

## Modern Mediation in Mainland China

By Ira Cohen, B.A., J.D., LL.M.

*"Each lawsuit is a fire; you cannot avoid its burning flame."  
Traditional Chinese belief*

### INTRODUCTION

Putative litigants' attempted avoidance of judicial litigation is not a novel business or legal strategy. Inoculated with a healthy dose of common sense and having tasted the bitter pill of court experience, many people and parties would sooner suffer some loss than find themselves entangled in a lawsuit that could prove more costly and time consuming, not to mention emotionally and psychologically draining. Consequently, in many instances, the parties choose not to trust their fickle fortunes to a judicial trial, but rather to take their troubles and tribulations to a mutually respected middleperson (often a wise village elder) in order to sort out their legal disputes.

It should firmly be borne in mind that a significant measure of ancient Chinese jurisprudence was derived from earlier moral teachings inscribed in later legal codes. The remainder of the corpus of law was comprised of orders issued by the various Emperors. Once law, it then became the duty of the Mandarins (i.e., important officials of ancient China) to instruct the people about the laws. For that important purpose, they gathered on a regular basis, usually twice a month.

"The six main laws of ancient China were as follows:

1. Every man must carry duties with obedience;
2. You must always show great respect to family ancestors;
3. Avoid legal actions as far as possible;
4. Lots of care shown to people who run the public schools;
5. All people should be reminded of laws regularly; and
6. Control your anger outbursts."

(Underscoring added.)

The entrustment of a respected neutral to assist parties in the resolution of a dispute has existed since ancient times. The alternative dispute resolution modality of mediation, then, has been part and parcel of the legal landscape of China for millennia. Even today, the Chinese recognize the palmary value of mediation. Of course, modern times call for evolving methods and professionalization of the mediation process. Enactment of mediation legislation, the training of mediators, the proper role of the courts, and potential use of virtual platforms for mediation are part and parcel of the broader discussion of ADR in China.

"China is currently undergoing a push toward the Rule of Law. This is a positive development, but it has resulted in a surge in litigation. People increasingly want their day in court, and the courts are

backlogged. Drawing upon China's cultural history, the ancient Chinese tradition of mediation will have an even larger role to play in the development of China's future."<sup>2</sup>

### OVERVIEW OF TYPES OF MEDIATION IN MAINLAND CHINA

*"A clever person turns great troubles into little ones, and little ones into none at all."  
Chinese Proverb*

The Chinese ADR scheme is involute. Depending upon whom you ask, currently there are four or five types of mediation practices prevalent in Mainland China, which may be veridically categorized as follows: civil; judicial; administrative; arbitral; and industry.

First, civil mediation (a/k/a "People's Mediation") is conducted, outside the confines of the regular court system, by respected people in the community. So-called "People's Mediation Committees" ("PMCs") have been established under the Chinese Constitution to mediate civil disputes. The PMCs can be arranged in settings such as factories, residential areas, or for small villages. Reportedly, there are millions of people's mediators, dwarfing the number of lawyers and judges in the formal justice system. Second, judicial mediation is conducted, inside the court system, by the judges. Court-conducted mediation is utilized in both civil matters and minor criminal cases. Such mediation ordinarily is attempted before trial. In situations wherein the mediation is not successful (i.e., the parties reject the efforts and fail to enter into a settlement), the case then meanders onward to trial. However, in a heteroclitic departure from Western court mediation practice, the same judge who attempted to mediate the parties' dispute—and failed—then, not infrequently, tries the case.

Third, administrative mediation is carried out by officials of the government. Fourth, arbitral mediation is run by various arbitration bodies. Fifth, industry mediation is conducted by recognized groups in various industries, e.g., Chambers of Commerce, trade associations, and arbitral institutions.

The two most prevalent forms of mediation, by far, are the civil and judicial types. This article will focus on this pair of Mainland China's ADR modalities.

### THE PEOPLE'S MEDIATION PROCESS

*"Two good talkers are not worth one good listener."  
Chinese Proverb*

Another pithy old Chinese proverb reminds us that that "all beginnings are difficult." Clearly, however, that is not sufficient reason not to dream of reform and implement change. In the Autumn of 2010, the government of the

People's Republic of China ("Mainland China"), in a well-calculated *démarche*, enacted The People's Mediation Law; said law was made effective on January 1, 2011. In theory, at least, the people's mediation process is touted to be free of charge, quick, diverse, and inclusive.

"The purposes of the People's Mediation are to resolve the community disputes in a timely fashion and to maintain the harmony as well as stability of the society. The People's Mediation services are provided to the public free of charge through the People's Mediation Committees in different geographical areas of the country. The People's Mediation Committees are funded by the government and they are also guided by the country's administrative and/or judicial organizations. It is expressly provided that women should be included in the People's Mediation Committees and ethnic minorities should be included in the People's Mediation Committees in areas with a population of ethnic minorities."<sup>3</sup>

### QUICK BREAKDOWN OF PEOPLE'S MEDIATION

- Participation in Mediation: Voluntary.
- Cost of Mediation to Parties: None.
- Relationship to Other Forms of Dispute Resolution: Without prejudice.
- Mediators: Member of PMC or appointed by PMC.
- Mediator's Background: Non-lawyer.
- Mediator's Education: Some education.
- Mediator Training: Intermittent.
- Mediator's Traits: Impartial; Enthusiastic; Without bias; Not to insult either of the parties.
- Mediator's Ethics: May not ask for, or receive, and favors or advantages; must not reveal personal data or trade secrets.
- Mediator's Public Obligations: improper civil, or criminal, conduct must be reported to law enforcement or relevant governmental authorities.
- Mediator's Compensation: None (exceptions: cases of lost wages, sickness, or death).
- Mediator Recognition: For exceptional achievements.
- Lawyers: None involved.
- Initiation of Mediation: PMC or any of parties.
- Refusal of Mediation: One party's refusal suffices.
- Selection of Mediator: The parties can choose their own or, in the alternative, simply accept the PMC designee.
- Confidentiality: If, and as, requested by the parties.
- Private or Public Mediation: As agreed by the parties.
- Public Mediation Attendees/Participants: can include friends, colleagues, neighbors, relatives, professionals, and experts.
- Number of Mediators: One or more.
- Conduct of Mediation: The parties must follow the general and customary ground rules; respect the mediator; and respect the other party.
- Style of Mediators: The approach, in general, is persuasive; the mediator will set forth the law and national

policies of Mainland China; and seek to achieve a negotiated resolution.

- Record-keeping: Yes, to some degree.
- Settlement Agreement: Verbal or written. Verbal
- Settlement Efficacy: At time it is reached.
- Written Settlement Efficacy: When both the Parties and the mediator have signed an accord.
- Court Confirmation of Settlement: Parties have 30 days to so request.
- Sanctions for failure/refusal to submit to Mediation: None.
- Termination of Mediation: Anytime, by any party.

It is noteworthy that settlements reached through PMC or other extra-judicial modalities of mediation typically are enforceable, but as contracts, not as judgments or decrees. Thus, in the event that the parties need, or desire, a court to recognize the judgment, the parties can request the same. Thereafter, if granted, the settlement will be enforced as if it were a court judgment. In stark contrast, settlements reached through mediation conducted by a court or, in the alternative, by an arbitral tribunal, can be enforced as court judgments or arbitral awards.

### THE JUDICIAL MEDIATION PROCESS

*"Listening well is as powerful as talking well and is also as essential to true conversation."  
Chinese Proverb*

As we have seen, ADR is a well-recognized dispute resolution mechanism in Mainland China. In recent years, the Supreme Court in Mainland China has emphasized the appetency for ADR as well as the courts' role in supporting ADR (and, in particular, mediation) as an efficacious manner of resolving parties' disputes.

"The PRC government has taken many measures in recent years to encourage and support the settlement of disputes through mediation. Furthermore, to support international commercial mediation, the PRC government has signed up to the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention on Mediation") on 7 August 2019. \* \* \* In 2021, the Supreme People's Court has published an implementation rule on the one-stop alternative dispute resolution (ADR) mechanism by court system ("the Rules"), which could reflect the court's attitude to further promote mediation as an efficient ADR to solve disputes. Also, the Rules specifically mentioned that in future, financial disputes involving many investors should be referred to a consolidated mediation conducted by industry associations and chambers of commerce first before such disputes go into litigation proceeding."<sup>4</sup>

Albeit the courts in Mainland China encourage the parties to resort to mediation, under the Civil Procedural Law, the parties cannot be compelled to so engage. Moreover, there are no penalties or sanctions that can be imposed on the parties for failing or refusing to participate in mediation proceedings. So, too, there is no remuneration for the performance of pro bono publico ADR in China. The neutrals' only grudons are an enhanced personal reputation and community approbation.

#### QUICK BREAKDOWN OF JUDICIAL PEOPLE'S MEDIATION

- Participation in Mediation: Voluntary.
- Participation Where Contract Requires Mediation: Still voluntary.
- Cost to Parties for Court Mediation: None beyond costs of court case (N.B., if case settled by mediation, court costs are reduced by 50%)<sup>5</sup>
- Relationship to Court Proceeding: Without prejudice.
- Mediators: Trial Judge wears the "Mediators" Hat.
- Mediators' Assistants: Court Clerks.
- Mediator's Background: Judge.
- Mediator's Education: Legal (Lawyer/Judge).
- Mediator Training: Intermittent.
- Mediator's Ethics: Judicial ethics.
- Mediator's Remuneration: Regular compensation as judge.
- Lawyers' Ethics: Lawyers not required to inform their clients of mediation option.
- Initiation to Mediation: by judge or by parties.
- Refusal of Mediation: one party's refusal suffices.
- Sanctions for failure/refusal to submit to Mediation: None.
- Selection of Mediator: The trial judge assigned to the case will function as Mediator.
- Court referral to outside (commercial) mediation: allowed.
- Confidentiality: As requested by the parties.
- Evidence: mediations are held on a "without prejudice" basis.
- Private or Public Mediation: as agreed by the parties.
- Public Mediation Attendees/Participants: can include friends, colleagues, neighbors, relatives, professionals, and experts.
- Number of Mediators: 1 (the trial judge).
- Presiding Mediator: The parties can object to the having the same judge who functioned as the mediator hold the trial (in cases of refused or failed mediation).
- Mediation during trial: allowed.
- Record-keeping: Yes.
- Settlement Agreement or Statement: Written (only).
- Written Settlement Efficacy: When the Court has signed.
- Termination of Mediation: Anytime, by any party.

#### EVOLVING MEDIATION PRACTICE IN MAINLAND CHINA

*"Patience is a bitter plant, but its fruit is sweet."*  
Chinese Proverb

"While mediation has many benefits, there have been concerns that the standard of mediation must improve to better serve modern Chinese society. China has been looking at combining the positive concept of harmony and dispute resolution embedded within traditional Chinese mediation, with the norms and expectations of modern international ADR practices. The Central Chinese Government has been pushing five significant changes."<sup>6</sup>

The quintet of proposed changes may fairly be summarized as follows: Greater focus on personal rights than Confucian ethics and compromising for the betterment of the group; 6A

1. Professionalization of mediation (more resources, better training, compensation)
2. Collaboration between courts and mediation bodies (courts can refer matters to mediation bodies and then confirm the settlements);
3. Institutionalization and legislation of mediation (enactment of Peoples' Mediation Law in 2011 and amendment of Civil Procedure Law); and
4. Use of modern technology and online ADR (e.g., PRC's Supreme Court's 2017 establishment of an on-line mediation platform).<sup>1</sup>

#### CONCLUDING COMMENTS, NOTES, AND OBSERVATIONS

*"It takes a wise man to learn from his mistakes. But an even wiser man to learn from others."*  
Zen Proverb

It is an omnipresent fact of life that beneficial change takes time and effort. Nothing happens overnight in the real sphere, and even less so in the notionate world. Nevertheless, it would appear that the court system in Mainland China is studying, adapting to, and evolving with the times, aiming for, at least, partial supercedence of judicial litigations by ADR modalities.

In 2022, the estimated population of Mainland China, the second most populous country in the world, was 1,425,671,352.<sup>7</sup> As China advances toward the Rule of Law and, at least in theory, provides more rights to its citizens, at the same time, it is clear that the Chinese populace has been turning to legal actions and the courts for enforcement of their rights. Tranquility and overall harmonization of a populace of roughly One Billion people supposedly has been forsaking rigorism and bending more to the needs, wants, and desires of the individuals.

How much of the vaunted changes are working in practice, or really touching the lives of average Chinese

citizens—the consumers of mediated justice—surely cannot be measured accurately here. However, it is beyond dispute that the Supreme Court of the Peoples' Republic of China has established, for what it is worth, a nationalized on-line ADR platform which can be found at [www.fayuan.com](http://www.fayuan.com). In that vein, it has been reported that, by the end of the first year of existence, "over 1,000 courts and 12,000 mediation organizations were involved in "fayuan.com"<sup>10</sup> The system ostensibly was designed so that non-lawyer parties can simply go online to: apply for mediation; select the neutral mediator; attend any proceedings via video hook-up; and execute any agreements through their cell phone, tablet, or computer.

By March of 2021, it was reported by the PRC Supreme Court that 13.6 million disputes had been handled by virtue of such online mediation, with an impressive 65% resolution rate (claimed); it is further boasted that on weekdays an average of 66 disputes per minute are being mediated and, allegedly, the number of court cases (which hit a recent zenith of 30 million cases in 2019) consequently have been on the decline.<sup>11</sup>

Despite our ideological and political differences with Mainland China's political regime and class, it is hard to quarrel with the historically demonstrated ingenuity and inventive triumphs of the Chinese people. Papermaking; tea production; movable type printing; porcelain, silk, paper, printing, the compass, alcohol (beer) for drinking; gunpowder; the mechanical clock; the umbrella; iron smelting; the rocket; bronze; the kite; the seed drill; the toothbrush; and paper money. All Chinese-invented "firsts."

I believe that it is not only possible, but beneficial, to engage in strategies to ferret out and absorb new information and then, to adopt and adapt the best advances gleaned from others—whether they be allies, vel non; competitors or not; common-law based or not—in order to strengthen the legal foundations of our own country. No legal system should operate in a vacuum. Rather, jurisprudence preferably should reflect tradition, provide reliable precedent, and support stability of a country, to be sure, but, at the same time, need not, and cannot, remain static, unchanging, and immovable. We should not be blind to the potential merits of Daedal changes—so long as beneficial, legal, and ethical—even if the source, though sagacious, is less saintly.

To be sure, the Chinese well understand—and heavily exploit—the theory, rationale, and practice of borrowing heavily from outsiders.

The United States, too, can, and should, take advantage of foreign knowledge, programs, and systems, so long as compatible with our form of democratic government, their adherence to our federal Constitution and laws, and their innate impartiality, fairness, and absence of bias. Armed with the right knowledge, we can make the necessary modifications and refinements to successful Mainland China ADR models so as to ensure that any new hybrids or variants comport with cherished American values and traditional notions of fair play, due process, and blindly administered justice.

While China, for example, continues to troll around for American intellectual property and research and development to "acquire" and exploit, there is nothing stopping the

U.S. from copying meritorious Chinese court constructs and positive, futuristic jurisprudential programs. We are not here talking about stealing, mind you. We are jawboning about learning and emulating. As did the Romans from the Greeks; and as did the colonial Americans after the British. Following some sage advice, attributed to the legendary Hong Kong/American martial artist and film actor, Bruce Lee: "Adapt what is useful, reject what is useless, and add what is specifically your own."

In Mainland China, earnest efforts are being advanced in the field of ADR. Meaningful and systemic change anywhere takes time. As an old Chinese adage observes, "[i] takes more than one cold day for the river to freeze three feet deep."



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#### Endnotes

<sup>1</sup>Alyce Miles, Ancient China Law, Prezi AI <https://prezi.com/myieg5nv7jeo/ancient-china-law/>

<sup>2</sup>From the Traditional to the Modern: Mediation in China, Weinstein International Foundation, <https://weinsteininternational.org/mediation-in-china/> Should the title be in black instead of blue?

<sup>3</sup>Ting-Kwok IU, Ng & Chan, Solicitors and Notaries, Kluwer Mediation Blog (February 2, 2021), <https://mediationblog.kluwerarbitration.com/2021/02/02/the-peoples-mediation-law-of-china-has-been-in-force-for-10-years/>

<sup>4</sup>Commercial mediation in Mainland China, Linklaters, <https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/global-gulde-commercial-mediation/mainland-china#:~:text=Mediation%20will%20be%20conducted%20either,parties%20agree%20to%20mediate%20contractually.>

<sup>5</sup>The costs of a mediation run through a commercial mediation body varies depending on the amount in dispute and/or the time expended. This footnote and the next one seem to be in lighter ink.

<sup>6</sup>Thus, any submissions made in an attempt to reach settlement will, ordinarily, not be admissible in later court

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