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East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China

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The Beijing Arbitration Commission & The Straus Institute for Dispute Resolution*

I. INTRODUCTION

Earlier this year, the Beijing Arbitration Commission (BAC) announced the creation of a landmark program for the mediation of international business disputes, including the publication of new mediation rules and the establishment of an international panel of mediators. In March of 2008, more than forty senior lawyers and former judges, most with broad experience as arbitrators and conciliators with the BAC, received forty hours of mediation training from the Straus Institute for Dispute Resolution (Straus Institute).

Stand-alone mediation is widely used to resolve business disputes in the United States (U.S.) and some other Western countries, but has not often been used in China. Therefore, significant attention is being given to this first-ever mediation venture by the BAC, one of the leading Chinese arbitration commissions. The joint venture between the BAC and the Straus Institute has also served to focus attention on Chinese and U.S. attitudes regarding the use of “med-arb” procedures in which a single neutral serves multiple roles in the course of attempting to resolve a dispute. This is a common practice in China, but is much more controversial (although often used) in the U.S.

This Second BAC/Straus International Videoconference, following up on last year’s successful inaugural program, will provide different perspectives on the current BAC initiative and evolving attitudes toward mediation and med-arb. Topics include: (1) the development and current

* This article is adapted from the program at the Second Annual Videoconference co-sponsored by The Straus Institute for Dispute Resolution and the Beijing Arbitration Commission, which took place on September 17, 2008.

state of business mediation in the U.S.; (2) the challenges and opportunities confronting China in developing stand-alone business mediation; (3) reflections on the skills necessary for mediators; (4) common pitfalls in mediation; (5) perspectives on med-arb (as opposed to stand-alone mediation); and (6) how to most effectively use mediation in conjunction with arbitration procedures.

II. VIDEOCONFERENCE PROCEEDINGS

*Thomas J. Stipanowich:*¹

I want to welcome you all this evening to the Second Annual East Meets West Videoconference cosponsored by the Beijing Arbitration Commission, Pepperdine University School of Law and the Straus Institute for Dispute Resolution. We are especially excited about this videoconference, both from the standpoint of having an opportunity to follow up on our earlier efforts with our partners at the BAC, but also because we have so many interesting participants this year. Let me take a few minutes and set the stage for today's videoconference. First of all, we at Pepperdine are enormously excited and energized by our partnership with the BAC headed by Madame Wang Hongsong. As you may know, during the last year the BAC developed a first-ever U.S./China Business Mediation Program, which includes not only new rules, but also a new panel of business mediators from China and from the West. This spring, my colleague, Peter Robinson, and I were privileged to participate in a training program which is modeled on Pepperdine University's "Mediating the Litigated Case." We had more than forty participants in Beijing at the BAC.

Mediation in the U.S. is widely used to resolve business disputes. During this program, we will talk about some of the reasons for the growing popularity of mediation in the United States and in other countries. In China, mediation has a much longer and venerable history, dating back thousands of years. However, stand-alone mediation, as it is practiced in the United States, is not often used to resolve business disputes in China. Therefore, significant attention is being given to this first-ever mediation venture by the BAC, which is among the most entrepreneurial and prominent Chinese arbitration commissions. The joint venture between the BAC and the Straus Institute has also served to focus attention on Chinese and U.S. attitudes regarding the use of med-arb procedures, or procedures in

1. Thomas J. Stipanowich is the William H. Webster Chair in Dispute Resolution, Professor of Law and Academic Director, Straus Institute of Dispute Resolution.

which a single neutral serves the roles of mediator and arbitrator. This is a common practice in China, but is a controversial practice in the U.S.; it is nevertheless used in many cases. We will talk about its use here in the U.S. during today's program. Let me take a moment to introduce the U.S. participants in today's videoconference.

First of all, on my extreme left is Jay Welsh. Jay is the Executive Vice President and General Counsel of JAMS, the largest private alternative dispute resolution (ADR) provider in the world. Jay has been with JAMS since 1991. He has been instrumental in the growth of that organization and has also played a very important role in the growth of the dispute resolution field in general. He writes and speaks widely on ADR topics to groups around the world. As General Counsel of JAMS, Mr. Welsh oversees all legal matters, panel quality, risk management, and ethics, among other issues. We're pleased to have Jay today. His topic will be "The Development and Current State of Business Mediation in the United States." Next we will hear from Jeff Kichaven. Jeff is a very well-known mediator, not only in Southern California, but throughout the country and increasingly around the world. Jeff was named California Lawyer Attorney of the Year in 2006. He is a graduate of Harvard Law School and the University of California at Berkeley. He handles about one hundred fifty cases in mediation every year, cases of all kinds that are going to civil litigation. We are very proud that, in addition to his many other affiliations, Jeff is an adjunct professor from time-to-time at Pepperdine and the Straus Institute. Jeff will be speaking on "The Requisites of an Effective Business Mediator."

We are also delighted to have another member of our panel who is also a very prominent mediator, Denise Madigan. She has been a full-time mediator for over twenty years. Denise began her work as Associate Director of the Harvard MIT Public Disputes Program, at which she focused on mediation of large, multi-party public policy disputes. She has mediated several large negotiations over federal regulations, and in the past fifteen years, has focused primarily on cases that are going to court involving intellectual property, business contracts, and severe personal injury, just to name a few. She has designed and taught courses in this field around the U.S. She is a very experienced and highly sought after trainer, and I am happy to say she has also worked extensively with Pepperdine and the Straus Institute. Denise will talk about "The Potential Pitfalls of Mediation."

I am always glad to introduce our other panelist today, and that is my colleague Peter Robinson. Peter not only has extensive experience as a mediator, but is also one of the most sought after trainers here in the U.S.

He has trained on most of the continents of the world. He is an outstanding colleague, and friend, and a very knowledgeable person who will talk today on “Perspectives on Med-Arb: Mixing Mediating and Adjudicative Roles.”

I am Tom Stipanowich. I will complete the panel today, and I will also be speaking on med-arb issues. I have been very privileged to work with the BAC over the last couple of years in our efforts there, and I am very excited about this continuing dialogue, which I think promises great things for all of us.

Without further ado, we will now turn to the main presentations. Let me say that we are going to cover five topics today, and for each topic there will be a Chinese presenter and a presenter from the U.S. Each of these presenters will speak for five to six minutes and then there will be an opportunity for other panelists, our friends in China, and other panelists here in the U.S. to make additional comments and have a conversation. We will then move on to the next topic. We anticipate spending about fifteen minutes on each topic. At the end of our presentation on these topics, we will open up the floor to questions from all of our other participants in the room. We have invited participants here on the U.S. side to write down questions, and we will get to as many of those as we possibly can.

Jung Yang:

We are very glad here in Beijing today to attend this event as cosponsored together by BAC and the Straus Institute. As Professor Stipanowich pointed out earlier, the joint venture between the Straus Institute and the BAC is a great effort in the development of mediation in China. As BAC has initiated the first mediation group earlier this April, BAC has made a great effort in promoting mediation in China. So today we have this great opportunity to discuss the development of mediation in the U.S. and in China. Earlier this year, we also had the opportunity to take courses from the Straus Institute. We had courses from Peter Robinson and Thomas J. Stipanowich. The courses are very helpful for our understanding of mediation in the U.S. As Professor Stipanowich pointed out, China has a long history of mediation in the past thousand years. However, commercial mediation and stand-alone mediation are not as widely practiced in China as in the U.S. We have a lot of things to learn from our U.S. counterpart. Today we hope that through our discussions and speeches from our speakers, we can learn some things about mediation and med-arb in this respect.

Let me introduce our panelists here sitting in Beijing. To my extreme left is Professor Zhang Jianhua, who is a law professor at the Law School of Beijing Technology and Industry University. Professor Jianhua will speak

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on the challenges and opportunities confronting China in the development of mediation. Professor Jianhua has taught law in the law school of this university, and, at the same time, practices law as a lawyer in Beijing.

The second speaker will be Mr. Chen Qiming. Chen Qiming is an experienced lawyer here in Beijing. Before practicing law, Mr. Qiming served as a judge in the local court. Mr. Qiming will speak on mediation pitfalls.

The first speaker will be Ms. Chen Guang. Ms. Chen Guang is a Senior Group Legal Advisor with PCCW. She is an arbitrator at the BAC and also an arbitrator at China International Economic and Trade Arbitration Commission (CIETAC). She has wide experience in arbitration and conciliation in arbitration, which we call arb-med. Ms. Chen Guang will speak today on the topic of a comparison between med-arb, arb-med, and stand-alone mediation.

The final speaker today from our side will be Mrs. Tan Jinghui. Mrs. Tan Jinghui is the Vice General Manager of the Legal Department of China's State Construction and Engineering Group Corporation Limited. She is also an experienced arbitrator. She will speak on the final topic of how to realize mediation value through arbitration. Now let me introduce myself. My name is Jung Yang. I am a lawyer from Beijing.

Thomas J. Stipanowich:

So, to begin our presentations today, we will begin with a discussion of "The Development and Current State of Business Mediation," first in the U.S. and then in China. To present the U.S. perspective on the state of business mediation, we will hear from Jay Welsh, General Counsel of JAMS.

A. The Development and Current State of Business Mediation

Jay Welsh:

Thank you, Tom. I want to say how happy I am to be part of what I think is a tremendously historic meeting between our two groups. I think it's absolutely amazing to sit here in Malibu, California and look out at the group watching our presentations in China. In 2009, our company JAMS will be thirty years old, and during those thirty years we have been keenly aware of trends in mediation in the U.S. Over that period of time, we have

seen American business and legal counsel become extremely comfortable with mediation as a method of resolving disputes. So the short answer to the question of, "What is the state of business mediation in the U.S.," I am happy to report that it is growing, and we think it will continue to grow in the future. But make no mistake, business mediation is popular because it is an alternative to settling litigation in the U.S. Most businesses do not want to be involved in litigation. Mediation is used as a tool to resolve litigation because it reduces the costs and the time involved in the dispute process. More importantly, it affords the parties the ability to control and craft their own solution. This sounds like an elementary mediation class, but in fact, the issues that drive mediation and the reasons why it is successful are cost, time, and control over the solution. When I say that mediation is used as a solution to the litigation problem, we must then work on how this will transpose to Asia, Europe, and other areas of the world. American business does not want to be in a foreign court. That's why, in every contract that is drafted, an American business will spend a lot of time drafting a dispute resolution clause setting up a system for resolving the dispute, which more than likely ends up in arbitration. We believe that the future of international mediation of business disputes will be a part of the arbitration process. Mediation will be an alternative used to settle disputes that are in arbitration. It is going to be more difficult to do this than it was to make mediation an alternative to litigation because there are forces in arbitration that make it more difficult to have mediation as part of that process. That's something that others are going to talk about. It's up to the lawyers and their clients to draft clauses which will permit and encourage mediation to proceed while the arbitration process is going forward or is paused so that mediation can take place. We clearly see mediation continuing to grow internationally, but as part of the international arbitration cycle. It was interesting that one of your panels is in the field of construction, because we feel that globally, international construction disputes will grow at a faster pace than other kinds of business disputes, with the exception of intellectual property.

Chen Qiming:

I have been a judge myself in many civil cases. In civil cases twenty years ago, judges tried to settle disputes by the use of mediation, but the laws available at that time made it hard to make judgments. This type of mediation led to low efficiency and too much pressure on the judges to investigate. As the economy has developed and business exchanges have become more complicated, old mediation cannot meet the current demands. Therefore, we need to find a new way to resolve modern business disputes. However, independent mediation has not developed very quickly in China.

What's the reason behind this? We need to do some studies. In China, it has long been the practice that officials work as a dispute center and mediator. This is because the current economy was not developed. In our traditional view, when we have disputes, we go to a higher level to get things done. This seems to be the most efficient way to resolve disputes. The concept of resolving disputes by power to save costs is not commonly accepted in China. Currently, the public is not that familiar with the features of commercial disputes and ways to resolve commercial disputes. Less is known about stand-alone mediation. People are not informed of the public power of the court. There is such a need for resolution by private powers, but the old style of mediation does not fit. Business disputes, once things get worse, result in litigation. In addition, litigation in China is relatively low and there is a risk of failed mediation. So compared with litigation and arbitration, mediation does not have much competitive edge.

In China, there is a lack of a supportive legal system, and the present system is not mature. Some countries are worried about the enforceability of mediation agreements. Therefore, they are quite skeptical of choosing independent mediation. However, things are changing. The fundamental change is that parties are involved in social activities and legal relations as a market entity and a legal entity. In the past, where the government monopolized everything, parties did not have such a legal entity. Take contracts for example. In order to enter into business activities, parties need to have a legal entity so that they can sign contracts with others on equal footing. These contracts, rather than government arrangements, will guide business activities. In business disputes, there is a need for self-resolution of commercial disputes—resolution of disputes in a peaceful and a fast way on equal footing. They are setting commercial measures to ensure the enforceability of mediation agreements, such as mortgage lien credit guaranty, although the public is not quite familiar with that. I think it is necessary to develop independent mediation by separating independent mediation from civil mediation, so that the advantage of independent mediation can be fully utilized.

According to statistics in 2005, China had 847,100 people in mediation and resolved about 4,486,800 cases. But this civil mediation is focused on family and labor disputes, rather than commercial disputes. However, this mechanism has contributed to the importance that has been attached to mediation and has resolved a lot of civil disputes. So it is possible for that specific mechanism to resolve commercial disputes. Independent mediation serves well for commercial disputes. BAC has a pool of various talents. In

today's world, where business activities are quite frequent, there is potential for independent mediation. In the past, with business activities such as at the beginning of the twentieth century, there were mediators for business disputes. It was usually a well-respected businessman working as a mediator. Generally speaking, a mediator was chosen because he or she was a friend of the disputant rather than because he or she was an expert. In today's world, this type of mediation, using a friend as mediator, still exists but it is not commonly practiced. Modern companies have very complicated internal and external relations, and it is very hard for businessmen to find time to conduct mediation and related research. There is such a need for stand-alone mediation.

An example can tell us that the business dispute mechanisms are also different in China. Just now our American counterpart has mentioned mediation clauses and med-arb clauses in business mediation in China. In China, we have clauses which say that once disputes arise, parties will resort to mediation first and then arbitration or litigation, if mediation fails. As for the question about how to understand the word "mediation," the answer is relatively unclear. Usually the word "mediation" means the discussion of negotiation, but, it actually means a third party will resolve the issues, rather than the parties themselves. Though these mediation clauses do not use independent mediation, they show the intention of parties to use mediation, even though they need to be guided in a more detailed way. To conclude, I think that the advantage of stand-alone mediation is not in the mediation of civil disputes, but business disputes. The market is to be fully explored and stand-alone mediation is facing an opportunity for development and needs to be commercialized. Once the concept of stand-alone mediation is accepted, it is going to be fully utilized.

Peter Robinson:

With respect to mediation becoming a better known option, should the focus be in the business community or in the Chinese legal community? Within the Chinese culture, where are these decisions made? Where is the source of the impetus for which process to use? I would also be curious to know if our American commentator, Jay Welsh, has any observations on the U.S. side, and whether this decision is largely driven by the lawyers or by the business people?

Jay Welsh:

I think in the U.S. it used to be that the decision was made by the outside lawyer. Now, we are seeing that decision driven more by the

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company itself and the company's General Counsel and in-house lawyers. So it has become more of a partnership over the years.

Thomas J. Stipanowich:

We have at least two corporate counsel on the Chinese delegation, Tan Jinghui and Chen Guang. I'm curious to know what you think will be necessary to encourage companies to make greater use of stand-alone mediation in Chinese disputes or international disputes.

Tan Jinghui:

My experience is in settling disputes under construction contracts. In China, American enterprises engaged in international construction projects are confronted with many legal conflicts, especially in implementing the contracts. Usually whenever the conflicts occur, the settlement of the dispute will be by arbitration, which applies to different clauses of the contract. Some procedures will be attached to the arbitration. For example, in the United States there will be mediation prior to the arbitration procedure. Usually, the Chinese enterprises that are confronted with these issues will have their problems already solved in the conciliation mediation procedure. The reason behind this is that international construction conflicts are rather complicated. Second of all, if the party is too engaged in disputes, there will be a lot of cost, both in time and money. From another perspective, based on efficiency and cost, most people would go for mediation and negotiation to settle the dispute. And of course, all of the attorneys, enterprises, and counterparts in the conflict make compromises based on trust and reasonable consideration. I think in international construction projects especially, the use of mediation and conciliation enjoys a very promising future for application.

Chen Guang:

As in-house counsel, usually we will assist the company in drafting some standard dispute resolution clauses into the agreement. According to the previous practice, usually arbitration must be used as the dispute resolution method for local companies and international companies. The company I am currently serving will usually use the BAC as the dispute resolution measure. But thanks to the BAC, this separate method of mediation has introduced a new way to solve the legal problems. But I think

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we need more time to educate and brief the companies to help them understand this new rule, this new method to resolve legal disputes. From my understanding, when disputants submit their dispute to the arbitration tribunal of the court, they are concerned about the time they are going to spend on the case, the cost that the company will have to pay, and the fairness of the judgment. The final concern is the enforcement issue. So if the mediation process can solve those problems regarding the time and cost, I think mediation has advantages. But regarding the fairness of the judgment, usually in mediation it is the mediator who functions as the facilitator. It is not purely partial gestures, so I think it is different from arbitration and negotiation. Regarding the enforcement issue, so far we have a way to confirm the settlement agreement in mediation to the actual award upon the disputing parties' agreement. This problem can be settled, but the fairness of judgment is still an issue because in commercial disputes sometimes the parties want to litigate a case, or they want to arbitrate a case. One purpose is to pursue the justness.

Peter Robinson:

As I have been processing the comments, it resonates for me that Jay's comments listed three things: (1) the cost; (2) the time; and (3) the risks if you go to trial or arbitration. I believe Professor Jianhua mentioned that sometimes the costs for internal disputes in litigation in China are not that much. I'm curious, is there a court backlog, is there an arbitration backlog, and do the Chinese also value the concept of self-determination, so that they will tend to agree to an outcome as compared to submitting to the judgment of either an arbitrator or a judge?

Jung Yang:

Yes, Peter, that's a very good question. Let me try to answer. I think that the notion of self-determination between the parties is a great notion which should be promoted here in China in regard to court and arbitration. Given what has been said by the speakers, I think there is a great opportunity here in China for the development of mediation. However, I think we also have great challenges in this respect. I think it is very helpful for us to start practicing mediation in a specific field, say in the construction field, where it has already been used in the resolution of disputes. Since the promulgation of mediation rules by BAC, there have already been companies from Japan and Italy who have approached the BAC for consultation on the Beijing Mediation Practice. I think that is a good starting point.

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The next topic is “What are the Requisites of an Effective Business Mediator?” Let me present the Chinese speaker Mr. Chen Qiming.

B. The Requisites of an Effective Business Mediator

Chen Qiming:

To settle disputes through mediation has again gained great attention from China in all parts, be it the legal system, administrative organizations or civil organizations. These traditional dispute settlements are now being widely used to settle a lot of problems confronted by the modern Chinese people. If you search “mediation skills” or “mediation pitfalls” as keywords on such search engines as Google, you could find a lot of relevant materials, books, news reports, and papers, etc. We can see from this that the study and research in this regard has already entered a new face of development in China. As an administrator, personally, I have successfully settled dozens of disputes.

I would like to share with you some of my personal experience in this regard and talk about mediation skills and pitfalls to be avoided. As far as skills used in the procedure of arbitration, I think the arbitrator or mediator should spend a lot of time reading the material before the tribunal. At the same time, we should not ignore the importance of the preparation or preparatory work because of the possibility of reaching an agreement through mediation. Through reading the material we could understand the facts and details of the parties involved. For example, the application for arbitration, the fact statement, the comparison of the evidence, the examination of the evidence, etc., all will be very helpful for us to understand the case. Throughout the process we should pose questions and spot doubtful points. I think the more energy and time spent on the preparation work, the more possible it is for us to finally settle the dispute successfully. Personally, I think that the second skill to be used is to carry out the study at the right time. There is a traditional Chinese saying that goes “seeing is believing.” During the settlement of certain cases you should go to the location to have an inspection of the objects which will give you a better understanding of the truth of the case, as opposed to simply reading the material, therefore laying a solid foundation for the successful settlement of the case.

Now I would like to share with you a case that I have handled. A window and door supplying business had sued a real estate company. The

supplying business had supplied over one hundred sound-proof doors for a project developed by this real estate company. However, the real estate company did not pay the money. The real estate company claimed the reason for their refusal to pay was that the doors provided by the supplying company were defective. The supplying business presented the Quality Acceptance Certificate of the doors provided. The two sides could not agree on the key points, so while accompanied by a representative of both parties, I went to the spot to see what was going on there. Through the field study I inspected very obvious defective elements in the doors. The supplying business admitted that the doors it supplied were defective in a certain way. The real estate company explained that the reason they signed the Quality Acceptance Certificate was because it was time for them to deliver the apartments to the buyer, so they had to go through the acceptance of construction formalities. One prerequisite for going through the acceptance of the construction formalities is to present the Quality Acceptance Certificate signed by both parties. So that is why they signed it in advance. Through the field study we learned the truth of the case and, as a result, both parties have reached a memorandum on settling the case and finally the case was successfully settled. Both parties were quite satisfied with the result.

The third aspect I would like to talk about is being patient with repetitive work in arbitration and mediation. Mediation can be very boring and repetitive work, and sometimes parties are very stubborn, and very persistent with their points and positions. They will repeat again and again their positions and opinions and will not budge even a little. Sometimes this whole process can be really prolonged. I personally settled a case where both parties had filed the case with the BAC in the year 2006, and one party was willing to carry out conciliation. However, after two years of talk no result had been achieved and the case had to go to arbitration. In another construction case that I have handled, after six months of complicated procedures, the final result was almost the same as the one that I proposed six months earlier.

The fourth aspect of mediating skills is to pick the right time to start mediation. Usually I start mediation after both parties are done with the cross-examination of their evidence and have verified the basic facts of the case. At this time it is much easier for us to predict the feasibility of the two parties' proposals. It is also conducive for the mediator to offer suggestions on the mediation plans to both parties.

Fifth, the mediator should propose the stand-alone mediation plans and offer suggestions on it. Some conflicts suffer from great differences between the two parties on the main points, and both parties would love to listen to the opinions offered by the arbitrator. During the process of mediation and under such circumstances, I will offer a rough or detailed

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mediation plan for the two parties' reference. The plan that I offer is sometimes more generous than the plan possibly reached by the two parties. Therefore, there will be certain room for adaption and change. For example, if the applicant claims for a payment of one million Yuan, and the respondent is only willing to pay seven hundred thousand Yuan, perhaps I will say to the applicant that you can only get eight hundred thousand back, and I will explain the reasons why. At the same time, I would say to the respondent perhaps you have to pay nine hundred thousand, and of course I would also have to offer the reason for my saying so. No matter whether it is eight hundred thousand or nine hundred thousand, they are all justified in a certain way. Finally, the two parties might reach their agreement at eight hundred and fifty thousand, and both of them will be quite satisfied with the result. This method that I have mentioned is similar to the method introduced by Peter Robinson and Thomas J. Stipanowich in the training program cosponsored by BAC and Pepperdine University. I think that suggestions offered by the arbitrator should be well considered and should be supported with reasonable explanations. It cannot be something offered casually or changed casually. No deception is allowed here or else the parties will lose confidence in the arbitrator.

Jeff Kichaven:

Now turning to the topic of what makes an effective business mediator, the experience in the U.S. is not all that different from what we just heard about the Chinese experience. A couple of years ago I wrote an article on this subject, and to write the article I conducted a survey. I spoke with fifty senior partners at significant law firms in the U.S. in different cities all over the country to ask them the question, because as consumers of mediation services, ultimately, they are the ones that decide what constitutes quality mediation. Now of course, there were considerations of basic skills and experience levels because in the U.S. the market has evolved to a point where you really have to be a full-time professional mediator in order to attract significant mediation work. A part-time mediator, someone who is not really committed to it as a profession full-time, is not going to get significant business. Beyond that though, there were three significant traits that seem to emerge as trends in the comments of the fifty lawyers with whom I spoke. They were: (1) integrity; (2) intellect; and (3) intuition. Much of this will overlap with the experience in China.

First, integrity – I was surprised to hear how many lawyers in the U.S. said things such as “when a mediator tells us that he’s going to keep

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something confidential and not disclose it to the other side, he has to keep it confidential and not disclose it to the other side,” or “when we ask the mediator to relay an offer or a demand from one side to the other, we expect her to do it faithfully, as we’ve instructed her to do it faithfully, on all of the terms and conditions we have requested.” Surprisingly, many significant litigators in the U.S. found that this was lacking with many of the mediators with whom they worked. So that kind of integrity—keeping your word and doing what you promise—is very important to American consumers of mediation. There was one other significant theme on integrity that many litigators mentioned. In many significant high stake cases involving large corporations, those corporations can afford the cost of the fight and many times they can also afford the consequences of losing the fight, and hence, they are not desperate to settle the case. So, the effective mediator has to walk a line between urging the parties to settle and yet respecting that the right of self-determination includes the right not to settle if it does not feel right emotionally, make sense logically, or seem practically doable for those parties. The mediators that seem too attached to the goal of settlement for settlement’s sake, according to the lawyers with whom I spoke, used that attachment to settlement to push too hard for settlements that the participants did not feel were principled. In American business, as in Chinese business, people do not want to make deals that seem to have no principle, or no reason behind them. So that is another aspect of mediator integrity which American consumers of mediation find important—urging people to settle, yet respecting that the right of self-determination means that sometimes they will not.

Point number two: intellect – What kind of intellect do American consumers of mediation want? Well, in a word, mediators have to be able to engage in some kind of evaluation of the case. In the American mediation circles, there has been a discussion for some time about so-called facilitative and so-called evaluative mediation. Yet as we just heard in China, and it is no different in the U.S., commercial mediators simply have to be able to engage in an intelligent discussion of what the case is all about; strengths and weaknesses, the likelihood of winning, the likelihood of losing, and all of the other things that unfold as a case lives and breathes. What is interesting is that what I gathered from these lawyers around the country, and consistent with my own experience, is that when people are new to mediation, they tend to think that the evaluation lawyers want most is for the mediator to go down the hall and tell the other side what a bad case they have. But among more sophisticated consumers of mediation, the kind of evaluation that the lawyer really wants is the mediator’s help in explaining to his or her own client the weaknesses of his or her own case. More lawyers will tell the mediator, “My client is emotional; my client is not

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thinking as rationally as perhaps they should; they're very upset about the situation. Please Mr. Mediator, help me get my own client to make a rational decision." This answer was somewhat surprising because even with executives of very large corporations as clients, the lawyers representing those clients said they needed help from mediators in getting their client's emotional state and rational state into balance so that more rational decisions could be made going forward. That is the kind of evaluation and the kind of intellect that lawyers need most—help in breaking bad news to their own clients.

Finally, the third point: intuition – What does intuition really mean in this context? What I think it means in the minds of the lawyers who purchase mediation services is, "How do you go about breaking this bad news to one's own client?" It's the people skills. It's the way of developing interpersonal communication, rapport and trust, so that when the message is delivered, it is heard, believed, felt, reacted to and reacted upon in a way that really serves the client's interests. So although we can talk a lot about intellect, and we can talk about the preparation and understanding of the law and the facts, ultimately the most successful commercial mediators in the U.S. take all of those skills and add to them the very important people skills that allow us to communicate with each other better, and to allow all of the communication to sink in.

Thomas J. Stipanowich:

We're proceeding now to common pitfalls in mediation, and we will hear from Denise Madigan and then from the Chinese counterpart.

C. The Potential Pitfalls of Mediation

Denise Madigan:

I will speak about the pitfalls of mediation, and my initial focus is on pure mediation in the sense of mediation done not within an arbitration, but where someone is functioning solely as a mediator. I will leave to my colleagues to talk about how they might be a bit different in the context of an arbitration process as well. With respect to mediation, and I hate to be on record talking about what can go wrong because I am an advocate for mediation, but to be honest there are things that can happen and we need to be aware of them so that we can prevent them from occurring or respond

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appropriately if they arise. From the party's perspectives, initially, I would like to talk about what can go wrong.

Let me first mention the broad category of when expectations are not met: when parties have an expectation about the mediation process, but they are somehow not satisfied. This is especially likely to happen when mediation is a fairly new process and the participants themselves are new to mediation. They may still be unclear as to what to expect of the mediator, of the other parties, of themselves, and of the outcome. For example, I recall twenty years ago when mediation was first beginning, parties would come to mediation with the expectation that somehow, I, as the mediator, would decide things for them. Now, in a pure mediation, I would not want to render a decision that I could impose upon them, so the parties would become confused if I refrained from rendering a decision. Sometimes the parties want the mediator to express an evaluative opinion, and in many cases, particularly those involving lawyers and in complex commercial disputes, they sometimes seek that. On other occasions, they are very express about not wanting an opinion expressed, at least not early on in the process. So if the parties' expectations about the mediator's evaluative inputs are not consistent with the mediator's expectations of his or her role, there can be a problem. For example, when the parties do not want to hear an opinion and the mediator ventures one too soon, it may create an appearance of bias. It can shift the negotiation somewhat, particularly if the mediator proposes a settlement that is unacceptable to one or more parties, and that settlement proposal may still hang out there in the air over all of the parties, tainting subsequent conversation. So the choice of when, how and whether to give evaluative input needs to be clearly aligned with the expectations and desires of the parties.

Sometimes parties forget that they have to do the work themselves, and that they have to negotiate, make compromises, or come up with ideas, and so the difficulty again is if they are looking to the mediator to solve the problem. Sometimes a party's expectations relate to their attorney, if an attorney is representing them in the mediation. They may be surprised if their attorney takes a more conciliatory role in advocating a perspective in the mediation than the attorney might otherwise take in an arbitration proceeding or in a courtroom. Parties sometimes need to be coached or reminded that advocacy in a mediation context is a bit different from advocacy in an arbitration context or in a courtroom context, where you might be a bit more adversarial and extreme in your argumentation.

Another general area of pitfalls happens when the parties themselves are not sufficiently prepared for the mediation experience. This could arise when they have not familiarized themselves or are not aware of all of the important facts and arguments that might need to be addressed or

readdressed in the mediation process. In the context of a litigation case, for example, perhaps they forgot to bring their calculations of damages, or they did not think through how they might prove up damages. That could be a road block to progress in the course of the mediation. Sometimes a lack of preparedness is reflected in bringing the wrong people to the table to negotiate, and so a mediator is left trying to bring a deal together between parties, not all of whom have sufficient authority, perhaps, to make a compromise, to be creative, or to strike a deal. This is sometimes the case when a party sends a very junior representative to the mediation and the other party sends a much more senior person to negotiate. Aside from the fact that it may make agreement difficult, there is also a potential insult if parties of different statures arrive at the mediation table. It is something we have to be careful about.

Finally, there is also a lack of emotional preparation sometimes to make the kind of tough decisions that have to be made. The different parties may have different expectations about the time frame for decision-making. In the U.S., we have tended towards assuming that if a mediation is successful, a settlement agreement will be rendered in writing at the conclusion of the session and signed by the respected parties before everyone leaves. But there could be circumstances where people arrive not expecting to sign an agreement at the end of the day, or hoping only to make some initial progress, or having to bring back some ideas to a board of directors, or a government agency, or senior supervisors before they can make additional steps in the negotiation process. So again, different expectations about the timeframe for decision-making, and, on a more personal note, even in severe personal injury cases or cases where a corporation is being sued for an injury suffered by another person, the individual may not be emotionally ready to make the decision. They need to be prepared to come to the mediation ready to do so.

Another pitfall has to do with something we call “good faith negotiation.” I hate to say this, but as more and more lawyers embrace mediation, more and more lawyers are “gaming” the mediation and using it sometimes as simply an additional tool to torment the other party. They may sometimes use it as a delaying tactic, saying “Yes, let’s go to a mediation and see what happens, and in the meantime let’s stay all proceedings while we try this.” They may use it as a technique to get further information, without coming with any desire to resolve the dispute. At the end of the day, the parties that come prepared to negotiate may feel they wasted their time, or even worse, that they were taken advantage of by the mediation process.

Finally, there are a whole host of issues related to the mediator's skills. To build upon the comments of the previous speakers, if the parties have to spend too much time educating the mediator, they will become frustrated, and time will be lost that could be better spent trying to resolve the dispute. Sometimes the parties may antagonize each other further and do damage to their relationship if the mediator is not skilled enough to soften the tensions during the mediation session. Sometimes a party may feel coerced into agreeing to something, either by the other party in the face of the relatively weak mediator, or by the mediator herself who may be pushing too hard for settlement, leaving the parties at the end of the day with an agreement they really do not want to see enforced. Of course in mediation, unlike in arbitration and court proceedings, all information shared tends not to be sworn testimony, or not to be vetted through various rules of evidence, so the opportunities for misrepresentation, as in negotiation, are ripe. We have to be aware that we lose some due process protections in the course of a mediation process. Of course we gain many other things, but that is part of the trade-off.

Chen Qiming:

It is quite similar to what I experienced with handling cases here in China, so I am pretty sure we have a lot of common problems to tackle. In order to avoid the possible pitfalls in mediation, I would like to say that we should not force the parties into mediation. This is something that can very easily occur in the process of arbitration. Some parties in China are faced with many challenges and methods for mediation. Apart from mediation offered by the arbitration committee, mediation is also offered by the government and other non-governmental organizations. Therefore, in some cases, if brought in the process of arbitration, there is relatively less possibility for mediation. Prior to the beginning of arbitration, the two sides or two parties have already been engaged in negotiation talk for a long time. When it is decided to bring the case to arbitration or litigation, there is already very little room for their negotiation and agreement. They are more willing to go through the formal or legal procedure instead of talking. In such circumstances, arbitrators should carry out the normal arbitration instead of persuading them into carrying out mediation.

Another aspect I would like to talk about as a mediator is that you should avoid predicting the result. I have personal experience in a similar case. I handled a case in which a contractor was about to recover the project payments from the buyers. The facts are kind of simple. The sum of money to be paid was also easily calculated, and was already accepted by both parties. Also, the proposal for mediation had already been accepted by both

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parties. However, in the process of mediation the two sides offered two versions of the money to be paid that were a little different from one another, and they failed to reach an agreement on this. Then I decided to put some pressure on the buyers' side, and what I said was not accepted by the buyer. So no agreement was reached that day. After the hearing, the buyer made a protest against me. The reason for that was they thought I, while pressuring them, predicted the result of the arbitration. I think in the process of arbitration or mediation the arbitrator or mediator should not predict in advance the result of the case.

The third thing I have for the things we should avoid is to not ignore the widely accepted values or virtues and the concept of right and wrong just in order to pursue the result of mediation. We should not ignore the social rules or standards for conduct or the widely accepted concept of virtues, simply to pursue a result of mediation. Although sometimes the two parties might reach an agreement, one party might feel wronged and even very unsatisfied with the mediation system and the mediator. For example, we cannot use force to get a certain result; to force one of the parties to reduce some of their due rights or interests.

Peter Robinson:

I heard Mr. Chen say that he is concerned about forcing parties into mediation, and I understand and many in the U.S. share that same concern about mandatory or compulsory mediation. It is interesting to also note that there are situations sometimes in the court system. In court-annexed programs people are largely compelled to participate in a mediation session before they can get to trial, and the local court reports that it has about a fifty percent success rate. It is complicated and there are many ways to look at it but many of us who have reservations about compulsory mediation are also rather surprised that under those circumstances there would be as high as a fifty percent resolution rate when people are somewhat coerced to participate.

Denise Madigan:

I would like to add to that by saying that it is different when the court orders you to mediation, and it is a separate process from trial. I think it becomes very difficult if you, as the arbitrator, try to force them into mediation as part of the same process. I think I would be very nervous about that, but I would agree with Peter that in a separate mediation process we

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have discovered that, while it may be harder to achieve settlement when parties are forced into a first session, the fact of bringing them together tends to ultimately lead to settlement more often than not.

Thomas J. Stipanowich:

I suggest that we proceed to the next two topics and then open the floor to discussion. I believe Chen Guang is going to begin our discussion on perspectives of med-arb.

D. Perspectives on Med-Arb: Mixing Mediating and Adjudicative Roles

Chen Guang:

Regarding the topic assigned to me, I think it is probably the most difficult one. I found that the Chinese translation on the topic assigned to me is different from its English translation. The Chinese topic is called arb-med, whereas stand-alone mediation in the English translation is med-arb. To be honest, I do not have too much to share on med-arb and the institution of stand-alone mediation as compared with arb-med. The med-arb model is still quite new to the legal professions and the other non-legal professions, organizations, and enterprises in China. Although the institution of mediation and stand-alone mediation has a long history in China, it has not often been used. Most of the things in this part that I am going to share with you are based on my understanding of it in theory, as far as in collaboration with some other professionals' views on this topic.

In China, arb-med is widely used in local and international arbitration cases. At least twenty to thirty percent of arbitral awards are based on disputing parties' settlement agreements. I also heard from a friend that, in the court system, there is also a nearly fifteen to twenty percent settlement agreement rate in litigated cases. As you may know, China's style of arb-med considers the parties arbitrating the case first, followed by mediation. Before the conclusion of the arbitration proceeding, the arbitrator will proceed to conduct a mediation phase upon the disputing parties seeking a mutual agreement. If the mediation is successful, the arbitrator will make the arbitral award based on the settlement agreement. If mediation fails, the arbitrator will deliver the arbitral award based on the facts and evidence obtained from the previous completed arbitration proceedings to finally resolve the dispute.

In the med-arb model, the dispute is mediated first. If an agreement is reached in mediation, the parties sign a binding settlement agreement, or by consent convert their settlement agreement into an arbitral award. If the mediation does not produce an agreement on all issues, then the mediator becomes the arbitrator and hears and determines the unresolved issues. In China, we cannot quite find a legal basis to support the combination of mediation and arbitration in a situation where the agreement is reached in mediation first. For example, according to the existing arbitration rules and the mediation rules, such as Article 44.1 of CIETAC Arbitration Rules, Article 27 of Mediation Rules of China Council for the Promotion of International Trade (CCPIT) and Article 22 of Mediation Rules of BAC, the disputing parties can apply for further arbitration after mediation to convert the settlement agreement reached in mediation first into an enforceable arbitral award. But this does not address the situation when the mediation has failed.

While mediation and arbitration are contractual dispute resolution methods, if the disputing parties agree to submit the failed mediation cases into further arbitration and agree for the previous mediator to serve as arbitrator in the further arbitration proceeding, then it is totally realized in the current med-arb model. BAC has promulgated separate mediation rules and also provided a suggested mediator panel list. Stand-alone mediation and the med-arb model are for those disputants who want to open their eyes to this new dispute resolution method. Consider the definition you know of stand-alone mediation and, actually, what I see here after is the quote and summary from the Mediation Course Training Materials provided by the Straus Institute of Dispute Resolution. It says:

In mediation, a neutral third party assists the parties in reaching a mutually acceptable settlement, often after negotiation has reached a stalemate. Mediation is defined as facilitative negotiation which does not involve a decision maker. One purpose of mediation is to avoid or break an impasse, generate operations. The mediator is usually guided by the parties and is a catalyst who focuses the parties on their interests rather than the conflict and positions they have taken.

I think there are many different views regarding arb-med, med-arb and stand-alone mediation. For the post-part of arb-med and med-arb I have summarized six points. First both med-arb and arb-med ensure certainty that either by agreement, or by award, the dispute will be resolved. Second, when changing from one rule to another, the arbitrator may gain insight during the mediation phase that could contribute to a more appropriate award. Third, in the mediation phase of this hybrid, any suggestions by the

mediator may carry more weight than in the mediation alone. In med-arb, the mediator will have the final say as arbitrator if the dispute is unresolved. In arb-med, the parties may take the mediator's suggestions as providing a glimpse of the already sealed award. Fourth, these processes provide an opportunity for the disputing parties to reach their own settlement agreement without worrying about issues regarding the legal fact of enforcement. Fifth, cost-effectiveness and efficiency save time and money of the disputants, and it is a speedy dispute resolution process if it is agreed by the disputants that the same neutral serves as both arbitrator and mediator in the arb-med and med-arb process. Sixth, most care about the final performance of the arbitral award by disputants if it is based on the mutually agreed settlement agreement.

Stand-alone mediation reduces time and expenses compared with the arbitration and litigation processes. It also reduces the emotional toll because the parties have more control over the process. The parties choose the mediator, when and where to mediate, and how long the mediation will last. The parties will control the outcome, which reduces uncertainty. There are more settlement options with more creative outcomes, and the settlement has a high degree of commitment. This also provides a basis for future negotiations and supports an ongoing relationship.

Now I will talk about the problems with arb-med. If the dispute is settled in the mediation phase the possible considerable time and money spent on the preceding arbitration phase will have been wasted. Any suggestions by the mediator in the mediation phase may be taken as hints as to the content of an already settled arbitral award, thus improperly coercing the party into settlement. The most debated part is the challenging of natural justice and process. In med-arb, the parties are likely to be inhibited in their discussions with the mediator if they know that the mediator may be called upon to act as arbitrator in the same dispute. Also, in arbitrability the issue of partiality arises when the parties have refused to accept a compromise suggested by the med-arbitrator. In the previous mediation process, a neutral will mediate and then after assuming the role of arbitrator, may be embarrassed by what has been conveyed to him or her informally or confidentially in the mediation processes. The mediator will often try to convince a party to make or decide an offer. In the context of med-arb, this may be taken as pressure in the form of a right to make an adverse decision as arbitrator if the party is perceived as unreasonable during the mediation phase. The disputants may use the mediation phase as preparation for a possible arbitration, thereby making it more probable that the dispute will reach arbitration.

Regarding stand-alone mediation, there are two significant points. The first is that the mediator does not have the final say, so his power of

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influence and control over the mediation process is relatively weak. It is the disputants who can choose the outcome. Another important point is that there is no final certainty of resolving the dispute. The mediation result is not the same as the final legal enforcement effect.

Peter Robinson:

Ms. Chen, you touched upon many of the hot buttons that cause all of us to be concerned. One of my first reactions to the question about commenting on med-arb or arb-med is that I first want to specify, how do the parties get there? If they came and committed themselves to arbitration, and then during the course of the arbitration at some point were invited to have this same individual who is the arbitrator serve as a conciliator of some sort, when exactly was that proposed? Because in some of your comments you brought me great comfort—you suggested that the arbitrator had already made his or her decision and sealed it in an envelope. At least that is my understanding of your comments. And then, at that point, may have taken on the role of the mediator. It is still awkward because any suggestion that the mediator at this point makes might be telegraphing what his arbitral award is. Nevertheless, the processes have some completion of the arbitration before the person takes on the role of the mediator.

My understanding is in the U.S., and I think sometimes in China some arbitrators actually explore whether the parties would like him or her to serve as a mediator before they have rendered a final decision. Now it becomes even more complicated in my mind because, as you have said, the arbitrator is now exposed to the ex parte conversations without the due process concerns that Denise Madigan raised. There is no cross-examination, the other side has not had a chance to rebut whatever might have been told to the arbitrator, and now the arbitrator has to make a decision. Will he or she consider that information if they go back into the arbitration mode? Will they be able to ignore that information? Will that information have an impact even though it is suspect and has not been subjected to cross-examination? If we start with arbitration, and then start to bleed into mediation, it raises many questions and issues. The other thing that I believe happens sometimes, at least in the U.S., is that people start in mediation and then they spend their time. There is no commitment to arbitration, at least at the beginning of the mediation. But as they get to the end of the mediation and they reach an impasse, at that point they make an assessment of whether all parties consent, and whether they now want to ask this same individual to serve as an arbitrator. He or she again has been

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exposed to *ex parte* communications that have not been rebutted and cross-examined, but the parties at least had a chance to experience this person in a neutral role and to assess whether they believe he or she has the maturity to still render a decision that they would be willing to abide by. So med-arb has a whole other set of sand traps and concerns, especially if the decision to go to arbitration is made at the conclusion of an unsuccessful mediation. I think you did a wonderful job of identifying many of those concerns.

I do want to share with you some empirical information that I have been working on. About three years ago, I was given permission to send a questionnaire to California judges. In that questionnaire, I included questions about the trial judge also serving as the settlement judge, so that before he would conduct a trial he would call the parties together with their consent and then he or she would conduct a settlement conference and do a mediation of sorts. It is interesting because it has many of the same concerns that we have as far as med-arb. What we found in the survey is that eighty percent of judges thought this was appropriate, and that in fact they were not concerned about it as long as the parties consented. Twenty percent of the judges felt that this was very wrong to do. While eighty percent of the judges theoretically endorsed this idea of a form of med-arb, it was interesting because only about a third of the judges said they actually do this regularly. An equal number of judges said that they never do this. So it was interesting to see the difference between the conceptual approval of the theory and the actual practice in managing their caseloads. We asked them, "If you are mediating a case that you are going to be the trial judge in, do you mediate differently than if you are not the trial judge?" Following Mr. Chen's comments to "be careful when you evaluate the case as a mediator," what we found is that the judges overwhelmingly commented that: "I am less evaluative. I am much more reticent to predict the outcome in the case if I am going to be the trial judge," or equivalent if he or she was going to be an arbitrator. Like the case study that Mr. Chen discussed when he said that after he relayed his opinion the people objected to him as an arbitrator and accused him of prejudging the case, we specifically asked the judges, "If you express your appraisal of the value of a case during an unsuccessful settlement conference, are you concerned that the parties will have a perception that you have established opinions and are no longer neutral?" Interestingly, the judges were evenly divided. A third of the judges said they were very concerned about that, while a third of the judges said they were not. So here we have a group of frankly distinguished jurists whose profession is to act as the equivalent of both an arbitrator and mediator, and they had very different reactions to this concern. In our country we have a jury trial. Many judges have said that because of the jury, my influence over the trial is not absolute. But interestingly, we do not have a jury system for

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family law cases, and data distinguishes the answer for family law judges who do what we call “bench trials,” effectively serving as an arbitrator, and making the decisions on the facts and the law. The family law judges had proportionally the same answers as the judges who reside over jury trials.

We also asked them one more question that I will share with you because you raised a couple of things. We asked, “If you do a settlement conference and the case does not settle, are you concerned with being exposed to inadmissible, confidential information?” Ninety-five percent of the judges said, “Not at all,” while five percent of the judges admitted that they were concerned. I’m not sure if I’m more interested in the data or in the possible denial of our sitting bench. They may not be entirely in touch with the situation. The other question we asked the judges, and I think Mr. Chen alluded to this, was, “If you predicted an outcome during the settlement conference, do you think that you are biased in the trial, in that you are trying to validate your prediction?” Again, ninety percent denied that this ever happens, and ten percent confessed that it does sometimes. The last thing we asked was, “If you had to try a case, do you resent or punish the party who was unreasonable in the settlement conference?” In true form, ninety percent of the judges said “That would never happen,” and ten percent of the judges confessed that, “Yes, this does happen sometimes.” So all of the concerns that both of you raised were things that we investigated empirically. I’m not sure how much we should trust the data because the judges were self-reporting, but it was interesting to ask them their opinions about these matters.

E. The Dual Role of Mediator and Arbitrator

Thomas J. Stipanowich:

I will take a few minutes to make some additional comments to try to pinpoint some possibilities even though, as you can see, we have some significant cultural differences in terms of perspectives on combined roles for neutrals. I speak not only as someone who has done empirical research in this area, having observed and talked with lots of lawyers about it, but I also have some experience in the area. I am currently also a neutral for JAMS, and over the years I have worked both as an arbitrator and a mediator, and have been asked to play joint roles on a number of occasions.

First of all, speaking of the role of mediation in arbitration, I think it is fair to say that most arbitrators do play subsidiary mediating roles. For

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example, if you are in a large complex case and you are the chair of a tribunal, very often you will find yourself working informally with the party representatives to try to address procedural issues in the interests of saving time and money, while trying to avoid getting the whole three member tribunal involved. This is particularly true with respect to exchange of information, which, in American arbitration, is a very big part of the process—often, the most extensive part of the process.

I have also noted that in many cases, mediators are able to set the stage for arbitration. In comparing notes with other mediators, I have found that in situations where it is not possible to reach a solution through mediation, or at least to settle the entire matter through mediation, it may be possible for the mediator to assist by at least narrowing the issues, or helping define the issues that will eventually be submitted to arbitration. In addition, it may be possible for the mediator to help identify appropriate qualifications for arbitrators in the proceeding, or even set up a process. In one case as a mediator, I helped set up a screening process for selecting arbitrators so that each party could select an arbitrator of his or her choice without the arbitrator knowing who made the selection.

Sometimes, as Jay said, you have mediation going on simultaneously with arbitration, but you have separate neutrals. You have an arbitrator or arbitration panel on the one hand, but at some point during the process, if not before, there will be opportunities for a separate mediator to come in and address the issues being handled in the arbitration. This could occur at the end of the information exchange and before the hearing, if not before both. Now I think where the nub of the controversy exists is with a single neutral taking on mixed roles. We have talked a lot about that and I will not repeat things, except to say that each of the issues that have been raised are actually lightning rods with U.S. audiences. If you have U.S. companies doing business in China, there will be concerns about the arbitrator being exposed to certain confidential information during the prior mediation process if the arbitrator has also mediated. Frankly, there is also a concern that people will not be as forthcoming in mediation. They will not be as candid if they know that their mediator is going to turn around and be their judge. This is something you hear American lawyers express concerns about all the time.

I got a phone call the other day from a lawyer who was very upset. He said he had been in a proceeding in which a neutral served as mediator and then took on the role as arbitrator in the same case. He told me over the phone that he wanted to overturn the arbitration award and maybe even sue the arbitrator in court. He thought he had been betrayed by the arbitrator, claiming “In mediation, he told my client that the other side would not receive more than two or three million dollars in damages.” Then when the mediator put on the hat of arbitrator, he rendered a five million dollar award

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against my client. So, you do have some very real issues among American attorneys. I will say, however, that what actually happens on the ground is a little different. I think most mediators and arbitrators, at one point or another, are confronted with the opportunity to put on another hat, and depending on the circumstances, and depending on the experiences and predilections of the neutral, they may do one thing or another.

If you are supposed to be an arbitrator, and you are asked to mediate, and it looks as though you might be in the position of arbitrator, one technique that has been used is to say, "I will mediate, but I only want to talk to everyone in the same room. I don't want to have separate meetings with the other parties." Now that, frankly, is going to significantly limit what you can do as a mediator, so it has tremendous limitations. Another possibility is to say that if you are going to mediate with the possibility of arbitrating, everyone (the parties and the neutral) has to be able to say at the end of a failed mediation, "We don't want to go forward with this neutral. We will mediate; we will try to resolve it, but if we cannot resolve it in mediation, we ought to be able to decide that we are not going forward." I have had experiences with this, but I try to be very careful about it. I always try to make certain that I am dealing with educated parties when we talk about more than one role for me. If I am an arbitrator and they want me to mediate, or if I am a mediator and they ask me to render an arbitration award, I try to make sure that they are effectively counseled on all of the negative possibilities that can occur. I also ask them to discuss it outside of my presence, then come back and report jointly so that I do not have one party trying to gain an advantage over the other with me. I also have had parties sign agreements that they will not seek to overturn an arbitration award on the basis that we engage in *ex parte*, or separate, communications. I also reserve the right, as they do, to walk away from the process at any point if I feel uncomfortable going forward. I am happy to report that every time I have acted as both an arbitrator and mediator, it has resulted in a successful mediation. But I have rarely done it, and I do constantly reflect on those experiences and talk with colleagues about it.

Tan Jinghui:

I would like to thank the BAC for this opportunity to share views about mediation. Here, I especially want to deliver my thanks to Professor Stipanowich and Professor Robinson because they came to China in March for a training session. The topic you just mentioned is a major part of my speech: "The Dual Role of Mediator and Arbitrator." My point is that a

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country that is developing a dispute resolution mechanism will have to consider two elements. One is the development and the current status of disputes. The second is about the social and legal resources we have to resolve issues. Currently, in China, as the economy has developed very quickly, there are more civil and commercial disputes. The disputants want to resolve the issues with the lowest cost and the highest efficiency to start a new round of cooperation. Many countries are willing to adopt med-arb so the med-arb system is actually on a one-hundred percent voluntary basis. In this situation, because the judge or arbitrator has gained some information, it might affect the fairness of his judgment. My personal opinion is that we can profit from this process, even though there is something lost in the mediation. This is fairly reasonable. My last topic is how to combine med-arb together. So actually this is a topic that has been discussed before.

I would like to share with you from two perspectives. From my personal experience, I would like to talk about the difficulties in med-arb. We have a lot of difficulties figuring out how to perfectly combine the mediation in our procedures. The first one is about the shift from arbitration to mediation. It is really difficult to create a legal environment for mediation. Another fact is that mediation is a new offer and a promise regarding the conflicts based on the voluntary basis of the parties. This requires a very relaxed atmosphere. It is hard to change the atmosphere when shifting from arbitration to mediation. This difficulty also makes it hard for mediators to communicate and negotiate in the mediation.

The second element is about difficulty in negotiation. As Professors Stipanowich and Robinson have mentioned in their trainings, they have talked a lot about the skills, and, as arbitrators, we are trying to use these skills and even use them creatively. I have found that the most difficult problem in negotiation is that both parties do not have the will to cooperate and compromise. This is actually related to the legal entity of those parties. Interests in the negotiation should be diverse. For example, economic interests, political interests, personal interests, and future interests—things like that. However, I often see that the parties are only concerned with the arbitration application and the litigation application. It is hard to resolve differences and build confidence before the submission of an arbitration application.

The third difficulty regards the dual role of mediator and arbitrator. Having an arbitrator as a mediator for these cases is really hard because he or she must use all sorts of means to resolve issues in order to avoid taking sides. In order to achieve common business interests we do not have very efficient ways for them to make agreements. Therefore, the difficulties in these three areas are my personal experience. How can we overcome the difficulties, and what are the skills that we can use to change the situation?

Mr. Chen talked a lot about the skills. I want to share with you my personal experience. I quite agree with Mr. Chen in that we should show concern for the cases. So besides on-site investigation, we should understand the related industry and the possible difficulties of the industry development. The second is about the case itself. We should know the core reasons for the conflicts. This is about the first view I would like to share with you. Also, if it is possible, we should improve the environment to shift from the arbitration procedure to mediation. Of course, in the future of mediation, we should institute an environment with friendly facilities after the arbitration procedure ends. We should move toward a friendlier atmosphere so that we can get to a renewal of the offer and promise. This way, the mediation can be really effective.

The third skill that I'll mention is about the proper timing for mediation. I quite agree with Mr. Chen. After the cross-examination, I think it is time for mediation. The parties will have a better understanding of the cases and the relevant law, thus allowing the mediator to better understand the situation. Therefore, he or she can make a full self-appraisal of the situation and the offer enabling him to make a reasonable compromise. Fourth, we should find the right interests for a breakthrough because the conclusion of any contract is based on goodwill. In the implementation of contracts, there might be problems that actually lead to the conflicts. So there is a development stage which is a gradual process. The interests are economic interests, political interests, and personal interests, which are needs. We need to find the right place for a breakthrough so that we can resolve differences, disputes and resentment among the parties. A senior mediator can even help parties to break icy relations and renew friendship and cooperation.

The fifth skill, which I think is the most important for mediation in China, is that we should focus on business interests and be business-interest oriented. Because of the dual role of mediator and arbitrator, the mediator should focus on business interests, so that the parties can make appropriate self-assessments of their business relations in the past, present, and future, so as to weaken the role of rules and regulations in assessment. The mediator at this time cannot tell the parties how he views their offer. In construction disputes, often parties will give up interests of outstanding payments, lawyer fees, arbitration fees, and opportunity costs—things like that.

The last skill I will discuss is about how to avoid taking a side. In order to avoid a possible biased judgment in the role of arbitrator and mediator, a mediator should be very careful to avoid taking sides. By applying measures

such as careful listening, aggressive interrogation, questions on the key issues, agreement to focus on business interests, and a creative dispute resolution plan, one can find the right interests to resolve disputes so that settlement can be reached. To sum up, from our experience in China, mediation, arbitration, and litigation often happens and this mechanism and concept of mediation paves the way for us to develop independent mediation. In terms of social and cultural background, I believe that in the dispute resolution mechanism in China, mediation is going to play a large role.

Jay Welsh:

This has been a very interesting discussion on med-arb, arb-med having two parties. I just wanted to say two things. When you have a single party doing it, you are losing the ability to have a mediator who can comment on what *this* arbitrator is likely going to do. Let me give you an example. If I am the arbitrator and Denise is the mediator, she is able to say, “You all want to settle this case because the arbitrator, Mr. Welsh, is not very smart and may not understand your issues, and you are going to want to control the result rather than giving it to him to decide.” This is a very powerful ability. In our studies in the U.S. among our cases at JAMS, we do twelve thousand commercial mediation cases a year, and we find that the parties want some evaluation. So if we are the same person and we cannot do that, the parties are not really getting the value that they want at least in the U.S. My third comment is that this is a prime area for research. I can see Pepperdine putting together a problem using med-arb and arb-med with two separate people and then seeing what the results are. They are going to be widely different in my opinion.

Jeff Kichaven:

I have a question on a different subject. What are the common stereotypes that you all have about Americans, as we behave in negotiations? What are the problems that you all see as typically arising in negotiations with Americans, and what can we as Americans do to communicate more effectively and to negotiate better with people from China?

Madame Wang Hongsong:

That is also what we want to know; how do we negotiate with Americans? We would like to know your viewpoint about the progress. I

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would hope that when negotiating with Americans, they could tell us their real intention at the beginning. Tell us your bottom line, so that we can negotiate in a more effective way instead of taking too much time on it.

Thomas J. Stipanowich:

I have a question from our audience. One of our audience members wanted to know if there are any efforts by the government of China to attempt to encourage greater use of mediation or other dispute resolution processes in business disputes.

Madame Wang Hongsong:

After the research, some of the departments will propose suggestions. As far as I know, the Department of Justice and the Supreme Court had some kind of explanation a few years ago about the role of mediation. In the future, whether there will be more considerations is a possibility. The Ministry of Construction and Ministry of Water Resources have issued documents about the use of dispute boards in construction. I think that the government is quite concerned about the development of mediation and they have noticed the professionalism of business communities overseas. The government is trying to introduce international experience. As the market economy further develops, the government will be more concerned about the development of mediation. Of course, the BAC wants to play a more important role in it.

Jung Yang:

The Chinese courts also encourage mediation between the parties. For example, those local courts have an especially large number of cases mediated between the parties by the judge before trial, and a large number of cases having been settled by mediation. I have learned that the rates for the settlement of mediation are very high with some courts. Of course, these are all small claims cases. As Madame Wang suggested, the Supreme Court of China is also planning a new way to promote mediation.

Zhang Jianhua:

I think there is a difference between American culture and Chinese culture, but in China we have similar courses. If disputes arise, then we

would resort to mediation first, and then arbitration or litigation if mediation fails. However, the mediation is not binding at all. Most mediation is based on mutual negotiation between the parties. I am interested whether there is such a clause in the U.S. to enforce binding mediation, or whether it is compulsory to seek help from certain mediation organizations. After that, it can be referred to litigation. So is there such a mechanism to resort to a certain organization for mediation?

Jung Yang:

In China, sometime the parties provide by contract that they will try to resolve the dispute through mediation before resorting to arbitration. Professor Jianhua is asking whether there are similar mechanisms and practices in the U.S.—that is to say mandatory mediation before arbitration.

Jay Welsh:

Yes, it is quite common to have a two-step or three-step arbitration clause where mediation would be part of the dispute resolution process. Denise has spent many years designing these kinds of clauses for companies depending on what the dispute and industry is.

Denise Madigan:

It is interesting because over the years they were introduced in part after disputes had occurred, where the parties had discovered the value of mediation and resolved that future disputes between the parties, particularly where they had an ongoing relationship, would resort first to negotiation between senior level executives, then mediation, and then arbitration before litigation. We see in the U.S., as a whole, a trend certainly within the courts to direct parties to mediation first before going to trial, and that certainly was not the case some twenty years ago. It surprises me now because in some states in the U.S., such as California, it is a very common practice. We are also now seeing a movement within the U.S. to require lawyers to recommend ADR to their clients as part of effective practice. In one state, it can be construed as an ethical violation by the state bar for failing to recommend it as an option to clients. Finally, we see attorney fee provisions in some state courts where a party entitled to attorneys' fees upon a victory may be limited if the party refused to participate in mediation prior to trial. So, we are seeing multiple forces within the U.S. encouraging the parties to attempt mediation before arbitration or litigation.

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Jeff Kichaven:

I have mediated many cases where people have been in the mediation because a contract requires them to be. They are terrible. I think it is a very bad idea to put that kind of provision in a contract because the result, most of the time, is that people come to the mediation in the wrong spirit. They are not there because they want to be there. They are not there because they have a genuine desire to work hard to put a difficult situation behind them. They are there because some contract says they have to be there. There are many cases that just seem to be non-starters, and I will ask people in those cases what the circumstances were that led them to come to mediation. In many of the non-starter cases, the reason will be "Some judge made us do it," or "Some contract made us do it." My sense is that mediation is sufficiently understood, sufficiently insinuated into the system of American justice (the American legal system), and that sophisticated lawyers know that mediation is out there. They know when to recommend it to clients, and they know when not to recommend it to clients. My sense is that these contractual provisions, at least among sophisticated lawyers and parties, are generally not necessary. You get better results when people come in a truly voluntary way.

Thomas J. Stipanowich:

Let me add a further comment on this because we are really in the process of absorbing the practice of using these multi-step clauses, and they are becoming very common in all areas of commercial practice. I listen with great sensitivity to what people like Jeff have to say because people are always asking about different kinds of clauses to put in their contracts. It is becoming very common to include, as Jay said, a requirement for good faith negotiation, often followed by a mediation process, and then, if necessary, resort to arbitration. Twenty years ago the leading construction contract in the U.S. called for binding arbitration as a way of resolving disputes that could not be resolved on the job site between the parties. Binding arbitration was in every contract. Ten years ago, in 1997, a new set of documents came out, and for the first time there was a provision to attempt negotiation at the job site. If that was unsuccessful, the parties were required to resort to mediation. If the mediation did not produce a result, then the case would proceed to arbitration. The 2007 documents just came out. The requirement of binding arbitration has been removed. You now have a menu of options, although mediation is always included as a provision in the contract.

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However, parties have a choice as to whether or not they arbitrate or go to court if mediation is unsuccessful. I think what has happened is the emphasis on mediation has, in a sense, displaced the emphasis on arbitration in construction disputes. That is not to say that people will not arbitrate, but it is going to require more of an affirmative effort on the part of drafters to ensure that they have arbitration in the contract. I also want to touch on the comment that Denise made about the increasing efforts by lawyers to use mediation tactically as a way of delaying resolution or playing games. I think it is going to be a continuing challenge for drafters, advocates, and particularly for mediators as we go forward. I guess what all of this suggests to us is that what we conceive as progress often presents new sets of challenges. There are unintended consequences to almost everything we do. Sometimes what seems like a good idea, like putting a provision in a contract, may not always produce the result that you expect or intend. So, these are experiences we share with you. We also look forward to hearing from you about your experiences as you develop new processes. We hope to learn from the good ideas you develop as you make greater use of stand-alone mediation.

III. CONCLUSION

Peter Robinson:

It is wonderful to see many of the people who attended the training in March—all five of our panelists—but we can also see many of those in the audience and recognize many of the people who also attended the training in March. It is great to see you again.

Jung Yang:

You too, Peter. In this morning's discussion, I have heard a lot of familiar expressions like "evaluative mediation" and "distributive bargaining" expressed by one of the panelists here, which reminds me of the great times we have spent here earlier this year in Beijing together with Tom and Peter.

Chen Guang:

I have some questions for Mr. Jay Welsh. JAMS provides a traditional arbitration and mediation service, so I just wondered how JAMS promotes your service especially with med-arb or mediation? Another question is how

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many cases does JAMS conduct in med-arb or mediation? What is the percentage rating for med-arb or stand-alone mediation cases at JAMS? Does JAMS follow-up on the performance rate of the settlement agreements in mediation cases?

Jay Welsh:

As the cases each year get larger and more complex, the number of matters that we do in a year are actually decreasing. We do about eleven thousand arbitrations and mediations a year. About seventy percent of those are mediation. So the decrease is both in revenue and the numbers of cases. We do about seven thousand five hundred stand-alone mediation cases a year throughout twenty offices in the U.S. We do not track the settlement rate because they all eventually settle. The question is when. But I will tell you one statistic that is clear. Ten years ago, most of the mediations that settled were settled on the day of the mediation. Less than fifty percent of the time, matters are settling on the day of the mediation, and I think that Jeff and Denise, who do this on a daily basis, can testify to that. That means they have to spend more time following up a week after, a day after on the phone, calling, managing the conflict and the resolution of it going forward. If you have a busy practice like they do, you have four, five, six, or seven active cases that are close to resolution but are not quite there yet. So you are on the phone during the day between sessions during lunchtime or whatever free time you have.

Now I will turn to the question about marketing, and how we get our services out there. I have been doing this a long time and I wish I knew the easy answer to that. It is one case at a time. People select the mediator, not the company. They select Jeff because they want Jeff, and if he does a good job in that case then the lawyers are going to go back and talk to other lawyers who are going to select him. It is a slow process. We advertise in the legal newspapers; we do seminars. When we started this, if there were four people on a street corner, I would talk to them about mediation. It was like missionary work. It takes a long time to build the confidence that lawyers have in the process and the trust clients need to have before they tell you all of the confidential information that you need in order to help them reach their resolution.

Jung Yang:

I think we have to stop here and call it a day. Let me thank you again and thank the Straus Institute. Thanks to all of the panelists, the BAC, and Madame Wang for giving us this great opportunity to meet your people and have this interesting discussion. Thank you, Peter, Denise, Jeff, and Jay. Let's keep in touch, and we will be looking forward to seeing you again here in Beijing.

Thomas J. Stipanowich:

We look forward to the next time. Thank you Madame Wang. Thank you, Mr. Yang and all of our dear friends in Beijing.