

The arbitration tribunal shall terminate conciliation and continue the arbitration proceedings when one of the parties requests a termination of conciliation or when the arbitration tribunal believes that further efforts to conciliate will be futile.

2. Impartiality of the CIETAC Med-Arbitrator

It was observed earlier that when the Med-Arbitrator is exposed to confidential information while serving as a mediator, he potentially compromises his role as an arbitrator by allowing such information influence his impartiality. The gravity of this problem in Med-Arb threatens the process' viability as an effective procedure. Peter observed that it remained unclear "whether parties convey information to the [Med-Arbitrator] in confidence during the conciliation phase, and if so, how it is maintained."¹⁵⁵

Article 50 of the CIETAC Arbitration Rules (2000) considers a wide range of explicit protections for the parties in the case of failed mediation in an arbitral setting. Article 50 states that:

Should conciliation fail, any statement, opinion, view or proposal which has been made, raised, put forward, acknowledged, accepted or rejected by either party or by the arbitration tribunal in the process of conciliation shall not be invoked as grounds for any claim, defense and/or counterclaim in the subsequent arbitration proceedings, judicial proceedings or any other proceedings.

I submit that similar to the issue of *ex parte* due process violations and possibilities of coercion in the Med-Arb process (whether cultural or otherwise), the impartiality of the CIETAC Med-Arbitrator is best understood in the context of Chinese culture. Note that Article 50 mentions nothing about whether or not a CIETAC Med-Arbitrator may use "any statement, opinion, view or proposal" in the "process of

¹⁵⁵ Peter, *supra* note 6, at 108.

conciliation" in making an arbitral decision. The provision merely states that parties may not bring up confidential points raised in mediation in their claims during arbitration "or any other judicial proceedings."

The Western critique is that this capability of a Med-Arbitrator violates his impartiality to render a judgment because of the influence of previous confidential information. After all, a Med-Arbitrator cannot be expected to merely "block out" information gleaned from the mediation phase of Med-Arb. I propose that he perhaps is not expected to "block out" such information, and this is actually why the parties have chosen the Med-Arb process instead of opting for readily available separate mediation and arbitration proceedings.

By not prohibiting a Med-Arbitrator to use such information, CIETAC is arguably consistent with Chinese cultural expectations. First, such a decision-maker, acting with discretion and aware of the conditions of both parties during the mediation phase, will render a judgment fairly as per the demands of re-establishing harmony. Second, individual party rights to privacy are done away with in the Med-Arb quest to attain collective harmony. As Stallard quotes a commentator: "[It] is nearly impossible to say 'privacy' in the Chinese language so as to convey the full English flavor of personal freedom, individuality, and a sense of being shielded from undue outside influences—all matters closely affected by law."¹⁵⁶

Why is such "evenhandedness" not expected from a local court that also makes a decision? The answer lies in parties' awareness of the local court's lack of knowledge as to each party's circumstances, in sharp contrast to the Med-Arbitrator's unique and advantageous grasp of the situation between the parties. *Arguably, this is a key distinction that disputing parties rely on when willfully engaging in the CIETAC Med-Arb process.* Further, while the decision rendered by the court might seem procedurally fair because it was not influenced by confidential information which may or may not be flattering to one or both parties, such "impartiality" by a court is offset by the external and structural factors that plague a Chinese court's substantive judgment, namely, Communist party policies, an uneducated judge, and local protectionism.

For both Chinese and foreign parties, it is far better to rely on the discretion of a Med-Arbitrator whose abilities, education, and credentials have been scrutinized through the CIETAC system, and is aware of the additional circumstances of a dispute that emerge through the mediation phase, than to trust an "impartial" judge who may not even render effective substantial justice. This explanation is consistent with the

¹⁵⁶ Stallard, *supra* note 119, at 477.

Chinese expectation of "arbitrating harmony," as well as the foreign parties' expectation of the general benefits of arbitration over "taking one's chances" in domestic court proceedings.

B. "Watertight" Approach: Hong Kong's Arbitration Ordinance and the HKIAC

Hong Kong evolved differently from the People's Republic of China. Its development stemmed from its culture as a city-economy dependent on service industries. Realizing that it was in its best interest, Hong Kong vigorously developed very straightforward international approaches toward international arbitration, and has since become one of the world's leading arbitral venues.¹⁵⁷

Having had a long engagement with the West as a British colony, Hong Kong was exposed to Western colonial approaches to arbitration. According to Stallard, as with other colonies in Southeast Asia such as Singapore, Hong Kong fused "indigenous Asian dispute resolution philosophy with imported colonial arbitration laws and 'transnational concepts.'"¹⁵⁸ Over time, Hong Kong adopted individualized arbitration laws, built from its own culture and borrowing from others.

Hong Kong began as a British colony in which English statutes and common law arbitration were applied.¹⁵⁹ Hong Kong adopted British reforms for judicial intervention in arbitration, as well as the UNCITRAL Model Law.¹⁶⁰ Under the principle of "One Country, Two Systems," Hong Kong was to retain much of its distinctive characteristics after the 1997 Hand-over to the People's Republic of China ("PRC"), enabling it to retain its place as one of the most relevant economic and financial centers in Asia.¹⁶¹

1. The Hong Kong Arbitration Ordinance

The Hong Kong Arbitration Ordinance of 1997 (Chapter 341 of the Laws of Hong Kong) provides the legislative basis for mediation and

¹⁵⁷ *Id.* at 479. For more detail on colonialism and its effect on past colonies' modern arbitration rules, see Jan K. Schaefer, *Abandoning Colonial Arbitration Laws in Southeast Asia- I: An Analytical History*, 15 MEALEY'S INT'L ARB. REP., 30, 35 (2000).

¹⁵⁸ Stallard, *supra* note 119, at 478.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 479.

¹⁶¹ As quoted in the HKIAC website, <http://www.hkiac.org/main.html>: "Hong Kong law is based closely on English law and its continuance in its present form until the middle of the next century is guaranteed by the People's Republic of China notwithstanding the change of Hong Kong's sovereignty which took place in 1997."

arbitration in Hong Kong.¹⁶² Under this law, there are two distinct arbitration regimes. One regime applies to domestic arbitration and the other to international arbitration. Since April 1990 the UNCITRAL Model Law has applied to international arbitrations held in Hong Kong.

In the context of Med-Arb, the Hong Kong Arbitration Ordinance is of particular interest. Section 2A (2) provides that:

where an arbitration agreement provides for the appointment of a conciliator and further provides that the person so appointed shall act as an arbitrator in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties –

(a) no objection shall be taken to the appointment of such person as an arbitrator, or to his conduct of the arbitration proceedings, solely on the ground that he had acted previously as a conciliator in connection with some or all of the matters referred to arbitration; [...]¹⁶³

This Rule corresponds to the Med-Arb procedure where the same person who mediates also decides the case as arbitrator. The procedure begins with mediation and ends with arbitration, both processes distinct from each other. Peter observes, “the possibility of a partial agreement appears not to be taken into account: The provision foresees that if no settlement can be produced, arbitration will begin.”¹⁶⁴ This implies that a settlement would effectively resolve the dispute and therefore no arbitration would be necessary.

In Section 2B concerning the mediation phase, the Ordinance further mentions:

- (1) If all parties to a reference consent in writing, and for as long as no party withdraws in writing his consent, an arbitrator or umpire may act as a conciliator.
- (2) An arbitrator or umpire acting as conciliator
 - (a) may communicate with the parties to the reference collectively or separately;
 - (b) shall treat information obtained by him from a party to the reference as confidential, unless that party otherwise agrees or unless subsection (3) applies.

¹⁶² For more detail on the potential impact of China's new Arbitration Law on Hong Kong, see especially Katherine L. Lynch, *The New Arbitration Law*, 26 HONG KONG L. J. 104 (1996).

¹⁶³ As reprinted in Neil Kaplan, *The Hong Kong Arbitration Ordinance: Some Features and Recent Amendments*, 1 AM. REV. INT'L ARB. 34 n.15. (1990)

¹⁶⁴ Peter, *supra* note 6, at 108.

(3) Where confidential information is obtained by an arbitrator or umpire from a party to the reference during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall, before resuming the arbitration proceedings, disclose to all other parties to the reference as much of that information as he considers is material to the arbitration proceedings.

(4) No objection shall be taken to the conduct of arbitration proceedings by an arbitrator or umpire solely on the ground that he had acted previously as a conciliator in accordance with this section.¹⁶⁵

Two important observations must be made to the provisions of the Ordinance related to the use of confidential information in the Med-Arb process.

First, Section 2B(3) of the Ordinance suggests that the information gained by the Med-Arbitrator during the mediation will be disclosed to the other party if no agreement is reached and the Med-Arbitrator deems the information relevant. This rule arguably renders rule 2B(2)(b) ineffective, since parties have no assurance that information revealed in caucus will be kept confidential. Linda Reif comments that the Hong Kong Commission was aware of the fact that this rule might repress the candor of the parties, but "was of the opinion that this was a better alternative than compelling the arbitrator to attempt to ignore material information."¹⁶⁶

Second, this Ordinance rule implies that the Med-Arbitrator will use this "confidential" information for decision purposes.¹⁶⁷ Perhaps as in the PRC, the point of the Med-Arb process is to enable the Med-Arbitrator to use such confidential information to make the arbitral decision. However, Alan Rau and Edward Sherman are correct in observing that the mediation phase of Med-Arb, which should invite candor and openness, will no longer be a safe place to reveal the true interests of the parties, and may have "the potential for converting mediation's encouragement of open communication into a trap for the unwary."¹⁶⁸

¹⁶⁵ *Hong Kong Arbitration Ordinance* as noted in Peter, *supra* note 6, at 109.

¹⁶⁶ Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 *FORDHAM INT'L L. J.* 578, 623 (1990/1991).

¹⁶⁷ Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 *TEX. INT'L L. J.* 89, 107-08 (1995).

¹⁶⁸ *Id.* at 108.

Another key feature of the Hong Kong Ordinance is its flexibility in enforcing Med-Arb arbitral awards. As observed earlier in this paper, one of the advantages of Med-Arb is the possibility that a mediation phase settlement agreement can be enforced as a contract or as part of the overall arbitral award. As with China's Arbitration Law, the Ordinance also provides for recognition of settlement agreements as arbitral awards. Hong Kong Ordinance 2A(4) provides:

If the parties to an arbitration agreement which provides for the appointment of a conciliator reach agreement in settlement of their differences and sign an agreement containing the terms of settlement (hereinafter referred as the "settlement agreement") *the settlement agreement shall for the purposes of its enforcement be treated as an award on an arbitration agreement and may by leave of the Court or a judge thereof be enforced in the same manner as a judgment or order to the same effect* and where leave is so given judgment may be entered in terms of the agreement. [emphasis added]

However, despite these benefits, and the fact that the Hong Kong Arbitration Ordinance allows for Med-Arb, the most prominent arbitration institution in Hong Kong, the Hong Kong International Arbitration Centre ("HKIAC"), does not allow Med-Arb blending to be part of its arbitration process.

2. The Hong Kong International Arbitration Centre

HKIAC was established in 1985 as a non-profit organization that is financially independent from the Hong Kong government, instead relying upon fees for its services to fund continuing operations. HKIAC acts as "an appointing and administrative authority . . . maintain[ing] a panel of highly qualified arbitrators" with no restriction on their nationality or residence.¹⁶⁹

For parties seeking to engage in the mediation process, the HKIAC Mediation Rules will govern the proceedings, outlining the selection and appointment of the mediator, the mediation process, and the termination of proceedings. The HKIAC statement on what the Mediator cannot serve as is quite clear. Under Article 14, related to the "Mediator's Role in Subsequent Proceedings":

¹⁶⁹ Fishburne & Lian, *supra* note 126, at 302.

The parties undertake that the mediator shall not be appointed as adjudicator, arbitrator or representative, counsel or expert witness of any party in any subsequent adjudication, arbitration or judicial proceedings whether arising out of the mediation or any other dispute in connection with the same contract...¹⁷⁰

The applicable arbitration rules for international arbitrations at HKIAC are the 1976 UNCITRAL Arbitration Rules. For domestic arbitrations, HKIAC applies a set of arbitration rules adopted in 1993. The 1990 Arbitration Ordinance created separate arbitration regimes for domestic and international arbitrations. Nonetheless, the two regimes are interchangeable. According to Fishburne and Lian, parties to a domestic arbitration can agree to follow the UNCITRAL Model Law to resolve their dispute, and parties to an international arbitration can elect to follow the domestic arbitration system.¹⁷¹

The HKIAC establishes a "watertight" approach to mediation and arbitration, securing separate rules that do not appear to provide for any mixing or blending. While inconsistent with domestic law, this is certainly consistent with UNCITRAL and its creation of separate Arbitration Rules and Conciliation Rules for use worldwide.¹⁷² Even Article 16 of the 1980 UNCITRAL Conciliation Rules provides that:

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.¹⁷³

What does UNCITRAL say about a mediator and/or arbitrator's impartiality? The UNCITRAL Arbitration Rules make no mention of whether an arbitrator can also play the role of mediator, and provides only that an arbitrator's appointment can be challenged, pursuant to Article 10(1), "if circumstances exist that give rise to justifiable doubts as to the

¹⁷⁰ HKIAC Mediation Rules Art. 14, effective as of 1 August 1999, available at <http://www.hkiac.org/main.html>

¹⁷¹ Fishburne & Lian, *supra* note 126, at 301.

¹⁷² *Arguendo*, the UNCITRAL Rules, created by a world body such as the UN, constitute the international standard for arbitration and conciliation proceedings and as such speak with a fair degree of authority, consistent with other institutional arbitration regimes, as to the orthodox belief in keeping the mediation and arbitration spheres separate.

¹⁷³ UNCITRAL Conciliation Rules (1980), available at <http://www.uncitral.org/en-index.htm>

arbitrators impartiality or independence.”¹⁷⁴ Article 7 of the UNCITRAL Conciliation Rules insist on the independence and impartiality of the conciliator (mediator), echoing the HKIAC Mediation Rules. This clear avoidance of combining the roles of mediator and arbitrator into one person is based on concerns of independence and impartiality, especially since the information the person was privy to as a mediator may affect his decision-making as an arbitrator. But as argued earlier, when considering overall Chinese tradition and culture, the CIETAC model appears to allow the Med-Arbitrator to make a decision with the private confidential information he is exposed to in the mediation phase.

Arguably, the HKIAC is heavily influenced by Western standards of arbitration which believe that mediators and arbitrators should not be the same person in the same proceeding. As the HKIAC seeks to be consistent with Western arbitration standards, especially towards a mediator or arbitrator's impartiality, it effectively bypasses any potential problems in cross-cultural dispute resolution. For instance, a foreign party relying on arbitration standards established by the International Chamber of Commerce or the International Bar Association will not have to contend with a Chinese party relying on a standard of adjudication and party-interaction based on Confucian cultural expectations. By accommodating Western institutional arbitration regimes' rules into its own rules of arbitration, HKIAC makes the international commercial dispute resolution process more predictable, effectively standardizing its mediation and arbitration procedures for Western parties seeking to resolve their dispute in Hong Kong.

The Hong Kong Arbitration Ordinance's adoption of Med-Arb is a clear concession to the Chinese people and their cultural expectations behind dispute resolution. The adoption of Med-Arb in Hong Kong law was likely done to make the Med-Arb process consistent throughout the PRC (including Hong Kong) and to enable Chinese and foreign parties in Hong Kong to partake in the Med-Arb process as available in CIETAC.

HKIAC, however, will not participate in Med-Arb. Among other reasons, it might regard the combined role of mediator and arbitrator in one person as violating a Med-Arbitrator's impartiality, blending two very different dispute resolution processes into one, creating all sorts of procedural and fairness issues that potentially jeopardize the legitimacy of the overall proceedings. CIETAC, as argued above, might argue that blending the two processes is more consistent with traditional Chinese dispute resolution, and the Med-Arbitrator can make a more informed, just, and effective arbitral decision that is beneficial to all when he is

¹⁷⁴ *UNCITRAL Arbitration Rules* (1976), available at <http://www.uncitral.org/en-index.htm>

made aware of external circumstances and facts through the mediation phase.

V. CONCLUSION

This paper has sought to examine the mediation-arbitration dichotomy in light of how the debate in China can be understood in the context of cultural and traditional influences, as well as the realities of China's legal evolution. External pressures have followed China's emergence as a world economic power. Foreign investors, nations and international governance regimes have demanded that China modernize its commercial practices towards more predictable global standards, including the resolution of commercial disputes. However, such pressures cannot readily diminish the influence of culture in Chinese commercial dispute resolution.

Within the context of cross-cultural dispute resolution, China's deep-rooted cultural traditions promote resolving disputes by friendly negotiation and mediation, which differ from the West's adversarial tradition of litigation and arbitration. Insofar as China may be pressured to adopt foreign modes of dispute resolution consistent with Western institutional arbitration regimes to accommodate foreign investors, this can only happen once China's legal culture improves. Rule of Law and the reliable enforcement of all arbitral awards must be more secure. One need only contrast China's present legal culture problems and its link to dispute resolution to Hong Kong's legal culture and the HKIAC's mechanisms of dispute resolution to notice the strong correlation between dispute resolution and effective legal structures.

The choice of mediation over arbitration in China is grounded in culture and tradition with its 'rule of *li*' social imperatives, social sanctions and present-day legal realities. Arbitration, of course, is far from an unwanted mode of dispute resolution. Rather, it is a second-choice for parties involved in dispute resolution in China when mediation is available as a first option. However, despite the development of the "Rule of Law" in China, mediation as a viable mode of resolving commercial disputes will not vanish so long as culture and tradition continue to strongly influence Chinese society and its commercial practices.

Med-Arb has emerged as a viable process of dispute resolution for the Chinese, as evinced by its presence in the laws of China and Hong Kong. There are still concerns whether a person serving the dual role of a mediator and arbitrator can truly work, given the perception of compromised impartiality of the Med-Arbitrator when an arbitral decision

must be made. While commentators make a good point by raising this concern of impartiality, we cannot underestimate the influence of Chinese cultural approaches to mediation and its belief that the Med-Arbitrator's impartiality and discretion under a CIETAC regime should not be regarded as compromised.

Ultimately, we must recall that the objectives of Chinese dispute resolution rest on harmony and the restoration of relationships (as mandated by a series of social imperatives and informal sanctions). An innovative approach to promote such goals, such as unifying the "best of both worlds" in these contemporary cross-cultural disputes, appears to be an eminently worthwhile strategy to engage in if, as hoped for in all mediation, "everybody wins" in the end.

Copyright of Columbia Journal of Asian Law is the property of Columbia Journal of Asian Law and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.