SELLING MEDIATION IN THE EAST

Is There an Asian Way?

Mediation is well established in the West, and it continues to grow there. However, its use is not as prevalent in the East. While many would argue this is because mediation is a relatively new concept to Asian parties, this explanation appears to be too simplistic. Perhaps the real reason mediation has not been embraced as enthusiastically by eastern companies is because it has been marketed to Asian parties the same way as it has been marketed to western ones. When promoting mediation in Asia it is crucial to know your audience and take cultural norms into account.

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I. Introduction

1 To say that the use of mediation in Asia is lacking when compared to its use in the US and Europe is an understatement; however, to say that the use of mediation in Asia is insignificant and a hopeless endeavour is far too dismissive. Mediation in Asia lies somewhere in the middle.

2 There is little question that mediation is not nearly as popular in Asia as it has become in the West. From the European Union’s Mediation Directive to government-sponsored mediation schemes in US courts, the West has been actively promoting the use of mediation, and parties seem to be responding. A 2011 survey of Fortune 1,000 US corporations found that 80% of respondents reported using mediation for commercial contract disputes. In the UK, the Centre for Effective Dispute Resolution reported that in 2012 the estimated size of the civil and commercial mediation market was around 8,000 cases (a 15% year-on-year increase since 2010). It is true that mediation has been around in the West much longer than in Asia, but is this really the main reason for such divergent statistics?

3 This is not to say that Asia has been ignoring the drive to promote the benefits and use of mediation. Many Asian countries have dedicated

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3 Centre for Effective Dispute Resolution, The Fifth Mediation Audit (15 May 2012).
mediation centres, and in October 2012, Singapore hosted its Alternative Dispute Resolution Conference, which placed a significant emphasis on mediation and its benefits.

However, the question arises: Has the Asian mediation community been promoting mediation in an effective way in Asia, the key words being “effective” and “Asia”?

A famous drug company once marketed one of its products in the United Arab Emirates. To avoid any mistakes, the company used pictures to communicate the effects of the product. The first picture was of someone who was ill. The second picture showed the person taking the medication. The last picture showed the person looking well. What the company did not remember was that in the Arab world people read from right to left. The lesson learned is that the way in which a product or idea is marketed matters.

It also matters to whom the product or idea is marketed. If a drug company is marketing a product that will prevent an illness, it is not wise to focus the marketing on those who are already ill. If the idea of the product is to prevent the illness, the product must be marketed to people before they become ill.

While numerous studies and consultations have been conducted in the West to understand how the use of mediation can be increased, the question remains whether these studies, and their conclusions, can be readily applied in the East. Is there really an “Asian” perspective on mediation? Do practitioners and proponents of mediation need to promote mediation in an “Asian” way?

There is no simple answer. If you ask five different members of the mediation community in Asia, you will most likely get five different responses. Nonetheless, it is unlikely that Asian parties have not embraced mediation because its benefits are only relevant to western users. It seems that somewhere along the way the benefits of mediation have not been properly promoted to Asian users. The impetus for increasing the use of mediation amongst Asian corporations may simply lie in altering the way in which mediation is presented to these corporations.

II. West versus East: How do they differ?

There is no such thing as a “western” approach or an “eastern” approach to dispute resolution. Either categorisation not only ignores

5 The term “Asian” is incredibly wide and very much a generalisation. There is no uniform “Asian” user of dispute resolution and there is no uniform “Asian” culture. Asia is made up of a diversity of cultures and traditions. However, when discussing an “Asian” perspective to dispute resolution, I focus on characteristics that, generally speaking, encompass a large proportion of Asian users, but certainly not all.

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differences between smaller cultures within these larger categories, but also
ignores differences that exist between individuals within the same culture.

Nonetheless, there are certain characteristics in relation to dispute
resolution that seem to be more prevalent in either western or eastern
cultures. Based upon this notion, the following lays out some general
themes about how individuals in the West and the East approach disputes.

A. The West

The western approach to dispute resolution is usually termed the
interests-based model. This model can be broken down into three core
themes:

(a) primacy of the individual;
(b) direct and open communication; and
(c) a constructive approach to maintaining beneficial
relationships.

(1) Primacy of the individual

The Westerner is interested in his own expectations, autonomy
and desires. The desires of the other party are not forefront in the
Westerner’s mind. Conflict resolution will be seen as a process of individual
satisfaction with the goal being the maximisation of self-interests, often
with little concern about the opposing side’s position.

(2) Direct and open communication

Western cultures tend to express their conflicts plainly and openly
in order for the parties to be very clear about how each other feel, the idea
being that this allows parties to deal properly with conflicts.

(3) A constructive approach to maintaining beneficial relationships

Although Westerners can be said to be self-interested, this does
not mean that they will not consider the other side’s desires or perspective.
However, when doing so, a party will often be interested in maintaining a
relationship with the other party in order to facilitate future dealings.
Westerners normally will not approach negotiations with the goal of
promoting harmony amongst the parties. A Westerner will most likely only
be interested in maintaining a relationship if doing so will provide a benefit.

6 Joel Lee & Teh Hwee Hwee, “Appropriateness of the Interests-based Model for
the Asian Context” in An Asian Perspective on Mediation (Joel Lee & Teh Hwee

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B. The East

15 When compared to Westerners, some broad traits emerge that differentiate Asians in relation to how they deal with disputes.

16 These broad traits can also be grouped into three core themes:

(a) Confucianism;
(b) collectivist inclination; and
(c) prevalence of face concerns.

(1) Confucianism

17 It would be inappropriate to suggest that Confucianism plays a large role in every Asian society. For example, Confucianism is not very prevalent in India. However, there are certain values contained within Confucianism that can be said to influence a large part of the Asian population.

18 These key values of Confucianism include the following:

(a) Society is composed of hierarchical relationships.
(b) Relationships are the source of an individual's humanity, meaning that relationships are very important to Asians, even if they are involved in a conflict with another party.
(c) Social harmony is the overall goal in human affairs; parties may be expected to sacrifice and compromise in order to achieve harmony.
(d) Attributes such as being compromising, yielding and non-litigious are often seen as virtues.

(2) Collectivist inclination

19 While it is true that an Asian party will want to maintain a relationship in order to facilitate continued commercial dealings with another party, this is only part of the picture; the maintenance of

8 In this context it is useful to note that while Confucianism does influence many members of Asian society, it is also helpful to look at the values exposed by other religious, philosophical, or cultural influences such as Hinduism that provide alternative foundations for values relevant to Asia.
relationships will be seen as a priority, even if doing so will not necessarily lead to any commercial benefits. An Asian party may be less interested in the actual facts or truth involved in a dispute and more interested in preserving a relationship and presenting a harmonious image in public.\textsuperscript{11}

(3) \textit{Prevalence of face concerns}

What is meant by “face” is the preservation of respect and avoidance of shame within one’s reference group. Asian cultures will often even set aside logic in order to reflect typical experiences or perceptions. Further, in Asian societies, the idea of “face” is reciprocal. Not only will parties try to preserve their own face; they will try to preserve the face of other parties as well.

III. \textit{How to promote mediation in the East}

The question becomes: How can understanding the generalised differences between western and eastern cultures help shape a unique way of promoting mediation in the East? By distilling these differences down, we can arrive at key desires Asian participants might have when approaching the dispute resolution process.

Four such desires are:

(a) the desire to avoid conflict;

(b) the desire to maintain a hierarchical structure;

(c) the desire to maintain relationships; and

(d) the desire to maintain face.

A. \textit{The desire to avoid conflict}

Mediation is often pitched as a form of alternative dispute resolution. Dispute is just another word for conflict, which, as noted above, Asians tend to avoid. This is not to say that Westerners seek out or embrace conflict, but Asians seem particularly reticent even to acknowledge when they are in a dispute. While Westerners will be driven by their self-interests even if those interests lead to disputes, Asians will often be driven by the Confucianist principles of harmony and compromise as well as the idea of maintaining relationships even if doing so may have disadvantages.

Instead of classifying mediation as a way of resolving a dispute or conflict, it can be sold as a way to build co-operation and communication

amongst businesses. By describing mediation in this way, neither party has to acknowledge a conflict even exists, thereby maintaining a harmonious balance.

When discussing mediation with the relevant decision makers in a dispute, mediation can actually be framed as a way to avoid conflict. As litigations or arbitrations progress, disputes only get bigger. Evidence needs to be gathered, witness statements need to be drafted, and hearings have to take place. All of these things scream conflict. Mediation can be seen as a way of avoiding all of this and remaining non-litigious (as well as keeping a “potential” conflict out of the media, thereby saving/preserving face for both parties).

B. The desire to maintain a hierarchical structure

One of the many benefits touted about mediation is how party-led the process is. While western parties may like controlling the mediation process, this may actually discourage some Asians from agreeing to mediate.

The Centre for Effective Dispute Resolution defines mediation as: A flexible process conducted confidentially in which a neutral person actively assists parties working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution. [emphasis added]

In an Asian context, there are some issues with defining mediation in these terms. The first is the use of the phrase “of a dispute or difference”. Above, I have addressed the problem with describing mediation as a way of handling a “dispute”. This part of the definition can simply be omitted when describing mediation.

The second potential issue is the use of the word “flexible”. Many Asian parties like a settled and clear process. This is why many Asians opt for resolving conflicts in court (as opposed to other dispute resolution methods), because the process used in court proceedings is clear and established. It provides for more certainty. Litigation is not seen as a newfangled dispute resolution method; it is the quintessential way to resolve disputes formally. It takes a while for change to be embraced, particularly in Asia where modern ideas are often rebuffed for the sake of tradition. Therefore, classifying mediation as “flexible” can put Asians off due to mediation’s perceived uncertainty. Instead, the structure mediation can provide should be embraced and emphasised (eg, the Singapore Mediation Centre’s procedural rules).

Also, it should not be stressed that the parties will maintain complete control of the process or that the mediator is simply there to facilitate discussion. The reason for this is that such a process lacks an authority figure. While it should be made clear that a mediator is not an adjudicator, a mediator can still be placed in a position of authority.

As discussed above, hierarchical relationships are important in Asia. This is present in litigation with a judge presiding over matters (or an arbitrator in relation to arbitration). The mediator can adopt this role in mediation. While a mediator cannot act exactly as a judge or arbitrator would, he or she can nonetheless adopt a more evaluative or direct form of mediation (as opposed to a facilitative approach). Emphasising this more authoritative approach that a mediator can adopt may make mediation appear more conducive to eastern cultures.

C. The desire to maintain relationships

This desire may appear to be largely the same in the East as it is in the West, but the impetus behind maintaining a relationship is quite different, as discussed above. Both Easterners and Westerners will usually want to maintain relationships with their business partners, even after conflicts have arisen, but mediation allows parties to explore fully the cause of a conflict.

Many times conflicts arise not because a party is unable to fulfil certain contractual obligations, but rather due to an underlying concern, factor, or problem which then manifests itself as a claim. Litigation will likely not expose the real issue, and the parties will be left in a legal dispute and a deteriorating (or ruined) relationship. Further, as noted above, Asians’ desire to maintain relationships goes beyond mere commercial benefits.

Therefore, the more conciliatory tone of mediation which leads to the maintenance of future commercial relationships, which is often touted in the West, should continue to be stressed, but in Asia another step needs to be taken. An important factor in promoting mediation to Asians is that it can help bring about relational benefits (beyond monetary rewards) that would most likely be abandoned if litigation were pursued.

D. The desire to maintain “face”

In Asia neither party in a dispute wants to appear weak or be embarrassed or shamed in front of the other party. Each party will want to maintain its own “face”. In addition to this, neither party will want to insult or embarrass the other party. Each party will want to maintain the

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other party’s “face”. This can force parties in conflict to walk a very balanced tightrope.  

36 In practical terms this can lead to neither party suggesting mediation as doing so may be perceived as an admission of weakness. There are ways around this, beyond the obvious (and not entirely successful) method of assuring parties that suggesting mediation does not mean that they have a weaker case.

37 One option, already embraced by some practitioners, is that of case persuasion. With case persuasion, if a party wishes to go to mediation, but does not want to be the party to suggest it, that party can approach a third party, often a mediation centre, which can in turn approach the other party to suggest mediating the dispute. The idea is that if parties wish to mediate but cannot bring themselves to suggest it out of fear of losing “face”, having a third party suggest mediation may put such fears to rest and facilitate commencing mediation. In some instances courts or arbitral tribunals can take an active role in encouraging settlement or mediation. Again, in this situation neither party is initiating the mediation procedure, so there is no loss of “face”.

38 Another option is to include the requirement for parties to mediate (or at least to discuss the option to mediate) in dispute resolution clauses. The use of such tiered dispute resolution clauses will make parties contractually obligated to mediate, meaning there is no need for either party to suggest mediation. While the benefits of contractually “forced” mediation may not be conclusive, if one of the major obstacles preventing parties from settling a dispute is the loss of “face” associated with suggesting mediation, making mediation an obligation rids the parties of this obstacle.

IV. Whom to target in the East

39 Knowing how to frame mediation to eastern users is only half the answer. In order to promote mediation effectively in Asia, it must be promoted amongst the proper entities.

40 In the West, when consultation procedures on mediation are undertaken, and when mediation is promoted, the mediation community often targets itself, including the mediation centres, the academics, the lawyers, the judges, and the mediators themselves. Those with a vested

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interest in the institution of mediation succeeding are often the ones who attend conferences, read articles, follow relevant updates and provide input on mediation developments.

41 This phenomenon is not unique to mediation. In arbitration it is often the arbitrators, the arbitration centres, and the private practitioners who attend arbitration conferences and stay up to date on the latest developments. However, the key difference is that parties are often forced to choose to arbitrate before a dispute arises (i.e., when a contract is being negotiated or entered into), and even at this early, pre-dispute stage, key arbitration players, mainly the private practitioners, are involved to promote the advantages of arbitration. In contrast, parties need not consider mediation before a dispute arises and even if the option of including a multi-tiered dispute resolution clause in a contract is discussed, parties will often view such clauses as extraneous and unnecessary. Therefore, even if lawyers promote mediation to clients at the contract drafting stage, clients will often defer the decision of whether to mediate until later. The decision between litigation and arbitration must be decided when parties enter into contracts; the decision of whether to mediate can be left until a dispute actually arises.

42 With this in mind, the question becomes whether mediation should be promoted the same way as other dispute resolution methods and, if so, whether a distinction must be drawn between promoting mediation in the West and promoting it in the East.

A. The mediation zone

43 Mediation will only be effective if parties are open to the possibility of compromise and settlement. However, parties’ openness to compromise usually has a distinct window. When a dispute first arises, parties will often lay out their positions, and while they take in the information put forward by the other side, their main goal is to present their own cases. During this stage, given that parties are largely focused on presenting their own cases, this is often not the best time for settlement discussions to take place.

44 However, once the parties have presented their positions and have had time to absorb the other side’s point of view, negotiations and discussions can occur. This is the time when mediation is most likely to be effective. How long this period lasts will depend on the parties and the dispute, but most disputes will have this “mediation zone”.

45 Whether mediation is attempted or not, once the mediation zone has passed settlement becomes more difficult. After a certain period of time, the longer a dispute continues the more entrenched each party becomes in its position and the less likely either party is to compromise.

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Therefore, if mediation is to be successfully promoted, it generally should be promoted to the parties in a dispute before the mediation zone has passed.

**B. The western mediation zone**

When a Western business finds itself in a dispute, traditionally lawyers are contacted to resolve the dispute. However, simply because the lawyers have been called in does not mean that a business relationship has disintegrated or that the company wishes to file court papers right away, but rather a company is seeking help from legal professionals to resolve a conflict.

In the West, lawyers are usually brought in at the beginning of a dispute, very often before negotiations between the parties have really begun. This means that companies have often just finished, or are in the process of, presenting their respective positions to each other. The important point is that the parties may not yet have entered the mediation zone and most likely have not gone beyond the mediation zone. Therefore, lawyers are given an opportunity at this stage to discuss the possibility of mediation with their clients.

In addition, simply because a Western party has commenced proceedings does not mean that negotiations are futile; in such circumstances parties are often still open to settlement. In the West, directives promoting mediation are often triggered once a party commences proceedings. Judges and arbitrators can encourage settlement in cases before them and influence a party’s likelihood to mediate.

Under a Western structure, those invested in mediation (the lawyers, the judges, and the legislators) very often become involved in the dispute resolution process before or during the mediation zone. This helps to explain why the promotion of mediation amongst practitioners and invested parties has worked in the West. The invested parties who attend mediation conferences and read mediation articles are able to relate the benefits of and developments in mediation directly to clients or companies in an effective and timely manner. The key idea is that parties are informed about mediation before they enter or while they are in the mediation zone.

**C. The eastern mediation zone**

The approach to dispute resolution in the East is different. When a dispute arises, the natural instinct is not to call in legal representatives, but rather for the parties to engage in discussions, negotiations and, in some instances, mediations. In the East, mediation and conciliation have traditionally been preferred strongly over arbitration and other compulsory adjudication in relation to the resolution of disputes, largely due to the fact that, if successful, they are more likely to provide a basis on which to
maintain relationships. In fact, in many disputes, instead of turning to lawyers, people in certain Asian cultures often turn to elders or other reputable persons in society first when seeking to resolve conflicts.

However, as companies become more global and commercial transactions become more complicated, Asia’s conciliation method of dispute resolution has become less realistic. Multi-national companies are not going to turn to the town elder to resolve a contractual dispute. This means that after discussions and negotiations have broken down between parties, the next step is often for the parties to engage counsel and commence litigation or arbitration.

The problem is that by the time counsel become involved it is often too late for mediation to be effective, or even to be an option. In many Asian cultures it can be very difficult to settle a dispute once it has entered into formal legal proceedings. Litigation is often a last resort in the East and is usually only initiated after negotiations have failed and there has been a complete breakdown in the relationship between parties. Even when courts or arbitration centres provide for conciliation procedures, once a litigation or arbitration has begun, such mechanisms are rarely used by the parties.

Therefore, lawyers, courts, and arbitration institutions (in other words, the key entities which often serve to promote mediation under the western structure discussed above) do not become involved in the dispute resolution process in the East until after the mediation zone has passed. Therefore, these entities can know all of the benefits associated with mediation, be up to date on the latest developments, and attend as many conferences as they wish, but if this information is not communicated to companies before or during the mediation zone, it does little good in promoting the actual use of mediation amongst parties.

D. The solution?

While the implementation of it may be difficult, the actual solution to promoting mediation in Asia is rather simple: focus promotion efforts directly on the parties themselves. Further, this promotion should be focused on formal mediation methods (involving a trained mediator), not

stoic discussions between two companies. A mediator is trained to achieve results that businesses would not achieve through normal negotiations. There is a reason certain mediators are much sought after; it is because they know how to get to the root of what each party wants, they know how to frame perspectives and facts in a new light, and they know how to settle a dispute before costly litigation or arbitration is necessary.

In addition to this, parties involved in disputes in Asia are increasingly from different cultures. Due to the economic problems in the West and the growing opportunities in Asia, European and American investors and businesses are moving east. This means that western and eastern businesses are doing more business together than ever before, and when disputes arise between these parties an added factor to consider is their cultural differences. Such cultural differences can lead to an additionally decreased ability to resolve disputes purely through negotiations. In such situations, a trained mediator who understands cross-cultural issues can bridge this gap in norms and perceptions and adeptly navigate through a potential minefield of cultural offences and approaches.

V. Conclusion

The use of mediation is on the rise globally. Business leaders are increasingly turning to this form of dispute resolution, through choice or compulsion, more than ever. However, the question arises as to why this trend is more pronounced in the West than in the East. While mediation has been around in the West for a longer time and therefore has had more time to take hold, this is a somewhat lazy answer to a complex question. A key factor might be to remember that it is important to know your audience when promoting mediation and then to target that audience.

There is a reason that companies promote their products differently in different locations. No matter where a company is promoting its product, it wants the same result: to have consumers purchase that product. However, companies have come to learn that if they promote a product the same way in China as they do in the US, sales might not surge as desired.

Mediation is a product and it needs to be marketed and sold. However, if mediation is sold in the East the same way as it is in the West, then it is unlikely that Asians will embrace mediation with the same fervour.

The benefits of mediation are largely the same in the East as in the West, but the way in which these benefits are communicated to an Asian audience may require some thought. It is also critical to communicate these messages to the proper audience, in the proper way, at the proper time. The West may read from left to right, but this does not mean that cultures that do not do the same cannot read; it merely means that we
need to format our reading materials differently in order to get the messages across.