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# Chinese-European Dispute Resolution in China: Towards Culturally Matching Procedures



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## **Abstract**

The EU-enlargement to a group of 27 member states in 2007 has increased the EU's global political and economical significance and its potential to exert strategic weight in international diplomacy. This has an impact on negotiations in EU-China relations. The Union's negotiation position vis-à-vis the Chinese partner is stronger than ever. At the same time, the Chinese increasingly recognise the dimension of the European culture—as complex as it is. This new situation for both sides gives reason to a closer look on negotiation and dispute resolution between Europe and China.

Inherently, negotiations on economical and political issues in EU-China relations are complex enough. What makes things even more challenging is the precarious cross-cultural divergence on how to negotiate and resolve disputes: How to lead negotiations when the parties' procedural preferences significantly differ from each other? There is no self-evident mutual consent on premises, procedures and norms in negotiation and dispute resolution between Europe and China. However, negotiating without such a common basis clearly hems effectiveness. It is thus imperative to explore how the different procedural preferences can be handled. The aim of the paper is to initiate the transfer and systematization of successful experiences with procedural issues in Chinese-European negotiation.

Methodically, the paper proposes an innovative theoretical approach to the problem as it translates central terms of interest-based negotiation theory into the cross-cultural context. The paper first examines Chinese and European preferences in dispute resolution and how they are reflected in the different modes of Alternative Dispute Resolution (ADR). Then, it gives suggestions for cross-culturally matching dispute resolution procedures which are likely to be appreciated as effective and fair on both sides. The study is based on the examination of ancient Chinese philosophy, current sources on ADR and personal interviews with negotiation professionals in Chinese-Western business (corporate lawyers, lawyers, and arbitrators/mediators) carried out in Beijing 2007.

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## 1. Introduction: a rules question

Picture the World Chess Championships. Players from different nations compete in international matches. Which rules should be applied? While Western countries play according to the FIDE standards, in several Asian countries the game follows a specific cultural tradition. Compared to the FIDE standards, the Chinese Chess Game *xiangqi*, for instance, allows greater maneuverability and fewer occasions for a draw. During the season, Western and Asian players train skills and routines according to their respective terms and some of these playing abilities will become independent and automatized. Now, when playing internationally, each side will be eager to play with its own rules. How to come to common grounds?

As far as the World Chess Championships are concerned, FIDE rules are applied and the question of *how* to compete is clear. But what if there is no such superordinate agreement like in the arena of dispute resolution in business relations between the West and China? What if, in addition, the successful interplay of both ‘players’ is crucial for achieving optimal outcomes on both sides, i.e. if it is a non-zero-sum game? What, if the competition between the players is a global political subject and the maintaining of a productive relationship is an important issue? With the steady rise of China in economical, political, and military terms, effective dispute resolution procedures between the People’s Republic and the EU become indispensable for the peaceful and constructive development of relations and potential benefits on both sides.

Up to now, there are no explicit common procedural principles for European-Chinese disputes which take the different cultural preferences how to negotiate into account and could act as reference standards.<sup>1</sup> Not least because of this, successful negotiation and dispute resolution practice in European-Chinese disputes seems to be reserved to personal expertise: experienced business negotiators and lawyers who more or less implicitly and intuitively interact as intercultural facilitators as well as mediators. Their success confirms that in the delicate matter of resolving disputes, when every party implicitly claims its way of negotiating was the right one, their differences need to be contextualised, translated, and mediated. These skills are closely bound to personal competence at present. Wouldn’t it be desirable to make these skills more transferable? And naturally, because of their own cultural origin, intermediaries in Chinese-European settings may be biased to either the one or the other cultural

preferences in negotiation. Wouldn't it be desirable, to rely on teachable and controllable procedural principles which appreciate the standards of effectiveness and fairness in both cultural contexts?

Let us first have a closer look at the challenges of Chinese-European dispute resolution.

## **2. Problem: A twofold tension in cross-cultural dispute resolution**

### ***2.1. The tension between fairness and effectiveness***

Among the various sources of difficulties in business negotiations, a pivotal point in *every* negotiation is the tension and the interrelation between moral aims and those of maximizing the own outcome.<sup>2</sup> Especially when negotiating about conflicting issues, every negotiator is interested in being treated fair and respectfully; often, he is also interested in himself complying with some set of social norms. And, of course, he is interested in making a good deal.<sup>3</sup> Depending on the cultural context, these ethical and economical efforts get more or less intertwined when there is a interdependency between the parties' behavior—as it is in creating and distributing value in a cooperation: dealing successfully within in the same network over a long-term period requires to be morally reliable to a certain degree.<sup>4</sup> For simplification, this tension will be addressed with the terms of *fairness* and *effectiveness*.

### ***2.2. The tension between divergent cultural preferences***

As already mentioned, the pivotal point in *cross-cultural* negotiation is the tension between different cultural preferences (customs, norms, and valuations) on *how* to manage disputes.<sup>5</sup> What makes it so interesting to look at the opposition of Europe and China in this context? Their relation is no less challenging in its cultural than in its political and economical dimension: China and Europe have a nearly independent cultural history of several thousands of years and have developed different epistemes with divergent basic values, which are much more complex as the individualist-collectivist typologies may suggest.<sup>6</sup> In distinction from other cross-cultural constellations (as within the Western hemisphere), it is *not* possible to deduce the different value systems and related norms and valuations concerning dispute resolution from each other; speaking in terms of Foucault, they are heterotopias for each other. So, in the majority of cases, empathic reasoning by analogy will not help getting intractable disputes resolved in a goal-oriented way.

### **2.3. Typically conflicting preferences**

For example, as many practitioners report, European-Chinese negotiations often suffer under the divergent preferences for objectiveness and procedural transparency in Europe and personal relatedness and confidentiality in China. Cooperation without dealing with these values seems impossible. Facing a conflict in a business relation, the Chinese party may take things more personal and may perceive the hole relationship as soured („ok, you don't want to walk with us“), while Europeans may seek for objectiveness („you have to pay this, you have to do this, but we can stay friends afterwards“). If interested in the relationship, the Chinese part most likely will try to gain common ground by seemingly ignoring the contentious issue and addressing it as indirectly as possible. It may invest a lot in nurturing their friendship, which from a Western perspective may seem exaggerated in a business relation: “The Chinese concept of friendship and more specifically their expectations of what friends should be willing to do for each other goes well beyond American (and European, AIK) notions of friendliness. Consequently the building of ‘friendly’ relationships in the negotiation process can lead to exaggerated expectations of dependency that, if not satisfied, can cause angry reactions and feelings of having been mistreated.”<sup>7</sup> After a while, the Chinese part may offer a compensation in order to set forth the collaboration. This strategy is said to focus on not losing face and to secure the network of friendship and mutual obligations (*guanxi*) often with a life-long perspective. It represents the economical as well as the moral rationale of Chinese business. As a tendency, the European part, accurately calculating with short term results, will look for a quicker solution by addressing the contentious issue in a much more direct manner. This strategy which focuses on clarifying circumstances is in its view thought to be fair as well as cost saving. The Chinese way may seem to Europeans as inefficient small talk, unpolite trickiness, resource wasting and unscrupulous bribing; the European way may seem to the Chinese as rude and foolish directness and economical irrationality. Both criticize the behavior of the counterpart in economical as well as in moral regards. To summarize, parties in Chinese-European disputes are not only struggling with their interdependency in the dilemma of fairness and effectiveness, of cooperation and competition; in addition, they mostly do not even know each others' perception of what actually *is* considered fair and effective in negotiation and how to handle it—if they are at all aware of their own premises. But, as Cecilia Albin claims, “there is a virtual consensus on one score, however despite different understandings of what is just and fair: negotiations and agreements which parties perceive as such are far more likely to

be accepted and to lead to successful outcomes. Therefore, the way in which competing ethical notions are handled in the process often has a direct impact on its result.”<sup>8</sup>

### **3. Method: towards cultural preference-based dispute resolution procedures**

Thus, being capable of complying with the others’ idea of fairness and cooperativeness is indispensable for efficient cross-cultural negotiation. Further, it is supposed that individuals are likely to comply with ethical norms—also with foreign ones—the more it suits their own economical purpose at the same time. In consequence, the question is how to mediate not only both sides’ perceptions of fairness but also those of efficiency. But how to meet this challenge?

In recent literature the idea of a meta-mediation has been already come up.<sup>9</sup> Indeed, why not apply the approved method of interest-based mediation on the matter of dispute resolution itself? Just as a mediator does when looking at two parties’ positions and interests, we can examine both sides’ approach to leading a negotiation. The different cultural preferences are procedural interests. The leading questions are: What do the parties perceive as effective and fair in negotiation and conflict resolution? Why and in which context? What about the interplay of fairness and effectiveness? Which mutually acceptable procedures match these complex demands?

While other cross-cultural negotiation models often get caught in the static confrontation of incompatible normative positions, this approach reaches one step further: It mediates the conflict of cultural values concerning negotiation procedures and interactions and leads the way to more effectiveness in cross-cultural negotiation. It does not intend to play off the substantial negotiation values against each other or to reach a global consensus on them. Its goal is to find pragmatic approaches on how to reach mutual satisfaction concerning the mode of negotiation in European-Chinese settings.

### **4. Theory: on Kong Zi’s idea of fair negotiation**

The first task in developing commonly agreeable procedures is to provide better mutual understanding of European and Chinese negotiation mind-sets. Here just one example for the Chinese side—a tale about Kong Zi (Confucius) and his way of negotiating in difficult situations—to give insight into the Chinese negotiation mind-set.

#### **4.1. System of superordinate harmony**

Through Confucianism, one of the dominant cultural sources of contemporary China, Kong Zi's morality is still present in Chinese negotiation preferences. The intrinsic motive of Kong Zi's ethic is to recover a superordinate harmony within the world of men, the heavenly ruler and heaven (*he*). Creating harmony starts at the earliest possible stage of disharmony, which in this context means: "In hearing litigations, I am like any other body. What is necessary, however, is to cause the people to have no litigations."<sup>10</sup> He put forward two moral means, which together serve to *prevent and transform social conflict*: the system of traditional norms and rites, *li*, and the virtues of humanity comprised in *ren*.

*Li* differentiates and structures society through traditional norms for each individual's social status and its relationships within the pyramidal society and the respective circumstances. It means not to repress but to regulate and cultivate personal interests, which are in this way blended into privileges and duties.<sup>11</sup> *Ren*, humanity, mitigates potential sources of conflict in between hierarchical gaps of *Li* by regulating personal interests and integrating them in an all-embracing moral order of proper humanity. The basic idea of *ren* is an unconditional human interdependency, i.e. an *a priori* constituting moral self-education: man becomes man only through the practice of humanity. This may serve also as a rationale for the required orientation toward the other and the restraint of personal interests for the sake of the Common Good.

#### **4.2. What's fair?**

What is fair conflict resolution behavior within this moral system directed at a superordinate harmony? An anecdote of the *Confucian Analects (Lunyu)* illustrates Kong Zi's understanding of fairness. It reports a moral negotiation dilemma and how the philosopher resolves it. Like a veritable case study, the anecdote indicates at the same time what is still complicating today's European-Chinese negotiations.

Yang Ho wished to see Confucius, but Confucius would not go to see him. On this, he sent a present of a pig to Confucius, who, having chosen a time when Ho was not at home, went to pay his respects for the gift. He met him, however, on the way. Ho said to Confucius, "Come, let me speak with you." He then asked, "Can he be called benevolent who keeps his jewel in his bosom, and leaves his country to confusion?" Confucius replied, "No." "Can he be called wise, who is anxious to be engaged in public employment, and yet is constantly losing the opportunity of being so?" Confucius again said, "No." "The days and months are passing away; the years do not wait for us." Confucius said, "Right; I will go into the office."<sup>12</sup>

An officer wants Kong Zi to accept a position in his apparatus, invites him and sends him presents, while Kong Zi gently recedes and evades the officer's obviously pushing advances. As he does not succeed in preventing an encounter and Ho appeals to his moral duty, Kong Zi gives in. The anecdote ends here. But the informed reader knows that he never actually started a job in Yang Ho's office.<sup>13</sup> Kong Zi's agreement is only a *provisional* one. He makes a promise but does not keep it.

Is this fair? Intuitively, at least from a European perspective, one would say it is not. However, the scene is cited in the *Analects* and is hardly an example for how *not* to do it. So, what is its moral logic? How could Arthur Waley comment Confucius' behavior as "polite and dignified"<sup>14</sup>?

### **4.3. Balancing personal interests and moral demands**

Let us see how Kong Zi complies with the fairness claims posed by himself within *li* and *ren*. Does he for instance show *loyalty to superiors (zhong)*, *humility concerning personal benefit (ke qi)* and *empathy or reciprocity (shu)* as pictured in the Confucian Golden Rule: "What you do not want done to yourself, do not do to others."<sup>15</sup> Strange to say, but in not openly refusing Ho's offer, he does, while, at the same time, in not keeping his promise, he does not comply with this commandment.

What about the demand for *moral stability and disputability*: better than being either loved or hated by all the people of his neighborhood is that "the good in the neighborhood love him, and the bad hate him."<sup>16</sup> Moral righteousness should become manifest *ex negativo* in open confrontation. Significantly, there properly is a duty of open critique vis-à-vis an immoral ruler: "Tsze-lu asked how a ruler should be served. The Master said, "Do not impose on him, and, moreover, withstand him to his face."<sup>17</sup> and "The determined scholar and the man of virtue will not seek to live at the expense of injuring their virtue. They will even sacrifice their lives to preserve their virtue complete."<sup>18</sup> Yang Ho, as it is preserved, was a powerful but morally degenerated officer, which in a difficult political situation sought for compelling the reputed Confucius' to support him.<sup>19</sup> But instead of openly refusing the pushing officer, Kong Zi decides to elude his advances and finally pretends to accept the office as required. These conflicting demands produce considerable tension in Kong Zi's understanding of fairness. There is a moral dilemma between the duty to be humble and reciprocally benevolent on the one hand and the duty to carry out a disagreement on the other hand. How is this dilemma coped with?

Confucius did not even meet one of his own demands properly. From a European point of view this would proof his dishonesty. But, from his point of view, he serves each of

the moral demands in an appropriate measure: the demand to comply with the superordinate *principle of the mean (zhong yong)* outranks the single demands for fairness. It stipulates that in the exercise of virtues one should beware of any extremes. Every moral decision should be weighed up in order to balance both the relevant demands and set them in the right interrelation. Kong Zi admitted himself to not comply with any of his moral claims entirely. Indeed, he lets pertinacity in moral principles finally outweigh the other demands a little. However, he does not confront the officer openly with his critique as this would disturb the required balance with the demands for humility, reciprocity and loyalty.

From a European moral point of view, in this case either the end justifies the means, or there is paradoxical tension between the purpose for integrity and the means of deception. A deeply ingrained European epistemological structure becomes apparent in this matter: there is either a hierarchy or it is a paradox. From Kong Zi's perspective implying *zhong yong* there is neither nor: what he does is simply fair and appropriate in his particular situation. Kong Zi's implicit logic of the anecdote would have been as follows: "For moral reasons I cannot meet your expectations but for the same reasons I cannot reveal to you my true thoughts which you surely are aware of. As I must keep integrity, it is only fair that given your constraints I am deceiving you. My actions only serve the superordinate purpose to save social harmony and our very coexistence." It is not about paradox or hierarchy but rather about a balanced tension between a motive and its means.

What does it mean looking at today's European-Chinese negotiation difficulties? Chinese negotiators may at the same time reject *and* accord and not regard this as exceptional, not to mention as unfair. Most likely, they only seek to balance different moral imperatives emerging of the circumstances. Effectiveness within this moral point of view means to subtly implement own interests without breaking these rules. The strategy relies on comparatively non-cost goods, because time and candor are malleable in the Confucian system of long-term interdependencies and strong interpersonal norms. At the expense of this, the strategy facilitates negotiating difficult matters without risking morally and socially expensive quarrels. The European side has to take all this into account when it wants to figure out the real interests of its Chinese counterpart.

Below the line, Kong Zi's way of being fair in negotiations is: 1) a moral challenge for Chinese negotiators who seek to pursue their interest and balance the moral demands in their individual case; 2) an often confusing and annoying business for the European

counterpart.

#### **4.4. Consequent reciprocity**

Consequent reciprocity is another characteristic feature of Kong Zi's understanding of fairness: "If the will be set on virtue, there will be no practice of wickedness."<sup>20</sup> In this sense, the emphasis on moral pertinacity in the tale is corresponding with the educational idea of punishing selfish and non-cooperative behavior in order to extend reciprocal cooperativeness: *Tit for tat* in a positive as well as in a negative sense. As game theory has proven, this principle is particularly effective in situations of long-term mutual interdependency.<sup>21</sup> As long as the counterpart is morally cooperative, it will be recompensed and encouraged in order to foster mutual cooperativeness and complementation. If the counterpart is acting morally uncooperative, it will be punished with reciprocal uncooperativity. As such, Kong Zi's fairness here requires in the first instance to subordinate personal interest under cooperativeness and obligates at the same time to punish others when they refuse to cooperate themselves.

### **5. Practice: dispute resolution between China and Europe**

Now let us see how dispute resolution between China and Europe is practiced in institutionalized procedures. First, a short introduction on terms and modes of dispute resolution in general may give all readers the opportunity to follow the further considerations.

#### **5.1. Terms and modes of dispute resolution**

Dispute Resolution (DR) is the term used to describe a variety of ways of dealing with disputes. Sometimes, *litigation* is the necessary route to follow. However, it is costly, time consuming, and it is not always a satisfying process for the parties involved because there is no flexibility for the requirements of the individual case. Moreover, litigation mostly breaks up relations between the parties. Because of the different legal systems involved, litigation in European-Chinese disputes is even more complicated and unsatisfying. That's why Alternative Dispute Resolution (ADR) is prevailing in Chinese-European business disputes. The alternatives to going to court mostly used are negotiation, conciliation, mediation and arbitration. This order reflects the gradations of how much the parties themselves or respectively an intermediary actively engage in reaching a solution.



Regardless of whether or not the parties are legally obliged to attempt to settle a dispute through negotiation, initial negotiations are inherent to the manner in which most Chinese counterparts will insist upon including a process of negotiation or friendly consultation before either party is entitled to begin formal dispute resolution procedures such as arbitration or litigation.”<sup>23</sup>

*Mediation/Conciliation.* „Mediation has always been a traditional way used by the Chinese to solve civil disputes. For a long time in the past, when disputes arose among the people, the relatives, friends, and elders of the disputing parties or those who were impartial and enjoyed high prestige would often be asked to intervene and mediate a settlement. By the late 1950s commune and street mediation services were well in place.“<sup>24</sup> As intermediaories play a more controlling and advisory role in Chinese mediation than in European mediation, the traditional Chinese concept of mediation is better described with the term conciliation as defined above. Today, mediation/conciliation in foreign-Chinese disputes in China is conducted by court, by the China International Economic and Trade Arbitration Commission (CIETAC), and by the collaborative Mediation Centre of the China Council for the Promotion of International Trade and the International Institute for Conflict Prevention and Resolution (CCPIT/CPR). Despite its long tradition in China, foreign parties reluctantly choose mediation, because mediated agreements are not always internationally recognized and enforceable yet: „In China, neither mediation agreement nor settlement statement has been provided with enforceability up to now. (...) On the contrary, the mediation agreement made by the court or arbitration tribunal has enforceability (see Article 89 of Civil Procedural Law and Article 51 of Arbitration Law).“<sup>25</sup> Only mediated agreements by CIETAC will take the form of an arbitral award and thus are international enforceable.

*Arbitration.* Because of its reliable enforceability, arbitration is the preferred mode of ADR in European-Chinese business relation. In 1986, China joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (The New York Convention) of the *United Nations Commission on International Trade Law* (UNCITRAL). In consequence, the *China International Economic and Trade Arbitration Commission* (CIETAC), the most important arbitration commission for foreign-related disputes in China, revamped its regulatories: “Resultantly, a neutral seat for determination of disputes can now be selected outside China and the procedural law of another country may apply to CIETAC arbitrations. China hopes this will enhance its growing reputation within the commercial arena as a leading player in the

resolution of Chinese-foreign disputes. The early signs are promising. For investors in China, arbitration is increasingly deemed the preferred method of resolving disputes. Consistent with other leading institutions CIETAC is experiencing record dispute referrals, handling more than 1,000 cases in 2006.<sup>26</sup> The international enforceability of arbitral awards in China “is perhaps the single most important advantage arbitration has over litigation and is one of particular significance in Asia where there are particular difficulties in enforcing civil judgments.”<sup>27</sup>

### *5.2.2. Comparing Chinese and European Procedures*

There has been increasing research on international, cross-cultural and even Chinese-Western Alternative Dispute Resolution in the last decades. These sources already reveal a lot of valuable information about the topic.<sup>28</sup> They all agree on the fact that its various practices reflect the respective values of the cultural context: In the Chinese tradition, procedures tend to value the principles of the golden mean, of selflessness and community; whereas in Europe, procedures reflect the values of self-realization, truth, and justice. But obviously, a blending process is taking place at the moment. More or less intentionally, Chinese and International lawyers and ADR institutions adopt and implement aspects of the other dispute resolution culture they are confronted with. Unfortunately, there are no empiric data yet how successful their efforts are. Let us pick out some procedural and interactional issues of dispute resolution and compare the Chinese and European point of view.

*Procedural issues in general.* Dispute resolution in the West usually starts when conflict is already broken out, while Chinese dispute resolution characteristically begins before the conflict actually arises. It aims to prevent it from developing. In the West, procedures come to an end, when conflict is resolved, which is not necessarily equivalent to a sustainable state of harmony between the parties as it is longed for in Chinese dispute resolution. Even if some European courts require that certain cases be necessarily referred to mediation before, mediation and arbitration in Europe put high emphasis on the voluntary participation. Traditional Chinese mediation/conciliation works differently, as “whether the Chinese disputants like it or not, there is a cultural obligation for them to mediate the dispute. The end of the personal dispute serves the crucial objective of achieving and maintaining social harmony.”<sup>29</sup> For today's Chinese businessmen there still exists an implicit obligation vis-à-vis a business partner to resolve disputes in a confidential setting (of negotiation, mediation, and arbitration) and to avoid going to court.

*Goals.* In Chinese negotiation and mediation/conciliation, the goal is to rebuild a

harmonious relationship between the disputants. It is a continuous process of repelling any potential threats, even after harmony has been rebuilt. To this end, the mediator/conciliator, appeals to the rationale of mutual cooperativeness as seen by Kong Zi above.<sup>30</sup> Parties' individual interests which do not fit, finally ought to defer to common interests. The efficiency goal in the Chinese concept is therefore the mutual benefit of a long-term win-win relation. It may take time and it is not guaranteed what exactly the benefit of such an investment will be. But this deal is thought to be definitely more reliable and sustainable than a deal between strangers: "The Chinese apparently see less inherent merit than Americans (and Europeans, AIK) do in the concept of compromise, of give and take and of tradeoffs. Instead, the Chinese prefer to hold up for praise ideals of mutual interests, of joint endeavors, and of commonality of purpose."<sup>31</sup> But, that has to be added, Chinese parties normally are prepared to compromise about details in pursuing a long, integral business interests.

Despite the fact that European short-term business may never get the real benefit out of a business relationship with a Chinese company: the goal of mediation in Europe is to reach an agreement that primarily best meets each parties' interests and individual views of justice. The assets of the agreement have to be explicit and binding and they must be available at that very moment, not in a couple of years. A re-established harmonious relationship at the expense of the parties' interests and individual views of justice is not appreciated, the more, it is devaluated as insincere and not sustainable. Here, the European values of truth and transparency strongly dominate the procedures of negotiation and mediation.

*Control.* In Europe, a mediator neither advises parties how to settle, neither does he force them to accept a particular solution or to settle at all. Settlement is always voluntary. Still, the mediator exercises control as he structures and leads the process systematically. In China, the mediator/conciliator controls the process in different way: He may decide who and what is to talk and what is to do. He may give advice on how to resolve the dispute and return to a harmonious collaboration. In traditional China, mediation/conciliation was an "effective instrument for educating the group in community values. In persuading and pressuring the parties to agree to a settlement, the mediator was instructing them and all others in attendance about those standards deemed right by the group."<sup>32</sup>

*Structures.* „In Chinese ADR all depends on the personal ability of the intermediary“: As a part of China's non-legalistic tradition Alternative Dispute Resolution in China is much less regulated by standards and rules. In Chinese ADR, all depends on the strength of

the third person, the mediator or arbitrator, and its ability to manage the case. In the tradition of non court dispute resolution techniques of today's mediation and arbitration were mixed together and had no specified rules. Parties just wanted to have a decision to be accepted by both of them. Senior authorities, respected by the community had to pass a sentence which would conciliate the parties to have normal going on in the community. It was not a question of right or wrong but of social harmony. The parties would not bother to challenge the authority. In the last decades with China's opening and the development of law, ADR procedures have become more legalized and structured in China. But compared to European regulations or those of the International Chamber of Commerce (ICC), Chinese ADR procedures, of CIETAC for instance, do not have that much defined procedural structures. In Europe, mediators and arbitrators have to comply with a set of ethical and procedural rules which shall serve for quality assurance.

The appreciation of personal and situational flexibility in Chinese ADR shows up in the fact that the CCPIT Mediation Center is working with a network of over 40 local subcenters in China. Every case is handled in coalition with local mediators or arbitrators or is fully transferred to them who are already familiar with the context of the case. In the Chinese view, less regulations allow more situational flexibility to solve every dispute appropriately.

*Intermediaries' ethics.* In Europe, a mediator/arbitrator obligates itself to be unbiased and impartial as he is expected to act from a neutral point of view. He is not allowed to have any business or private relation to neither of the parties. In contrast, in the Chinese world of *guanxi*, intermediaries are mostly more familiar with the parties. "(A)s there are about one million mediators in China, the Chinese mediators are well known in the community. As a result, they have established close relationships with the disputants. To the Chinese mediators, knowledge of, and familiarity with the disputants, is a great asset that enables them to determine who is right or wrong in a dispute. Neutrality is therefore of less a concern to Chinese mediators than those mediators in the western countries such as United States and Australia. To the Chinese, the major goals are eliminating the dispute and keeping the anger down. To this extent, the Chinese mediators serve more as adjudicators than mediators."<sup>33</sup>

By this personal relatedness, also parties themselves can indirectly keep control over the process and the outcome: "The extrajudicial process often allowed both parties a considerable opportunity for bargaining through and with third persons whom they were likely to know and respect, whom they could often select, and who might even be

familiar with the background of the dispute as well as with local norms and practices. This facilitated a solution with which each party felt he could live.”<sup>34</sup> Consequently, in China there is no skepticism against caucuses as often seen in Europe, the more, parties mostly dislike to discuss face to face with the other party because at that stage to the conflict they distrust each other so much. There is no question about the mediator`s impartiality, because they both have the same opportunity to speak to him. As a result of this, outcomes may not always be balanced: “Educated, powerful and wealthy persons or families had obvious advantages in settling disputes within the local group as well as before the courts. This often led to bias on the part of the mediators and to an unfair settlement that weaker parties were powerless to prevent.”<sup>35</sup>

From the inward perspective of Confucian morality, the practice of fair mutual benefit always depends on the person and the situation you deal with: Do you have any obligations or do others have any obligations according to the hierachies in the family or at work? While the ethical code for European intermediaries prescribes impartiality, the ethical code for Chinese intermediaries in a tendence allows partiality for the economic good of their own group.

## **6. Suggestions towards cross-culturally matching procedures**

### ***6.1. Rely on commonly agreed terms of fairness***

*The Dao is nameless and inexpressible*—the more rules, the more confusion and the more immorality between the people. The non-legalistic thinking of Lao Zi still prevails in Chinese negotiation preferences: Fair and efficient human interaction in relationships follows a general fairness morality of the golden rule and mutual benefit. Europeans on the other hand often struggle with the rigour and complexity of their moral standards, represented in Immanuel Kants Categorical Imperative. Likewise, the sophisticated, highly regulated jurisdictions of European Law are contrasting with a Chinese law which is rather vague and tends to serve more for political guidelines. As law, rules and operational prescriptions have a highly different status in Europe and China, the parties` procedural preferences come into conflict with each other: „Whereas those outside China tend to think of a contractual problem in terms of the parties` strict legal rights and obligations laid down in the contract, Chinese businessmen are more inclined to be guided by concepts of fairness and equity which lead to an expectation either that the strict terms of the contract should not be enforced, or that the contract should be renegotiated according to changing circumstances. Similar attitudes may

affect the manner in which Chinese conciliators and arbitrators approach the task of resolving disputes.<sup>36</sup>

Chinese and European parties may find common ground in the consent that all is negotiable if some basic conditions are kept. Before anything else is done, they shall discuss and commonly agree on their own terms of fair collaboration and dispute resolution. If there is a business interest, the Chinese side may be eager to talk about the relationship and the mutual benefit, anyway. If there is a business interest, the European side may be eager to discuss all legal details in order to not to lose any asset. But disputing about legal details longer than necessary in this setting is definitely not conducive. Thus, Europeans shall implement their most important legal issues into the agreement as unmistakably simple duties of collaboration. Most Chinese business people are interested in peaceful solutions and wish to avoid long-term troubles. Thus, they shall take the Europeans' need for clear conditions seriously and consider their future requirements in advance. Finally, the parties should mutually verify their interpretations of the agreement.

### **6.2. Avoid litigation**

„It is all about saving face“. As already mentioned, there is no long tradition of formal law and legal procedures in China, neither in deal making nor in dispute resolution. Disputes traditionally have been conciliated by an authority's consideration of the circumstantial and personal context of the dispute. Today, local judges may operate on the level of *guanxi*, that is, they want and give benefits. Thus, litigation in China is all about *guanxi* strategy which European parties may be unwilling and unable to work with. Moreover, litigation in China is perceived as highly face threatening. Its win-lose logic breaks up precious relationships, a price that no business men in China, especially Europeans, can afford. In addition, once you start arbitration or litigation, the Chinese party may just not settle. Often, they do not have a commercial reason at that point to settle, it is all about saving face. Further, imposed judgements may order face threatening concessions that parties will only reluctantly attend. So, if parties really want to resolve the case quickly and maintain the relationship as well, they shall do it in informal negotiation or mediation: While in litigation there is always a loser and a winner and in arbitration there is often a loser and a winner, in negotiation and mediation there are mostly two winners who will be happy work together again.

### **6.3. Prefer informal and formal negotiations**

Consequently, if communication between the parties went smoothly before the dispute

arised, informal negotiations can solve the dispute fair and effectively for both sides. All business men are familiar with face-to-face negotiation in an unofficial setting. They are likely to work constructively on a settlement by themselves as they do it in dealmaking. Additionally, Chinese parties preferably do not involve official third parties because of the higher risk of losing face and losing control of confidential information. In informal negotiations Chinese negotiate more in detail about conflicting positions as it is not a matter of face. Further, thanks of the opportunitys to criticize more openly and disclose own limits, informally negotiated agreements are more likely to be implemented. The ability to bring its real interests into the agreement will strengthen also the Chinese party's committment.

„In case the disputes between/among the parties, they (the mediators, AIK), sometimes invite related departments of local government to do mediating works for resolving their troubles.“<sup>37</sup> To secure implementation, it is conducive to bring an extern factor into the negotiation: Choose Chinese or foreign government representatives or officials of a supervisory authority as intermediaries. If there is an official present at the contract signing, when conflict comes up later, there will be somebody willing to intermediate, too. Officials can serve as a strong leverage for the principle of mutual benefit, and can make sure that both sides get what they are entitled to. Bureaucratic authorities can impose more effective sanctions (as an audit of the commercial or labor inspectorate) than the Chinese legal system is able to. Officials called to testify or moderate the agreement will take charge that the cancellation agreement is correctly fulfilled. When doing business in China it is nearly impossible possible to comply with all the regulations. This is not about morality but an instrument of power.

#### **6.4. Choose arbitration when failing in negotiations**

„If negotiations break down the claimant may consider resorting to litigation or arbitration as a means of compelling the other party to satisfy his claim. In the context of international contracts, *arbitration rather than litigation* will usually provide the most appropriate means of resolving disputes.“<sup>38</sup> Certainly, the first reason is that arbitration awards are internationally enforceable. Another reason for Europeans is neutrality: competing with the established *guanxi* structures is difficult when coming from Europe. „The parties preference for a neutral venue can be met more easily in the context of an arbitration provision than in a submission to jurisdiction. The ability to choose the tribunal is seen by many as one of the most important aspects of arbitration. Moreover, the parties may, through the arbration clause, ensure that any tribunal is itself neutral both as regards the parties and, if appropriate, the arbitration venue.“<sup>39</sup> A big

advantage from the Chinese point of view, is that arbitration is still more adjustable than litigation: „(A)rbitration permits the parties at the time of contracting (or subsequently by agreement) to agree or shape the procedure that will be followed in the course of any arbitration proceedings, to take into account the nature of the dispute.“<sup>40</sup> Furthermore, arbitration is confidential and is not necessarily as time-consuming and costly as litigation.

### **6.5. Choose mediation/conciliation when enforceable**

At the moment, international business disputes mediation/conciliation is rare in China. But given the long history of mediation-oriented thinking in Chinese culture, mediation/conciliation should have a big potential in this country. For foreign parties, it's all about enforceability: if it is not internationally enforceable without complications, they will not choose mediation/conciliation. However, with combinations of mediation and arbitration, as the Mediation Window<sup>41</sup> and Med-Arb<sup>42</sup> international enforceability is legally ensured.<sup>43</sup> But why do mediation and not arbitration at all? There are considerable procedural advantages over arbitration regarding the challenges of Chinese-European disputes:

*Securing the relationship:* Step by step, mediators can eliminate hostility between the parties and pave the way for better communication and further cooperation. Mediation pays more attention to long-term business interests, regardless of winning or losing one single case.

*Space for circumstantial factors:* Many European parties do not know much about Chinese company culture and vice versa. In mediation, the various circumstantial factors which are involved in a business dispute can be taken into account. For instance, the interpersonal, political context of hierarchy and *guanxi* which is often more complicated than the case itself. It is often not very clear who holds power and responsibility in a Chinese company. *Guanxi* is indispensable to find out who is the right person to attend the negotiation and how to deal with all the other people involved. One has to be very careful with face concerns: while talking to the CEO, an experienced mediator may better know how to give him face and play off own assets. A mediator with both backgrounds, both languages, and *guanxi* in china, can use this leverage of multilevel dimensions of publicity and politics, while a foreigner in dyadic negotiations may not be able to impose anything to a Chinese in China. In *joint mediation*, mediation can profit of both the competence of a Chinese and an European mediator.<sup>44</sup>

*Procedural Flexibility:* „Neither the mediator nor the parties need to rigidly stick to the

proceedings. Mediators could adopt flexible strategies and tactics as long as it is beneficial to dispute resolution.<sup>45</sup> Within the procedural flexibility of mediation, which is highly appreciated in its Chinese tradition, the mediator is able to create good circumstances for both parties' preferences: with a good, frank conversation on other non-conflictual matters in order to meet the need for trust building activities on the Chinese side<sup>46</sup>; with consistent reframing<sup>47</sup> in order to meet the need for transparency and structure on the European part. Such activities are of considerable value for the respective party while requiring only minor concessions of the other one.

*Balancing culturally different concepts of claiming:* A mediator/conciliator can also balance between the culturally different kinds of claims: 1) The European claims for individual rights and justice vs. the Chinese claims for compliance with the common duties of collaboration. 2) The inherent limitedness of claims from the European point of view vs. inherent collectiveness of claims which consider all involved people from the Chinese point of view.

## **7. Concluding remark**

Sure enough, as I myself am European, the paper tends to speak from and for the European point of view. Even if it is desirable to find a space in between the cultural perspectives in order to mediate them properly, it is not possible for a human being to be entirely unbiased in cultural regards. Actually, cultural neutrality is definitely not the goal this study strives for. Even more so, it encourages to develop a broad knowledge and understanding of divergent European and Chinese points of views. This broadened horizon enables not only to appreciate but also to compare and evaluate one's own procedural culture as well as aspects of foreign cultures.

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- <sup>1</sup> The procedural rules of the Chinese-British mediation center of CCPIT/CEDR, the International Chamber of Commerce (ICC), or the China International Economic and Trade Arbitration Commission (CIETAC) do not consider the matter systematically.
- <sup>2</sup> See Lax, David and Sebenius, James, "The Manager as Negotiator: The Negotiator's Dilemma: Creating and Claiming Value," in: Goldberg, Stephen, Sander, Frank, and Rogers, Nancy, (eds.), *Dispute Resolution*, Boston, MA 1992, 49-62.
- <sup>3</sup> See Wheeler, Michael A. and Menkel-Meadow, Carrie, eds., *What's Fair? Ethics for Negotiators*, San Francisco 2004.
- <sup>4</sup> See the iterated prisoner's dilemma games as shown by Robert Axelrod. Axelrod, Robert, *The Evolution of Cooperation*, New York 1984.
- <sup>5</sup> See Salacuse, Jeswald, "Ten Ways that Culture Affects Negotiating Style: Some Survey Results", in: *Negotiation Journal*, 14(3), 1998.
- <sup>6</sup> See Yu Xuejian, "The Chinese 'Native' Perspective on Mao-dun (Conflict) and Mao-dun Resolution Strategies: A Qualitative Investigation", in: *Intercultural Communication Studies* 7(1), 1997-8, 63-82.
- <sup>7</sup> Pye, Lucian W., *Chinese Commercial Negotiating Style*, Cambridge M.A. 1982, 20.
- <sup>8</sup> Cecilia Albin, *Justice and Fairness in International Negotiations*, Cambridge 2001, 13. (Emphasis AIK) This is also a superordinate ethical need: „So unterstellt das Verfahren beispielsweise Idealformen einer wünschenswerten Konfliktbearbeitung, die einem westlich-europäischen Kontext entspringen, so dass sich ein unreflektiert zur Anwendung gebrachtes Mediationsverfahren den Vorwurf des Neokolonialismus gefallen lassen muss.“ On the cultural conditionality von mediation see Joseph P. Folger, Robert A. Baruch Bush, "Ideology, Orientations to Conflict, and Mediation Discourse", in: Folger, Joseph P., Jones, Tricia S. (Hg.), *New Directions in Mediation. Communication Research and Perspectives*, Thousand Oaks, 1994, 3-25.
- <sup>9</sup> See Albin, *Justice and Fairness*, and Mayer, Claude-Hélène, Boness, Christian Martin, *Interkulturelle Mediation und Konfliktbearbeitung*, Münster 2004.
- <sup>10</sup> *Lunyu*, XII, 13, here an in the following cited from *Confucian Analects*, translated and commented by Arthur Waley, New York 1938, reprinted 1989.
- <sup>11</sup> See Tu Wei-Ming, *Humanity and Self-Cultivation. Essay in Confucian Thought*, Berkeley 1979.
- <sup>12</sup> *Lunyu*, XVII, 1.
- <sup>13</sup> *Konfuzius. Gespräche (Lun-yu)*, aus dem Chinesischen übersetzt und herausgegeben von Ralf Moritz, Stuttgart 1982, 218.
- <sup>14</sup> Waley, *Confucian Analects*, 317.
- <sup>15</sup> *Lunyu*, XV, 23.
- <sup>16</sup> *Lunyu*, XIII, 24.
- <sup>17</sup> *Lunyu*, XIV, 23.
- <sup>18</sup> *Lunyu*, XV, 8.
- <sup>19</sup> "Finding that the sage would not call on him, he adopted the expedient of sending him a pig, at a time when Confucius was not at home, the rules of ceremony requiring that when a great officer sent a present to a scholar, and the latter was not in his house on its arrival, he had to go to the officer's house to acknowledge it." Waley, *Confucian Analects*, 317f. He points to the *Lǚ Chǐ*, XI. Sect. lii, 20.
- <sup>20</sup> *Lunyu*, IV, 4.
- <sup>21</sup> See Axelrod, Robert, *The Evolution of Cooperation*, New York 1984.
- <sup>22</sup> See Jia Wenshan, "Chinese Mediation and Its Cultural Foundation", in: Chen Guo-Ming, Ma Ringo, *Chinese Conflict Management and Resolution*, Westport 2002, 289-295. Wall points out: "Mediation is the primary method of conflict resolution in China, the world's most populous nation (...)—85% of the disputes in China are resolved through mediation." Wall, James A., "Mediation in the People's Republic of China", in: M. Afzalur Rahim (ed.), *Theory and research in conflict management*, New York 1990, 118.

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- <sup>23</sup> Freshfields Bruckhaus Deringer (ed.), *The resolution of China disputes through arbitration*, Hong Kong 2004, 2; freshfields.com/practice/disputeresolution/publications/pdfs/8287.pdf, 17.7.07.
- <sup>24</sup><sup>24</sup> Lim Lan Yuan, „Mediation Styles and Approaches in Asian culture“, speech on Asia Pacific Mediation Forum-Conference 2003, Singapur; www.unisa.edu.au/cmrg/apmf/2003/papers.htm, 19.7.07
- <sup>25</sup> Mu Zili, „Resolving Disputes by Mediation: CCPIT’s Practice“, Source of CCPIT, Beijing, China.
- <sup>26</sup> Roe, Mark, “Quicker Justice”, in: *International Construction Review* ICON, 11 June 2007.
- <sup>27</sup> Freshfields, *The resolution of China disputes through arbitration*, 5.
- <sup>28</sup> See Augsburg, David W., *Conflict Mediation across Cultures*, Louisville 1992; ; Clarke, Donald C., “Dispute Resolution In China”, in: Lee T.V. (Hrsg.), *Contract, Guanxi, and Dispute Resolution in China*, New York/ London 1997, 369-420. Cohen, *Chinese Mediation on the Eve of Modernization*, in: *California Law Review*, 54(1), 1966, 1201-1226. Goh Bee Chen, *Law Without Lawyers, Justice Without Courts. On Traditional Chinese Mediation*, Aldershot 2002; Jia Wenshan, “Chinese Mediation and Its Cultural Foundation”, in: Chen Guo-Ming, Ma Ringo, eds., *Chinese Conflict Management and Resolution*, Westport 2002, 289-295; Wall, James A., “Mediation in the People’s Republic of China”, in: M. Afzalur Rahim, ed., *Theory and research in conflict management*, New York 1990. For instance, Augsburg’s comprehensive study *Conflict Mediation Across Cultures* compares mediation in “Modern Cultures” to mediation in “Traditional Cultures”. Unfortunately, his opposition suggest that the model of “Modern Cultures” is in itself “modern” and as such better and “more civilised” as the model of “Traditional Cultures” which “still” relies on backward principles at large. Nevertheless, in other respects the distinctions he made are valuable for differences in European-Chinese ADR principles. Augsburg, *Conflict Mediation across Cultures*, 202.
- <sup>29</sup> Cohen, *Chinese Mediation*, 1223.
- <sup>30</sup> “The goal was to convince the parties to agree to the imposed solution because of its inherent reasonableness.” Cohen, *Chinese Mediation*, 1222f.
- <sup>31</sup> Pye, Lucian W., *Chinese Commercial Negotiating Style*, Cambridge M.A. 1982, 77.
- <sup>32</sup> Cohen, *Chinese Mediation*, 1225.
- <sup>33</sup> Lim, *Mediation Styles and Approaches in Asian culture*.
- <sup>34</sup> Both Goh, *Law Without Lawyers, Justice Without Courts*, 12. (Emphasis AIK)
- <sup>35</sup> Cohen, *Chinese Mediation*, 1224.
- <sup>36</sup> Freshfields, *The resolution of China disputes through arbitration*, 4.
- <sup>37</sup> Mu, *Resolving Disputes by Mediation*.
- <sup>38</sup> Freshfields, *The resolution of China disputes through arbitration*, 5. (Emphasis AIK) For that, it is essential, that the parties include in their contract a clause outlining how binding solution to any dispute can be reached.
- <sup>39</sup> Freshfields, *The resolution of China disputes through arbitration*, 4.
- <sup>40</sup> Freshfields, *The resolution of China disputes through arbitration*, 4.
- <sup>41</sup> „Basically speaking, it means that during the arbitration process, the tribunal may, on the basis that both parties have a desire for mediation, or one side so desires it that the other side agree to when consulted on it by the tribunal, conduct mediation proceedings for the case. If the parties have reached an amicable settlement conducted by the tribunal, the tribunal shall end the case by making an arbitration award in accordance with the contents of the settlement agreement.“ Mu, *Resolving Disputes by Mediation*.
- <sup>42</sup> „(A)fter the parties have reached a settlement agreement, the mediator may persuade the parties to conclude an arbitration agreement, subject them to an arbitration proceeding (summary procedure) and finally make an arbitration award including the contents of the settlement agreement, so as to it binding to both parties.“ Mu, *Resolving Disputes by Mediation*.
- <sup>43</sup> This feature of CIETAC which has been conformed by the Arbitration Law of China and CIETAC’s Arbitration Rules.

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<sup>44</sup> „This mediation style was initiated by CIETAC-China Internatioanl Economic and Trade Arbitration Commission, with AAA, the American Arbitration Association in the mid 1970s. The term ‘joint mediation’ means *mediation conducted with assistance from a Chinese mediation institution and/or a foreign counterpart pursuant to a set of mediation rules jointly adopted by both mediation institutions*. Since 1987 instead of CIETAC, CMC – CCPIT Mediation Center – has administered and conducted this kind of mediation together with its foreign cooperative partners.“ Mu, *Resolving Disputes by Mediation*.

<sup>45</sup> Mu, *Resolving Disputes by Mediation*.

<sup>46</sup> See Tjosvold, Dean, Hui Chun, and Sun Haifa, "Can Chinese Discuss Conflicts Openly? Field and Experimental Studies of Face Dynamics in China", in: *Group Decision and Negotiation*, 13(4), 2004, 351-373.

<sup>47</sup> To enable disputants to see things differently and more positively, mediators utilize a technique called reframing. Reframing is to change the conceptual or emotional viewpoint of an experience or statement and to place it in another frame which fits the "facts" of the same concrete situation equally well but thereby changes its meaning. It assists parties to redefine the way in which they understand or conceive a problem.