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6th CIETAC Annual Event in Hong Kong
A Tryst with the "Oriental Experience" –
A Practical Overview of the Med-Arb Process
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Good afternoon, ladies and gentlemen,

I am indeed pleased and very honoured to be here to welcome you all to this event and of course to share some views. I thank the China International Economic and Trade Arbitration Commission (CIETAC) for organising the 6th Annual Event in Hong Kong and for inviting me, first time as the Secretary for Justice, to participate in the event. I came in other capacities in the past.

2. The topic today is a very interesting one: "A tryst with the 'oriental experience: A Practical Overview of the Med-Arb Process'". Presumably the "tryst" is referring to the one between "mediation" and "arbitration". If "mediation" and "arbitration" are indeed in a romantic relationship, then perhaps they may be best described as an "odd couple".

3. On the face of it, mediation and arbitration can't be more different. Their underlying concepts seem to be fundamentally opposite to each other. Last month, the Department of Justice, together with the United Nations Commission on International Trade Law (UNCITRAL) and the Asian Academy of International Law, organised a Hong Kong Forum to commemorate the 60th Anniversary of the New York Convention. In the Forum, we organised an debate on whether mediation or arbitration is a more advantageous mode of dispute settlement, and we had distinguished panelists speaking for the "mediation" and "arbitration" sides respectively. During the debate, the debaters from the "mediation camp" likened "mediation" to "peace", and "arbitration" was

likened to “war”. That description may be a bit sensational but it does reflect the impression of some people on these two distinct modes of dispute settlement.

4. On the other hand, some scholars have drawn analogy with the traditional dichotomy between “li” (禮) and “fa” (法) in Confucius’s teachings. “Li” are the social norms of propriety and they lean in favour of conciliation, respect and accommodation of each other’s views. “*Fa*”, or the formal legal rules, are something more a basis of adjudication.

5. An early saying about Chinese law was “以德為本，以刑輔之”. In other words, virtue was used as the basis of the society and criminal sanction was used to assist the implementation. That very much reflected the Chinese culture, or perhaps not merely the Chinese culture but something very Asian.

6. Given the difference between arbitration and mediation, it brings to my mind the French paradox, which some of you may have heard about. Why can the French who eat so much lovely food, foie gras and steak etc., stay so slim? When we look at Arb-Med, Med-Arb or Arb-Med-Arb, however you do it, these are hybrid processes and there is also a paradox in them. I hope that today you will be able to find out why they work and how they work. I would suggest that it is a paradox based on confidence, trust and moderation and you may consider whether you agree with such description. I am able to say that because I had the great benefits of participating in Arb-Med procedures in the past and I will share some examples with you.

7. And now, back to the title, “mediation” and “arbitration” do not fall in love at first sight. Like many odd couples in romance movies, and probably in real life too, they may find each other insufferable at the start, but if they can find a way to respect and work with each other, they may create a perfect match and a very happy ending for all.

8. I may share with you my experience. I was a stern disbeliever of mediation, let alone Arb-Med, until I participated in training in mediation when my views were converted. And then I participated in mediation to see how it worked. I remained, in those days, a stern disbeliever of Arb-Med. I learned about the process through Professor Tang Houzhi, who of course is the father of arbitration in China and a stern believer of Arb-Med. He has written many papers to promote that concept. I did not believe in it because, probably like some of you today, I wondered how this odd couple can be a perfect match and be successful.

9. I was converted because I participated in it. The procedures I participated had two types of results: one result was that the dispute was settled through the changing of the hat from arbitrator to mediator. I also had the experience of the mediation not giving rise to a fruitful result and we then had to write the award.

10. I can share with you an example. I remember I was one of the three arbitrators in a rather complicated construction arbitration in Taiwan which involved a major infrastructure project in Taiwan. One side was the foreign contractor and the other side the government authorities in Taiwan. The arbitration was coming towards the end and we had a break before the final remarks. During the break, the parties talked to the arbitrators as well as among themselves over a cup of coffee. Then they started to realize that they were not correct as they started off with. Then we realized there was a chance of converting the arbitration into mediation. So we said: let's stop the coffee break and we would try to do what we can in the remaining few hours. Then we discussed and ultimately settled the matter without having gone to the writing of the award. That case involved a foreign contractor with foreign lawyers participating, and so was not entirely Asian.

11. That experience allowed me to reflect on why Arb-Meb worked. Throughout the process, the parties would be able to build confidence and trust of the tribunal, the three of us.

Therefore they would know whether we were able to switch hats and do the compartmentalisation. In other words, the tribunal has to keep the arbitration's evidence and arguments in the "arbitration compartment" and when necessary move into the "mediation compartment". As I sometimes say, it is a bit schizophrenic. So, that is why it works – trust and confidence. Moderation of course comes from the understanding that settlement is a matter of give and take.

12. However, adversarial-trained lawyers who have not actually been in an Arb-Med process would raise all sorts of questions. Does it work? What if it is abused? If you see parties in private, would the parties influence you and therefore make you biased when you come to write the award? All these questions were raised, usually by those who have not actually been in the process. My own experience is that these would not arise, but that is not good enough. Therefore, one must look further how best to address the potential abuses. One should bear in mind that the parties only switch to mediation by consent. If they do not trust each other in the sense of respecting the procedure, they would not agree. If the arbitrators do not trust themselves in being able to compartmentalise, they would not agree to convert either.

13. So how does one deal with the potential abuses? I would throw a few ideas. There is no conclusion, but these ideas are gleaned from practices, primarily in civil law jurisdictions. In Switzerland and Germany, for example, the courts would allow a judge to mediate. Hong Kong courts of course now also encourage mediation, but the civil law jurisdictions would conduct mediation within the judicial systems.

14. There are different ways to deal with the Arb-Med process. For example – and I mentioned that in my talk in 2009 in Swiss Arbitration Association – instead of all three arbitrators converting into mediators, only two of them mediate, and so the Chairman remains sanitised, or alternatively, only the Chairman mediates. In that case, if the award is to be written, there will be no colouring of

minds by taking on board things said in private. Alternatively, one may have a "shadow mediator". In other words, in addition to three members of the tribunal, an extra person would sit there and do nothing until, towards the end, when the parties agree to mediate, then that person would become the mediator.

15. Mediation procedures may also be modified, in two ways at least. One way is to remove the caucus approach. In other words, an evaluative type of mediation is adopted to test the strengths and weaknesses of the parties' cases. The analysis would hopefully make the parties become more realistic.

16. The other way is the approach provided for in the Hong Kong Arbitration Ordinance. The Ordinance permits Arb-Med and deals with the concerns by providing that everything raised by the parties during mediation be revealed in arbitration if mediation fails. Therefore, anything said in caucuses will no longer be private so that fairness and level playing field are ensured in the arbitration process.

17. In short, in order to make Arb-Med work, one can modify the "Arb-Med panel", introduce a "shadow mediator" or fine tune the procedures. To quote what Professor Tang has said: "the proof is in the pudding". He has been very firm in believing that Arb-Med works and I would urge you not to just brush it aside but to consider how to capitalise on the flexibility of dispute resolution procedures for the benefit of users. Thank you very much.