



F. Peter Phillips

Hoping to Avoid a Court Battle? Try Mediation

A new business mediation center offers US and Chinese companies a dispute-resolution alternative

F. Peter Phillips, senior vice president for Committees and International Programs, the International Institute for Conflict Prevention and Resolution, recently discussed the US-China Business Mediation Center with Paula M. Miller, assistant editor of the CBR.

CBR: Who founded the US-China Business Mediation Center, and what is its mission?

Phillips: The Conciliation Center of the China Council for Promotion of International Trade [CCPIT], and the International Institute for Conflict Prevention and Resolution [CPR, formerly the CPR Institute for Dispute Resolution] established the US-China Business Mediation Center in 2004. CCPIT formerly operated the China International Economic and Trade Arbitration Commission [CIETAC]—China's largest arbitration institution—which split off from CCPIT earlier this year. CPR is a nonprofit coalition created by a group of corporate general counsel in 1979 to develop and encourage the use of alternatives to litigation. Until recently, all of its work was conducted in North America. But now, in addition to its work with CCPIT in China, CPR works with groups of member companies in Europe and Latin America.

CCPIT's Conciliation Center approached CPR about two years ago to develop a new mediation center that would make American businesses feel more comfortable resolving business conflicts in China. The goal was to provide US and Chinese trade partners that come from different backgrounds and different legal systems with an alternative to arbitration and litigation that would still allow effective resolution of disputes. [Mediation and arbitration are both dispute resolution processes that use a neutral third party to help settle the dispute. In arbitra-

tion, a private judge decides the issue. Mediation tends to be more flexible, is nonbinding, and seeks a consensual agreement that engages the parties more fully (see p.36).]

CBR: How does the Center work?

Phillips: CPR is based in New York and CCPIT is headquartered in Beijing. The US-China Business Mediation Center does not have one office in a specific city but co-administers projects by sending mediators wherever commercial disputes arise. Applicants can submit dispute forms by mail, by fax, or through our websites. [See www.cpradr.org or adr.ccpit.org; applications must be accompanied by a \$2,000–\$4,000 registration fee and a \$8,000–\$16,000 deposit, depending on the monetary value of the disputed claim.]

The Center asks the parties to choose a mediator. But when the Center created its rules, it knew PRC companies might want assistance from Chinese mediators and US companies might prefer assistance from American mediators. We therefore devised a method that would permit the use of two neutral mediators: one Chinese and one American. And we developed a training system and trained the neutrals together.

CBR: Does the Center specialize in certain industries or investment forms?

Phillips: The Center does not specialize in specific industries—nor is there a limit on the range of matters the Center will mediate. But the cases should involve “substantial” amounts of money—for example, an argument about a minimum of \$100,000. The mediation panel is made up of heads of major US and PRC law firms, corporations, government agencies—including former members of the PRC Supreme Court—and law schools. They are well-respected people who know business,

understand how to act as a neutral, are trustworthy, and will maintain privacy.

CBR: How developed is mediation in China?

Phillips: The practice of conciliation, as China refers to it, is deeply ingrained in Chinese culture and the maintenance of productive relationships is far more sophisticated there. By comparison, Americans are more individualistic and tend to rely on the compulsion of law, such as contracts, to settle disputes. That said, modern business mediation is rarely practiced in China. For example, in the West, companies are accustomed to directly seeking mediation of a problem, independently of any adjudicative process. By contrast, Chinese conciliation frequently occurs in the course of litigation or arbitration—when an arbitrator or judge acts as a conciliator—and independent mediation is much less common.

CBR: When does mediation work best? When do you recommend companies try mediation instead of arbitration or litigation in China?

Phillips: Some people in the Center's coalition of members will mediate any case—after all, mediation costs little and may succeed. Other members are more selective about what they will mediate or take to court. But some cases, for example those that involve criminal fraud, embezzlement, or “bad acts,” should rarely be mediated. And some industries may require a judicial outcome, for example, if there is a challenge to the validity of a

When Drafting Contracts, Mention Mediation

Since business disputes can arise in even the most carefully planned ventures, companies should include mediation as a dispute resolution option in their contracts in addition to arbitration, venue, and choice of law clauses. When drafting the contract, discuss these sample clauses with your clients and counterparts and adapt them to your needs.

Version one

“Any dispute arising under this contract shall be settled by friendly consultation, assisted by mediation through the offices of the US-China Business Mediation Center (the Center) if one of the parties chooses to do so. The assistance of the Center may be sought by any party to this contract and the procedures of the Center shall govern the nonbinding mediation. Unless the parties otherwise agree, in the event that the dispute is not settled within 45 days of the commencement of the consultation, or within 30 days of the parties' first meeting with the facilitator from the Center (whichever comes later), then the dispute shall be submitted for final and binding arbitration to the [.....].”

Version two

“Any dispute arising under this contract that is not settled by friendly consultation, shall be submitted to nonbinding mediation to the US-China Business Mediation Center (the Center). The mediation shall be conducted in accordance with the procedures of the Center, in a location agreed upon by the parties or, in the absence of agreement, in Beijing. The parties shall be represented at the first mediation session by a representative with authority to resolve the dispute, and a party's good-faith participation in the first mediation session shall be a condition precedent to that party's commencement of arbitration or litigation in any forum. Unless the parties otherwise agree, in the event that the dispute is not settled within 30 days of the first mediation session, or within 45 days of a party's demand for mediation (whichever comes later), then the dispute shall be submitted for final and binding arbitration to the [.....].”

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Sample Mediation Procedures

The US-China Mediation Business Center's mediation procedures offer an alternative to arbitration. Some of the key procedures are listed below. For a complete list of the Center's procedures, see www.cpradr.org/pdfs/Intl_China_Procedure04.pdf or e-mail the Center (info@cpradr.org or adr@ccpit.org).

- The mediator shall have no interest in the outcome of the dispute and have no current or anticipated business or personal relationship with any party to the dispute.
- Each party must be represented at each mediation conference by a business executive authorized to negotiate a complete resolution of the entire dispute, unless excused by the mediator from a particular conference.
- At least 10 business days before the first substantive mediation conference, each party will submit to the mediator a written statement summarizing the background and present status of the dispute, including any settlement

efforts to date. The submission should include an analysis of the party's real interests and needs—this will help the mediator assist the parties in finding a solution that effectively addresses those interests. The parties are encouraged, but not required, to exchange the materials they submit to the mediator.

- Efforts to reach a settlement shall continue until a written settlement is reached, the mediator concludes and informs the parties that further efforts would not be useful, or one of the parties or the mediator withdraws from the process.
- If the parties fail to develop their own settlement terms, and if expressly requested to do so by both parties, the mediator may submit a final settlement proposal to the parties before terminating the procedure; or if qualified to do so, may give the parties an evaluation of the likely outcome of the case if it were tried to final judgment, subject to any limitations under application mediation

rules, court rules, or ethical codes. Thus, a mediator cannot offer a definitive evaluative assessment of the dispute without the parties' permission and without also being qualified to do so. Often such assessments can disrupt an otherwise effective mediation process if not provided at the parties' express request based upon a shared respect for the basis and authority of the mediator's assessment.

- The mediator shall not serve as an arbitrator in the same or substantially related matter, unless the parties and the mediator otherwise agree in writing.
- The parties may request the Center to arrange for entry of the mediated settlement agreement as an arbitral award, or request a court of competent jurisdiction to enter the settlement agreement as a judgment.

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patent. Also, some insurance companies will go to court to get a legal interpretation of what certain language means if they think the language is unclear.

These exceptions aside, mediation is appealing because it focuses on the immediate problem and how to resolve it instead of strictly focusing on legal issues. Often, in business, the quicker the solution is reached, the better the outcome. Mediation saves time, and the partners themselves decide the outcome and can keep working with each other. People increasingly recognize that lawsuits are not a way to make money.

CBR: What are some of the main problems with China's mediation sector?

Phillips: Well, mediation is clearly for "big players"—when lots of money is involved. For those familiar with mediation, the process is very user friendly. But one of the main challenges is that many participants are still unfamiliar with mediation. A lot of people think mediation means "compromise" or that something will be paid over a party's objections. But after mediation occurs, the business environment usually improves. The process adds value—it does not "split the baby."

CBR: What are some of the Center's competitors?

Phillips: Because the challenge in this field is to develop and encourage use of the process itself, entrants don't act as competitors so much as fellow educators. And I predict that will be the case for the foreseeable future—there will be many more disputes receptive to mediation than there will be good mediators to assist. There are regional mediation centers around Southeast Asia but unfortunately they have not yet made a substantial impact. These [Southeast Asian] centers are nonprofits, just as we are, and we all work to make a contribution—not to collect an application fee or increase value in our own organizations.

CBR: What laws and standards does the Center follow?

Phillips: There are many international standards for arbitration, but because mediation is not a legal process, not many laws cover it. The United Nations Commission on International Trade Law has released international standards, and the United States has promulgated uniform mediation acts. The European Union has issued ethical codes and draft directives for EU states to encourage mediation. Also, CPR has promulgated standards for practitioners.

The practice of commercial mediation is growing internationally, and farsighted multinational corporations that practice mediation are well ahead of the game. 完