Another common tactic is to leave all the important decisions to the last minute then demand responses immediately.[151] This often entails a late night final negotiation session the day before the other party flies out. This slow-slow quick-quick process irritates Westerners and unless they are aware of the dynamics of the game can lead them to make unwise last-minute agreements in order to have something to show for their time in China. This hurried agreement can later cause conflict and be the subject of disputes or misunderstandings. What this means is that the foreign party will be temporarily out of their comfort zone when they are negotiating. I learnt many years ago to never advise my Chinese counterparts what flight I was on or the exact day of my arrival. This allowed me time to follow my own schedule and arrange meetings with other parties.

¶3-203 Venue – Hometown Advantage

Negotiations usually take place in China; the Chinese may visit another country on an exploratory visit but will insist the substantive negotiations take place in China. An advantage to this is that the decision makers are in country not overseas and solves the problem of trying to locate and communicate from afar. The downside is they have what Pye calls the "home court advantage."[152] The home court advantage is significant and creates the impression the visitor must perform well in order to be allowed to do business in China.[153] Westerners are guests of the host Chinese, which allows them to set the agenda and creates an ambience where the foreigner is seen to be seeking an audience at the Court of the Chinese as in ancient times. The visitor will often be kept in ignorance as to their agenda in China. A general schedule will be agreed upon before arrival but once you arrive they will maintain complete control over your movements.[154] This allows the Chinese to take full advantage of the visitor's culture shock, fatigue, lack of information and back-up resources.[155]

¶3-204 Hospitality

One of the backdrops to a dispute in China is often that the original deal was brought together during part of the wining and dining phase of the original negotiation. Chinese hospitality is lavish and constant. An important fact that most Western negotiators are often not aware of/forget when visiting China or discussing business with Chinese is "you are never ever off duty." Chinese uses banquets, lunches, karaoke, visits to saunas and scenic trips to evaluate the other party, develop the relationship, send and gain information. This controlling of the ambience is all part of the negotiation and can influence the behaviour of the parties, as Henry Kissinger noted during negotiations with Chinese Government officials, "after a dinner of Peking duck I will agree to

[151] ibid.

[152] Pye, op.cit. p.32

[153] ibid.

[154] Pye, op.cit. p.32

[155] Huang, Andrulsruilis and Tong, op.cit. p.72

anything."[156] Often, everything said at these informal events will be file noted later and mentioned during the substantive formal negotiation or at the mediation if there is a dispute.

In Asia and China in particular, activities that happen outside of official working hours are extremely important. More deals are done over a meal than anywhere else. The apparent success of a negotiation between the Australian government and the Chinese to clinch a AU$25 billion gas deal was headlined "Long lunches clinched deal with China." A member of the negotiating team said, "If you didn't socialise it would be much harder to get your point across."[157] So, these informal meetings and what was said at them will often be mentioned during a mediation session. During mediation, the Chinese will take a holistic approach and describe every interaction including the social occasions with the other party as part of the negotiation and the deal. If the Western party insists on confining the discussions to just one part, for example, the contract, then the mediation could struggle to move past the opening meeting.

¶3-205 The Negotiating Team

Chinese negotiating teams always present a united front. In China, on an important deal, the Chinese could arrive with ten persons in their team. Usually Westerner's will bring three at most. The individualistic style of Western negotiators, unless carefully managed by a team leader, can result in an "altogether and one at a time" situation. Chinese teams will normally co-operate and work with the leader, and team members will support one another both verbally and non-verbally. Many Western negotiating teams have yet to understand that in China, throughout the negotiation, there is a need to ensure each member of the negotiating team's statements are reinforced by their colleagues.

Allowing each member of the team to speak as they see fit is a mistake. The Chinese, recording everything carefully, will later exploit any inconsistency among the other team's members,[158] eg "but last week Mary said your company…" Arguing that the comment must be seen in the overall context of your position will not be accepted. It will be used to try shame and confuse the other party. They probably know full well it was an off the cuff remark or said light heartedly but if a team member gave them a weapon they are happy to use it if needed.

¶3-206 The Team

Technical experts, academics and lawyers are often extremely difficult to manage in a situation that requires strict negotiation discipline. They are

[156] In Solomon Richard, p.61

[157] G. Sheridan, N. Wilson and C. Armitage, Weekend Australian Newspaper, 10-11 August, 2002, pp.1-2

[158] Sheridan, Wilson and Armitage, op.cit. p.5

usually paid handsomely for their individual professional skills in their home environment. They have been trained to stand on their own two feet and debate, lecture or argue within their area of expertise. These professionals are hard to control at a negotiation meeting and team leaders often have a hard time getting them to stick to a disciplined format. Another problem is that it is often very difficult for Western negotiators to deal with silent periods during negotiations; so the individualistic, low context individual "professional talker" will often break the silence even if it means making a concession.

¶3-207 Negotiators

Not everyone can make a good negotiator and the demands of inter-cultural negotiation are more stringent than for mono-cultural work.[159] The job requires stamina, intelligence, empathetic skills and above all, flexibility. Curry states that top CEO's or bosses are invariably bad negotiators.[160] This is due to their being used to having others follow their lead. Authority goes with the territory; they are often not used to negotiating a consensus amongst their staff. They always get the final word. During a mediation session they can sometimes be their own worst enemy, being unable to listen or tolerate the others' position.

In contrast, as Fang notes, the Chinese negotiating team is essentially a consensus-seeking group. They represent positions agreed on by a large number of people within their organisation;[161] they are confident in their negotiating style and positions. They rarely show any disunity but will, however, use the **hei lien bai lien** (good cop bad cop)[162] routine and use the 'friendly" Chinese member to gain concessions. Chinese are very good strategists and are used to working as a team to purposely keep others guessing and they keep moving the goal posts.

¶3-208 Language and Interpreters

During negotiations or mediation sessions it is best that each party has his/her own interpreter. A Chinese party's interpreter may have inadequate skills and experience but even if their interpreter is highly skilled, to successfully utilise an interpreter parties must be provided with more than mere oral translation during the negotiations.[163] As mentioned, Chinese communication is high context communication. Negotiators and mediators must move beyond explicit Chinese wishes to discover their needs and wants. Without having independent interpreters many nuances may be missed.[164]

[159] Curry, op.cit. p.1

[160] Ibid

[161] Fang, op.cit. p.135

[162] N.B. Not a literal translation

[163] Fang, op.cit. p.203

[164] Pye, op.cit. p.71

Chinese Language Specialist

It must be remembered that professional interpreters are hired to do a specific job; they may be reluctant to give advice on other matters or give the wrong advice.[165] Implicit clues about the Chinese parties misunderstandings or attitude may not be picked up.[166] It is for this reason very important, if possible, during mediation sessions for each party to bring their own Chinese speaker. They can interpret the coded important messages the Chinese send during the negotiation which may be by way of metaphors allegories and hints.[167] Do not be surprised, however, if Chinese parties may sometimes pretend not to understand a non-Chinese Mandarin speaker. The difficulty for foreigners of learning Chinese has been, as Curry states, a "tactical tool for centuries."[168] They do not feel comfortable having a foreigner within the language circle.

Having a Chinese language specialist also allows for an informal exchange of views outside the formal negotiating periods. It is standard practice for a Chinese to approach Chinese speaking negotiators during lunch or in break out times to exchange views, offer insights into their position or seek clarification of the other sides positions. As Pye notes, Japanese negotiation teams always have Chinese speakers who are sought out by the Chinese for informal discussions, which are unrestrained by the formal atmosphere of a formal meeting.[169]

The use of Chinese native speakers, as opposed to non-Chinese fluent Mandarin speakers, can be useful but there can be problems. The Chinese person may speak English, for example, but that does not mean they have a full understanding of Western culture. Also, the Chinese will often exert considerable pressure on them to gain concessions. They will use their Chineseness to create a bond between them and try to use it to weaken their objectivity and loyalty to their employer. "**women dou shi zhong guo ren**." (We are all Chinese.) The ethnic Chinese person will be caught in a vice of the two parties' interests and expectations.[170] This is often the case at mediations and the mediator, when asked by the Chinese party, "can I meet with the other team's Chinese member in private?", will need to think about this carefully especially if they cannot speak the language so will not be able to follow the conversation. It can be fairly innocent but could develop into a bullying tactic.

¶3-209 Inscrutable Chinese

In the past Chinese and other Asians, for instance, the Japanese have been described as being "inscrutable", in other words, impossible, to read when

[165] Bucknall, op.cit. p.55

[166] Pye, op.cit. p.71

[167] Ian Rae Financial Times, 2001, p.2 [www.ftmastering.com/mmo] Accessed 23 August 2002

[168] Cury,op.cit. p.2

[169] Pye, op.cit. p.74

[170] Pye, op.cit. p.73

negotiating with them. This Chinese characteristic that evolved from the need to protect face is the apparent lack of emotion shown during negotiations, hiding one's emotions is second nature to most Chinese.[171] To openly display anger, frustration or dislike of another disrupts harmony. Not showing emotions like feelings of anger or joy helps to maintain harmony by not imposing one's feelings on others.[172] Restraining emotional expression does not mean that emotion is absent of course and usually there will be some "leaking" of the hidden emotion if one observes carefully. Smiling, however, does not always mean they are being friendly; a smile is often used to mask embarrassment or lack of understanding. This last behaviour can be extremely disconcerting to Westerners and one of my former colleagues, who was feeling rather upset about a certain situation, eventually burst into tears when the Chinese person she was talking to just kept smiling at her no matter what she said. So, reading body language needs to done with care, the "reader" must allow for differences of expression in other cultures.

¶3-210 Age

The Chinese accord greater respect to an older and higher status negotiator.[173] The basic principles of Confucianism include respect for one's elders. Age is an asset when visiting Asia. Persons under forty are not really considered grown up. The decision makers in China are nearly always forty and upwards. They do not feel comfortable dealing with a young person and will take it as a sign of a lack of respect. As mentioned earlier in this book, this can affect the relationship between the mediator and the parties.

¶3-211 Patience

Patience is the indispensable attribute in negotiating with a Chinese.[174] It is also the negotiator's most important quality.[175] Chinese parties will often refuse to take "no" for an answer. They will return time after time to their original proposal and ask for a concession.[176] A mediator is wise to try and prepare non-Chinese parties to expect that they will need considerable patience.

¶3-212 Stratagems

Most books on Chinese negotiating stratagems will refer to Sun Tzu's Art of War an ancient Chinese military treatise which lists detailed stratagems for defeating your enemy. The Art of War has been studied by countless generations of Chinese and few Chinese business people would be unaware of

[171] Curry, op.cit. p.36
[172] Michael Bond, op. cit. p.233
[173] Hong Seng Woo, op.cit. p.117
[174] Curry, op.cit. p.3
[175] Cray, op.cit. p.87
[176] Pye, op.cit. p.85

it. It has been said correctly in my view, that Sun Tzu's central strategic goal is "subdue the enemy without fighting."[177]

Fang lists 36 Chinese negotiating tactics.[178] Many are derived from Sun Tzu's stratagems. Most of the literature on this subject notes the most common tactics employed by Chinese negotiators. The most important thing to remember is that any lists or notes for negotiators are not conclusive.

I do not intend to cover the many tactics which may be employed in negotiation in China but will mention just a few below to give a sense of what can happen. (Obviously many negotiation tactics are used by negotiators from all cultures and are not solely used in China.) Some of the most common based on the my own experience and those of others are:

- use of terrain:
  - keep the other party off balance, change the schedule and exploit culture shock;
- divide and conquer:
  - exploit divisions in the other team;[179]
- deception:
  - using deception to convince the other they are stronger they are;[180]
- appearing to be friendly:
  - using friendship as a ploy to securing concessions;[181]
- fatigue:
  - Chinese negotiators have great stamina and demonstrate an apparent love of boredom;[182]
- playing competitors off against each other:[183]
  - they often say they are in simultaneous talks with other parties; and
- price:
  - no matter what price the other side quotes it is always too high.

[177] Fang, op.cit. p.155
[178] Fang, op.cit. p.289
[179] Fang, op.cit. p.291
[180] Fang, op.cit. p.289
[181] Curry, op.cit. p.147
[182] Pye, op.cit. p.85
[183] Fang, op.cit. p.290, Curry, op.cit. p.147

- confirming and discussing authority;
- confirming who will attend and role of decision makers;
- getting an initial understanding of the background of the dispute;
- discussing any previous settlement discussions and offers;
- describing the mediator's role;
- describing the mediator's approach and style; and
- answering any questions.

It is also a chance for the mediator to ask the parties to prepare costs information and undertake a risk analysis if they have not already done so. Quite often, parties who have never attended mediation before may not have worked through their own process issues like who will present the opening statement and for how long. Parties and their legal advisers are occasionally quite surprised to find out that everyone attending the mediation will have the opportunity speak, so giving them a chance to prepare will not embarrass them on the day. Mediation is voluntary and that includes the parties having the right to refuse to meet in a joint session with the other side. Whilst the mediator will not try to force the reluctant party to do something against their will, this is the type of issue which can be discussed fully during pre-mediation contact.

In my experience a preliminary meeting can be of great benefit to a cross-cultural mediation. This may include:

- a discussion of cultural expectations;
- an explanation of how the mediator's role in Hong Kong say may differ from China or vice versa;
- preferred forms of address;
- choice of the pivot language (main language to be used during the mediation);
- whether or not interpreters will be required; and
- any cultural or religious dietary issues.

All pre-mediation contact is confidential whether it is face to face or over the telephone. However, the mediator will normally keep each party informed as to what meetings or telephone conversations have taken place without revealing the content of the discussions.[212] In Asia, it is not uncommon for a mediator to be invited to a pre-mediation lunch by a party rather than meeting in an office but this must be treated with caution as it could create an impression of bias.

[212] Occasionally one party will insist that the mediator does not share any information of this nature however most parties will usually agree that everyone should be kept informed as to what meetings or substantial telephone conversations have taken place.

¶4-082 Setting up the Mediation

Once the preliminary meetings have been held the mediation usually takes place soon afterwards. The day before the mediation the participants list will have been circulated for the last time and any final logistical issues resolved. Depending on the parties wishes the mediation day will commence at 9am or 9:30am and will continue until 5:30pm or 6pm with an understanding that if necessary the mediation will continue beyond that period if all parties agree.

¶4-083 Beginning of the Mediation Day

Most mediators will arrive before the parties, as to arrive late could make a bad impression, lessening confidence in the mediator and be seen as disrespectful. The mediator will often have had no input into the choice of venue and so must adjust to whatever environment the parties have chosen. It is good practice for the mediator to "check out the real estate" before the parties arrive. The mediator should think about where the parties will sit for the first joint session and as sometimes the room will have been set up by someone with little knowledge of the mediator's requirements a readjustment is often needed, for example, the removal of unnecessary items on the conference table which obscures the sightline of the mediator.

If there is a flip chart it should be positioned where everyone can see it clearly. The room and shape of table may dictate much of the seating, but the mediator needs to decide on the best seating arrangement to encourage communication and assist the building of relationships. It is common practice for the mediator to decide where everyone sits especially if there are a large number of people to manage. It will waste time and feel quite confusing if everyone plays "musical chairs" before the mediation begins.

One of the most important practical matters to inspect is the position of the parties' rooms in relation to each other. If for some reason the rooms are next to each other the soundproofing should be tested to find out whether or not the parties can hear each other when they are in a "confidential" private session. In Hong Kong, space is at a premium so unlike overseas the mediator seldom has the luxury of a separate mediator's room. Each of the parties should have a similar private room that can be used as their base during the mediation day, and which the mediator will visit for the private meetings. Mediators also need to familiarise themselves with the location of emergency exits, fire doors, washrooms and IT facilities. Also, it is important that the rooms and/or video conferencing facilities are available until late, in case the mediation extends beyond the agreed hours.

The mediator or service provider will usually have reminded the parties or their legal representatives that someone should arrange for lunch to be delivered and it should be agreed in advance who is going to pay for the food. If held in law firms, hotels or serviced offices drinks and snacks are usually available during the day. Once the mediation begins there is usually not enough time for parties to leave the premises for lunch breaks outside. In most

mediation there is no formal break for lunch, and work will continue throughout the day with the mediator working between the rooms. Apart from saving time it keeps the momentum of the mediation process going forward and keeps everyone focussed on moving towards a possible settlement.

¶4-084 Greeting the Arriving Parties

In a perfect world the mediator will have met with all the attendees prior to the mediation or at least spoken with them by telephone. However, sometimes, for example, an overseas party's flight may arrive too late for a meeting the day before or a lawyer may have been tied up in court so unable to meet the mediator. In that case as one of the key benefits of pre-mediation meetings is the opportunity for the mediator and parties to get to know one and other, the mediator will try to spend a little bit more time in private with the attendees they have not met in order to introduce themselves. The mediator will check that everyone is comfortable with this; otherwise one party may see it as a delaying tactic or feel unhappy about not being informed what is going on. If the parties are Chinese business cards will nearly always be exchanged and this is a good opportunity for the mediator to confirm in private that each side has the required authority to settle if resolution is reached.

First impressions count and the mediator will know that this first meeting even though not in the mediation proper could affect the whole tone of the mediation for the rest of the day. The mediator will often provide information at this stage about what to expect from the day, as well as checking on the parties practical and comfort needs. This is often a good time to check to see if there any time constraints. Does someone have to leave early to catch a plane? If anyone has not yet signed the mediation agreement then this might be a good time to get it signed. After greeting each party the mediator will then allow the parties' time to settle in and hold a final team meeting.

¶4-085 The First Joint Session of the Mediation

The Mediator's Opening

The mediator's opening has four main purposes:

- to set the tone for the mediation;
- to establish the mediator's role and authority;
- to emphasise the ground rules for the mediation; and
- to outline how the day might run.[213]

Whilst every mediation is unique the opening joint session does tend to follow a fairly set framework depending on the mediator's style and training. However, although a mediator can prepare a plan as to how they intend to start the mediation they can rarely plan for the middle or the end of the mediation.

[213] CEDR Handbook p.56

Much of the mediation day will require the mediator to rely on their training, experience and above all their intuition. This is what makes mediation so fascinating but requires intense concentration from the mediator. The mediator cannot "switch off" as they must be alert to even the smallest signals from the parties as to a change in mood or a negotiating position.

Allowing for flexibility and the unexpected is very important; being over reliant on any set formula could go horribly wrong. Parties can change their minds about who will speak first or not, suddenly without warning refuse to meet with the other party in joint session, send different representatives to the mediation at the last minute, insist on only talking about the legal case or exclusively about one area which they know does not interest the other side, play tactical games or pretend to be angry. On the other hand, they might suddenly genuinely wish to settle the matter quickly, reverse their former tactic of fighting for every small concession, put additional new deals on the table and change the way they respond to the other parties without warning.

¶4-086 First Impressions and Tone of the Mediator's Opening

The tone of the opening should be positive and confident so that the parties feel that they are in good hands. The opening should not be too long or overly complicated and is best delivered in an organised manner which indicates the mediator knows what they are doing. Too much information is self-defeating as the parties who are often under a great deal of stress will have difficulty taking it all in.

Each mediator will either adopt a particular style or naturally possess an individual style to employ during the mediator's opening, ranging from the avuncular "everyone's favourite uncle" style, to the crisp "no nonsense commercial executive" chairing a meeting style and everything in between. This is the time where the mediator begins to establish their authority and establish a respectful working relationship. The parties will very much take their cues from the mediator, if the mediator appears disinterested, negative or lacking in energy this will cast a cloud over the whole mediation. If a mediator fails to establish rapport and authority during the first joint session it could be a very difficult day. Done effectively, the mediator's opening will set the tone for the rest of the mediation.

¶4-087 Opening Statement Checklist

Welcome and Parties Introduce Themselves

This can set a positive tone for the opening session but sometimes if the parties know each other well it can be dispensed with.

Mediator's Introduction

This is usually a brief introduction highlighting some aspects of the mediator's background or experience that the parties might find useful to know.

the word "submission" to mean a "legal submission" and provide documents that were really just shortened versions of the court documents.

Please see below some guidance notes for lawyers in preparing:

- case summaries; and
- mediation bundles.

Not all lawyers are happy with providing case summaries as they either do not understand why they are needed or simply do not want to spend the time preparing one. It takes time and skill to prepare a good summary limited in size to five to ten pages. Also, some lawyers subscribe to Mark Twain's dictum. "I didn't have time to write a short letter, so I wrote a long one instead."

A mediation summary is important because it has a different purpose compared to court documents. The summary is for use in a consensual process intended to find a settlement, and which is off the record for all litigation purposes. Its aim should be to identify the key issues.

It is not always possible for parties to agree on the contents of the main body of information forming the background to the case called the "bundle." What is very helpful is if lawyers can agree a reading list for the mediator to read. This saves time and the cost of the mediator receiving two nearly identical bundles before the mediation.

¶6-131 Documentation Suggested for Mediation Case Summaries and Bundle of Documents[301]

Case Summary

The case summary is intended only as a brief document to allow the other party(ies) and the mediator(s) to come to grips with the main issues in the dispute. It serves as a brief explanation of what the dispute is about and should aim to provide:

- a perspective of the dispute to the other party(ies);
- the mediator with the necessary background to the dispute in order to facilitate a discussion; and
- clarification of parties' respective positions and their involvement in the mediation process.

The case summary should be no longer than eight sides of A4 paper long.

Please note that it does not have to be written in a legal format, plain English is fine, the case summary is to assist the Mediator/s understand the main issues not to convince a judge as to the merits of the party(ies)'s case.

[301] CEDR Asia Pacific documentation advice to parties

¶6-132 Content of Case Summary

The case summary should comprise the following components:

- **participants** – an identification of all the protagonists involved in the dispute including:
  - details of decision makers; and
  - explanation of business/personal relationships;
- **the dispute** – a description of the dispute in narrative form that should include:
  - chronology of events – a clear picture through time of the order of events relating to the dispute;
  - matters not at issue between the parties – identification of main facts and/or issues relating to the dispute which are not at issue eg events that led to crisis, background of parties, details of accident, etc;
  - matters at issue between parties – this should be the heart of the case summary. The identification of the key issues that are in dispute will assist in narrowing the spectrum of controversy and thereby focus the parties' energy on resolving them;
  - details of any attempts to settle or offers to date; and
  - cross-reference to key supporting documents contained in bundle.

Conclusion

An opportunity to reiterate key interests and indicate expectations of the process whilst recognising the legitimacy of those of the other party(ies) involved in the dispute. It is also worth considering the best alternatives to a negotiated settlement in the event a resolution is not reached during the mediation, eg consider resolution of dispute through courts (time, likely outcome, costs, etc).

¶6-133 Other Considerations

The parties may also wish to consider the following for inclusion in their case summaries or for discussion at/general preparation for the mediation:

- identification of key interests whilst acknowledging those of other parties can assist in establishing a spirit of co-operation;
- similarly, provision of/reference to independent criteria, precedents or principles may assist in setting objective standards of fairness or benchmark against which parties can measure and legitimise their own claims (eg: independent valuation, industry standards, expert witness); and

- parties should also consider the comparative importance of issues and endeavour to balance factors of different nature – eg: apology (expression of regret) vs liability (admission of responsibility), compensation (finality of payment) vs continuity (on-going relationship to resolve problems/explore new opportunities).

¶6-134 Bundle of Documents

With an emphasis on keeping documents to a minimum, the bundle should comprise of key supporting papers, which clarify the matters in issue between the parties. The bundle is not meant to be a complete file of the case. The purpose is to clarify matters for the mediator and establish objective standards of fairness for the negotiations.

Sometimes parties decide to submit an agreed combined bundle of documents. In the alternative, the parties can decide to submit an agreed reading list for the mediator(s) to read from the bundle of documents, which will save time and provide clarity for the mediator.

¶6-135 Other Issues

It is important to understand that if a document is not in the bundle submitted, a party at the mediation can still rely upon it. The party simply brings the document along to the mediation and draws upon it should the need arise.

The parties are free to submit confidential papers to the mediator(s) if they wish to disclose information to him/her on a confidential basis. Such papers should be separate from the general case summary and clearly labelled "for the mediator's (s') eyes only."

All documents should be sent to the service provider and we will ensure that simultaneous exchange occurs.

The above is an example of what lawyers may wish to submit to the mediator and not meant to be conclusive.

¶6-136 Translation

Translation between Chinese and English is more difficult than that between European languages, this is because the two languages originate from two different language families, namely, Sino-Tibetan and Indo-European, which gives rise to many differences in modes of expression, grammar, syntax and the meaning system. So, if documents need to be translated for the mediation it can be an expensive and difficult undertaking. Using an internet search engine to conduct a free translation is only useful in getting a rough idea what the contents are about. It is definitely not of a sufficiently accurate standard to be relied on in a mediation or court proceedings.

There are some amusing examples of bad translation or unintended meanings for instance when both KFC and Pepsi entered the Chinese markets:

- when translated into Chinese, Pepsi's "[c]ome alive with the Pepsi Generation" became "Pepsi brings your ancestors back from the grave"; and
- in 1987, Kentucky Fried Chicken set up its first mainland China KFC outlet. Their famous "finger-lickin' good" advertisement was translated into Chinese characters that meant "eat your fingers off."

Of course these issues were quickly addressed and today Pepsi is popular in China and KFC restaurants seem to be everywhere.

However, on a more serious note, communication relying on documents which have been translated is fraught with difficulties if the translation is not done really well. Often the parties at mediation will have Chinese-speaking lawyers, who can read in Chinese but this does not mean they will all totally agree on the meaning in either English or Chinese. Of course this can be the case in any dispute, where parties may insist on their own interpretation of a clause or sentence in a contract. Nonetheless, badly translated documents can increase the chance of miscommunication and argument about meaning.

Another factor is that Taiwan and Hong Kong use traditional Chinese characters (**fanti zi** 繁體字) while China changed to simplified characters (**jianti zi** 简体字). So, Mainland Chinese may have difficulty with the traditional characters and those from Hong Kong and Taiwan may struggle with simplified characters. I think it may be useful for non-Chinese lawyers if we examine this issue more closely below.

¶6-137 Simplified Chinese Characters

As mentioned, this is used primarily in Mainland China and is the version taught most widely outside Greater China at the moment. This written form was adopted after the establishment of today's People's Republic of China in 1949. Mao strongly supported this idea, the Chinese Government believed simplifying the writing method would make it easier for people to read and write, which would raise literacy, making it possible for more of the population of China to understand the Government's policies.

¶6-138 Traditional Chinese Characters

They are still used in Hong Kong and Taiwan and as the name suggests, this is the traditional version that has been written by Chinese people for thousands of years. After 1949, people in Hong Kong and Taiwan continued to use the "old" traditional text after political separation. However, a newspaper in Hong Kong, although it can be read quite well by a Taiwanese person, will be written in a style that suits the Cantonese dialect, not the Mandarin or Hokkien dialect they speak in Taiwan.

Another point to note is that although originally Chinese Simplified characters were exact translations of Chinese Traditional characters but with fewer strokes, over time new words have emerged which are not found in each type, which could lead to problems in translation.

Summing up it is suggested that if important documents need to be translated:

- be aware of the translation issues that may arise;
- do not try to save money; it is best to get good translation work done;
- discuss this issue with Chinese staff members;
- check if the other side has already had some translation work done and is willing to share the documents;
- allow time for the translation work to be completed; and
- lastly, make sure the client is happy with the translation work before the mediation.

¶6-140 Preparation with Client

It is vital that the lawyer set time aside to meet with the client before the mediation.[302] Working as a team the lawyer(s) and client(s) can prepare carefully, go over the negotiation strategy and make sure everything is ready. If the lawyer has not met the client before, it is a good time to get to know them and something about their personality.

As mentioned, in Hong Kong, there is now a duty imposed under the CJR on all lawyers to discuss mediation with their clients. However, throughout Greater China the knowledge and skill to educate clients about mediation and other ADR processes is not uniform. It would not be true to state that even in Hong Kong where lawyers are bound to educate their clients about mediation, this is carried out effectively across the board. Many lawyers in the region have taken the time to learn about mediation, often paying to attend mediation training themselves, judges in China and Hong Kong have participated in courses and others have gone so far as to take full training mediator courses leading to accreditation. Notwithstanding this, a large number of lawyers are still not equipped to assist their clients in this regard which can impact adversely on the preparation they are able to offer their clients.

¶6-141 Client Education by Explaining Mediation

A lawyer needs to explain mediation to the client and how it is going to help them resolve the client's case. Lawyers are trained to ask questions in normal client meetings primarily with a focus on gaining information that will be useful in litigation. So, in order to understand, what the clients' real needs and interests are the type of probing plus emphasis of the questions needs to change. What might not be at all relevant in court could be the key issue for the client. The lawyer can typically expect their clients to ask questions such as:

- what will happen at the mediation;

[302] The ADR Practice Guide, op.cit.p.289

- what role will the mediator play;
- do I have to speak;
- do lawyers have to attend;
- will the mediator tell us who is in the right;
- do you think we will settle it at the mediation;
- if we do not settle what happens; and
- if we mediate can I still go to court?

It will often surprise clients, if they have never attended mediation, that they are being offered the chance to play an active role. This will not concern heavy-weight entrepreneur businessmen with strong personalities but those clients who tend to see the lawyer as their guide and champion in resolving disputes may be hesitant about this more active role. So, it is very important that pre-mediation they understand that the process may put them centre stage at times and the mediator will be speaking directly to them rather than through the lawyer. They will need to be reassured that this is normal and an important opportunity to say what is on their mind.

The client needs to understand the special features and characteristics of mediation and the role of the mediator in facilitating settlement. It is also important to emphasise that the client will play a leading and active role in the process, by focusing attention on the client's business and other needs and interests, and how those might be accommodated by any settlement reached in mediation. Although assisted by the lawyer, the negotiations in the mediation are under the client's control. The client should also be given reassurance on issues like the confidential nature of mediation in the event that it fails to achieve resolution.

The issue of client education persists throughout the life of a case. A lawyer needs to remain alert to the opportunities for mediation as a case evolves. The lawyer will also need to specifically address the mediation option with the client, and the opponent, in response to any court encouragement to mediate, and in particular in response to the evolving legal dispute resolution landscape (see below), which has raised the prospect of potential cost consequences if there is an unreasonable failure to mediate.

¶6-150 Pre Mediation Contact with Mediator

Most mediators will tell you that pre-mediation contact with the lawyers and their respective clients is very important.

¶6-160 Preparing for the Mediation Day

Having the right people attend the mediation is very important because:

Agreements for which a mediation document is not needed should be recorded in the court log and will become legally binding upon signature of the parties, judges and the clerk.

4. Failure of Mediation

Article 91 of the Civil Procedure Law provides that a court of law should adjudicate in a timely fashion if mediation fails to produce an agreement or if one party retracts before the mediation document arrives.

¶8-032 New Civil Procedure Law (CPL)

On the 31 August 2012, the Standing Committee of the National People's Congress of the People's Republic of China (PRC) approved significant amendments to the PRC's Civil Procedure Law (the Amended CPL), which will came into effect as of 1 January 2013. With regards to mediation there are some changes in the CPL which could foster the use of commercial mediation in China.

¶8-033 Judicial Recognition of Mediation Settlement

Under the previous civil procedure rules, a private settlement outside the court room was considered a contract. This meant that as in other jurisdictions like Hong Kong and the UK the breach of such a mediation settlement meant the parties had to bring the case back to litigation proceedings all over again. However, currently pursuant to the Amendments (Articles 194 and 195), the parties may, in accordance with the People's Mediation Law,[369] apply to the Basic People's Court (基层人民法院) where the mediation institution is located to obtain judicial recognition of the mediation settlement within 30 days after such mediation settlement becomes effective.

¶8-034 Enforcement

If the court considers the mediation settlement complies with the mediation law, the mediation settlement is capable of serving as a basis for commencing mandatory enforcement proceedings directly. This is a breakthrough in recognition of mediation as a means of dispute resolution. However, it is questionable whether private settlement without involving a mediation institution would be eligible for judicial recognition under the Amendments.[370] So, this could mean that ad hoc mediation, which is where the parties and mediator conduct a private mediation without using a recognised mediation body might not be covered by the new amendments.

Under the new CPL rules mediation settlements may receive judicial recognition. The new rules have changed with regards to the legal status of a

[369] People's Mediation Law of the People's Republic of China (Adopted at the 16th meeting of the Standing Committee of the 11th National People's Congress of the People's Republic of China on 28 August 2010)

[370] Zheng Rungao, Partner, Clifford Chance, Client Briefing, 17 October 2012

mediation settlement agreement. This may encourage more parties to try mediation as previously one of the big issues in China has always been the matter of enforcement. In a low trust environment like China clients are very focused on whether the settlement agreement can be enforced or not. As mentioned, one reason for the popularity of arbitration has been because parties felt reasonably confident they could get the award enforced by a Chinese court under the New York Convention. Having to chase a party who breached the mediation settlement agreement through the courts was seen as costly and an additional waste of time.

¶8-035 Institutional Mediation in China

As noted above, parties and their legal advisers have to be prepared for Chinese courts or arbitration tribunals to introduce mediation sessions into their proceedings often with little warning. A party may refuse to mediate but this may be unwise given that it could be portrayed as showing an unwillingness to try and settle in a "principled way" or in a spirit of cooperation.

¶8-040 Med-Arb or Arb-Med during Arbitration Proceedings

As mentioned earlier, arbitration proceedings in China incorporate mediation into their hearings.[371] Both domestic and international arbitration in China permits mediation before commencing arbitration. Even where the dispute is set down to be arbitrated arbitrators may suggest and encourage the use of mediation. Legal advisers and their clients must keep in mind that the arbitrator may seek to mediate at any stage of the process if the tribunal is so minded.

A key feature of Chinese arbitration is that the arbitrator and the mediator are often the same person. It is often stated outside China especially in common law countries that these roles are not compatible (see more on this below). One of the central aspects of facilitative mediation is that in order to reach a settlement agreement parties are encouraged to discuss their disputes openly, and to indicate their practical objectives to the mediator, usually in a private session. So in the event the parties do not settle, the mediator-arbitrator may well have received information that the parties would not have been willing to disclose to an arbitrator under normal circumstances. There is also the risk of a breach of due process since in a private session one party may state "facts" which the other party has no knowledge of and therefore is unable to respond to appropriately. It is also thought it could potentially impact negatively on the mediation phase, as parties would be reluctant to speak freely, and as a consequence the mediation process itself could be far less effective.

In 2008, the CEDR Commission on Settlement in International Arbitration, Co-Chaired by Lord Woolf and Gabrielle Kaufman Kohler, was

[371] CIETAC, the Beijing Arbitration Centre and the Hong Kong International Arbitration Centre all have rules covering this situation.

¶8-200 Macau

¶8-201 Macau Legal System[423]

Macau was lent to the Portuguese in 1537 and became a Portuguese colony until its handover to China in 1999. Macau went through three distinct periods in its legal history: a period of mixed Chinese-Portuguese jurisdiction (1557-1849), a colonial period (1849-1974) and a post-colonial period (1974-1999). It is now in its fourth period: Chinese Administration under special conditions.

On 20 December 1999, the sovereignty of Macau returned to the People's Republic of China. The establishment of the Special Administrative Region (SAR) had been agreed between Portugal and the PRC in the Sino-Portuguese Joint Declaration and like Hong Kong embodies the principle of "one country, two systems" provided for by the Chinese constitutional framework. Like its sister SAR Hong Kong, Macau was provided with a Basic Law which serves as the de facto constitution of the territory.

Under the Basic Law, Macau enjoys a high degree of autonomy with legislative, executive and judicial powers, including that of final adjudication. Additionally, the Macau SAR has limited international capacity in foreign relations, mainly in terms of economic matters, and issues its own passports and currency, maintains controls of its borders and has the power to regulate its own customs tariffs system. The Basic Law also made sure that no major legal transformations took place, safeguarding private ownership and the liberal capitalist system inherited from the Portuguese administration, for at least until 2049, when the period of unrestricted Chinese administration starts.

The legal system in Macau thus remains part of the group of the civil law or Roman-German legal systems of continental Europe tradition. That means that, unlike Hong Kong, the main source of law in Macau is not case law but codified and written legislation (statutes) that contain general and abstract rules from which specific solutions to each case may be rendered. In civil law systems, judges are expected to apply the law instead of providing major developments to the law, which means that in Macau, although court jurisprudence is generally followed, there is no system of binding precedence. Study of provisions of the law is therefore more important than the study of case law.

The legal system of Macau is based on the Portuguese legal system, although there are some differences. Most of the codes reflect an adaptation or evolution from their Portuguese equivalents, with the exception of the Commercial Code of Macau, which drew from various sources, including the

[423] Website: C & C Lawyers, Avenida da Praia Grande, 759-3F Macau, Tel: (853) 2837 2642 / 2837 2623, ccadvog@ccadvog.com, [http://www.ccadvog.com], Accessed 21 May 2013

Italian Civil Code. Given that Portugal is a member of the European Union, the legal system of Macau also drew indirectly from European law.

Chinese and Portuguese are both official languages in Macau and although Chinese is widely used in the Administration, Portuguese is still the predominantly used language in judicial proceedings. Administration of justice in Macau is organised in a three-level independent judicial system: Court of First Instance and Administrative Court; Court of Second Instance; and Court of Last Instance. The Courts of Macau enjoy the power of final adjudication. Additionally, the Central Government of the People's Republic of China has agreed with the Macau SAR on the Mutual Recognition and Enforcement of Civil and Commercial Judgments, which facilitates the judicial review of judgments from one legal system by the other. The Mainland Government has also concluded a Closer Economic Partnership Agreement (CEPA) with the Government of Macau under which goods from Macau that are exported to the Mainland are not subject to customs tariffs and Macau-based companies and professionals of service industries are given relaxed measures when entering markets in the Mainland.

In Macau's civil law system, legislative enactments such as codifications and minor laws passed by the legislature are the central source of law that is recognised as authoritative. Macau's legal system has experienced several reforms over its history, more recently in the labour law area, in order to be up-to-date with reality. Alongside the codification of major branches of law and the existence of a Basic Law that sets grounds for the rule of law and securing fundamental rights, the law is enforced by a three-tier judicial system that warrants its reliability and implementation of court decisions to ultimately achieve justice.

Since it is not a unitary system, the courts are independent among themselves in order to warrant defence of the rights and interests legally secluded, repress violation of legality and settle conflicts of public and private interests.

Macau's legal system is also tailored to accommodate its particular gaming reality. In fact, regulation of the gaming industry could almost stand by itself as an autonomous branch of law, with its particulars and provisions reflected in the judiciary system.

The Courts mainly undertake dispute resolution in Macau, although arbitration is also possible and enforceable. The first tier of the court system is the First Instance Court, which is subdivided into a specialised court for administrative matters and the Judicial Base Court that carries out the assessment and trial of all other matters, with some minor exceptions. In fact, all petitions regarding labour issues, civil matters, criminal disputes and other quarrels are filed or submitted into the Judicial Base Court and, in first instance, assessed there.

The Second Instance Court has an appellate jurisdiction to hear appeals of decisions from the First Instance Court. An appeal does not mean a new trial,

but instead the facts and laws of the case are appreciated again in a different court. In addition, the Second Instance Court has the original jurisdiction to hear certain matters such as crimes and misdemeanours committed by members of the Government.

The third and final layer that warrants the legality and legitimacy of the judicial system is the Last Instance Court, which is responsible for standardising case law. Moreover, this court is also the ultimate appeal court and, therefore, the final and ultimate mark in the achievement of justice and the defence of rights and interests.

In Macau, disputes can also be resolved outside the courts and by non-judicial means if fundamental rights or matters that are reserved to court advocacy are not in order. Parties to a quarrel can often agree on the terms of settlement among themselves and such agreement shall be considered valid and binding.

In addition, Macau's legal system also embraces the possibility of resolving disputes by the means of arbitration. Arbitration in Macau can take place for claims that do not exceed MOP50,000 (US$6,242) if they are related to matters involving consumer rights and insurance. Furthermore, without a limitation of claim value, arbitration is also allowed for certain matters under civil law and commercial law.

The enforcement of arbitration awards and decisions from the courts of other jurisdictions outside Macau is also possible. This is provided that a few legal requirements are fulfilled, and only after the submission of such decisions and awards to the Second Instance Court for confirmation.[424]

¶8-210 Mediation in Macau[425]

There is little material to consult with regard to the mediation environment in Macau. Occasionally, lawyers and judges from Macau have taken mediation training but they usually do so in their private capacity. Macau is not a large international trading centre and does not attract the type of dispute flow that Hong Kong does. Most international law firms do not maintain offices there but service any Macau work from Hong Kong. The Macau judiciary are starting to recognise that Macau needs to update its thinking about dispute resolution and a new act is in the pipeline but not available officially yet for perusal by the general public. I have been informed the definition of mediation below is from the new draft Act.

The Act defines mediation as:

> "[m]ediation is when a neutral third party as a mediator selected by the parties voluntarily is asked to assist the parties to reach a consensus in order to negotiate a mutually acceptable agreement."

[424] C&C Lawyers, Nuno Sardinha da Mata

[425] I would like to acknowledge the assistance of Fred Kan, of Fred Kan & Co, Hong Kong who kindly supplied the information with regard to Macau.

One possible source of future mediation development in Macau is the opening of mediation services in arbitration bodies which is what happened in Hong Kong at the HKIAC. Currently there are five permanent arbitral institutions in Macau, such as Consumer Arbitration Centre under the Macau Consumer Council, Macau Lawyers Association Voluntary Arbitration Centre, Arbitration Centre of Macau World Trade Centre, Insurance and Private Pension Dispute Arbitration Centre under the Monetary Authority of Macao, and Building Management Arbitration Centre under the Macau Housing Bureau. Among the above listed Arbitration Centres, the Arbitration Centre of Macau, World Trade Centre, and Macau Lawyers Association Voluntary Arbitration Centre are of a general nature, admitting all categories of civil and commercial cases, while the other three arbitration centres are of a specialised nature, that is only for specific types of cases. In addition, the Consumer Arbitration Centre and the Insurance and Private Pension Dispute Arbitration Centre only handle cases in which amount is not higher than MOP50,000 in dispute.

A conciliation procedure is the first step before the arbitration procedures adopted by organisations including Insurance and Private Pension Funds Arbitration Centre, Macau Consumer Dispute Arbitration Centre and Building Management Arbitration Centre. If the parties choose to refer disputes to one of the arbitration centres for processing, such arbitration centres will first invite the parties to a mediation session. If the mediation is successful the arbitration committee or arbitrator will confirm this with the institution. Otherwise, the dispute will continue to the arbitration proceedings. So, currently, the use of stand-alone commercial mediation in Macau is not popular or used to any great degree.

However, currently there is no general mediation system in Macau; therefore the public does not understand mediation. There is no independent and specialised organisation for mediation, the law does not specifically regulate the system of mediation and the mediation process is only attached to the arbitration centres mentioned above.

¶8-220 The Future of Mediation in Greater China

Worldwide mediation is adapting and developing in response to the demands of international trade, civil justice systems and the global community. Commercial mediation has developed from its humble beginnings in the USA into an important dispute resolution mechanism in most international jurisdictions. It has not remained static or frozen in time, however, and is constantly being adapted and developed in different ways to suit local conditions.

As modern commercial mediation continues to develop in Greater China important practical questions such as the future role of judges and mediation, trying to match dispute resolution processes with disputes, the provision of

access to justice for claimants, the role of lawyers in alternative dispute resolution processes, the future options for international dispute resolution in Greater China and further reform of civil procedure benchmarked against international best practice will need to be examined.

In 2011, I was a speaker at a conference in New York called "Dueling with Dragons': Managing Business Disputes in Today's China"[426] and was asked from the floor, "when do you think commercial mediation as we know it in the USA is going to take off in China?" I rather bravely or perhaps foolhardily answered, "soon." Modern commercial mediation has been much discussed amongst academics, arbitrators and lawyers in China for many years. There have been many conferences, seminars, training sessions, and fact-finding trips by Chinese judges overseas.[427] However, whenever I had spoken with working lawyers in China up to that point in time, I had found little enthusiasm amongst them, to try mediation to resolve their client's disputes.

So, the answer that I gave that day, speaking truthfully, was perhaps more wishful thinking than based on fact, but I now believe that it is now looking more and more correct. Modern mediation in China has a long way to go but real interest in mediation is now substantial and the cases our Hong Kong office are handling involving Chinese parties from all over Greater China, for example, have been increasing all the time. However, of much greater note is the fact that mediation umbrella bodies are being formed in places like Beijing and Shanghai to promote commercial stand-alone mediation in China and there is genuine interest growing amongst lawyers, the judiciary and government to embrace modern commercial mediation.

This is not to say that the model of commercial mediation that develops in China will be a carbon copy of mediation in the US or UK. Having said that, I see no reason why the commercial mediation model such as the one currently being used in Hong Kong and elsewhere in Asia is not perfectly suitable for most cases in China. Nevertheless, just as **Weibo** may resemble Twitter, it is not Twitter and so I submit that the modern mediation models that are starting to develop in China will take on "Chinese characteristics" 中国特色 (**Zhong Guo te se**) as they flow through the deep well of rich Chinese traditional mediation concepts.

Modern commercial mediation's progress in China will not be without difficult, however, as, for example, some aspects of Chinese traditional mediation, with its preference for a more evaluative style of mediation, will challenge the Western facilitative model. Also, much more work will have to be done, I believe on the cross-cultural issues in commercial mediation. Some Western mediation organisations and training bodies mention culture in passing but do not really attempt to get to grips with how culture affects

[426] 'Dueling with Dragons': Managing Business Disputes in Today's China, 20 September 2011, Sponsored by CIETAC and the HKIAC, The Harvard Club, New York.

[427] CEDR London has hosted many such trips by delegations of Chinese judges to visit the UK and learn about commercial Mediation as practiced in Europe.

negotiation and mediation. On the other hand, some Asian dispute resolution bodies try, in my view, to over-emphasise culture and say that mediation is singularly culturally specific and that the mediator has to be of the same nationality or speak the same language as the parties, for it to be effective. Using the Western model and merely changing the language or the nationality of the mediators does not create an Asian model. Greater China embracing modern mediation may in fact be the catalyst that will drive a more sophisticated and rigorous debate about culture's impact on the modern mediation model. This could result in the adoption or testing of many models to suit domestic and international cases. Med-Arb, for example, could still have a significant role to play in Chinese mediation and form the core of a range of other models which are flexible enough to be adapted to suit the needs of parties in a dispute.

Another challenge as mentioned earlier in this book is that perhaps ironically the great efforts to modernise the Chinese legal system which, in many ways, has been a remarkable success, is also creating a barrier to the use of mediation in spite of the fact that it has traditionally been the preferred model of dispute resolution in Greater China. Also, Chinese lawyers are just as likely to resist using a dispute resolution model which they worry will adversely impact on their income level and role, as other lawyers around the globe. Even in Hong Kong and despite the huge efforts of the government and judiciary to encourage the use of mediation, some lawyers are resisting having their role as litigators or counsel at arbitration challenged by having to attempt mediation and potentially having their clients settle the case. However as a judge in Hong Kong said to me privately, "lawyer's fee levels are not our primary consideration, it is the benefit of mediation to the community that is always uppermost in our minds."

Mediation in the Chinese dispute resolution sphere will, I believe, prevail and as Zeng Xian Yi[428] put it rather eloquently:

> "In China, mediation has remained vibrant and alive from antiquity to modernity not because of sound institutions and perfect legal provisions or because of mediation's operational simplicity and low-cost effectiveness. Rather, it has done so because it offers a core value meaningful to every human being, one that is increasingly being accepted by modern society: harmony."

The rapid pace of mediation's development in Hong Kong has been closely followed by the dispute resolution community in China, Taiwan and Macau. With regard to China I submit that the modern commercial mediation model will take off in a more significant way over the next five years. It is

[428] Zeng Xianyi, Dean, Faculty of Law, Renmin University, Beijing, China, Foreword, Report Hong Kong Working Group on Mediation, 2010, p.1