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Commercial Mediation in China: The Challenge of Shifting Paradigms

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The rise of China as a trade partner to the United States, and the legal and commercial ramifications of this phenomenon, have been widely observed and commented upon. This article relates some experiences that the International Institute for Conflict Prevention and Resolution (“CPR Institute”) has had with respect to encouraging commercial mediation in China, and suggests some lessons learned from those experiences. It concludes that Western concepts of mediated negotiation may have fundamental cultural limitations that require participants in the process to be open to shifting their understanding of the mediation process itself and of dispute resolution generally.

CPR Institute’s Experiences in China

In 2003, CPR Institute was approached by the China Council for Promotion of International Trade (CCPIT).¹ CCPIT was interested in creating some sort of a resource by which disputes between American and Chinese businesses might be resolved on terms that would be cognizable and trusted by both Chinese and American principals. That prospect was very enticing to CPR and to its corporate membership. The Institute obtained some multi-year financing for that effort from some of these corporations, and went on ahead.

Negotiations took about a year, which by Chinese standards is not at all long.² An agreement

1 Established in May 1952, China Council for the Promotion of International Trade comprises enterprises and organizations representing the economic and trade sectors in China. It is the most important and the largest institution for the promotion of foreign trade in China. The aims of the CCPIT are to operate and promote foreign trade, to use foreign investment, to introduce advanced foreign technologies, to conduct activities of Sino-foreign economic and technological cooperation in various forms, to promote the development of economic and trade relations between China and other countries and regions around the world. The Conciliation Center of the CCPIT is a standing organization dedicated to helping disputants resolve disputes arising out of commercial and maritime transactions by means that don’t involve litigation and arbitration. The Center has established 43 sub-centers, forming a nationwide conciliation network. See generally <http://english.ccpit.org>.

2 “As the first premier of the People’s Republic of China in the 1950s, Zhou Enlai is supposed to have said, when asked about the impact of the French Revolution: ‘It’s too early to tell.’” http://en.wikipedia.org/wiki/Historiography_of_the_French_Revolution. This anecdote is variously told of Mao, Zhou, and others, and is presumably apocryphal.

was reached, a mediation center was established, and rules for the mediation of commercial disputes between American and Chinese businesses were promulgated.³

In the course of these efforts, CPR visited and framed working relationships with the United States-China Business Council; the American Chamber of Commerce in Beijing, numerous American companies investing in Hong Kong, Guanzhou, Beijing and Shanghai; CCPIT officials, civil judges and CIETAC arbitrators in Nanjing and Beijing; esteemed Chinese and American professors, and many other leaders. It developed what the Chinese call *guanxi*.⁴

In 2005 CPR conducted a three-day mediator training in the Beijing headquarters of CCPIT for a select group composed half of very prominent American and British lawyers who practiced in Beijing and Hong Kong, and half of CIETAC arbitrators, CCPIT conciliators and Chinese judges and professors.

The first indication that something might be amiss came during the first day of this training. By lunch it was clear that the Chinese participants were unhappy. That afternoon, the trainers broke the agenda and asked for a discussion of why the Chinese trainees were dissatisfied. One very prominent Chinese judge explained: “I am a judge in the Supreme Court. I have been a judge for thirty-five years. I have conciliated 10,000 cases. And you’re trying to tell me how to do an opening statement? There is no need for an opening statement by the judge. Our civil procedure law provides that I am obligated to offer my services as a conciliator in any case before me. I always do. The CIETAC Arbitration Rules provide that the arbitrator is obligated to offer his services as a conciliator, and they always do.

“And what I do is to say, ‘I’m going to now conciliate this case. Stop lying, all of you stop lying. Tell me what really happened.’ And they tell me what really happened, because I am a very respected judge. Then I go back to my office. I look up the law to find out what the right answer is. Then I come back and I say, ‘According to the law, you owe him 10,000 RMB. Now, you will either pay him the 10,000 RMB or we will go back to the trial. And if we go back to the trial, then in front of your children and in front of your mother and in front of your business partners I will point to you and say, ‘You owe him 10,000 RMB.’”

He concluded, “They all settle.”

The CPR trainer said, “I’m not surprised.”

3 These rules may be found in *BUSINESS DISPUTES IN CHINA* (Michael Moser, ed.), Juris Publishing 2007, at pp. 21-36. The rules, the explanation of the US-China Business Mediation Center, and other information on the CPR effort in China may be found at www.ChinaMediation.org.

4 “It’s a term that literally means ‘relationships’ but that in this [business] context translates far better as ‘connections.’” Scott D. Seligman, *CHINESE BUSINESS ETIQUETTE: A GUIDE TO PROTOCOL, MANNERS, AND CULTURE IN THE PEOPLE’S REPUBLIC OF CHINA*, Warner Books 1999, at p. 180.

The judge added, “And also they settle on the right terms.” And in that final response, the beginnings of the Chinese paradigm of conflict resolution was introduced.

Contrasting Paradigms: Fisher and Confucius

The dispute resolution paradigm that Western conflict managers and mediators have been taught is classically stated in the influential book *Getting to Yes* by Roger Fisher and William Ury.⁵ The paradigm emphasizes identification of disputing parties’ interests, rather than their negotiating positions.⁶ The measurement of success of a negotiated resolution is then the extent to which those interests are satisfied, rather than the extent to which one negotiator “beats” the other.⁷ In the course of interest-based negotiation, it is sometimes possible to create new and unexpected value, improving the parties’ relationship in ways impossible to achieve through crude compromise or, worse, adjudication.⁸

Underlying this paradigm are fundamental values, paramount among them the primacy of individual interests and the virtue of self-determination. Other attributes of a “complete” resolution in this paradigm include an element of vindication or moral affirmation (sometimes through apology); restitution for the harm done to the claimant; forgiveness extended by the claimant; and a plan for prevention of a recurrence of the conduct causing the harm.⁹

But conciliation in Chinese culture is founded on the concept of interpersonal and social harmony, not the vindication and pursuit of individual interests. The sources of this model may be found in a quick (and necessarily amateur¹⁰) review of Chinese moral teaching, particularly the influence of Confucius.

A primary virtue taught by Confucius is *jen*: goodness, respect, benevolence.¹¹ It is expressed not through contemplation, study or prayer, but rather through an individual’s conduct with others. Confucius taught: “The gentleman has morality as his basic stuff and by observing the rites puts it into practice, by being modest gives it expression, and by being

5 Roger Fisher and William Ury, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*, Penguin Books 1991 (2d ed. with Bruce Patton).

6 *Id.* at pp. 40-55.

7 *Id.*

8 *Id.* at pp. 56-80.

9 *See, e.g.*, Karl A. Slaikeu, *WHEN PUSH COMES TO SHOVE*, Jossey-Bass 1996, at pp. 35-38.

10 While I enter this profound topic with the trepidation of the amateur, I note that were I to be silent until I became expert I would never speak. While it is undoubtedly true that “Hell is full of musical amateurs,” (George Bernard Shaw, *Man and Superman*, Act I), it is also true that “[a]n expert is one who knows more and more about less and less.” Nicholas Murray Butler, *reprinted in BARTLETT’S FAMILIAR QUOTATIONS* (16th edition, Justin Kaplan, ed.), Little, Brown and Company 1992, at p. 585. One goes forward as best one may.

11 Denise Lardner Carmody and John Tully Carmody, *IN THE PATH OF THE MASTERS*, Paragon House 1994, at p. 72.

trustworthy in word brings it to completion.”¹² Thus, the manner in which the individual handles his relationships with others is the chief expression of his wisdom, benevolence and kindness. The relationship of son to father, or elder to younger brother, are to be harmonious; and if they are, then that harmony will expand to other more distant relationships such as that among other families in the neighborhood, or even between the subject and the emperor.

The broad social implication of properly balanced individual conduct is expressly made by Confucius: “It is rare for a man whose character is such that he is a good son and obedient as a young man to have the inclination to transgress against his superiors; it is unheard of for one who has no such inclination to be inclined to start a rebellion.”¹³

The most profound expression of this harmony is a respect for ritual, or etiquette in the way one treats others: *li*.¹⁴ In the observance of *li*, one sets an example for conduct that, if modeled by others, would yield a perfectly harmonious society. “To aim always at harmony without regulating it by the rites simply because one knows only about harmony will not, in fact, work.”¹⁵ The “perfect man” – that is, one whose manner and conduct embody the moral integrity of these teachings – has *lian*.¹⁶ For the “common people,” who may not have the insight consciously to choose a harmonious life of *li*, the example of those who do – those whose lives embody *lian* -- will serve to steer them towards the harmonious life with greater effect than compulsion would. “If a man is correct in his own person, then there will be obedience without orders being given; but if he is not correct in his own person, there will not be obedience even though orders are given.”¹⁷

Compulsion and punishment, or *fa*, is a contrasting virtue.¹⁸ It has its place, too, particularly in the art of government. But in characteristic Chinese fashion, these concepts are not viewed as stark alternatives, and certainly not as opposites. The concept of *kuei* teaches that there is a duality in all things in nature, and that overcoming seeming contradictions is an inevitable challenge to any individual; thus, by extension:

[S]eemingly insoluble contradictions, in either business or political matters, do not always mean the two parties cannot reach an agreement; that if both sides

12 CONFUCIUS: THE ANALECTS, XV.18. D.C. Lau, trans., Penguin Books 1979, at p. 134.

13 CONFUCIUS: THE ANALECTS, I.2. D.C. Lau, trans., Penguin Books 1979, at p. 59.

14 Boyé Lafayette De Menthe, THE CHINESE HAVE A WORD FOR IT, Passport Books 2000, at pp. 242-44.

15 CONFUCIUS: THE ANALECTS, I.12. D.C. Lau, trans., Penguin Books 1979, at p. 61.

16 Boyé Lafayette De Menthe, THE CHINESE HAVE A WORD FOR IT, Passport Books 2000, at pp. 245-46.

17 CONFUCIUS: THE ANALECTS, XIII.6. D.C. Lau, trans., Penguin Books 1979, at p. 119.

18 A helpful overview of the concepts of *li* and *fa*, and their role in forming modern Chinese mediation practices, is offered in Tanya Kozak, “International Commercial Arbitration/Mediation in CIETAC,” available at <http://cfcj-fcjc.org/clearinghouse/drpapers/kozak.htm>.

work conscientiously toward a compromise the results often end up being a stronger union than if there were no differences to begin with.

Not surprisingly, one of the first guidelines for dealing with contradictions in one's personal life or in public endeavors is to exercise patience, to apply gentle persuasion or pressure here and there, but let the opposing forces evolve at their own speed – a characteristic of Chinese behavior that is recognized world-wide.¹⁹

And once again, Confucius directs the ruler to a path to harmonize both *li* and *fa* in his dealings with the common people: “Guide them by edicts, keep them in line with punishments, and the common people will stay out of trouble but will have no sense of shame. Guide them by virtue, keep them in line with the rites, and they will, besides having a sense of shame, reform themselves.”²⁰

The fundamental virtue that these precepts and traditions prescribe is harmony – of the individual within the family, of the family within the community, of the community within the empire, and of the empire among nations. This is the underlying principle and the informing paradigm of modern Chinese commercial mediation.²¹

The state-sponsored Conciliation Centers of CCPIT, in a volume observing the 20th anniversary of their establishment, proudly cited the statement of President Hu Jintao, “We maintain that the people of all countries should join hands to strive to build a harmonious world of lasting peace and common prosperity.... A harmonious socialist society should be a society of ... harmony between man and nature.”²² The same book also prominently reprinted a communiqué of the 6th Plenary Session of the 16th CPC Central Committee stating a goal of “improving judicial system and mechanism to enhance judicial safeguarding of social harmony....”²³

These goals are immediately evident in Chinese institutions addressing the management of business disputes. Both the civil judicial code and the state-sponsored commercial arbitration code permit the judge or arbitrator to act as informal conciliator and work to resolve dispute

19 Boyé Lafayette De Menhe, *THE CHINESE HAVE A WORD FOR IT*, Passport Books 2000, at pp. 220-21.

20 CONFUCIUS: *THE ANALECTS*, II.3. D.C. Lau, trans., Penguin Books 1979, at p. 63.

21 For that reason, “ADR in China is not considered ‘alternative,’ but mainstream.” Urs Martin Læuchli, “Negotiations and other ADR with the Chinese,” available at <http://www.læuchli-adr.com/article.htm>.

22 20TH ANNIVERSARY OF CCPIT/CCOIC MEDIATION CENTER 1987-2007, CCPIT 2007, at third unnumbered page.

23 *Id.*

informally.²⁴ The CCPIT Conciliation Centers continually emphasize harmony, not vindication of individual interests, as the goal of the conciliation process.²⁵

The paradigm in America is illustrated by the parable of the oranges, where disputing parties' interests are both met when they agree to share a shipment of fruit upon discovering that one wanted only the rind and the other only the pulp. The paradigm in China might be illustrated in an escalating dispute between two neighbors that, one afternoon, prompts the village mandarin to visit one of the feuding neighbors. The mandarin will show respect and demand respect, then instruct the disputant what the terms of the resolution are to be. The disputant is to perform these terms and the dispute is then to be brought to a close with no further question. This is because, in the larger scheme, nobody cares about his dispute, or his rights, or his need for vindication. He had the responsibility to maintain harmony in his community, and he is to refrain from any further fractious behavior that disrupts it for his personal reasons.²⁶

These Chinese cultural (or, as I prefer to think of them, spiritual) predispositions express themselves in unexpected ways. Prompted by the singular spectacle of the opening ceremonies of the 2008 Olympics in Beijing, a *New York Times* columnist wrote:

If you show an American an image of a fish tank, the American will usually describe the biggest fish in the tank and what it is doing. If you ask a Chinese person to describe a fish tank, the Chinese will usually describe the context in which the fish swim. [...] When the psychologist Richard Nisbett showed Americans individual pictures of a chicken, a cow and hay and asked the subjects to pick out the two that go together, the American would usually pick out the

24 James M. Zimmerman, *CHINA LAW DESKBOOK*, American Bar Association (2d ed.) 2005, at pp. 835-37.

25 *See, e.g.*, 20TH ANNIVERSARY OF CCPIT/CCOIC MEDIATION CENTER 1987-2007, CCPIT 2007, at pp. 145-61 (quoting expressions of mission by CCPIT mediators in terms such as “to establish a relationship of concord and harmony;” “to promote strongly the spirits of harmony;” “to promote business harmony;” “to develop the qualities of human nature so as to resolve contradictions, and pursue harmony which benefits society;” “to build a harmonious society;” “a method for harmonizing society;” “to mediate the contradiction, to resolve the disputes, to promote the harmony;” and so on.

26 *See, e.g.*, Nabil N. Antaki, “Cultural Diversity and ADR Practices in the World, a chapter in *ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES* (J.C. Goldsmith, Arnold Ingen-Housz and Gerald H. Pointon, eds.), Kluwer Law International, 2006, at p. 283. (“As the Chinese social model is a traditional one, disputes are most often resolved by an older member of the family or a respected figure of the neighborhood.”) The author also notes that, by tacitly incorporating Confucian principles in its modern civil legal code, “the two sources of obligations which are most widespread [elsewhere] in the world, *i.e.* religion and positive law, are replaced here by an uncoded moral code based on interpersonal relations, which is secular, informal and interiorized by those who know it. In this spirit, a person who fulfils himself or herself and succeeds in his or her personal life fulfils his or her family, social and political role at the same time.” *Id.*

chicken and the cow. They're both animals. Most Asian [*sic*] people, on the other hand, would pick out the cow and the hay, since cows depend on the hay. Americans are more likely to see categories. Asians [*sic*] are more likely to see relationships.²⁷

The paradigm is not “What do the individual parties want to gain; let’s see if both of them can gain or lose an equal amount.” The paradigm instead is “What might we do to render harmony to a disharmonious event?”

Anticipated Challenges in an Unpredictable World

This outline is not an indictment of Chinese mediation practice, but an explanation for how and why it is different from Western practice, and how fruitless it would be to aim to “teach the Chinese the right way to do it.” Indeed, it could be argued that, compared to the way Americans go about managing commercial (or, worse, tort) disputes, the Chinese approach is a far more efficient, effective, and socially responsible way of looking at life.

But it’s not GE’s way, and it’s not Honeywell’s way, and indeed I doubt if it is the way of the clients of many American attorneys. And, indeed, one may ask whether it really is “harmony” when one party is being told by the judge/mediator, “If you do not do X, I will shame you.” On a grand social scale, is such a practice really harmony, or merely a collectivist appearance of harmony, as opposed to the authentic product of individual conduct? On the other hand, is this not the underlying assumption of the American concept of a BATNA²⁸ – that one should accept any negotiated outcome that is preferable to the likely compelled outcome? Which of these practices is more informed by *fa*?

27 David Brooks, “Harmony and the Dream,” *New York Times* August 12, 2008, at p. A21. This column provoked a response by Jerome A. Cohen – who is professor of Chinese law at New York University and really *is* an expert on China – worth quoting at length:

“David Brooks’s thoughtful reach exceeds his grasp. He succumbs to the old, discredited clichés about “Asia” and “the West.” Japan and China cannot be lumped together at one end of the individualist-collectivist spectrum. The Japanese are far more group- or community-minded than the Chinese. [...] Confucius preached a [...] belief in putting the common good before individual satisfactions. [He was] responding not to some innate Chinese cultural preference for collective welfare but to fiercely individualistic traits in China’s complex society. By resurrecting and adapting Confucius and now stressing “harmony” (at least in principle), China’s current leaders have sought to unleash but channel that abiding individualism in ways that have thus far produced astonishing economic results.”

New York Times, August 14, 2008, available at

http://www.nytimes.com/2008/08/15/opinion/15brooks.html?_r=1&scp=1&sq=Jerome%20Cohen&st=cse&oref=slogin.

28 “BATNA – your Best Alternative To a Negotiated Agreement – is the standard against which any proposed agreement should be measured.” Roger Fisher and William Ury, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*, Penguin Books 1991 (2d ed. with Bruce Patton), at p. 100.

The Chinese approach to arbitration – and in particular the practice of an arbitrator’s meeting with the parties *ex parte* in the role of conciliator and subsequently, if unsuccessful in settling the case, resuming the final and binding arbitration -- is also unfamiliar and unsettling to many Western participants.²⁹ I was once both entertained and dismayed by a “war story” involving a major American company whose counsel discovered, in the course of a CIETAC arbitration, that the Chinese arbitrator was lunching with counsel for the opposite side on a regular basis during the hearing. When confronted, the arbitrator explained that he would of course lunch with the other counsel, because that counsel was the arbitrator’s cousin. The arbitrator could not understand why the American counsel was upset with this arrangement: “I thought that was why you chose me,” he explained, “because I have *guanxi* with the other side. You do want this to be resolved, don’t you?”

There is no clear resolution of these issues. One thing, though, is indisputable: If a Western commercial conflict manager prepares for negotiation with a company in China by saying, “What’s my BATNA?” and “What’s their underlying interest,” he going to have a problem -- a real “square peg, round hole” problem.

Some caveats should also be kept in mind when considering the “grand view” of the future of U.S.-Chinese commercial dispute resolution:

- ❖ There is a sharp generational distinction in the modern Chinese business and legal community. There was a big difference between the way the older people were responding to the CPR training and the way the younger people were responding. Young Chinese are not as responsive to the Party, or to Chinese custom, as their elders, and their ambition is palpable and Western-focused.
- ❖ China’s economic growth has been guided by a central political entity that guides the country and controls the conduct not only of its markets but of its people. Thus neither China’s market behavior nor its information flow is a function of supply-and-demand intersections, but rather of central decision-making in which the conduct of individual entities is designed to serve a broader politico-social objective. This has a particularly demonstrable effect on negotiation, where the discretion and authority of the Chinese negotiator may be severely limited in deference to communal “upper management.” Such is the requirement of communal senior decision-making that

29 “While certain authors advance that the combination of conciliation with arbitration is an ideal form of dispute resolution, the practice has been described as ‘entirely inappropriate,’ ‘disastrous,’ ‘bizarre,’ and even ‘perverse.’” Joseph Reynaud, “Playing Chinese Chess? Fairness and Reform in CIETAC Arbitration Procedure,” January 2006, at p. 14, available at <http://lsa.mcgill.ca/aplam/ChineseArticles/FAIRNESS%20AND%20REFORM%20IN.pdf>.

gross inefficiencies develop: many Chinese negotiators would rather pay a million RMB because they were ordered to by a judge, than 10,00 RMB in discretionary settlement through conciliation, simply so that they will not later be second-guessed for conveying company assets at their own initiative.

- ❖ Over the next very near term, questions of the sustainability of Chinese economic growth are going to become much more prominent, as the challenges of limitations of natural resources become more pressing, having a direct impact on such social rudiments as food production and the supply of water, as well as finding ways to deliver fossil-fuel energy without fatally despoiling the country. In a related concern, the gross inequality of the distribution of the wealth that is being created in China will increasingly challenge the political stability of this trading partner. Chinese legal and commercial decision-making is taking place under pressures of which we Americans may not always be cognizant.
- ❖ More fundamentally, a substantial increase in wealth that is not accompanied by socially and commercially accountable institutions is hugely problematic. Corporate governance, market competition, transparent securities exchanges, and political and industrial enterprises that are accountable to their owners, their regulators, their employees, their customers and their communities – these forces act as both a stimulus and a “brake” on the raw production of wealth, and their absence in China raises real questions whether China really is, as so many predict, the great 21st century power. Mere wealth creation, without social accountability, is not the way the rest of the developing world has been evolving and may be a brief episode rather than a lasting way of life.

But those are macroeconomic or big-trend kind of perceptions that may not be susceptible to proof. And there are no easy answers to ensuring that American investors in China, and Chinese investors in America, have shared legal and business expectations. A final anecdote to illustrate this quandary will, I hope, close this essay on a suitable note.

Recently I spent time with my colleagues at CCPIT to negotiate, on behalf of CPR Institute, an extension of the agreement between the two institutions. I sought some assurances that CCPIT would fulfill certain duties of promotion, education and inter-cultural exchange that were part of the original undertaking but had not been performed to CPR’s satisfaction during the initial term. For the first time in our relationship, I expressly shared with my counterpart the factual basis of CPR’s dissatisfaction (waiting, however, until his superior was not in the room in order not to cause a loss of face for either of us).

I was told: “One does not catch fish in clear water.”

For a year and a half I did not understand what that meant, and I suspected that I was being abused as a gullible American. But it eventually made sense to me. In the course of dealing with people -- and with all of nature -- one will always encounter uncertainty. One needs to recognize and embrace that uncertainty or mystery, because that's how the world works. Some work is fit only for those who are willing to act decisively even though their knowledge is imperfect.

Now, that attitude is in sharp contrast to what American-trained litigators are taught — detail, clarity, leaving nothing to chance. It is quite frustrating for a Western-trained negotiator to ask each side, “What do you want?” and get long pauses, lack of clarity, analogies and mystery. But, from the point of view of the Chinese, Western negotiators – even Western mediators, who pride themselves in the acuity of their observations -- see too much of the *fa* in disputes, and not enough of the *li*.

My children's world will increasingly be a Chinese world. American values may on the wane and China's influence may be on the rise. That is an issue that my daughter is going to have to confront in her lifetime. But certainly, she is going to have to live with uncertainty, with an inability to make probability calculations that are useful, in a world where the decision-making process I have taught her may be increasingly inapplicable. She is going to have to fish in muddy water, and I have told her so.

These are challenges for which I am unknnot prepared to propose a solution. The purpose of these remarks is to sensitize conflict managers to the likelihood that, if you know what you are doing when you're addressing commercial dispute resolution in China, you are probably wrong.