AN AMERICAN MEDIATOR'S PERSPECTIVE ON ASIAN-AMERICAN BUSINESS DISPUTE RESOLUTION

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Increased commercial globalization means increased cross-border disputes. This of course means, in turn, that commercial dispute resolution practitioners must stay current with events around the world. Southeast Asia is an especially dynamic region from a mediator/attorney's perspective, and this paper will highlight three interesting developments: The rise of Singapore as a regional dispute resolution center; the rapid growth of the use of the internet to enhance case initiation, management and resolution; and cultural differences between Western and Chinese business communities that are becoming too pressing to remain of merely academic interest.

1. Singapore as a world center for international commercial dispute resolution.

In the past five years, Singapore has set out to surpass Hong Kong's place as the center for international dispute resolution in the ASEAN region, and has succeeded. Among the leading mediation and arbitration institutions housed in Singapore are the Singapore International Mediation Centre (SIMC); the Singapore International Dispute Resolution Academy (SIDRA); the Singapore International Mediation Institute (SIMI); the Singapore International Arbitration Centre (SIAC); and the Singapore Mediation Centre (SMC).

On the commercial arbitration end, Singapore is vital. It is the third most frequently named seat for international arbitration (after London and Geneva), owing to the excellence and efficiency of the Singapore International Commercial Court; the high reputation of the rules and administrative support provided by SIAC; and a regimen of local laws that encourage third-party funding.

On the commercial mediation end, four leading institutions offer distinct but related and mutually supporting missions:

- SIMC provides mediation services for international commercial cross-border disputes, whether involving Singapore parties or not. An example is a recent dispute between a Taiwanese and a Peruvian company, in which SIMC was trusted as the provider of a mediator and home for the sessions. It has a panel of technical experts as well as a global network of 70 mediators situated in 14 countries. The web site features brief videos of the mediators. It has online filing and neutral search capabilities. Most interestingly, it has a Arb-Med-Arb procedure whereby an arbitration can commence, the matter deferred to mediation, and the settlement referred to the arbitration tribunal for issuance of a consent award enforceable through the New York Convention.

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- SIMI is similar to the International Mediation Institute. It promulgates qualification and credentialing standards to contribute to the professionalization of the mediation practice in the region.
- SIDRA provides "thought leadership," supporting forums on best practices in various fields and conducting research as well as training and education.
- SMC is the provider of mediation services for domestic disputes. Established in 1997, it is linked with the Singapore courts and, indeed, located in the Supreme Court building. Among its fields of expertise are ICANN domain name disputes, construction conflicts, and family and community disputes.

The growth of mediation in Singapore has been intense. With a population of five million, and the establishment of community mediation centers in the 1990s, the courts introduced a presumptive civil mediation program through SMC in 2000, accompanied by laws and rules that (for example) included an "ADR Form" to accompany all complaints, requiring counsel to certify that clients had been advised of alternatives to litigation and further requiring an "opt-out" of presumptive mediation tracks. In 2013 a working group was established to investigate the feasibility of an initiative in international commercial mediation. SIMC was established the next year. In 2016 SIDRA was founded and court rules were further amended. In 2017 the Mediation Act was enacted to permit stays of court action pending mediation, confidentiality protections, and the recording of mediated settlements of litigated disputes as court judgments.

Taking aside the challenges of leadership that were so evidently met, and looking retrospectively, these developments were entirely in keeping with Singapore's role as a commercial and judicial hub in the region. Asian economies are rapidly rising and Singapore is well-positioned to take advantage:

- It is stable, neutral, open trusted, with no public corruption, and a rule of law that is well-known and efficient.
- It has a suite of institutional support of international trade as well as international commercial law, including the International Commercial Court and Maxwell Chambers — a centrally-located building in which is officed JAMS, ICDR, LCIA, WIPO, and any number of other international organizations.
- It houses the offices of many of the leading 200 global law firms
- It has favorable regulatory frameworks, including tax benefits for non-resident arbitrators who conduct hearings in Singapore

The key to all this, of course, is the "magic triad" of private commercial interests, public dispute resolution institutions, and public policy. Private commercial dispute resolution in Singapore is a reflection of, and at the same time a contributor to, a collaborative vision to dominate the regional economy. While the United States retreats from engagement with this dynamic region through policy shifts such as disavowal of the TPP, Singapore has found its role — and central to that role is highest-quality mediation and private arbitration of international commercial disputes that accompany the stupendous growth in regional and global trade.

2. ***The impact of online case filing on the legal profession in China***

The ASEAN region has also latched onto technological change, and the legal profession has not been immune. Recently I attended an ADR conference in Hangzhou, China, and with some other American colleagues I was given a tour of the West Lake District Court in Hangzhou, China. The lobby had arrows pointing ahead for "lawyer service," to the left for "court," and to the right for "mediation and rapid arbitration."

A battery of computer terminals was available, at which a member of the community could select among "directory information," "file a case," or "consultation," among others. If you picked "consultation" you were prompted to input what your problem was (*e.g.*, "neighbor's dog barking too much"), what you wanted the court to do, where you lived, and so on. The computer would then tell you what provision of the civil code was implicated by your problem, what the code provided in simple terms (full code language can be printed out), how much it costs to file a complaint (usually between 10 and 50 RMB, or $1.50 – $8.00), and how many people who lodge such complaints prevail (e.g., "3,476 complaints under this code provisions were filed with our court in the past 5 years, and only 26% resulted in a judgment for the claimant, while 74% did not").

The user is then prompted again to the home page, where she could decide whether to file the case, to ask for in-person consultation, or to ask the court to set up a mediation. Or to go home.

Speaking of home, you can of course do this whole thing from your bed using the internet.

Access to justice? You bet. Robust, useful and accurate information on your claim? Absolutely and at no charge. Options for methods of problem-solving? Multi-door courthouse? Empowering the citizen to manage her own issues? Check check and check.

Where are the lawyers in this process? Market disruption, anybody?

3. Culture as a practical challenge in cross-border dispute resolution

Finally, when discussing commercial mediation in Asia it is necessary to draw attention to the built-in miscommunication between our cultures. It affects me greatly because what American companies expect from the mediation process, and the service I was trained to provide, is not what Chinese companies expect, or what Chinese mediators provide. American mediators are so eager to teach non-American mediators what they think they know, that they often underestimate the lessons that they can learn from older cultures such as China. This is especially true in fields like conciliation, where centuries of experience have developed a different approach to dispute resolution – one that deserves respect.

Certain fundamental differences between Western and Asian dispute resolution approaches are set forth in a compelling, brief book by Professor Joel Lee, of the National University of Singapore, and his colleague Teh Hwee Hwee. The book is called *An Asian Perspective on Mediation*.

By providing definitive analysis of the components of Asian negotiation, Lee and Teh address the topic with candor and sympathy. They postulate that three interrelated "core concepts" inform Asian conflict resolution: Confucianism, collectivism, and face concerns. These act to promote conflict resolution approaches that are not based on self-interest, as Getting to Yes has emphasized for thiry years. Rather, Asian culture includes concerns such as social hierarchy, appropriate peer-to-peer interactivity, harmony, relationships, and dignity. Without relying on stereotype, the authors demonstrate the root cultural sources for contextual negotiation and the importance of recognizing and promoting *guanxi*.

The implications of these profound cultural truths upon the practice of international mediation are inescapable. Face is saved when the mediation provider, rather than one of the parties, initiates the process. Mediators should have good relationships with the parties and be people of recognized commercial and social authority, not "neutrals" as in the West, and not disengaged. The party representatives should be of equal "connectedness." Mediators should exercise leadership and demand professionalism and respect. Outcomes may reflect not merely party autonomy but social and commercial expectations that it is the mediator's role to articulate, and embrace features that far transcend the particular transaction at issue, extending into long-term relationships. Belligerence and posturing are discouraged. The mediator is expected to inject ideas of how to move forward productively, and to insist upon outcomes that are practical for all concerned.

The editors of this book presume a level of cohesiveness between the way business is conducted and the cultural values of Asian tradition. For example, in the brief section on the impact of Confucianism on Asian business negotiation, the following four "tenets" have obvious applicability to the value of mediation:

- FIRST, social harmony is the ultimate goal of human affairs; conflict is an unacceptable form of social disruption.
- SECOND, the five chief relationships (father to son, ruler to subject, husband to wife, older brother to younger brother and friend to friend) are hierarchical, and fulfilling one's duty in a relationship is preferable to advancing one's own objectives. Overt expressions of anger or hostility are discouraged, especially if directed at figures of authority.
- THIRD, self-esteem is derived from the relationship of the individual to others, particularly the family, and a high degree of conformity is expected.
- FOURTH, compromise, non-litigiousness and yielding are virtuous; self-sacrifice is sometimes required for the sake of restoring harmony. Litigation is to be avoided because it signifies a lack of willingness to compromise and a failure to persuade the other side to make appropriate concessions — worse, an over-concern for one's own interests, which involves a loss of face.

Prof. Lee does not see Western and Asian mediation styles as opposites. Indeed, he professes that the contribution that the essays in the book might make is to encourage broader application in principles of interest-based negotiation to include contextual interests such as those outlined above.