

NEGOTIATIONS AND OTHER ADR WITH THE CHINESE

by [Urs Martin Laeuchli](#)

Cross-cultural negotiations and alternative dispute resolution (ADR)¹ with the Chinese, in particular, exemplify how civilization clashes may be reconciled in the post-Cold War era.

Negotiations has its origins in rhetoric, the art of communication. In the last twenty years the European-American tradition has seen a renaissance of Aristotelian thinking about rhetoric. This has reactivated the idea of alterocentric thinking, and led to greater interest in principled negotiation and other forms of ADR.

Simultaneously, China, steeped in traditional ADR, is becoming more open to outsiders.

Cross-cultural negotiations are inherently more difficult than intra cultural negotiations, however, they are among the most intellectually exciting challenges in the field of dispute resolution.² According to Huntington, Western centrism has declined and the interaction between and among all civilizations has again become the centerpiece of historical inquiry.³ Cross-cultural exchange with modern China must be understood in the context of both her ancient and modern history of dealing with foreigners, her prospects for becoming a major power in the twenty-first century, and her history of dispute resolution.

Throughout history, relations between China and outside nations have been problematic. There have been repeated attempts to remove all foreigners from China. However, since Deng Xiaoping's plan of modernization in the late nineteen-seventies, China has increasingly sought economic and legal exchange with the United States and other nations.⁴

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. 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, husband and wife, elder and younger brother, and friend and friend. [5](#) *Li*, or propriety, arises from the observance of these right relationships. [6](#) Confucius held a low view of *fa*, or law.

On the other hand, an opposing school of thought, the Legalists, held that a nation needed to be held together by strict laws with harsh punishments.[7](#) To this day, the state of Chinese law is in flux. 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, [8](#) but by the internalization of Confucian ethical principles as the result of thousands of years of socialization.

Nevertheless, since 1978, China, in order to achieve economic development and greater contact with foreigners, has aggressively pursued setting up laws, rules and regulations that govern arbitration and litigation. However, ADR in China is not considered "alternative", but mainstream.

One of the most striking aspects of dispute resolution in China is the importance of mediation.[9](#) To the Chinese it is a natural extension of Confucian ethics, and therefore has the longest-standing position in Chinese tradition and is pervasive in China. [10](#) In China, arbitration is a growing area because of the country's desire to participate in the world economy and the traditional low-keyed role of its judiciary. 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, that is, concord, promoting Chinese interests and long-term right relations.

As a practical matter, 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. [11](#) The foreign negotiator should observe Chinese social customs meticulously, for example dining together, [12](#) and inquiring about each others' families. [13](#) Secondly, the foreign negotiator must also be aware of the role of the administrative bureaucracy and hierarchy in negotiations, e.g., in negotiating with state-owned enterprises. [14](#) Thirdly, 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. 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. [15](#)

Cross-cultural exchange with China should result in many positive combinations. For example, China should 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 beneficial as well, namely in light of China's increased involvement with world trade.

Should others adopt or adapt Chinese ADR? One application of Chinese ADR would be the combination of arbitration and conciliation. If this 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 may in fact be a creative cross-

fertilization of Western and Chinese models. Other models and combinations should be pursued as well.

ENDNOTES:

[1](#) Or, as I prefer to say, ADR stands for "Advanced Dispute Resolution."

[2](#) Wyatt McDowell and Wayne I. Fagan, Perspective on ADR from the Section's Committees, Dynamics in Cross-Cultural Negotiations, ABA Dispute Resolution Magazine, Spring 1996, 18.

[3](#) Samuel P. Huntington, The Clash of Civilizations and the Remaking of the World Order, 21-29 (1996).

[4](#) See Jonathan D. Spence, The Search for Modern China 653-659 (1990).

[5](#) Albert H.Y. Chen, An Introduction to the Legal System of the People's Republic of China 10 (1993).

[6](#) Xin Ren, Tradition of the Law and the Law of the Tradition: Law, State, and Social Control in China 20 (1997).

[7](#) Ren, supra note 6, at 21. For another discussion of legalism, see Hyung I. Kim, Fundamental Legal Concepts of China and the West: A Comparative Study 5-6 (1981).

[8](#) The Chinese term for right "quanli", may include "interest" itself. For further discussion, see Randall P. Peerenboom, Rights, Interests, and the Interest in Rights in China, 31 Stan. J. Int'l L. 359, 360 (1995), with reference to the American philosopher Nozick, et.al.

[9](#) Jerome Alan Cohen, Chinese Mediation on the Eve of

Modernization, 54 Cal. L. Rev. 1201 (1966), reprinted in 3 Harvard Law School Studies in Chinese Law 1201, 1201 (1966).

[10](#) See Robert Perkovich, "A Comparative Analysis of Community Mediation in the United States and the People's Republic of China", 10 Temp. Int'l & Comp. L.J. 313, 313 (1996).

[11](#) Marita van Oldenborgh, Court with Care, Int'l Bus., Apr. 1995, at 20.

[12](#) "The Chinese make great efforts to affect the other party with hospitality." Zhengdong Huang in "Negotiation in China: Cultural and Practical Characteristics", China Law Rptr. 141 (1990).

[13](#) Frank L. Acuff, How to Negotiate Anything with Anyone Anywhere around the World 309 (1997).

[14](#) China's history includes the history of the development of bureaucracy. Dean Allen Foster, Bargaining Across Borders: How to Negotiate Business Successfully Anywhere in the World 68 (1992).

[15](#) Foster, supra note 14 at 214.