CROSS-CULTURAL NEGOTIATIONS, WITH A SPECIAL FOCUS ON ADR WITH THE CHINESE

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I. INTRODUCTION

Cross-cultural negotiations, in general, and alternative dispute resolution (ADR)¹ with the Chinese, in particular, represents an intriguing example of how civilization clashes may be reconciled in

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1. Or, as the author prefers to say, ADR stands for “Advanced Dispute Resolution.”
the post-Cold War era. In general, as world political and economic barriers fall, the responsible minds of the global village ought to direct civilization clashes toward reconciliation, while preserving cultural diversity. In addition to using a body of international law, international organizations may use ADR to create a framework for cooperation and interstate relations.

In recent history the European-American community has become again receptive to principled negotiation, which represents a return to its roots in the Greco-Roman tradition. Simultaneously, China, still steeped in its traditional forms of negotiation and the equivalent of ADR, is becoming more open to the outside world.

Practically, as increasing numbers of foreigners engage in business, education and political exchange with the Chinese, those foreigners need to understand aspects of Chinese thought, dispute resolution and the history of foreigners in China. At the same time, the Chinese need to understand the significance of honoring legal obligations. While others often negotiate with legal norms in mind, the Chinese often rely on non-legal norms. While this practice represents many challenges for cross-cultural negotiations; it also is an opportunity for the cross-fertilization of various forms of ADR and a splendid example of how civilization clashes may be reconciled in the shifting geo-political arena.

Part II of this article briefly discusses the growing trend towards ADR in the European-American tradition within the context of the history of negotiations. Part III discusses cross-cultural negotiations and ADR in light of an expert on comparative politics, Samuel Huntington, and his thesis that the post-Cold War era has ushered in a reemphasis on cultural identities and differences, including the rising prominence of Chinese civilization. Parts IV and V examine the historical, economic, political, philosophical and legal background of ADR with the Chinese. Part VI discusses the practical aspects of cross-cultural negotiations with the Chinese.


4. See infra Part II.

5. See infra Part III.

6. See infra Parts IV and V.
including the growing significance of the *huaqiao*⁷ and Part VII offers concluding remarks.⁸

II. NEGOTIATIONS

Negotiations has its origins in rhetoric, the art of communication.⁹ The term negotiation is as ancient as it is packed with meaning. We owe Greek antiquity, namely Aristotle and Socrates, for much knowledge and discovery on rhetoric. The longstanding art of speaking to a crowd, as well as dialogue and multilateral discussion, emerged from this Greek theory of speech and dialectic.¹⁰ Historically, the Romans perfected what Greek rhetoric started.¹¹ Other cultures acknowledged, groomed and developed rhetoric as well, although their cultural impact on Western rhetoric is less significant. These cultures include the Chinese, Indian, Arab, African, Latin, and Islanders and other native cultures.¹²

In the last twenty years the European-American tradition has seen a renaissance of Aristotelian thinking about rhetoric, which has reactivated the idea of alterocentric thinking, and led to greater interest in principled negotiation and other forms of ADR. Alterocentric thinking considers the interests of the other party, as opposed to ecocentric thinking, which centers on the self. Interestingly, the business and legal community, in addition to linguists, theologians and psychologists, have contributed chiefly to this renaissance. For example, on the European continent, a central figure in this renaissance was (if not is) the "excommunicated Jesuit" and author Rupert Lay,¹³ who popularized this idea in the 1970s and 80s. Instead of postulating altruism or egocentric thinking in negotiations, Lay counseled the intermediate line of putting the nego-

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⁷. *See infra* Part VI.B.
⁸. *See infra* Part VII.
¹². *See id. at 36, 43.
iation communication partner (not adversary), in the middle of the negotiation (in one line with Aristotle’s “alterocentric” orientation). 14

Very similarly, but without obvious connection, Roger Fisher of Harvard University Law School sparked this movement in the United States. 15 He urges negotiating parties to use his patent idea, the “best alternative to a negotiated agreement” (BATNA) in the process of negotiating. 16 One’s BATNA is the standard by which any proposed agreement should be measured. 17 Keeping in mind one’s BATNA allows negotiating parties to be flexible in developing creative solutions, leading to reasonable negotiations guided by interests, and win-win solutions free of entrenched battles for positions. 18

The tone in both Lay’s and Fisher’s systems of negotiation is more personalized and efficient, and less accompanied by the noise of unproductive conflict. Thus battlefield and hard-sell negotiation tactics are ousted. This trend towards principled negotiation and the use of ADR is growing. 19 In the 1996 Association of American Law Schools Mini-Workshop on ADR, ADR was presented as the alternative to litigation, conflict, and war. 20 Teaching of ADR as well as conflict resolution has become a growth industry.

In contrast to the Western development of negotiation, the Chinese system of negotiation has shown remarkable consistency in

17. See id.
18. See id.
20. See Association of American Law Schools, Mini-Workshop on Alternative Dispute Resolution 142 (1986). The section on Dispute Resolution of the American Bar Association is accordingly growing. While just a handful of people assembled a few years ago, at this year’s conference in San Francisco the participants reportedly numbered 1104 and the speaker at the next conference will reportedly be the famous philosopher judge, and unsuccessful mediator of the Microsoft case, Richard Posner.
its development with no observation of big jumps. To this day the Chinese rely on negotiation techniques that are thousands of years old.

III. CROSS-CULTURAL NEGOTIATIONS AND ADR

This section discusses cross-cultural negotiations and the peculiarities of negotiations and ADR involving the Chinese, first examining international arbitration with a reference to the role of culture.

In her autobiography, Fay Calkins, a caucasian woman, wrote that the problems of bridging cultures never occurred to her while negotiating her own marriage with a Samoan chief. Her indifference may be surprising, since she also expressed the hope that her “matai” didn’t inherit a yen for twenty wives like his grandfather.

“Communicating across cultures is even more demanding than working at effectively communicating in a single culture, because the participants' references, experiences or filters have less overlap.” The specifics of each situation, whether in personal matters, or issues of geostrategical dimensions, determine the mode of resolving cross-cultural disputes. The negotiating parties, however, must first recognize the additional challenges that cross-cultural disputes bring. Cross-cultural negotiations are inherently more difficult than intra-cultural negotiations. These challenges may make cross-cultural negotiations more problematic, but they are among the most intellectually exciting challenges in the field of dispute resolution.

What makes the elements of culture and crossing the frontiers sig-

22. See Zhengdong Huang, Negotiation in China: Cultural and Practical Characteristics, 6 CHINA L. RPR. 139, 139 (1990) (examining the profound influence of Chinese traditional culture on negotiation and the lack of familiarity by Chinese with modern techniques of negotiation).
23. See id. at 142 (noting that negotiation techniques are also less reflected in writing, and would require intense sociological field study to verify).
25. See id.
significant for negotiations and ADR? One must first consider the notion of international ADR before turning to the notion of the clash of civilizations.

A. International ADR

The most important distinction of international (versus domestic) arbitration, one of the most common forms of cross-cultural dispute resolution, is the enhanced concern for neutrality.\(^9\) International arbitration is often particularly designed and accepted to assure parties from different jurisdictions that their disputes will be resolved neutrally.\(^{30}\)

Commentators also remark on the difficulties between British and American negotiators.\(^{31}\) Although they share a common language, cultural heritage and history, nevertheless, Britain and the United States are two sovereign countries, with their own approaches and attitudes. Thus, it does not take a far-reaching imagination to see where these differences lead for cross-cultural negotiations in the case of parties with a different culture, history, religion, language, sense of justice, customs, concepts of human beings and philosophy. For example, time has different meaning and importance in different cultures.

While “time is money” in the Western culture, it has no such value attached to it in many cultures in Asia, Latin America and Africa.\(^{32}\) This mindset affects the pace of negotiations and the punctuality of meetings.\(^{33}\)

The concept of bargaining also varies among cultures. When

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29. *See generally* George T. Yates III, *Arbitration or Court Litigation for Private International Dispute Resolution: The Lesser of Two Evils*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION*, supra note 2, at 224-234 (discussing the choice between international arbitration and adjudication). “[W]hen arbitration is chosen as the means of dispute settlement, there is greater preoccupation with the method for choosing unbiased arbitrators than with the governing law and its underlying economic philosophy.” Gabriel M. Wilner, *Acceptance of Arbitration by Developing Countries*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION*, supra note 2, at 284.

30. *See* GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES*, COMMENTARY & MATERIALS 2 (1994); *see also* BEN BEAUMONT ET AL., *INTERNATIONAL COMMENTARY ON THE CHINESE ARBITRATION ACT* 89 (1995) (explaining that from a Chinese perspective, the words “international” and “foreign-related” are sometimes used interchangeably). As discussed below, the Chinese have a history of strained relations with foreigners.

31. *See* Bilder, supra note 2.

32. *See* Ghauri, supra note 27, at 12.

33. *See id.*
Scandinavians, usually very uncomfortable with aggressive bargain-
ing, negotiate with Saudis—a serious culture-clash can develop. In
Saudis will often open with a price much higher than the one they
will ultimately settle for; Scandinavians will start with a price very
close to what they will settle for. Also, the difference in individual-
istic and collectivistic approaches may be critical. In an individual-
istic culture like the United States, negotiators usually look for the
"top person" on the other side who should be convinced. In
"we"-oriented cultures, like Japan, the group, not just an individual
must be convinced.

In addition to institutional factors, a recent multicultural study
also included the following as sources of conflict: differences in
training, background, responsibilities, identities, and loyalty of or-
ganizational members. Thus the potential for misunderstanding
between parties from different nations and cultures is large. ADR
is widely accepted in East Asian and former Socialist countries as
well as to a far extent in the United States and Western Europe,
and in some parts of Africa; however, in Latin American and Arab
nations it is still less accepted. I turn now to a discussion of cul-
ture in light of the clash of civilizations.

B. Culture

Culture is defined in a variety of ways. But in most instances,
as discussed here, the definition goes deeper than the mere catego-
rization of nation-states, and the corresponding term of transna-

34. See DEAN ALLEN FOSTER, BARGAINING ACROSS BORDERS: HOW TO NEGOTIATE
35. See id.
36. See FRANK L. ACUFF, HOW TO NEGOTIATE ANYTHING WITH ANYONE ANYWHERE
AROUND THE WORLD 43 (1997).
37. See id.
38. See Xuejian Yu, Conflict in a Multicultural Organization: An Ethnographic At-
tempt to Discover Work-Related Cultural Assumptions Between Chinese and American Co-
39. See Julia A. Martin, Arbitrating in the Alps Rather Than Litigating in Los Ange-
les: The Advantages of International Intellectual Property-Specific Alternative Dispute Reso-
40. See, e.g., Debra L. DaLaet, Don't Ask, Don't Tell: Where is the Protection Against
Sexual Orientation Discrimination in International Human Rights Law? 7 L. & SEX 31, 46 (1997) (discussing various perspectives on the definition of culture); Kenichi
Ohmae, China's 600,000 Avon Ladies, 12 NEW PERSP. Q., Winter 1995, at 14, 18 (ex-
plaining that the nation-state in its traditional form of the 19th century is seen
more and more replaced by other entities, such as the region-state of a typical
population of 5-20 million).
tionality. In fact, all of the following factors play an eminent role:

- collective
- expectations
- experiences
- practices
- stereotypes
- tradition
- morals
- people
- language
- traditions
- customs
- religion
- ethics

These factors have come into increased prominence since the end of the Cold War. According to Samuel Huntington, an expert on comparative politics, Western centrism has declined and the interaction between and among all civilizations has again become the centerpiece of historical inquiry. Non-Western peoples and governments are increasingly being recognized as joining present day shapers of history rather than as objects of Western colonialism. In this context, culture is used in an interchangeable sense with a particular civilization.

However, cultural identification remains relative. For example, while locally it might be significant whether I am from “Bauma,” a village in the Töss Valley; in the rest of Switzerland, indication of my canton is sufficient. With respect to the rest of Europe, usually I am identified as Swiss, or, sometimes as a German Swiss (referring to one of the four native ethnicities within Switzerland); but once overseas, very often I’m viewed as a European, if not (as I experienced in Asia) simply as a Westerner.

Huntington pointed out that cultural differences are becoming the dominant differences of the future, which is already apparent.

The discussion about the nation-state situated on the line of civil society—citizen society is a different discussion. See Urs M. Lauchli, Minimal State and Distributive Justice (forthcoming) (on file with author).

43. See Clash II, supra note 41, at 20.
44. “Canton” is defined as “[a] district or local governing unit [such as] one of the states of the Swiss confederation.” Webster’s Third New International Dictionary Unabridged 329 (1993).
45. See Clash II, supra note 41, at 20.
[For example,] in the former Soviet Union, communists can become democrats, the rich can become poor and the poor rich, but Russians cannot become Estonians and Azeris cannot become Armenians. In class and ideological conflicts, the key question was “Which side are you on?” and people could and did choose sides and change sides. In conflicts between civilizations, the question is “What are you?” That is a given that cannot be changed.

From Tibet to Kosovo and East Timor, the “wrong” answer to this may lead to a knife in your chest, years in the Gulag or “ethnic cleansing.” In Eurasia the great historic fault lines between civilizations are once more shifting. This is particularly true along the boundaries of the crescent-shaped Islamic block of nations from the bulge of Africa to central Asia.

In the East, countries and civilizations have attempted to become modern without becoming Western; Japan is an example. Japan may prolong this cultural shift, given it maintains the flexibility it has already shown during, for example, the Meiji Restoration (1868) in which Japan’s rulers adopted in piece-meal fashion Western institutions of modern centralized rule, after World War II where American occupation and tutelage contributed to a rebirth for Japan, the two big oil crises (1973 and 1975) in which Japan showed remarkable resilience, and after “endaka,” meaning “yen appreciation,” leading to Japan’s becoming a creditor nation in 1985.

Disintegrating societies and failed states with their civil conflicts and destabilizing refugee flows have emerged as the greatest menace to global stability. Huntington surmises, almost apocalyptically, that the next world war, if there is one, will be a war between civilizations.

46. CLASH I, supra note 42, at 27.
47. See id. at 35.
48. See id. at 49.
50. See id. at 185 (discussing America’s occupation of Japan).
51. See id. at 270-75 (discussing the “oil shocks”).
53. See J. Brian Atwood, From the Cold War to Chaos and Cholera, 11 NEW PERSP. Q., Fall 1994, at 21.
54. See CLASH I, supra note 42, at 39.
foreign policy was built on military alliances and nuclear deterrence.  

This article now turns to one of the most interesting developments in the post-Cold War era: the increasing prominence of the Chinese. Cross-cultural ADR with the Chinese represents a particular application of the clash of civilizations. Therefore, those who negotiate with the Chinese must be acquainted with China's particular historical, economic, political, philosophical and legal circumstances.

IV. SYSTEM BACKGROUND IN CHINA

A. Brief Historical Setting and Prognosis

Cross-cultural exchange with modern China must be understood in the context of both its ancient and modern history of dealing with foreigners and its prospects for becoming a major power in the twenty-first century.

Throughout history, relations between China and outside nations have been problematic. The Chinese dynasties which provided stability, peace and harmony were those which managed not to get involved in controversies with foreign powers. One example of a problematic relationship with an outside nation was the Opium War in 1839-42, which was an attempt to repel the British, who brought opium into Chinese ports to pay for highly desired tea and silk.

At the end of the Opium War, the Treaty of Nanking was signed, which ceded Hong Kong to Great Britain. The subsequent opening of Chinese ports to foreign commerce and residence ended the traditional system of tribute relations between the Chinese empire and outside “barbarians,” at least for the following one-hundred years.

In addition, there have been repeated attempts to remove all

55. See CLASH II, supra note 41, at 21.
57. The Tang Dynasty may have been a possible exception to this trend.
59. See id. at 158-59 (describing the articles of the treaty).
60. See Gamer, supra note 56, at 182 (describing these relations).
foreigners from China. During the anti-foreign Boxer Rebellion which started in 1900, several hundred missionaries and foreign civilians were killed and their property destroyed in northern China. Foreign intervention, in which the United States, Japan, Russia, Britain, France, Germany, Austria and Italy participated, ended the rebellion.

The defeat of the Japanese invaders, and the victory of the Communist revolution in 1949 under Mao, led to the People’s Republic of China (PRC). The PRC remained closed to the United States until Nixon’s visit to China in 1972. The PRC has increasingly sought economic and legal exchange with the United States and other nations since Deng Xiaoping’s plan of modernization began in the late 1970s.

Aside from some business opportunities, the American Bar Association was, at first, generally pessimistic as to the benefits of private Sino-American trade transactions, but today this opinion has changed. Currently China is in a race with Japan for the second largest world economy.

It is expected that China will be the Asian world-power of the future. The emergence of the greater China co-prosperity sphere is facilitated by a Bamboo network of family and personal relationships and a common culture. While modern Japan could hardly exercise hegemony over this Asian cultural space, the Chinese-
based economy of Asia is rapidly emerging as a new epicenter for industry, commerce and finance.

This Chinese-based economy includes Hong Kong, Singapore and Taiwan. Hong Kong integrated economically with China before it was handed over to the Chinese in 1997. The PRC received Hong Kong from the British as a Special Administrative Region, under the slogan “One country, two systems.” This move was in partial response to international influence for independence of the political system in Hong Kong. However, the concept of sovereignty used by China is an outmoded political one that stems ironically from the British monarchy.

Meanwhile, Singapore changed its anti-PRC policy in the 1970s (although diplomatic relations were not formalized until 1990) toward an improved relationship with a heavy investment stream in China. In the early twenty-first century it seems likely that Taiwan will become more closely integrated with mainland China. This Asian strategic area thus contains substantial amounts of technology and manufacturing capability (Taiwan), outstanding entrepreneurial, marketing and services acumen (Hong Kong), a fine communications network (Singapore), a tremendous pool of financial capital (all three), and very large endowments of land, resources and labor (mainland China).

China, the new “superpower,” is assessing when during this century it has the possibility of becoming the pre-eminent global power. How adversarial will the relationship be in the interim? Some mainland Chinese contest the view that China will be the new superpower; they prefer to emphasize that China is a developing nation. They hold that the standard that coastal cities have

How this can still be said about the Chinese future remains an open question.

74. See Garner, supra note 56, at 153.
75. See VINES, supra note 73, at 179 (noting that China’s takeover of Hong Kong is essentially a recolonization).
77. See CLASH II, supra note 41, at 174.
78. See Weidenbaum, supra note 68, at 22.
80. See MURRAY, supra note 69, at 15-16.
reached is not and will not be within sight or representative for the whole country. Critics of the term “superpower” are afraid that this terminology is chosen for the sake of increasing defense spending. The most likely prognosis is that China has the potential to become the superpower of the next century, but nobody knows whether this possibility will happen.

In light of this background, this article now examines Chinese social structures, cosmology and dispute resolution.

B. How Confucian is the PRC State?

The king boasted to Confucius that virtue in his land was such that if a father stole, his son would report the crime and the criminal to the state. Confucius replied that in his state, virtue was far greater for a son who would never think of treating his father so.

Although China’s regime has tried since 1949 to eradicate traditional thinking, the Chinese people remain remarkably resilient. Communist leaders have maligned Confucianism, criticizing it as a superstructure of feudalism. However, recently Confucius has been also praised by some of them as the “main pillar of traditional Chinese culture and the pride of the Chinese nation.”

Confucianism (to a much greater degree than Buddhism or Taoism) can truly be said to have molded Chinese civilization in general. This characteristic is based on ethical principles of self-cultivation that undergird a properly functioning society.

81. See id.
82. This assertion is based on personal conversations with mainland Chinese visiting in the United States.
83. Besides other factors, this prediction depends on the political fortunes of China’s leadership.
85. For a discussion of the continuity between communist and traditional rule, see XIN REN, TRADITION OF THE LAW AND THE LAW OF THE TRADITION: LAW, STATE, AND SOCIAL CONTROL IN CHINA xi-xii (1997).
86. See WILLEM VAN KEMENADE, CHINA, HONG KONG, TAIWAN, INC. 373 (Diane Webb trans., 1997).
87. Id. at 372.
tended family may have priority over the state, much more than for example, in Japanese society. Also, the Chinese sense of national identity, citizenship, and public spirit is weaker than that bound in its neighboring states, Vietnam, Japan, and others. The economic reforms that started under Deng Xiaoping may represent the restoration of older Chinese social relationships. The self-sufficient peasant household seems to have survived communism, and it has flowered, once given a chance by the rural responsibility system.

C. Chinese Thought and Dispute Resolution

Not surprisingly, the Chinese view of dispute resolution is grounded in Confucian ethics and ultimately, Chinese cosmology. This has made the Chinese view of negotiation and ADR enduring.

Ancient Chinese cosmology holds that all phenomena, both natural and human, can be explained by the interplay of two forces, yin and yang, and of the five Chinese elements: soil, wood, metal, fire, and water. Yin is negative, passive, weak, and destructive, and yang is positive, active, strong and constructive. In other words, human relationships and the forces of nature affect each other. The underlying principle of Chinese cosmology is harmony, with nature and among persons (tian ren he yi).

Confucius was the preeminent Chinese thinker who articulated how harmony can be achieved among persons. He identified several cardinal relationships that need to be honored for a stable social order. They are father and son, ruler and subject,

90. See FUKUYAMA, supra note 88, at 92.
91. For a discussion of these reforms, see VAM KEMENADE, supra note 86, at 9-10.
93. See DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA 44 (1967). The Chinese order is jin mu shui huo tu. See id.
94. See WING-TSIT CHAN, A SOURCE BOOK IN CHINESE PHILOSOPHY 244 (1963).
95. See Elizabeth Feizkhah, Traveler's Advisory, TIME INT'L, Aug. 2, 1999 (recognizing that buildings in Hong Kong are constructed only after architects are instructed on fengshui, which is the way buildings should face in order to achieve good fortune)
98. See id.
husband and wife, elder and younger brother, and friend and friend. 99 Li, or propriety, arises from the observance of these right relationships.

Confucius held a low view of fa, or law. 100 He believed that law can convict and execute people, but that it cannot teach them humanity, kindness, benevolence and compassion. 102 He taught that if people are ruled by li, then fa is not necessary. 103 The following are quotes from his Analects:

I can hear a court case as well as anyone. But we need to make a world where there’s no reason for a court case. 104

If you use government to show them the way and punishment to keep them true, the people will grow evasive and lose all remorse. But if you use integrity to show them the way and ritual to keep them true, they’ll cultivate remorse and always see deeply into things. 105

On the other hand, an opposing school of Chinese thought, the Legalists, held that a nation needed to be held together by strict laws with harsh punishments. 106 Fa, or law, was “compulsive and punitive.” 107 This thought was exemplified by Emperor Qin ShiHuang, who constructed the Great Wall and emphasized the cruel and excessive punishment of those who dared to show even the slightest resentment. 108 Justice was meant to be certain, swift and harsh. 109 When China adopted both a Confucian and Legalist view of law, laws were limited and when they were applicable, pen-
alties were harsh. Thus, the history of Chinese dispute resolution and law is the story of li and fa. Up until this century when Western ideas of law were introduced to modern China, Chinese law was mainly penal in nature. It had highly developed criminal codes and procedures but civil law was rare. Dispute resolution was chiefly done through villages and family elders and the goal of dispute resolution was restoring harmony and the giving of concessions.

When the Republic of China, the predecessor of the PRC, was founded in 1911, the Chinese adopted some legal notions from the West. However, these notions were short-lived. Roscoe Pound, also an advisor to the Chinese government after World War II, remarked on the lack of Chinese juristic and legal terminology:

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

When the PRC was founded in 1949, its leaders looked to the Soviet Union for legal models. The view in communist political science is that law follows politics. Ideas such as those reflected

110. For a summary of the salient features of the legal system of traditional imperial China, see CHEN, supra note 97, at 12-14.
112. See CHEN, supra note 97, at 12-14.
113. See INTRODUCTION TO CHINESE LAW, supra note 108, at 5-6.
114. See CHEN, supra note 97, at 12.
115. See id. at 21.
117. See CHEN, supra note 97, at 26.
118. See David F. Forte, Western Law and Communist Dictatorship, 32 EMORY L. J. 135, 164-82 (1983) (discussing the Communist Party’s views of law up to and during the Cultural Revolution).
in law and politics belong to the superstructure of a society, which itself would be determined by a material basis. Since the “Soviet era,” the PRC has had four constitutions.119 During the Cultural Revolution (1966-1976), many lawyers were attacked and law schools were closed.120 Since Deng’s push for modernization, the schools have re-opened.121 To this day, the state of Chinese law is in flux.122 Laws are no sooner enacted than they are modified.123 This state of affairs has occurred because Chinese society has never been ruled by fa.124

As a result, Western lawyers and business people are often confused as to their legal status and the efficacy of China’s courts.125 Foreign business persons perceive barriers to a fair and effective handling of disputes, chilling the potential for expansion.126 Foreigners who sign contracts find that failure of performance may indicate that the contract is secondary to personal and organizational relationships or other collective concerns.127 In China, these concerns can take precedence over contractual obligations, thus undermining contract autonomy.128 Also, if a Chinese court seeks to re-evaluate a contract, even immediately after it has been signed,129 a Chinese court may be much more sympathetic than a court in another country.130

In the spirit of seeking “common ground while reserving dif-

119. See CHEN, supra note 97, at 42.
121. See SPENCE, supra note 58, at 705.
123. See id.
124. See id.
125. See id.
127. See ACUFF, supra note 36, at 61 (discussing an interesting anecdote on how foreign business people view contracts with the Chinese). The PRC is a contracting state of the Convention for the International Sales of Goods. See id. However its implementation in China is a separate issue. See id.
ferences” between Western and Chinese views of law, Randall Peerenboom proposes to “return to the root and ask . . . what is a right?” With reference to Rawls, Nozick, and Dworkin, Peerenboom highlights the distinction in the American legal system between rights and interests. In contrast, the Chinese term for right, *quanli*, may include interests itself. Peerenboom states that “[I]ndeed, the view that rights are something other than interests may be particularly important in China precisely because China lacks traditions that limit what society can do to the individual for the good of the collective.”

D. China’s Legal Setting

This article now examines China’s current legal setting, before examining ADR in China.

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.

As discussed above, Chinese society is neither built upon a constitution and a system of laws derived from it, nor on a theory of rights that is independent of interests, but by the “internalization of Confucian ethical principles” as the result of thousands of years of socialization. In an inversion of what is commonly said about the Western legal system, in China the *rule of man* trumps the *rule of law*. *Fa* is an outsider in a society sewn together by *li*. *Fa* is often considered by the Chinese, and others, as an instrument of Communist Party leadership.

Nevertheless, since 1956, China, in order to achieve economic development and greater contact with foreigners, has aggressively pursued setting up laws, rules and regulations that govern arbitra-

133. See id. at 360-364.
134. See id. at 365 (stating that *quanli* may only refer to rights).
135. Id. at 386.
136. Chinese proverb (on file with author).
137. See FUKUYAMA, supra note 88, at 84.
138. See INTRODUCTION TO CHINESE LAW, supra note 108, at 26. This assertion also based on remarks by Professor Larry Foster, Dean of the William S. Richardson School of Law, at the University of Hawaii at Manoa, 1992.
139. See Lubman, supra note 122, at 2.
tion and litigation. However, because of the Chinese disposition towards *li* and against *fa*, it will be a long time before Chinese society and practice adjusts to what has been legislated. More likely, *fa* will be adjusted to a changing Chinese society.

China's current law "follows the continental legal tradition, therefore, the sources of law are mainly statutes and written legal documents." The hierarchy of laws relates closely to the structure of the Chinese government." China’s socialist political structure is centered on a system of people’s congresses which create and supervise administrative, judicial and procuratorial organs at all levels.

Chinese legislation ranges from local ordinances up to laws promulgated by the National People’s Congress. The judicial system’s organization is set forth in the "Organic Law of the People’s Courts of the People’s Republic of China." It negates, however, a vertical and horizontal division of power as found in the philosophical tradition of Hobbes, Locke, and Montesquieu, or the constitutional one of America’s founding fathers in Philadelphia in 1787. Some sketch of separation of powers may be found in a split between China’s party and state organs, and between central and local authorities. But this separation appears unbalanced, power is centralized, and the provinces function more as administrative circuits than as counterweights within a vertical check-and-balance system. This separation might also be seen as the background for fear of a process of spinning out of China’s regions towards greater autonomy and self-determination.

China’s judicial organs carry out investigation, prosecution and adjudication and are not considered autonomous entities. In fact, adjudication in China is often policy-driven. During a particular political campaign, punishment may be harsher than in

142. *Id.* at 15.
143. *Id.*
144. See *id.*
145. See *id.* at 18-20.
147. See CHEN, *supra* note 97, at 104.
other times. Because of the traditional Chinese disdain for fa and the closing of law schools during the Cultural Revolution, it will be a while before enough well-trained legal professionals are able to run China’s courts. Most judges have not received formal legal education. Moreover, they are appointed by standing committees of the appropriate People’s Congress and have no special tenure or job security.

Only since 1979 have courts begun to concentrate more on civil disputes. In one study, seventy percent of all cases were settled by mediation rather than legal judgments. In fact, “an initial attempt must be made to mediate all civil disputes.” Also, sometimes an adjudicative committee decides a case before trial. This practice of mini-trial is called in China “first decide, then try.” In terms of enforcement, in a survey of judgments in 1987 through 1988, up to forty percent of judgments were not enforced in some provinces. One reason for this lack of enforcement is localism, or local protectionism. This practice can extend to corruption and some provinces will not enforce judgments by other provinces.

V. OTHER FORMS OF DISPUTE RESOLUTION IN CHINA

A. General Forms

Now let us turn to ADR, which unlike the Chinese legal system, has an enduring presence in Chinese society. In fact, it is not considered “alternative” in Chinese society, but rather mainstream, as the following discussion will demonstrate.

Before the Communist revolution a French writer dared to

149. Professor Stanley Lubman, Remarks at Stanford Law School (Fall 1997).
152. See Clarke, supra note 150, at 254-55.
153. See id.
154. See id.
156. See id.
157. See id. at 123 (citing Zhou Wangsheng, Judges Discuss the Legal System, 4 PE-KING UNIV. L.J. 50 (1989)).
158. See Clarke, supra note 150, at 266-268.
159. See id. This practice is also confirmed by Stanley Lubman’s observations. See Lubman, supra note 149.
stipulate that the regime of international settlement in regard to
property title in Shanghai was "simple." 161 This pronouncement
can hardly be said for today's complex system of different and over-
lapping forms of dispute resolution in China. In fact, in modern
terms, ADR could be said to be a measure of crime prevention.

The following are methods of dispute resolution in the PRC:
benevolent contracts negotiations, conciliation, arbitration clauses,
arbitration agreements, and economic tribunals. 162 Although these
are all distinct methods, 163 they are all tied together in achieving ac-
cord, and the emphasis on li over fa. Courts and arbitral bodies
routinely engage in conciliation during the course of litigation and
arbitration proceedings, suggesting that despite institutional differ-
ences conciliation, arbitration, and litigation operate along a con-
tinuum of dispute resolution methods. 164 Interestingly, these tech-
niques can also frequently be observed in lower level European
courts. 165 In the United States, this practice is seen with the increas-
ingly used court-annexed ADR. 166

B. Mediation

One of the most striking aspects of dispute resolution in the
PRC is the importance of mediation. 167 To the Chinese, mediation
is a natural extension of Confucian ethics, and therefore has the

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161. See Tchang Teng-Ti, Les Titres de Location Perpétuelle sur les
Concessions de Shanghai [The Titles of the Usual Locations of the
Concessions of Shanghai] 12 (1940).
162. See Malte Schindhelm & Hansjörg Haack, Wohlwollende Vertrag-
sverhandlung, Schiedsvereinbarungen, Wirtschaftsgerichte als Möglic-
keiten der Streitbeilegung, Auswahlbibliographie zum modernen Recht der
Volksrepublik China [Selected Bibliography to Modern Law of the People's
163. See Ge Liu & Alexander Lourie, International Commercial Arbitration in
China: History, New Developments, and Current Practice, 28 J. MARSHALL L. REv. 539,
164. See Potter, supra note 128, at 70.
165. See id. There are provisions in Chinese Civil Procedure Codes where the
judge is compelled to act as mediator. From personal observation I can tell that
judges do this amply in a rather informal way, at nearly any point during the pro-
cedings up to the final judgment.
166. For examples of articles on the current debate on court-annexed ADR in
the United States, see Steven R. Wirth & Joseph P. Mitchell, Note, A Uniform Struc-
tural Basis for Nationwide Authorization of Bankruptcy Court-Annexed Mediation, 6 AM.
167. See Jerome Alan Cohen, Chinese Mediation on the Eve of Modernization, 54
longest standing position in Chinese tradition, and is pervasive in China.\textsuperscript{168} Traditionally, parties mutually agree to a resolution with the guidance of an experienced and respected elder.\textsuperscript{169} This method stresses agreement, respect, and right relationships. Mediation may be conducted by people's mediation committees, administrative bodies, arbitral tribunals or courts.\textsuperscript{170}

In China, mediators investigate facts, "persuade and educate" the disputants, often leading to "self-criticism" and change by the disputants.\textsuperscript{171} For example, in one dispute involving the marital problems of a husband and wife, which included allegations of abuse by the wife, the mediator suggested that the couple go to Beijing for a holiday.\textsuperscript{172} "[T]he matter was resolved when the husband expressed regret that he abused his wife."\textsuperscript{173} In another instance, after mediation, an unmarried woman who had become pregnant agreed to write a "self-criticism" and pay a fine.\textsuperscript{174} In a third instance, a grandson was angry with his grandmother over her living arrangements.\textsuperscript{175} The neighborhood mediation "committee met with the disputants and reminded the grandson that his grandmother, who was ninety-four years old, did not have long to live and that he should therefore try to make her happy."\textsuperscript{176} One mediation leader stated that the goal of the neighborhood mediation committees was to "make people happy" and to see that people "live in harmony."\textsuperscript{177}

C. Arbitration

Ideally, arbitration is suited to the resolution of a dispute in a friendly personal and business relationship; in some circles arbitration is appropriate because it is taboo to force the other party be-

\textsuperscript{169} This practice harks back to the practice in traditional imperial China. See CHEN, supra note 97, at 12.
\textsuperscript{170} See XICUAN & LINGYUAN, supra note 120, at 203.
\textsuperscript{171} See Perkovich, supra note 168, at 325-26 (1996) (discussing several examples of Chinese mediation models).
\textsuperscript{172} See id.
\textsuperscript{173} Id.
\textsuperscript{174} See id.
\textsuperscript{175} See id. at 326.
\textsuperscript{176} Id. at 326-27.
\textsuperscript{177} Id. at 327.
fore a governmental tribunal.\textsuperscript{178} In China, arbitration is a growing area of dispute resolution because of the country’s desire to participate in the world economy and the traditional low-keyed role of its judiciary.\textsuperscript{179} However, although Western arbitration involves a third party deciding a dispute between two other parties, the principles and goals of Chinese arbitration are similar to those in mediation and negotiation, promoting Chinese interests and long-term right relations. In fact, the chief characteristic of Chinese arbitration that distinguishes it from non-Chinese arbitration is that if the Chinese parties so desire, conciliation may be used during the process of arbitration.\textsuperscript{180} If the conciliation is unsuccessful, upon request, an arbitral judgment will be made.\textsuperscript{181}

The legal framework for Chinese arbitration is governed by the Civil Procedure Law of 1991 and the Arbitration Law, which was adopted in 1994.\textsuperscript{182} Before these laws were enacted, arbitration was regulated by a combination of central government decrees, statutes, regulations and common practice.\textsuperscript{183}

The China International Economic and Trade Arbitration Commission (CIETAC) is the sole organization authorized to hear non-maritime commercial arbitrations between Chinese and foreign parties.\textsuperscript{184} CIETAC’s arbitrators include arbitrators from Hong Kong, Macau, other foreign countries and mainland China.\textsuperscript{185} The newest crop of arbitrators are members of the legal profession.\textsuperscript{186}

In general, parties to international transactions have the right to choose arbitration rather than litigation to resolve their disputes in virtually all situations. Parties have the right to decide who will arbitrate their case, and hearings are conducted at CIETAC headquarters or at one of its branches.\textsuperscript{187}

\begin{itemize}
\item \textsuperscript{178} See Thomas Ruede & Reimer Hadenfeldt, Schweizerisches Schiedsgerichtsrecht [Swiss Law of Arbitration] § 6, at 28 (2d ed. 1993).
\item \textsuperscript{179} See Blay, supra note 140, at 331-39.
\item \textsuperscript{180} See Liu & Lourie, supra note 163, at 539, 558.
\item \textsuperscript{181} See generally James T. Peter, Med-Arb In International Arbitration, 8 AM. REV. INT’L ARB. 83, 106-08 (1997) (discussing the Chinese practice of combining conciliation and arbitration).
\item \textsuperscript{182} See Liu & Lourie, supra note 163, at 549.
\item \textsuperscript{183} See id. at 540.
\item \textsuperscript{184} See Blay, supra note 140, at 332.
\item \textsuperscript{185} See Law: Seeking Out the Compromise, China Britian Trade Rev., May 1, 1997, available in 1999 WL 19539317 (stating that CIETAC is comprised of 137 foreign arbitrators).
\item \textsuperscript{186} See Blay, supra note 140, at 332.
\item \textsuperscript{187} See Guiguo Wang, Business Law of China 549 (1993).
\end{itemize}
Article 51 of the Arbitration Rules of CIETAC considers a wide range of protection of the parties in case of failed conciliation in an arbitral setting. Article 51 states that:

any remarks, views and proposals which have been made, raised, put forward, acknowledged, accepted or rejected by the other party or by the arbitration tribunal in the process of conciliation shall not be invoked as grounds for any claim, defense or counterclaim in subsequent arbitration proceedings, judicial proceedings or any other proceedings.\(^{188}\)

This provision is broader than the Rules of Optional Conciliation according to Article 11 of the International Chamber of Commerce (ICC).\(^{189}\)

Chinese courts do not have jurisdiction over the dispute if the parties have reached an effective arbitration agreement, and arbitration awards are final and may be enforced by the courts under a very simple procedure under the Civil Procedure Law.\(^{190}\) Chinese courts may also enforce arbitration awards by foreign arbitration bodies located in a foreign country which is a member of the New York Convention.\(^{191}\) It should be noted however, that a Chinese court may decide not to enforce an arbitral award if the Chinese court believes the arbitration award to be contrary to Chinese social and public interests.\(^{192}\) Other countries have established public policy clauses.\(^{193}\) If the Chinese judiciary handles the "public order" clause too liberally this may backfire; a recent trend shows the de-

\(^{188}\). See Ben Beaumont et al., Chinese International Commercial Arbitration 101 (1994); see also Fed. R. Evid. 408 (regarding the admissibility of negotiations in subsequent judicial proceedings).

\(^{189}\). See Beaumont, supra note 188, at 63. The ICC, headquartered in Paris, has been the dominant institution in international arbitration since World War II. See id. The type of transnational commercial dispute that may be resolved by ICC arbitration is not limited by the parties' business, nationality, or whether they are in the public or private sector. See id.

\(^{190}\). See Wang, supra note 187, at 550.

\(^{191}\). See id.

\(^{192}\). See Code of Civil Procedure of the People's Republic of China, Act of Apr. 9, 1991, 3 China L. for Foreign Bus. Reg. (CCH), ¶ 19-201. Even though an award may be final (not able to be appealed), its enforcement is always another issue.

sire of Chinese claimants to enforce arbitral awards abroad. 194

The combined role of conciliator/arbitrator is common in other Asian countries and has been accepted by dispute resolution centers in the Pacific Rim. 195 However, while countries such as Indonesia and Korea suspend arbitration hearings while a conciliation is attempted, in China arbitration and conciliation are combined in an on-going process. 196

The next section examines negotiations with the Chinese, which are best understood in light of the foregoing discussion of history, law, and dispute resolution.

VI. CROSS-CULTURAL NEGOTIATIONS WITH THE CHINESE

A. People’s Republic of China

As a practical matter, and in light of the above discussion, successful foreigners in China are the ones who adapt themselves well to dealing with the Chinese without fa, including law, arbitration or litigation. The correct approach to negotiation with the Chinese is the promotion of li, a long-term relationship, the respectful promotion of Chinese interests, the maintenance of equanimity and friendship, and lastly the promotion of the foreign party’s interests.

Companies who are successful overseas spend fifty percent longer in negotiations than the unsuccessful ones. 197 As confirmed by countless businesspeople, the key to negotiations in China is patience, patience, and more patience, intermingled with a lot of informal meetings, banquets, and time for the opposing side to communicate with their superiors. 198 However, many foreigners fail to understand what is behind this factor of patience with the Chinese. The answer is: li, not fa must be the focus of negotiations.

Many foreigners, however, have never correctly learned to negotiate in their own culture, pushing and shoving for short-term

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195. See Donahey, supra note 107, at 74.
196. See id. at 75. Various models of this combination are examined in Steven J. Burton, Combining Conciliation with Arbitration of International Commercial Disputes, 18 HASTINGS INT’L & COMP. L. REV. 637, 639 (1995).
197. See Marita van Oldenborgh, Court with Care, 76 INT’L BUS., Apr. 1995, at 20.
198. See id.
negotiating advantages, and they are used to making mistakes. If a foreigner is ignorant of deferential treatment which must be afforded the Chinese, she may find a very compliant Chinese negotiator. In fact, in order to preserve amity, the Chinese negotiator may say "yes" to all of the foreigner's demands. "To preserve the atmosphere of harmony, Chinese are reluctant to say 'no' to the face of the other party." However, this Chinese negotiator's action is only a facade. Inside, the Chinese negotiator will have no intention of following through on this commitment. Moreover, there may be almost no legal enforcement of this agreement between the foreigner and the Chinese negotiator.

Or, in response to a foreign negotiator's style, the Chinese may refuse all of the foreigner's demands and be completely unyielding. In either case, the foreign negotiator has accomplished nothing, either with a completely yielding (but ultimately noncompliant) negotiator, or a completely unyielding negotiator.

So, how does the foreign negotiator proceed? Firstly, the foreign negotiator, focusing on li, must woo her Chinese counterpart by promoting a respectful long-term relationship. The foreign negotiator should observe Chinese social customs meticulously, for example, dining together, and inquiring about each others' families. Effective negotiators must view meal, ceremony and tour invitations as times for interpersonal relationship building, and therefore as key to the negotiating process.

Secondly, the foreign negotiator must also be aware of the role of the administrative bureaucracy and hierarchy in negotiations, for example, in negotiating with state-owned enterprises. Foreigners might prefer that higher personnel be present during all negotiations. These bosses may be more mindful of the overall ne-

200. Huang, supra note 22, at 140.
201. This technique applies to other East Asian countries' negotiators as well. See Rosalie Tung, Negotiating with East Asians, in International Business Negotiations, supra note 26, at 379.
202. "The Chinese make great efforts to affect the other party with hospitality." Huang, supra note 22, at 141.
203. See Acuff, supra note 36, at 309.
205. China's history includes the history of the development of bureaucracy. See Foster, supra note 34, at 68.
Cross-cultural negotiations, rather than the details of the deal. This may be helpful when parties are deadlocked on details and may make the ultimate outcome more permanent. If they are not present, then the foreign negotiator must factor communication with these bosses into the time needed for negotiation.206

Third, the foreign negotiator must diligently study the Chinese interest in her deal. If the foreign negotiator is willing to bend over backwards to ensure a fair deal for the Chinese, the Chinese will reciprocate for the foreigner many times over.207 Keep in mind, that any agreement ultimately needs the cooperation of local authorities.208 Local authorities will only cooperate if they feel that they are respected. The rewards of respecting the Chinese, however, may yield generations worth of good will.209

Lastly, the foreign negotiator must be open to the possibility that a written contract is often not seen as the end of negotiations with the Chinese, but the beginning of a relationship.210 The Chinese may look to foreigners to allow numerous changes to the contract after it has been signed. Although this arrangement may not be ideal for the foreign negotiation, again foreigners should consider interests, and not only positions, in their long-term relationship with the Chinese. The Chinese should also consider the

206. See Foster, supra note 34, at 68.
208. See Huang, supra note 22, at 144.
209. This relationship, however, must still be nurtured and maintained. See Foster, supra note 34, at 285. Foster also gives an example of how studying the Chinese interest, and flexibility, akin to principled negotiation discussed earlier, can be helpful in negotiating with the Chinese. See id. at 286. A chief executive of a global U.S. telecommunications company, Manning, after months of negotiating with the Chinese government’s communications representative, Mr. Wang, believes that he is about to reach an agreement. See id. His company’s policy is global price uniformity; suddenly Mr. Wang asks for special pricing. See id. Manning cannot compromise on pricing; however, he needs to see that the Chinese are testing his friendship. See id. Instead of being a deal-breaker, there is an opportunity for enhancing the long-term relationship between the two parties. See id. Manning offers a second possibility: providing the Chinese with new equipment at a reduced cost. See id. In return the Chinese agree to help him out with his regulatory mandate and accept the original pricing. See id. In this solution, the executive recognized the real underlying cultural and economic needs of the Chinese, sought options, and satisfied their need for “special attention” and treatment. See id. at 286-87. It is interesting that the solution here is remarkably similar to what Lay, supra note 13, Fisher, supra note 15, and Lauchli, supra note 199, would propose.
210. See Foster, supra note 34, at 214.
weight of legal documentation.

B. Huaqiao: The Chinese Outside the PRC

A discussion of negotiations with the Chinese would be lacking without noting the role of huaqiao, or the overseas Chinese. Because the overseas Chinese have dominated foreign investment in China, they have a significant impact on negotiations in China, not to mention in their adopted countries.

There are two main groups of huaqiao, those in Asia (Singapore, Taiwan, Indonesia, Malaysia, Thailand, Philippines, etc.) and those in North America (the United States and Canada). In their new home countries, these persons often create successful business communities. The communal spirit in East Asia is quite strong.

While the huaqiao in Asia are culturally more similar to the mainland Chinese (minus the aspect of the Communist system), North American huaqiao are quite diverse. Depending on generation, family type, length of stay in their new home country, and other factors, North American huaqiao fall along a wide cultural spectrum, ranging from very close to their Chinese roots, to almost integrated into their new society.

Huaqiao have been extremely influential in the introduction of foreign capital into China. They often serve as “middlemen” for other foreign investors. It has been noted that those huaqiao who are not working within the confines of a Westernized legal system perpetuate an informal view of law in China.

VII. CONCLUSION

In the post-Cold War era, cross-cultural negotiations represent difficulties and opportunities. The clash of civilizations accentuates

211. See Weidenbaum, supra note 68, at 22.
212. See id.
214. Historically, educational, political, cultural and linguistic ties run very deep. See Gamer, supra note 56, at 141-45.
216. See Weidenbaum, supra note 68, at 24.
217. See id.
218. See Lubman, supra note 122, at 18-19.
CROSS-CULTURAL NEGOTIATIONS

Cultural differences. At the same time, several legal systems in the Western hemisphere are moving towards a greater acceptance of ADR. China, steeped in ADR, is moving towards further legalization of its society. ADR, because of its flexibility, may be a solution for the clash of civilizations.

In practice, foreigners who are engaged in negotiations with the Chinese, need a familiarization with Chinese thought, history and ADR. This knowledge is essential for long-term positive results. It is also an opportunity for foreigners to remind themselves more of the importance of 仁, virtue and deference, and traditional values, in Chinese ADR. This approach to ADR could have ramifications for Western social systems and cross-cultural negotiations and the envisioned resolution of the clash of civilizations.

On the other hand, China will hopefully honor more findings through institutionalized proceedings, and recognize international standards in terms of enforcement of contracts and particularly awards that may not in every instance be beneficial for a local Chinese interest. The decrease in mistrust towards foreigners will be stimulating for cross-cultural exchange as well.

Should “Chinese ADR” be adapted by others? I will not speculate as to whether this is immediately desirable or possible. One application of Chinese ADR would be the combination of arbitration and conciliation. If this combination is pursued, any adaptation should involve an agreement about the combination of arbitration and conciliation, and the appropriate handling of confidential information which is disclosed during conciliation. This idea may in fact be a creative cross-fertilization of Western and the Chinese models. Other models and combinations should be pursued as well.