CHINA. SOME LESSONS IN MEDIATION

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INTRODUCTION

"Win your lawsuit and lose your money". "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." These could easily be quotations from the current crop of lawyer joke books. The fact that they are old Chinese sayings[1] only goes to show that concerns about litigation are not just contemporary American problems. Nevertheless, such problems cannot be dismissed as an inevitable consequence of litigation. Nor can they be treated as merely a product of the universal inclination to mock lawyers and the legal system in the manner immortalised by Shakespeare: "The first thing we do, let's kill all the lawyers."[2]

Adjudication is the traditional method of dispute resolution in America. Dissatisfaction with the unacceptable cost and delay[3] experienced in adjudication[4] has led to a growing awareness and use of mediation[5] as one of several options for dispute resolution.

Mediation may be regarded as a non-traditional form of dispute resolution in this country. However, it is anything but a novel concept or alternative model in China and other Asian countries. In view of the opening quotations, it is not surprising that in China, mediation, not adjudication, has been the prevalent method of dispute resolution for thousands of years. Indeed at first blush, China's experience with mediation suggests mediation is a form of dispute resolution which could be effectively used to resolve all types of disputes. This has led to commentators observing that "the Chinese example [of mediation] is impressive both in its scope and effectiveness"[6] and that:

> Despite cultural, political, and historical differences, Chinese methods and philosophies of alternative dispute resolution have lessons for those seeking improvement in our traditional Western adjudicative model.[7]

The thrust of this paper is that these observations are certainly valid and there are many lessons to be drawn from China's experience with mediation.[8] The lessons, though, cannot be so directly drawn as initial comparisons suggest. Rather, the vastly different social conditions, history and philosophies of the two countries mean that the lessons are subtle, and to be properly appreciated, need to be understood in their context.

It is naturally tempting to the critics of the adjudication system and adherents of consensual forms of dispute resolution to cast China's experience with mediation as a desirable goal, or even a model which we should seek to emulate. The consequence of the profound socio-cultural differences between the two countries is that the Chinese system of mediation has little direct precedent value. Whilst Chinese mediation does not offer an applicable methodological model of mediation, the philosophic and communal underpinnings of Chinese mediation provide many valuable comparative lessons. A review of the social and

philosophic foundations of mediation in China reveals a mindset to dispute resolution which is normally evident in successful mediation in this country and which has recently gained greater general prominence and acceptance. Similarly, as mediation is increasingly utilised and experimented with in America, the Chinese experience provides a valuable benchmark from which to test the current trends, perceptions, successes and failures of mediation. For example, in America, mediation seems to have enjoyed its greatest acceptance in family disputes and at the other end of the spectrum, its least in disputes involving purely distributive issues. Can this discrepancy be explained because some types of disputes are not as well suited, or indeed not suited, for mediation? Conversely, does China's experience with mediation prove that all disputes are suited to mediation? If so, what is it about our society and or legal system which deters greater use of mediation? This of course is not an exhaustive list. Evaluating these issues, however, provides salient lessons and guidance on the future prospects and goals of mediation as an alternative form of dispute resolution in this country.

CHINESE MEDIATION

In China, mediation is the prevalent form of dispute resolution. In 1980, "there were 6,120,000 civil and minor criminal cases handled by the mediation committees...10.8 times the number of civil cases handled by the basic-level people's courts in the same period."[9] The scope and importance of mediation to dispute resolution in China are best illustrated by the Cultural Revolution. During the Cultural Revolution and in particular at its height from 1966 to 1971, the rule of law, such as it was, ceased to exist. All the same, this country of over 1 billion people continued to function. Disputes, whether personal or commercial, were handled by mediation.[10]

Mediation has been described as "one of China's fine traditions."[11] The Chinese preference for mediation cannot simply be attributed to a recognition eons ago of the pitfalls of adjudicative methods of dispute resolution. Rather, the traditional Chinese aversion to adjudication and preference for mediation is a product of three principal factors:

1. Confucian philosophy;
2. inadequate legal system for dispute resolution; and
3. social structure.[12]

These factors led to a system of mediation and methodology quite different to our understanding of the concept. The People's Republic of China transformed mediation even further, with the utilisation of mediation as a means to articulate and advance communist ideology and objectives. Therefore, in order to understand the Chinese method of mediation and its continuing prevalence in Chinese society, it is first necessary to briefly review the three foundations of mediation and in this context, the contemporary role of mediation since the creation of the People's Republic of China in 1949.

CONFUCIAN PHILOSOPHY

Until recent times, Confucianism remained the dominant Chinese philosophy and significantly influenced China's rulers and, perhaps to a lesser extent, the populace.[13] Confucianism was postulated on the existence of harmony in heaven and on earth. The aim therefore of all human relations was the preservation of natural harmony.[14]

On earth this harmony was manifested in a hierarchical order, so social order was the key term in the Confucian definition of social structure. The Confucian attitude to the law revolved around the concepts of *li* and *fa*. The primary ethical rules lay in the *li*, a set of normative virtues and rules of conduct to achieve harmony within and between the social roles of the people. Thus, Confucian values emphasised not the rights of the individual but the social order. "[I]deas of order, responsibility, hierarchy and harmony" were the prevailing social norms and amongst the *li*, harmony was preeminent.[15] Confucian thought also placed a heavy emphasis on persuasion and moral force, in contrast to physical force and sanction. This emphasis was such that moral force was effectively equated with good, whilst the sanction of physical force was tainted with evil. *Li* was not a body of rules, but rather an instrument for training character and encouraging moral force.

In a society governed by *li*, unbridled self-interest was effectively controlled from within. A person who led a life conforming to *li* knew how to behave properly. Individual interests were legitimate, but not to the point where they were elevated to the plane of moral virtue. Consequently, to "insist on one's rights" ran counter to the spirit of *li*.[16]

In respect of mediation, the utility of Confucianism is immediately apparent. The emphasis on harmony, social order and the diminution of individual interests and property in preference to the group and social order was conducive to a consensual resolution of disputes without the need for sanction. It went further than this though. In a society governed by *li*, conflicts of interest were easily resolved because it was virtuous to make concessions or even "suffer a little". Harmony was preeminent and in a dispute, it could be restored through compromise.[17] Dissension and conflict were therefore avoided as far as possible. The great art of *jang*, to yield, not only was virtuous, but increased stature in seeking to put social order ahead of individual interests and rights. *Jang* also reflected the spirit of self-criticism which Confucian ideology sought to inculcate. If you followed *li* and were treated unfairly, you were expected to attribute this failing to your own behaviour and find the source of the problem within yourself.[18]

As is discussed below, this philosophy through the emphasis on compromise and recognition of others' interests greatly facilitates the prospects of two parties resolving a dispute consensually. Confucianism equally contributed to the prevalence of mediation over adjudication through the concept of *fa*. *Fa* can be broadly translated as "law" though the concept of *fa* is narrower and not coextensive with all the implications of "law" as we understand it. The Confucian attitude to *fa* was that it was a regrettable necessity because there are always certain elements of society which need to be controlled by *fa*. Nevertheless, resort to legal process was disreputable, even when there was a legitimate grievance.[19] This was because resort to the law and the sanction of force to resolve the dispute was an admission of the failure of persuasion and the virtuous *li* qualities. As

Confucius recognised, *li* and *fa* produce their own corresponding psychologies.[20] For a legal system based on *fa* and its simple hedonistic pleasure-pain psychology, community members will instinctively think in terms of avoiding punishment and as a consequence, self-interest. It followed that in a society dominated by *fa*, people think in terms of manipulating laws to personal advantage and consequently become litigious. Conversely, when a populace is motivated by virtue, rather than punishment, the emphasis and trend is towards a communal outlook. Thus, *fa* was regarded as a necessary but deprecated aspect of life.[21]

In the context of China's traditional attitude to mediation, recourse to the law and sanction of the courts were socially and philosophically tainted. *Fa* was further discredited when Legalist ideas were implemented by the harsh despotic Ch'in dynasty. After Ch'in rule was dissolved in 210 BC, Confucianism became the orthodox philosophy until 1911. Legalist strands of thought still applied though, because *li* was insufficient of itself to govern an empire.[22]

The combination of the dominant Confucian philosophy and the integration of *li* into substantive law produced a distinctive view of disputes and how they should be resolved in China. This factor alone could probably explain the traditional Chinese preference for mediation. This preference was however reinforced by two powerful historical realities: the inadequate legal system and social structure.[23]

LEGAL SYSTEM

As one observer of nineteenth-century China noted, there was a "universal dread among the people of coming before court and having anything to do with their magistrates."[24] The reasons are not hard to understand.

Often the court of the magistrates was far from the villages where the majority of the people lived.[25] The time and cost of travelling and staying at the county seat of the court were prohibitive for all but the most wealthy and leisurely. Philosophic objections apart, common experience and knowledge did little to encourage the populace to endure these hardships in order to obtain the adjudication of disputes by the court.

The magistrate was the government's principal official in the county and responsible for the entire process of the administration of justice. This extended beyond adjudication of disputes to collection of taxes, administration of public works, promotion of education and culture, leadership of public ceremonies and a host of other duties. In these circumstances, the magistrate necessarily depended on a large staff of assistants. The assistants' "reputation for greed, corruption and insolence was legendary and frequently well-deserved."[26] The subordinates usually saw to it that no litigant could move the case without being subject to a range of unlawful practices and fees. These added enormously to the customary fees which were incurred at each step of the litigation process and described as "numerous as the hairs on an ox."[27] These practices also contributed greatly to the delay of the litigation process. As the common saying went: "[T]he magistrates may go but the officers [assistants/clerks] remain; the officers may go but the case-law remains."[28] In short, the cost, delay and corruption inherent in the court process caused

tremendous distress to the parties. As a consequence, involving an enemy in a lawsuit was seen as an effective means of revenge.[29]

Even when the matter eventually came before the magistrate, there was no relief.

Philosophically, resort to the court was seen as regrettable and suggested a failure: either because it reflected the failure of another to respect one's own "face" or a shameless concern for one's own interest to the detriment of society.[30] The loss of "face" was exacerbated in court where not only was there the public admission of failing and revelation of a private problem, but the very court process entailed personal humiliation. At trial, the parties enjoyed no separate representation, were required to remain in a kneeling position before the magistrate and could be tortured in order to elicit evidence.[31] Pending trial or awaiting appeal, the parties could be subject to illegal torture, incarceration and privations, though such impositions could be relieved by financial payments.[32]

A just ruling by the magistrate at the conclusion of the trial could never compensate for all the personal and financial hardships involved in the court process. However, even a just ruling was not expected. The magistrate was not legally trained, but qualified for the position by mastery of the Confucian classics. The magistrate was not from the local area and was therefore ignorant of local customs and dialect. Although some acted consistently with their training, many saw the posting as an opportunity of a lifetime and were widely regarded as corrupt, cruel, unpredictable and lazy.[33] Even for the conscientious, it would not be surprising if the magistrate did not bring to bear the care, concern and the preparation ideally expected of the adjudicative function. The magistrate had a wide range of responsibilities. No doubt the matters being disputed were a disruption to these other responsibilities and seemed of minor importance by comparison. Either way, the common impression was that: "Of ten reasons by which a magistrate may decide a case, nine are unknown to the public."[34]

It is easy to see why adjudication was avoided as far as humanly possible[35] and how this process would not only leave the parties, families, if not neighbourhoods and villages, embittered for years to come.[36] The practical outcome was that adjudication would be a mistake which a family, if not village, would only make once in a living memory.

The corruption and abuses of the judicial system were officially tolerated because they achieved a desirable socio-cultural end. It was recognised that if the people found ready and perfect justice in the courts, lawsuits would increase to a frightful amount. Imperial indifference to the administration of justice achieved the social goal of minimising litigation and in the words of K'ang-hsi Emperor, also achieved justice because:

> As for those who are troublesome, obstinate and quarrelsome, let them be ruined in the law courts - that is the justice that is due to them.[37]

SOCIAL STRUCTURE

In America, the family is regarded as the fundamental unit of social structure.[38] Family members are also commonly involved in other influential groups, whether it be local schools, church, social associations or arising from work, professional or other broader based community organisations. In broad institutional terms, this is a comparable social structure to that found in China. There too, social structure and organisation revolve around the family as the basic societal unit, as well as kinship groups or clans within the village. Another collective grouping has been the guild, an organisation concerning merchants or artisans of similar training and other social units arising from common social or commercial relationships.[39] As covered below, to this social structure has been overlaid the organisational structure implemented by the People's Republic of China.

Therefore, in broad institutional terms and leaving aside the organisational groups mandated by the State, the social structure is similar. Nevertheless, there are profound differences in the role and degree of importance of the social structure, primarily due to the prevalent social philosophy and pervasiveness of the small group in China.[41] In the context of mediation, the implications of this social structure and the attitudes which underscore it are crucial.

In America, socially the family is fundamental, but philosophically the emphasis is on the individual. Our society recognises the importance of the larger group and community, but the prevailing concern is the individual's rights, privacy and freedom of action, within reason.[42] By contrast, it is not that Chinese culture does not appreciate the importance of individuals, but rather places greater emphasis on an individual's role in the larger group. The basic unit of traditional Chinese society has not been the individual, but the group to which the individual belonged.[43] Consistently with Confucianism, traditionally there has not been a clear concept of "rights" as we understand the concept.. Rather, the emphasis was on duty to the community. Hence in Chinese language, the term for "self" carried a connotation of selfishness, whereas the term "public" had the favourable implication of public good.

The profound difference in the degree of importance of the group and its social role is illustrated by the reminder that most people of the world, including China, "live and die without ever achieving membership in a community larger than the family or tribe."[44] The intimacy of life in China is linguistically exemplified by the fact that there is no simple Chinese term for "privacy".[45]

The importance and pervasive influence of a small group in such a society are therefore quite understandable. A social structure of small-scale groups and communities has always been conducive to informal resolution of disputes,[46] especially when coupled (as it almost automatically is) with a communal outlook. Politically, the primacy of the group meant that a dispute would ordinarily be resolved in a manner considered appropriate to the group.[47]

A good illustration of the crucial role of the group is provided by Chinese society's response to an individual who errs. The intimate nature of life in China and the role of the group is such that fellow group members are quickly aware of a problem, whether it be

emotional, work-related or deviation from social norms.[48] Friends and neighbours within the group will extend "help", whether desired or not. The principal remedy is subjective, in that the group can exert considerable peer pressure to prompt conduct consistent with duty. If a person persists in anti-social conduct, the level of "help" is escalated in quantity and intensity and if need be, the involvement of additional persons, such as a village or neighbourhood leader, factory officials or the local policeman. The Chinese sometimes describe this process as *shuofu* ie "to persuade by talking". This process can culminate in very pointed and public discussions. As is to be expected, such a process (which can be described as mediation in broad terms[49]) normally produces compliance. If the communal involvement through such discussion and other methods of gossip and ostracism do not prevail, then the legal system will gradually become involved. Still, even after the legal system takes over, group members remain important as sources of information in the legal officials' investigation of the case.

The pervasiveness and effectiveness of this social structure and its extrajudicial mediation of problems and disputes, are demonstrated by the fact that the Chinese preference for mediation was never legislatively imposed, at least prior to the Cultural Revolution.[50] By contrast, the laws of the Tokugawa Shogunate in Japan (1603-1868) which shared the Confucian heritage, institutionalised and thereby reinforced the preference for mediation and compromise in that country.[51] Professor Jerome Cohen in his much quoted article, *Chinese Mediation on the Eve of Modernisation*,[52] attributes this to the fact that it was unnecessary because in reality "mediation was frequently no more voluntary than it was in Japan."[53] The courts did not provide a practicable alternative remedy, few disputants were bold enough to challenge the result deemed fair by the group and "the magistrate often upheld the position of the group's leaders."[54]

CONTEMPORARY CHINESE MEDIATION

History defines the present. So it is with mediation in contemporary China, notwithstanding the enormous social and political upheaval which China has undergone this century. This enormous change began with the overthrow of the Ch'ing dynasty in 1911 and continued through the civil and foreign wars to the changes wrought since the advent of the People's Republic of China in 1949.

Attitudes to a formal system of law and its development seem to have officially changed.[55] Still, the traditional social antipathy to law and coercion as a means of affecting behaviour will be difficult to overcome.[56] In any event in respect of mediation, despite moves to a more formal system of law, mediation, not adjudication, remains the officially preferred method of dispute resolution.[57]

The role of groups in the social structure has continued in the People's Republic of China. If anything, the role has assumed increased emphasis. This is because the intricate institutional network presented by small groups offers the ideal vehicle to achieve the political and ideological goals of the State. Small groups of between ten to twenty people regularly meet to discuss ideology, recent events and in relation to problems, to undertake the process of criticism and education to produce conformity with social norms.[58] As noted, this social structure means community members are aware of problems and disputes,

normally without being told. There is a communal feeling, though help will be provided whether or not requested.[59] Help and if need be, mediation, can be provided by the group, community leaders, officials, as well as mediation committee members.[60]

Although mediation reflects in many respects its traditional practice and Confucian philosophy, today it also bears the "heavy imprint of Communist ideology and perspectives."[61] Mediation retains its prime function to resolve disputes. The approach and philosophy of mediation which the People's Republic of China inherited has most markedly been altered in the Communists' opposition to the Confucian emphasis on harmony and, as a result in mediation, compromise. Instead, absolute criteria of right and wrong have been stressed.[62] To be ideologically correct, mediation must be "principled," that is grounded in the policies and goals of the Communist Party. These modifications may be thought to undermine the traditional philosophic approach which was conducive, if not essential, to the continued success of mediation. Gauging from Stanley Lubman's interviews with fifty Chinese emigres and review of documentary sources between 1965 and 1967,[63] this has not occurred. The explanation seems to be that to the extent that this differing emphasis created barriers to mediation, these barriers were offset by the extent to which mass mediation was seen as an important political instrument.[64] To assert right and wrong was expected. Right and wrong and the mediation of the dispute were measured though within the context of Party ideology and programs, which included the expeditious resolution of disputes which otherwise may interrupt the progress to a prosperous community.[65] Consequently, the small groups which have been a natural part of Chinese life, together with the presence of various community committees and representatives of State and Party power in every day life, provide an organisational framework which institutionalises not only political control, but also mediation as the preferable means of dispute resolution.

Symptomatic of this social and political structure are the desirable qualities of contemporary mediators. Mediators are expected to have "links to the masses", so they are aware of disputes and the society's circumstances. A mediator should be persistent and have close ties with cadres. The link to cadres is important to obtain help if needed and achieve correct political consciousness. It was said of one model mediator that she "was not only an activist mediator, but a very good propagandist."[66]

Maoist ideology has also influenced mediation, not only in the approval of mediation as the preferable form of dispute resolution between the people, but also because as a process it achieves the notion of "mass line."[67] Mediation does so because it has always involved the populace in non-bureaucratic methods of persuasion and furthermore, provided the means for education of the masses in the ideology and objectives of the government; just as it had done in promoting Confucian philosophy and values.

The politicisation of mediation to articulate and apply ideological principles and programs, supplement other means of control, and provide for "principled" resolution of disputes to advance social and economic advancement, is no doubt real;[68] but its impact on the process and utility of mediation is difficult to measure. We still lack essential knowledge and understanding of Chinese society and historically, much of the information we do have

comes from emigres. This limitation is lessened when, as here, the objective is not to critique the Chinese method of mediation, but evaluate some of the lessons it provides.

SOME LESSONS

This review makes it clear that China's preference for mediation is due to a combination of cultural, philosophic, political, and social conditions, none of which have been replicated in this country. The uniqueness of the Chinese experience with mediation means that the Chinese method of mediation does not provide a model which we could, nor should, seek to emulate. Moreover, the apparent lessons of China's experience with mediation, whether it be in methodology, philosophy or its broad application, must be carefully evaluated in light of our differing history, culture and social values. Notwithstanding these significant comparative differences, China's experience offers many lessons and insights into mediation and its optimal role of dispute resolution in this country.

The justification and therefore objectives of dispute resolution in this country have been listed as being to:[69]

- lower court caseloads and expenses;
- reduce the parties' expenses and time;
- provide speedy settlement of disputes that were disruptive to the community and the lives of the parties and their families;
- improve the public's satisfaction with the justice system;
- encourage resolutions that were suited to the parties' needs;
- increase voluntary compliance with resolutions;
- restore the influence of neighbourhood and community values, as well as the cohesiveness of the community;
- provide accessible forums to people with disputes; and
- educate people to try to use more effective dispute resolution processes than violence or litigation.

The correlation between these objectives and the advantages realised by mediation in China are self-evident.[70] Nor does the social utility of these objectives require any explanation. Similarly, the factors which have been listed as favouring mediation[71]: "no legal remedy; preserving a relationship; maintaining privacy; avoiding high fees; and avoiding delays," are equally applicable to China.[72] In addition, in China, there are several other political, practical and philosophic reasons which could be added to this list of reasons favouring mediation.

In short, the potential and advantages of mediation which allow the parties to quickly, privately and by a self-imposed process consensually resolve the dispute themselves, seem to be an ideal process and exemplified by China's experience. Nevertheless, the capacity of mediation to resolve disputes in this country to the same degree as in China is highly questionable. The differing philosophical and socio-cultural framework within which mediation has to operate in America means that the desirable dispute philosophy for mediation is much more difficult to engender. This conceptual difficulty permeates the mediation process and affects its overall utility. Added to this are a host of other problems

arising from the different socio-cultural conditions of the two countries. The two barriers which stand out in America as indicative of these differences and their resulting difficulties for the mediation process are: the emphasis on the individual, the procedural difficulties of reaching a mediated outcome which is regarded as fair within this term of reference, and the problems posed for mediation by distributive disputes.

DISPUTE PHILOSOPHY

What becomes quickly apparent to an American first exposed to mediation is that the process and skills which it entails are quite familiar, for ultimately mediation is a form of facilitated negotiation. The essence of mediation and its distinction with adjudication are that the parties to the dispute have control of the process and seek to reach an agreement which is mutually satisfactory. The mediator facilitates this process, but has no power to impose an outcome.[73] What, however, is critical but often quite alien, is the consensual mindset which often needs to be adopted, or if necessary, engendered before a successful mediation can be realised.

When the parties control the process, as they do in mediation, cooperation is clearly essential if any progress is to be made. A cooperative, rather than adversarial outlook by the parties, is not only procedurally essential, but also substantively critical if any resolution is to be reached. This is because any resolution of the dispute must be mutually acceptable. Therefore, reaching a resolution is dependent on a readiness to recognise the other party's interests and be flexible. That such a mindset is not common in America, unlike China, is revealed by the attention which negotiation texts and courses devote to the traps of a competitive adversarial outlook and the potential gains from value creation and cooperative solutions.

The classic example of this has been the best seller, *Getting To Yes*.[74] Its fundamental message is to stress cooperative negotiating techniques, in contrast to the competitive approach of asserting individual rights and claiming value, which are the traditional, if not natural negotiating strategies of our society. This emphasis on interests, opportunities for mutual gain through cooperation and the recognition of shared interests, reflects many of the tenets of Confucianism. Similarly, the emphasis on and encouragement of the capacity of individuals to resolve disputes consensually by force of reason, rather than sanction, reflect a prevalent Chinese philosophy.[75] That such a philosophy has to be inculcated in this country, forcefully illustrates the philosophic differences with China and the hurdles which mediation has to overcome.

The Chinese outlook to mediation though goes beyond a recognition of the advantages of cooperation and value creation. The values of cooperation, harmony, mutual understanding and consensus are cherished and instinctively applied to dispute resolution. The Confucian disdain for litigation and the social disharmony which it fostered have been ideologically matched by the Maoist and the political philosophy that disputes should be resolved by democratic methods of discussion, persuasion and education.[76] Moreover, throughout China's history the government, if not communal perspective, has been that mediation was preferable because it fostered social cohesion, minimised hostility and served

a useful educative function.[77] Such a philosophic and political outlook is obviously very conducive to mediation and its capacity to resolve disputes.

Again, these values do not exist to the same degree in America. Professor Axelrod has documented the winning strategy in computer tournaments and the communication difficulties which arise in negotiations due to the tension between value creation and distribution.[78] This tension arises in part because of our instinctive, or maybe conditioned, inclination to be competitive in disputes, rather than cooperative. In essence, the winning strategy of "Tit for Tat" in this negotiation tournament revolved around being cooperative, immediately retaliating if this cooperative behaviour was not reciprocated and then resuming cooperative behaviour, if and until the cooperation was again not reciprocated. The communication of the willingness to cooperate was unambiguous. Notably, Tit for Tat never defeated an opponent, it just elicited behaviour which allowed both to do well. This strategy for negotiation has been applauded[79] and described as "conditionally open." The Chinese readiness to be cooperative is understood by all Chinese parties to a dispute. There is though nothing conditional about it. Indeed, the Chinese approach is not only to cooperate, but be ready to compromise in order to resolve a dispute, whether it be for the sake of harmony, aversion to conflict or political grounds.[80] In such an environment there is less need to adopt a negotiating strategy like Tit for Tat, which although seeking to create value by cooperation, also seeks to minimise a party's vulnerability to competitive, adversarial conduct to claim value. Moreover, often the Chinese are prepared to "suffer a little" to resolve a dispute.[81] If in our terms, the Tit for Tat approach to dispute resolution is regarded as conditionally open, the Chinese approach should be classified as "Positively Open," that is, instinctively cooperative and keen to reach a consensual resolution.[82]

The Positively Open attitude of Chinese society is central to the success of mediation. Furthermore, it is practically complemented in China by several institutional factors. Namely the emphasis on persuasion, moral force and the importance of the group's interests, compared to the individual's. The combined effect of these institutional factors is to create an implicit, or if need be, explicit coercive force for the successful mediation of a dispute. The means "range from completely private mediation at one end of the scale to public adjudication at the other, the one shading into the other almost imperceptibly as public opinion was felt to be more strongly involved."[83]

Thus, whereas in China, an open, cooperative and public minded approach is adopted, in America, the instinctive inclination is to assess the dispute solely by reference to one's own interests. Social conditioning, past disputing patterns and experiences also quickly lead the disputants to adopt a combative approach. It is often only with the benefit of time, quiet reflection, or considerable legal costs and delay, that the disputants can transcend their instinctive and natural desire for total vindication in the resolution of the dispute and recognise that even on purely selfish grounds, some cooperation and understanding with the other party can be advantageous. With this typical mindset and communal dispute experience, the threshold obstacle for a successful mediated outcome is for the mediator to assist the parties to overcome this pattern and recognise the potentially mutual gains from a consensual resolution of the dispute.

The recognition in America of the validity of many of the Chinese philosophies and values outlined previously, has recently extended beyond their direct application to effective mediation. It has been recognised that the traditional and instinctive adversarial approach to disputes is often counter-productive and harmful. To avoid framing a dispute in competitive positional bargaining terms - you breached your contractual obligations at a cost to me of $10,000 and I will not accept a cent less - parties are encouraged in effect to look beyond their own position to the interests of both parties. The analog to this is the Confucian ethic of *li*, to engage in "self-criticism" and look beyond oneself to the other party and the group's interests. The Confucian emphasis on compromise for compromise's sake is criticised in China today. Nevertheless, Jean Escarra's recognition that the great art of *jang* was to accumulate an invisible fund of merit from which a person could obtain advantages,[84] or as Granet put it, "a moral ascendancy,"[85] has a conventional analog. Astute negotiators and negotiation texts[86] recognise the importance of the human dimensions of a dispute, which are often ignored in the assumption that the dispute solely revolves around issues of rights and or property. Understanding and acting sympathetically to the other party's emotional interests cannot only be the key to a successful resolution. It can also establish goodwill which is repaid many times over in a dispute or on-going relationship. Similarly, human emotions and values are central to relationships, but can be trivialised or irreparably damaged in adversarial dispute resolution. Feminist jurisprudence, business executives[87] and creative negotiators have all recognised of late that the adversarial, competitive system of dispute resolution degrades, if not destroys the relationship between the disputants. Hence, when a relationship between the disputants is or might be valuable, a consensual form of dispute resolution is much more preferable to adjudication.

Of course current attitudes should not be treated as irreversible. The increasing recognition of the importance of human relationships and emotions in disputes is likely to continue. This is a trend from which mediation as a process will benefit. As China's experience illustrates, mediation can also educate and thereby transform social attitudes on disputes and the criteria by which the outcome is measured. Given the increasing recognition of the importance of human values, relationships and community interests[88], such a transformation may occur and mediation could play an important didactic role in this change. In the meantime, as Confucius warned, a society led by law, litigation and rights breeds its own psychology of individual advantage and litigiousness.[89] Breaking this vicious cycle will be difficult.

If and until this transformation in social philosophy and values occurs, the Chinese philosophy that "it is better to keep a friend, than to win a victory,"[90] marks in a sense the significant divergence of the philosophies and socio-cultural values of the two nations. This divergence also highlights the harsher environment which mediation in America has developed from and reflects in its methodology. The concern with good relationships reflects Confucian and contemporary values in China. In America, it also describes a common human predisposition[91] and on occasions, a prudent recognition of true interests. However, notwithstanding the recognition of the need to adopt a negotiating outlook which transcends the conventional competitive mentality of win-lose, it is not said in America that one must be sacrificed to secure the other. Rather to the contrary, effective

negotiation and mediation is advocated in America as a means for parties to preserve their relationships and maximise their interests in dispute resolution.[92]

The rub though for mediation is that the fundamental focus in America is on the individual, in terms of legal status, fulfilment and rights. What Newsweek described as "the Age of Me".[93] Larger groups and community are important, but the individual is the predominant perspective.[94] The practical effect is that for any dispute resolution system to be socially acceptable, it must be capable of giving effect to individual needs, whether it be privacy, rights or claims. Our society's emphasis on the individual provides the starkest contrast with China, where the group and its interests are preeminent.[95]

This reinforces the question of the extent to which mediation can perform a significant dispute resolution role in our society. Not only is mediation inhibited by the general absence of cultural values which stresses the virtues of cooperation, compromise and consensual resolution of disputes, but as a process it also has to deal with a society where the rights and interests of the individual, not community, are considered paramount. The implications of these factors permeate the process, extending to considerations of the utility of mediation in the absence of legal or social coercion and what constitutes a fair outcome, when the point of reference is not the group or community's interests, but the individual parties. These issues are considered below.

In this and all other comparisons of mediation in China and America, it is critical and difficult to fully comprehend that unlike our legal system, which relied on the coercive power of the state, traditionally China's system of dispute resolution has rested on the coercive force of morality. This was exemplified during the Cultural Revolution, when the rule of law effectively ceased to exist. The applicable precedent and mediation process revolved around morality - a mixture of custom, public opinion, tradition, persuasion and education.[96] Sanction was not obtained from the state nor even physical force, but rather from the fact that the disputants were members of a network of social and work groups which also participate in the dispute resolution process.[97] In this community, "social pressure largely supplanted legal coercion as a method of settling disputes."[98] The practical difficulty for America is that the emphasis on the individual, rather than communal rights, means that often communal coercive force is going to be absent. The absence of a moral coercive force (leaving aside the explicit coercive force exercised by the group) is another fundamental difference between mediation in the two countries and an obstacle to mediation's capacity to handle all types of disputes.[99]

THE MEDIATED OUTCOME

The advantages quoted earlier for mediation as a method of dispute resolution is an impressive list. What is striking though about the list of advantages quoted, is that they do not include any reference to mediation reaching a "fair" or "just" outcome. Of course, what is a "fair" or "just" result is a comparative and value laden judgment which varies. For present purposes, it is sufficient to assess this on the basis that an outcome is unfair, if given the full range of the parties' interests, the result represents a severe miscarriage of justice for one of the parties. As we have seen, the focus on the individual party's interests, in

contrast to communal and societal interests, illustrates the ethnocentric aspects of this definition.

The concern whether mediation is a form of dispute resolution which produces a "fair" result is not alleviated by reference to China's experience. Commentaries on China's experience with mediation, whilst illustrating in many respects the social and political utility of this system, do not stress the "fairness" of the mediated outcome.[100] Indeed, some of the factors which have made mediation so successful in Chinese society seem to militate against reaching a result which, from Western perspective, is fair. For example, the stress on communal interests, compromise for philosophic or ideological reasons and a process which utilises not just reason, but pressure in order to realise what the mediator considers to be the "reasonable" outcome, where the benchmark of "reasonable" is not necessarily the individual's interests, but the small group, society, economy, state or political party's interests.

The role of the mediator is of course crucial to the nature of the outcome reached. In China, the role of the mediator could extend the full spectrum from a facilitator of discussion to an influential third party who determines the issues, facts and terms of reasonable settlement and if need be, can mobilise such enormous social, political, economic and moral pressure that the parties have little option but "voluntary acquiescence."[101] Through such peer pressure and or the dislike of conflict and its social embarrassment, parties would sometimes agree to a compromise that was unsatisfactory to one or more of the parties. As a result, "[t]he disagreement was merely driven below the surface and went on simmering, and the situation was ripe for explosion or provocation."[102] The extent to which the mediator and group endeavoured to persuade the parties to accept a proposed solution because of its reasonableness should not be underestimated;[103] any more than the degree of pressure which could be exercised by a group to prompt recognition and acceptance of the proposed solution.[104] This is best illustrated by two examples of mediation in China:

> First, the invited or self-appointed village leaders come to the involved parties to find out the real issues at stake, and also to collect opinions from other villagers concerning the background of the matter. Then they evaluate the case according to their past experience and propose a solution. In bringing the two parties to accept the proposal, the peacemakers have to go back and forth until the opponents are willing to meet halfway. Then a formal party is held either in the village or market town...If the controversy is settled in a form of "negotiated peace," that is, if both parties admit their mistakes, the expenses will be equally shared. If the settlement reached shows that only one party was at fault, the expenses are paid by the guilty party. If one party chooses voluntarily, or is forced, to concede to the other...it will assume the entire cost.[105]
>
> The political and ideological dimensions of contemporary mediation in China is reflected in the case of a woman cadre who had adulterous relations. The cadre sought a divorce from her husband. The mediators of this dispute "stressed the "glory" of being a cadre. Because she feared losing her cadre status, this "positive

> factor" in her "thought" was used to educate her; her problem was "solved," and there was no divorce.[106]

This is not to suggest that reaching a fair result in the terms defined above is not an objective of mediation in China. The point is the priority of this objective in the overall scheme of mediation. In China, the answer is that a "fair" result (in our terms) was readily sacrificed in favour of an outcome which realised social and politically desirable advantages. Citizens accepted this because it provided an effective method of terminating disputes which was socially acceptable in light of the group mores and Confucian ideological values. In persuading and pressuring the parties to agree to a settlement, the mediator was instructing the parties and others of the standards deemed acceptable to the group, if not community.[107] This process has been colourfully described as "the usual Chinese method - a great deal of head knocking and a great many feasts for the injured party."[108]

To our eyes, such a process of explicit coercion seems more akin to dispute management, than dispute resolution. The functional question which arises in America is whether seeking a "fair" outcome should be a prominent objective, when such an outlook may jeopardise the realisation of all the other potential advantages of mediation. The implications of securing a "fair"" result in mediation by reference to the individual parties' interests and how high a priority this should be, is further illustrated by the intuitive reaction to the mediation example of the cadre given above. This mediation realised all of the advantages of mediation and dispute resolution listed above. Yet the outcome troubles the Western conscience. The method and result seem unfair, contrary to notions of justice and legal rights. The initial response is that not only do the "ends not justify the means," but that the end for the cadre, if not her husband and family, is individually unsatisfactory. Furthermore, although the resolution of this dispute may be socially desirable, that does not offset the cost to the individual parties.[109] In short, our morality tells us this is not an acceptable result, nor an instance of successful dispute resolution, irrespective of the social advantages. Conversely in China, the social and political utility of mediation makes such an outcome acceptable.

The differing reactions to this outcome reflect the different ethical, political and cultural values and therefore criteria by which the utility of mediation is measured. Yet the panoply of moral and legal issues which this outcome raises are not so easily dismissed in respect of the overall development of mediation. Mediation offers considerable ethical and procedural advantages over adjudication. It is also a method of dispute resolution which is very popular.[110] If notwithstanding these advantages, a mediated outcome such as that for the cadre is regarded as socially unacceptable, then this is an important insight. It indicates the precepts of our dispute resolution system. The criteria from which it is measured, remain concepts of individual justice, irrespective of the social cost which that entails. The ramifications of this for the maximisation of mediation in this country are various. The desire for a "fair" and "just" outcome measured by reference to the individual parties may be a significant barrier to the utilisation of mediation and the considerable advantages it offers. Nevertheless, if and until there is a transition in social values, mediation must seek to ensure outcomes which satisfy this demand. How this is to be done without detracting from the essential qualities of the mediation process is a separate topic. Suffice to say that

the fact that the disputants in America are only likely to frame any resolution by reference to their individual interests underscores the conceptual and procedural barriers which confront the greater use of mediation in America.

The procedural obstacles which community values in America present for mediation are compounded in respect of rights. In the absence of a *li* mentality, individual interests are elevated to the higher plane of rights. It is said that often what drives disputes is the parties' desire for vindication and protection of rights.[111] Furthermore, that individual rights are crucial and only adjudication protects them and gives force to the values implicit in social norms and rights.[112] The pragmatic answer is that this is true of the minority, not majority of disputes. In respect of such a minority of disputes, if a party wishes to establish a precedent, it will choose adjudication. If not, and there are irreconcilable differences between the parties, they too will quickly resort to the appropriate dispute resolution forum, which in such a case would be adjudication. Theoretically, all other disputes should be suitable for mediation. Sadly, this is not so. Not just because of the conceptual and social obstacles outlined previously. Also because mediation in America is not well suited to distributive disputes, when the individuals' rights conflict and the parties have no other relationship from which to draw some common foundation.[113]

As with the previous observations, the practical lesson of the difficulties and importance of reaching a "fair" outcome is not that these problems are fatal to mediation and its development in this country. Rather, these problems should be recognised and dealt with, for otherwise these factors are likely to reduce the scope for mediation and its successful resolution of disputes.

DISTRIBUTIVE DISPUTES

Mediation as a method of dispute resolution in America has enjoyed its greatest success and acceptance in disputes between parties who share a relationship. For example domestic relations, custody, landlord-tenant, neighbourhood disputes,[114] as well as business and other relationships. China's experience makes this quite understandable. The parties to the relationship either have the equivalent of a Positively Open attitude, or the relationship provides a platform from which such an attitude can be engendered. This can occur even when the relationship has become acrimonious, for at the very least the relationship provides a common framework for meaningful dialogue. Arising out of the relationship there will be common interests, whether they be emotional, property or commercial interests. Communication between the parties is essential and the common interests facilitate communication. The communication often will initially concern the cause of the acrimony, but with the mediator's assistance can evolve into a discussion of the parties' mutual, differing and conflicting interests. From this perspective and mutual understanding, the parties are often able to recognise and accept solutions to the dispute which are not only mutually satisfactory, but may create value. In any event, once the disputants in this interactive process are prepared to consider the other party's position, interests and solutions which may be mutually beneficial, the communication and procedural advantages of mediation can come into play.

In short, the existence of the relationship provides the crucial basis or vehicle which, one way or another, facilitates communication and eventually an approach by the parties to the dispute equivalent to a conditionally open approach. Of course, the existence of the relationship and of its inherent interests can be so important as to impose its own "coercive force" for mutual resolution of the dispute.[115] Similarly, the preference for a consensual, rather than adjudicated resolution, can induce a more flexible and open approach.

It has been said that, "[I]n theory, nearly all disputes can be mediated."[116] China's experience with mediation supports this. Commercial, contract, tortious and other civil disputes are handled by mediation.[117] Why is it then that disputes between parties who have no relationship are apparently not turning to mediation as quickly as would seem appropriate, given the acknowledged problems of adjudication?

There is a further dimension to this issue. A dispute between parties who share no relationship may well involve a distributive issue. This combination is exemplified by many tortious actions. The paradigm is two strangers who are involved in a collision between the automobiles which they own and were driving at the time. Driver A was totally to blame and the only real issue between them is how much compensation A should pay B for property damage and personal injury. Such a dispute can be referred to as distributive, "when more for one means less for the other, when no joint gains beyond simple agreement exist."[118]

There is in theory no reason why this example dispute could not be satisfactorily mediated. Indeed, a survey has shown that the rate of successful mediations for disputants with a continuing relationship was 76%, compared to a successful mediation rate of 65% without a continuing relationship.[119] Such mediations though would be difficult, for a relationship in effect is the lubricant and fuel for the mediation process. With common sense and similar perspectives on liability and damage, the parties should realise that mediation offers them considerable procedural advantages to relatively quickly, cheaply and privately resolve the dispute. The parties also share one common bond and interest, to avoid the emotional and financial cost of litigation. The reality though is that the parties often do not have the same view of liability and damage. With a distributive dispute, a further complication is that this disagreement cannot be dealt with in the context of a relationship or other interests; for there is only one interest and more for one means less for the other. Not only is there no basis for value creation, but when it is a dispute between strangers, there is little scope to build a cooperative approach. These difficulties are exacerbated in distributive disputes concerning rights or damages, for often there are conflicting versions of facts, accompanied by distrust and animosity between the parties.[120]

Ironically, China's experience underscores why mediation, despite all its potential advantages and success with tortious and other distributive disputes in that country, is seemingly ill-equipped to deal with them in America. The socio-cultural values in China provide a foundation conducive to mediation and mediated results. An existing relationship is not necessary for parties to adopt a cooperative, broader approach to mediation. These social values mean that there is in effect "a coercive force" to engender a recognition of the advantages of mutual resolution of disputes. Also, despite our criticisms of the procedural

cost, delay and frustration of litigation, it offers a viable, if not always preferable option to mediation, especially when it is compared to the traditional litigation process in China.

Finally, it has been suggested that two factors which favour litigation are a disputant seeking a "jackpot" and when "a party doesn't want to settle."[121] The list of advantages cited for litigation[122] and in particular the derisive reference to "jackpot" miss the point. It is true that the failure of many disputes to be consensually resolved can be objectively identified as ultimately a failure of communication. The reality though is that sometimes parties are incapable of meaningful discourse, whether it be by intent or an inadvertent product of personal, cultural or other reasons. There can also be irreconcilable differences between the parties. In distributive disputes such as the traffic example cited earlier, it is quite possible that the parties cannot agree on a settlement amount and therefore mutually resolve the dispute (at least not until the door of the court).[123] Similarly, the prevalence of private over public interests makes it quite feasible that each individual's interests to a dispute cannot be reconciled, nor mutually resolved. Also in some circumstances, adjudication may be better suited as a means of dispute resolution. The dispute may turn on difficult questions of fact, law or public standards which require the type of inquiry offered by adjudicative procedures. It may also be that the dispute can only be resolved by a third party making and imposing a decision with the sanction of the law.

CONCLUSION

Undoubtedly mediation often presents the opportunity for a more productive and efficient means of dispute resolution. The extent to which mediation is utilised in China provides an impressive and enviable example of this. The differing socio-cultural values go a long way though to explain the respective legal systems and diminish the direct correlation of the lessons from China in mediation. The extent to which mediation is dependent on certain values which culturally exist in China and are often absent in ours, presage substantial questions about mediation's utility and capacity in disputes where there is not at least some form of relationship or common interest between the parties. Where such disputes do not concern substantial issues, the procedural advantages of mediation should offset these problems. Otherwise, mediation's potential as a means of dispute resolution may not be as promising as its proponents and China's experience suggest.

China's experience with mediation provides numerous lessons for mediation in America, many of which have not been covered. However, there are three which should be briefly mentioned. First, the move towards greater legalisation in China was partly prompted by the breakdown of legality during the Cultural Revolution and the perceived arbitrariness of the courts.[124] It is paradoxical that whilst we move towards mediation and a more flexible dispute resolution system, China is seeking a more legalised and predictable system of law. The motivation for this change of approach is to "restore a sense of security to individual citizens and guard against factional use of state power in the future."[125] China's pursuit of these procedural advantages accords with the perspective that a formal legal system, such as ours, can make a considerable contribution to democratic values, national unity[126] and the protection of important human values and rights. Second, China and America are seeking to overcome centuries of philosophic, practical and institutional tenets of behaviour to reach the optimum balance in a dispute resolution system. Developments in both

countries underscore the tension between law's role as a means of dispute resolution and enforcement of social norms. The irony is that the two countries are approaching the problem from opposite ends of the spectrum and their respective experiences will provide mutually beneficial lessons for some time. In the meantime, China's experience does not demonstrate that adjudication has no role. Rather, it demonstrates that mediation, like adjudication, should never be seen as the panacea for effective dispute resolution.

The third and final observation concerns the opening quotations. Similar comments have been made by eminent American jurists.[127] Moreover, China has almost realised Shakespeare's wish. With less than ten thousand lawyers, the People's Republic of China was almost a society without lawyers.[128] Yet it functioned and its disputes were resolved, largely without the assistance of lawyers. Certainly by our standards, the outcomes sometimes seemed unfair and reinforce the need to establish acceptable standards for mediators and the mediation process.[129] Nevertheless, China's experience still raises the question whether it is necessary to revert to lawyers in the event of a dispute. Mediation suggests not. This would be a pity, for lawyers with their professional training, skill and experience, have much more to offer the dispute resolution process than the requisite skills if resort must be made to the process of adjudication. The time has past though when lawyers in order to honour their professional responsibility, if not preserve their practice, must demonstrate a more creative response to disputes and fully utilise all the options to resolve them. If this was to occur, an objective and informed appraisal of the dispute would often suggest mediation as the preferable forum to at least initially try to resolve the dispute.

ANNEXURE

DISPUTE RESOLUTION PROCESSES[130]

CHARACTERISTICS	ADJUDICATION	MEDIATION	NEGOTIATION
Option	Involuntary	Voluntary	Voluntary
Binding	Binding; subject to appeal	If agreement, enforceable as contract	If agreement, enforceable as contract
Third Party	Imposed, third-party neutral decision maker generally with no specialised expertise in dispute subject	Party-selected outside facilitator	No third-party facilitator
Formality	Formalised and highly structured by predetermined, rigid rules	Usually informal, unstructured	Usually informal, unstructured
Procedure	Opportunity for each party to present proofs and arguments	Unbounded presentation of evidence, arguments, and interests	Unbounded presentation of evidence, arguments and interests
Outcome	Principled decision, supported by reasoned opinion	Mutually acceptable agreement sought	Mutually acceptable agreement sought
Hearing	Public	Private	Private

A COMPARISON[131]

PROCESS	MEDIATION	LITIGATION
Who decides?	Parties	Judge
Who controls?	Parties	Attorneys
Procedure	Informal	Formal
Time to hearing	3-6 weeks	2 years or more
Cost to party	Nominal or low	Substantial
Rules of Evidence	None	Technical
Publicity	Private	Public
Relation of parties	Cooperative	Antagonistic
Focus	Future	Past
Method of negotiation	Compromise	Hard Bargaining
Communication	Improved	Blocked
Result	Win/Win	Win/Lose
Compliance	Generally honoured	Often resisted or appealed
Emotional result	Release of tension	Tension continued

NOTES

1 The first is a common Chinese aphorism quoted by Justice Robert F Utter, *Dispute Resolution in China*, 62 Wash L Rev 383 at 385 (1987). The second is an old proverb quoted by Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernisation*, 54 Calif L Rev 1201 at 1206 (1966).

2 William Shakespeare, *Henry VI,* Pt 2, IV:2

3 Former Chief Justice Berger was quoted in the Wall Street Journal, 18 May 1986 as saying: "[L]itigation [has become] too costly, destructive and too inefficient."

4 These are the common complaints, but an equally important consideration is how effective litigation is in resolving disputes, where "effective" revolves around factors such as emotional cost, productive solutions to the dispute and the advancement of the relationship. These issues are dealt with in the second part of the paper under the heading, "Some Lessons".

5 Mediation means different things to different people and nationalities, as this paper illustrates. Generally, it is fair to describe mediation as a method by which a third person or persons seek to resolve a dispute without imposing a binding decision. This is the definition adopted for this paper. In contrast to mediation where the parties consent to the resolution of the dispute, in the adjudication of a dispute, the third person's or persons' role through the sanction of the law is to make and impose a decision on the parties. Mediation can occur as an alternative or adjunct to this legal process. Nevertheless, unless otherwise noted, no distinction will be made between judicial and extra-judicial mediation for the purposes of this paper.

6 M Holt Meyer and Charles J Wysocki, *Chinese Mediation*, 57 NY St Bar J 37 at 58 (1985).

7 Utter, note 1 at 383.

8 Strangely, few articles seem to have addressed such possible lessons ethnocentrically and specifically. This is probably due to prudence and good judgment. Comparative legal endeavours must be embarked upon with caution. Each country's legal system is a product of a complex web of social, cultural, historical and political factors which is not apparent to a foreign observer, irrespective of the breadth of research and reading. Of course, this is particularly true of China. In fact, prudence suggests this footnote should be printed boldly as a warning and disclaimer for the rest of this paper.

9 Law Annual Report of China 198 2/3 at 218 (1982) cited by Chin Kim, *The Modern Chinese Legal System,* 61 Tul L Rev 1413 at 1432 (1987). Citing from the same source, Chin Kim notes at 1430-1431 that in 1980 there were more than 800,000 mediation committees, with more than 5 million mediators elected by popular vote.

10 Utter, note 1 at 394.

11 *Is It Necessary for Us To Retain the People's Mediation Committees?* Kuang Ming Daily, 2 Sept (1956) cited by Cohen, supra note 1 at 1205. The Chinese government's official newspaper, The People's Daily, carried a series of articles celebrating community mediation and its many praises in Oct 1990, described it as the "Eastern experience." - The People's Daily, p 4, issues of 22-23 Oct 1990 Beijing cited by Xinghai Fang, *A Study of Community Mediation in China,* (1991) (an unpublished article, a copy of which is held by the Stanford Centre on Conflict and Negotiation).

12 See generally Cohen, supra note 1; Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 Cal L Rev 1284 (1969); and Utter, supra note 1 who at 384 lists essentially the same three factors.

13 Cohen, note 1 at 1206.

14 Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 Cal L Rev 1284 at 1290 (1969).

15 Cohen, supra note 1 at 1207. In turn, the quotation was taken from a translation by Joseph Needham of an excerpt from ESCARRA 17, 2 Needham, Science and Civilization in China 529 (1956).

16 This summary of Confucianism is, unless indicated otherwise, drawn from Benjamin Schwartz, *On Attitudes Toward Law in China*, in Milton Katz (ed), Government Under Law and the Individual, Washington D C: American Council of Learned Societies pp 27-39 (1957).

17 Cohen, note 1 at 1207.

18 Id.

19 Cohen, note 1 at 106.

20 "If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid punishments but have no sense of shame. If they be led by virtue and uniformity sought to be given them by *li*, they will have a sense of shame and, moreover, become good.": Cited by Schwartz, note 16.

21 Schwartz, note 16.

22 Lubman, note 14 at 1290.

23 The impact of Confucianism and cultural attitudes should never be underestimated. In reality, the philosophic and practical reasons to prefer mediation over adjudication were closely intertwined.

24 Williams, The Middle Kingdom 507 (1883) cited by Cohen, supra note 1 at 1212.

25 Unless otherwise noted, this summary of the legal system is drawn from Cohen, note 1 primarily from pages 1212 to 1215.

26 Cohen, note 1 at 1213.

27 Ch'u, Local Government 49, cited by Cohen, note 1 at 1213.

28 Quoted by S Van der Sprenkel, Legal Institutions in Manchu China 135 (1962), cited in turn by Cohen, note 1 at 1213.

29 Williams p 479, note 24.

30 Cohen, note 1 at 1207-1208.

31 Ch'u, Local Government 80, cited by Cohen, note 1 at 1214.

32 Williams 514-515, cited by Cohen, note 1 at 1214.

33 Cohen, note 1 at 1212.

34 Scarborough, A Collection of Chinese Proverbs 335 (1926) cited by Cohen, note 1 at 1212.

35 The traditional counsel was: "Let householders avoid litigation; for once go to law and there is nothing but trouble.": Scarborough, id at 334.

36 The Chinese say, "(A) lawsuit breeds ten years of hatred": Kenneth Cloke, *Politics and Values in Mediation: The Chinese Experience*, (1987) 17 Mediation Quarterly 69 cited by Peter Lovenheim, Mediate, Don't Litigate (McGraw Hill, 1989).

37 Jernigan, China in Law and Commerce 191-192 (1948) cited by Cohen, note 1 at 1215.

38 The emphasis on "family values" in the 1992 Presidential election campaign illustrated this, despite the contemporary controversy over whether a family should be seen solely in traditional terms of husband, wife and children.

39 Lubman, note 14 at 1294-1295 and Cohen, note 1 at 1216-1222.

40 This structure is well illustrated by Lubman, note 14 at 1313 and 1331.

41 The summary of Chinese society in the following three paragraphs, unless noted otherwise, is drawn from Barton, Gibbs, Li & Merryman, Law in Basically Different Cultures 102-140 (1983) [hereinafter referred to as Different Cultures].

42 Different Cultures, note 41.

43 Lubman, note 14 at 1294.

44 The Moral Basis of a Backward Society (The Free Press, 1958). In China, the ideal family was "under the control of a patriarch imbued with the Confucian values of propriety and order." - Maurice Freedman, *The Family in China, Past and Present*," 34 Pacific Affairs, (Winter 1961-62) p 323. It has been said that the contrast between West and China can "most forcibly be expressed by saying that the unit of an ancient society was the family, of a modern society the individual": George Jamieson, *Chinese Family and Commercial Law*" Hong Kong: Vetch and Lee (1970, originally published in Shanghai, 1921) at 2-3 . This definition of modern society may of course be disputed today.

45 Different Cultures, note 42.

46 Stephen Goldberg, Frank Sander & Nancy Rogers, Dispute Resolution (2nd ed., Little Brown and Company, Boston: 1992) [hereinafter referred to as Dispute Resolution] note at pages 6-7 that "[M]ediation by respected community members was a central means of conflict management in small-scale societies across the world and commonplace in this country within cohesive immigrant or religious groups as early as colonial New England."

47 Lubman, note 14 at 1297-1298.

48 A revealing case study of this process is provided by the case of Kuo Tzu-Ch'iang, whose careless production resulted in charges of "sabotage of production," see Victor Li, Law Without Lawyers: A Comparative View of Law in China and the United States 75-89 (1978).

49 See the general definition at note 5.

50 There have been some exceptions, such as Article 17 of the Marriage Law of the People's Republic of China (1950) but overall no legislative initiative which reflects the propensity to mediate, see Cohen, note 1 at 1209-1210. Legislation which has had this effect since the Cultural Revolution is detailed in note 57, infra.

51 Cohen, note 1 at 1209.

52 Both in this paper and elsewhere, see 54 Calif L Rev 1201 (1966).

53 Id at 1223.

54 Id.

55 A drive towards greater legalisation was mounted from 1954 to mid-1957, but collapsed after the anti-rightist campaign of 1957. Then at the end of the Cultural Revolution and fall of the Gang of Four in 1976, a fresh drive towards legalisation commenced. See Kim, note 9 and Victor H. Li, *Reflections On The Current Drive Toward Greater Legalisation in China*, 10 Ga J Int'l & Comp L 221 (1980).

56 Li, note 55 at 222-223.

57 The admonition of Mao Tse-tung that disputes among the people ought to be resolved, whenever possible, by "democratic methods, methods of discussion, of criticism, of persuasion and education, not by coercive, oppressive methods." is faithfully followed - address by Mao Tse-tung, "On the Correct Handling of Contradictions Among the People" on 27 Feb 1957, cited by Cohen, note 1 at 1201. The gradually developing body of statutory law reflects this preference for mediation. For example, Article III of the 1982 Constitution provides for the establishment of neighbourhood and municipal people's mediation committees, similarly Article 14 of the Law of Civil Procedure promulgated on 8 Mar 1982 recognises the role of mediation, as does the Marriage Law promulgated on 10 Sept 1980.

58 Utter, note 1 at 392.

59 Lubman, note 14 at 1349 quotes emigres that once activists or cadres "request" the parties to mediate, people are loath to decline for fear of renewed and insistent requests. Fang, note 11 at 3 describes community mediation as "intricate and ubiquitous."

60 It is beyond the scope of this paper to describe and review the organisation and operation of mediation through the people's mediation committees and people's court. Put simply and at the risk of gross over-simplification: "[P]eople's mediation committees are elected by the people to mediate initial disputes. If the parties fail to reach an agreement through mediation or do not desire mediation, the next step is "the people's court where the court may initiate mediation at any time": Kim, note 9 at 1431. For a more extensive discussion, see generally Lubman, note 14 and Cohen, supra note 1.

61 Utter, note 1 at 387, quoting in turn from Zhu, *Mediation: The First Line of Defence* (an unpublished manuscript presented at the 1985 Annual Meeting of the American Comparative Law Society).

62 Lubman, note 14 at 1287.

63 Recorded in the article, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 Cal L Rev 1284 (1969).

64 It is hard to say how much this is also attributable to the traditional preference of mediation and/or because it was a form of dispute resolution which accorded with Confucian values.

65 Lubman, note 14 at 1339.

66 *Mediation Committee Member Hsi-chen*, Tsingtao Daily, 20 May 1956, cited by Lubman note 14 at 1322.

67 Lubman, note 14 at 1303-1306.

68 Id at 1339.

69 Dispute Resolution, note 46 at 8.

70 The parallel is illustrated by a comparison of the advantages of mediation in China, socially, politically and individually, cited by Lubman, supra note 14 at 1300 and Cohen, supra note 1 at 1223-1225. See the Annexure to this paper which compares mediation with litigation and highlights the differences in process and approach.

71 This list is quoted from Lovenheim, note 36 at 29.

72 Further advantages of mediation are noted by Riskin in note 73 infra. Lovenheim, supra note 36 at 10 lists the following as advantages which mediation "can be: quick...; confidential...; inexpensive...; fair...; and successful...". Mediation can have all these advantages, but as is noted below, what constitutes a "fair" and "successful" result and the priority which mediation places on such an outcome requires careful analysis.

73 The presence of the mediator and the fact that ultimate authority resides with the disputants is said to alter the dynamics of negotiation and provide distinct procedural advantages over adjudication. Leonard Riskin, *Mediation and Lawyers*, (1983) 43 Ohio St L J 29 lists these advantages as: cheaper, faster, potentially more hospitable to the non-material interests of the disputants, greater scope to educate and communicate with each other about their and the community's needs, as well as helping the parties to work together and realise that cooperation can produce positive gains, cited in Dispute Resolution at 103.

74 Roger Fisher and William Ury, Getting to Yes (2nd ed, Penguin Books, New York, 1991).

75 It is said that "the Chinese are preoccupied with 'persuasion'" and its capacity to resolve disputes exceeds that found in the West, Cohen, note 1 at 1203.

76 See the quotation from Mao Tse-tung in the first part of note 57 and the accompanying text, supra.

77 Cohen, note 1 at 1225.

78 See Robert Axelrod, The Evolution of Cooperation (Basic Books Inc, 1984) and Douglas Hofstadter, *The Prisoner's Dilemma, Computer Tournaments and the Evolution of Cooperation*, 715 Meta-Magical Thema's.

79 Hofstadter, id and David Lax and James Sebenius, The Manager as Negotiator (Free Press, New York, 1986) at 158.

80 The virtues of harmony and compromise may no longer be stressed, but it seems that their loss of influence to prompt a mediated result have been effectively compensated by a political recognition of the practical and economic advantages of the expeditious resolution of disputes.

81 Again, today the readiness to "suffer a little" could be prompted by considerations of social and/or political expediency, as well as traditional visions of moral virtue.

82 Analogously, this point is also evidenced by reference to the typical human predispositions towards conflict and its resolution. The three common types of human predisposition are quoted below from a circular of the Stanford Centre on Conflict and Negotiation. Although individuals or societies cannot be categorised as one or the other, it seems that the Chinese approach can be characterised as a concern with good relationships and perhaps, though to a lesser degree, concern with avoiding conflict. By contrast, a common Western approach is typified by the first, *concern with winning:* tendency to "take charge"; enjoys being in control; purposeful; likes to win; feels responsible for outcome; willing to lead; forcing; may be impatient and eager; competitive; enjoys being a partisan. The second is *concern with avoiding conflict*: dislikes disputes; feels conflict is usually unproductive; uncomfortable with explicit disagreement, especially if heated. When faced with conflict, tendency to withdraw or deflect. In disputes, unlikely to take initiative; may appear to be detached, or uninterested; reluctance to become involved or engaged. The third is *concern with good relationships:* sensitive to the feelings of others; tends to be supportive and helpful; receptive and accommodating; wants to be liked; in the face of conflict, desire to preserve and foster good relationships with the other side; in disputes, may behave in a "soothing" way; very concerned that conflict or differences may disrupt relationships."

83 Van Der Sprinkel, note at 1223.

84 Le Droit Chinois (Browne translation, 1961) at 17, cited by Cohen note 1 at 1207.

85 Quoted by Schwartz, note 16.

86 One of the many examples is to be found at 121-122 of Max Bazerman and Margaret Neale, Negotiating Rationally (Free Press, New York, 1992).

87 For eg, Carol Gilligan, In a Different Voice (1982) argues that women place stress on the care and preservation of relationships and therefore a consensual and principled form of resolution of disputes. This approach is far preferable to the male approach of competitive, adversarial and analytical resolution of disputes. Mark McCormack, The Terrible Truth About Lawyers (Beech Tree Books, New York, 1987) is generally critical of the competitive adversarial approach of lawyers and how this approach is often counterproductive, because it is guaranteed to damage any relationship between the parties.

88 Environmental concerns and the accompanying movements are another contemporary example of a transition in emphasis from private to public interests.

89 See notes 19-20 and the accompanying text supra.

90 Quoted by Utter, note 1 at 384 in respect of the saying of an elderly Chinese mediator in 1986. The initial import of the quotation is ambiguous, but subsequently, Utter reiterates the saying at page 395 in the context that "[T]he goal is to preserve the relationship, rather than to pursue the absolute victory that we have been accustomed to seek in our system."

91 In the context of negotiation, personal predispositions are divided between concern for: winning; good relationships; and avoiding conflict. See note 82 supra.

92 See Fisher and Ury, note 74 and the text accompanying notes 78-79 supra.

93 Quoted from Newsweek's Review of "Getting To Yes" in which it was suggested the text may help convert the "Age of Me to the Era of We."

94 Elihi Root, *Public Service and the Bar*, 41 ABA Rep 355 (1916) observed that: "The administration of law is affected by that same general attitude which I have mentioned, in which citizens think about what they are going to get out of their country instead of thinking of what they can contribute to their country. ...With our highly developed individualism, our respect for the sanctity of individual rights, our conception of government as designed to secure those rights...it is natural that there should be a continual pressure in the direction of promoting individual rights and privileges and opportunities and very little pressure to maintain the community's rights against the individual and to insist upon the individual's duties to the community." Thus, unlike the Chinese, individual rights based claims were not seen as immoral or disruptive violations of fundamental ethical rules, but to the contrary, natural and customary behaviour.

95 The consequence of this and customary ethical rules in China, is to inhibit the assertion of rights and diminish the stature of any person who does so: Utter, supra note 1 at 385.

96 Id at 391.

97 Lubman, note 14 at 1309-1325.

98 Cohen, note 1 at 1220.

99 As covered below under the heading "Distributive Disputes", the existence of such moral coercive force in an existing relationship between disputants could partly explain mediation's success in these fields. If mediation's success is to be extended beyond domestic and other disputes which exhibit this characteristic, then changes in methodology and a substitute coercive force need to be considered. This problem is not insurmountable. Meyer and Wysocki, note 6 at 39 correctly note that this problem can be overcome by drawing upon "sources of institutionalised authority to derive enough "friendly coercive" force in order to be effective." Already in some instances Court referral schemes provide this coercive force or incentive by the immediate presence of the Court and the adjudication scheme. Another example is how parties immediately prior to trial become much more receptive and reasonable to mutually negotiated settlements.

100 See for example note 72, which cites passages detailing the advantages of mediation and generally Lubman, note 14.

101 Cohen, note 1 at 1201.

102 Van Der Sprenkel, note 28 at 119-120.

103 Cohen, note 1 at 1223.

104 Within the family, clan or village, the chief instrument of social control is public opinion. Social disapproval and isolation can be a terrible punishment, see Yang, note 105 infra at note 59 on page 1299. Stanley Lubman's article, note 14 illustrates frequently how such pressure is exerted in various forms in the People's Republic of China. As noted previously, one instance of this is group meetings where the group will engage in "criticism-educate" and generally exercise peer pressure to prompt conformity with group norms, - Mitchell, *Dispute Settlement in China*, 4 Student Int'l L Soc Int L J 71 at 79 (1980) cited by Utter, note 1 at 392. Appeals to a court frequently provided no redress in traditional China, where the appellant was challenging not merely his opponent, but the social group which initially resolved the dispute, - Lubman, note 14 at 1299. More recently, where a Party or Government official has been involved in the resolution, it seems that the position would have been the same, at least up until the fall of the Gang of Four.

105 M Yang, A Chinese Village: Taitou, Shantung Province 165-166 (1945) cited by Lubman, note 14 at 1298.

106 Lubman, note 14 at 1308.

107 Cohen, note 1 at 1225.

108 A H Smith, Village Life 302, cited by Cohen, note 1 at 1223.

109 This reaction only reinforces the earlier observation that our perspective revolves around the individual and such a perspective has procedurally important implications for mediation.

110 One empirical study concluded that 66.6% of a group who had their disputes mediated were satisfied, compared to 54% of the group who had their disputes litigated: McEwan and Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 Me L Rev (1981) cited in Dispute Resolution at 153. In the same text at 143, psychologist Tom R Tyler is quoted from *The Quality of Dispute Resolution Processes and Outcome: Measurement Problems and Possibilities*, 66 U Den L Rev 419 (1989) 436 where he states that mediation is much more popular than adjudication as a process.

111 Sally Merry and Susan Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Justice*, 9 Just Sys J 151 at 152-153 (1984), cited by Dispute Resolution at 143.

112 Drawn from the comments of Professors Owen Fiss, Timothy Terrell, Richard Abel and Judge Harry Edwards in Dispute Resolution at 144-146.

113 See notes 114 to 123 infra and the accompanying text.

114 Empirical data on the utilisation of mediation by type of dispute is difficult to obtain. The American Bar Association Standing Committee for Dispute Resolution anticipates producing such a national study next year, but as the author was told, "[I]t is an enormous job which will take us ages." The National Institute of Dispute Resolution also does not have this information. The author was advised though by Caroline Polk of the Institute in a telephone interview on 5 Oct 1992, that their information indicated that mediation had been successful primarily in the areas listed in the text preceding this footnote.

115 This can occur because the relationship is sufficiently important that out of self-interest it prompts a cooperative approach or even because the relationship and its interests are more important than "victory" in the dispute.

116 Lovenheim, note 36 at 20.

117 Cohen, note 1 at 1221.

118 Lax and Sebenius, note 86 at 119.

119 Statistics are drawn from McEwan and Maiman's survey, note 110 at 151.

120 The McEwan and Maiman survey, id, bears this out. At page 150 it is noted that traffic accident cases had the lowest mediated settlement rate of 41% and were the most difficult to resolve. At 153 it is also noted that 80% of the parties with a continuing relationship were satisfied with the mediated result, whereas this dropped to a satisfaction level of 65% when the parties had no continuing relationship.

121 Lovenheim, note 36 at 29. The other factors opposing mediation were: "wanting test case; party absent or incompetent; and serious crime." The factors favouring mediation listed at the same page were: "no legal remedy; preserving a relationship; maintaining privacy; avoiding high fees; and avoiding delays."

122 Lovenheim, note 36 at 29.

123 The traffic example does not provide the most extreme example of this problem, though such disputes have been described as difficult to mediate, see note 120. Traffic accident cases occur frequently, often involve relatively minor injuries and entail well settled law. Comparatively then the frequency and settled law lends an air of stability and predictability to liability and damages which, coupled with the expeditious and cost efficient resolution of claims, should make mediation attractive to the disputants. Remaining with the tortious examples (though examples could be easily drawn from other spheres of civil law) by comparison claims for high stake personal injury claims arising from medical malpractice, toxic harm, mass torts and claims for pure economic loss often involve difficult and uncertain issues of fact, law and assessment of damages. The various possible permutations arising from the resolution of these issues may mean such a considerable differential in expectation of the parties that a mediated result is unlikely and adjudication is called for.

124 Kim, note 9 at 1413-1414.

125 Id at 1414.

126 Cohen, note 1 at 1225.

127 Judge Learned Hand in an address to the American Bar Association in 1926 said: "As a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." Abraham Lincoln's preparation notes for a lecture in 1850 included the passage: "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time." Former Chief Justice Berger's verdict on litigation is quoted at note 3 supra. As Voltaire once remarked, "I was ruined but twice - once when I won a lawsuit and once when I lost one." Quotations cited by Lovenheim, note 36 at 3-4.

128 Different Cultures, note 41 at 102.

129 Moves to establish such standards of process and accreditation for mediators are discussed in Dispute Resolution, note 41, in particular at 159-171.

130 Quoted from DisputeResolution, note 41 at 4.

131 Table quoted from Lovenheim, note 36 at 13 where it was adapted from Kenneth Cloke and Angus Strachan, *Mediation and Prepaid Legal Plans* (1987) 18 Mediation Quarterly 94. This table is quoted as an illustrative comparison only. Often process outcomes will vary depending on the parties and type of dispute and therefore the value judgments in the quoted table, such as for "emotional result," should be recognised as such.