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Abstract

Purpose – This paper aims to examine how the law may play a role in mediation by paying special attention to how the law is excluded from and included in the process of court mediation in China.

Design/methodology/approach – Hundred model court mediation cases selected by the Supreme People's Court of China were analysed and reviewed.

Findings – The law is relevant in Chinese-style court mediation in four ways: first, judge-mediators are intended to use mediation to avoid resolving legal difficulties or challenges; second, judge-mediators consult the law to anticipate the losing party and the potential negative effects that might result from the adjudication; third, judge-mediators refer to the law to propose a mediation scheme or plan to guide the parties to settle; and fourth, judge-mediators would use the law as a bargaining chip in various ways to induce the parties to settle.

Research limitations/implications – Standards should be set out for the use of law in the mediation process to standardise judge-mediators' actions, to ensure that the law is not used coercively to push settlement, which would undermine the parties' self-determination in mediation.

Originality/value – This paper provides an original understanding of how law affects the process, the outcomes and, ultimately, the nature of settlements that parties achieve through court mediation in China. This study contributes to the literature that argues that ethical norms and legal standards should be set to direct those legal evaluations.

Keywords Self-determination, Coercion, Court mediation, Role of the law

Paper type Case study

In the Western framework, the pre-trial bargaining in negotiation or court-referred mediation generally is viewed as a game played in the shadow of the law. There are two possible outcomes: settlement through bargaining and adjudication by a judge or a bargaining breakdown. The judge encourages private bargaining but stands ready to step from the shadow and resolve the dispute by law if the bargaining breaks down (Cooter *et al.*, 1982). With the rise of ADR all over the world, court mediation has found a welcome reception in Chinese courts within the past 10 years. Official Supreme People's Court (SPC) (2014) statistics show that the rate of civil and commercial cases resolved in the first instance by mediation and withdrawal was 62 per cent in 2009, 65.29 per cent in 2010, 67.3 per cent in 2011 and 64.6 per cent in 2012. Unlike the court-annexed mediation of some western countries, court mediation has always played an integral part of litigation in China, rather than functioning as an alternative or independent dispute resolution mechanism. In China, the judge-mediator takes the dual roles of mediator and ultimate adjudicator in a dispute. The judge-mediator urges the parties to mediate at every stage of the trial. If mediation then fails, the parties will argue their case before the same judge-mediator. This procedure fundamentally differs from western-style mediation, which, although encouraged or referred by the courts, is

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strictly a private procedure involving the parties and a third-party mediator with no connection to the judge-mediators. In general, Chinese-style court mediation is mediator-guided and result-oriented (Ng and He, 2013). The dual role of both adjudicator and mediator raises significant questions about what the role of the law is in Chinese-style court mediation. Is the shadow of law theory applicable to Chinese court-annexed mediation? How does the law affect the process, the outcomes and, ultimately, the nature of the settlements that parties achieve through court mediation? This paper attempts to study these questions by examining the role of law in court mediation practice by reviewing 100 model mediation cases selected by the SPC from across the nation.

This study shows that the roles the law plays in court mediation are generally determined by the judge-mediators according to their professional understanding of the importance of law in the mediation process. In nearly one-third of the cases, and particularly in those involving divorce and the enforcement of judgments, judge-mediators focused on factual problems with practically no regard for law. In contrast, in approximately two-thirds of cases, where law still functioned as a reference for the judge-mediators, judge-mediators would refer to the law to encourage settlement by explaining legal terms and the framework of legal liability and even hint at the final ruling implicitly or explicitly to induce the parties to settle successfully. Specifically, the law is relevant in Chinese-style court mediation in four ways: first, judge-mediators are intended to use mediation to avoid resolving legal difficulties or challenges; second, judge-mediators consult the law to anticipate the losing party and the potential negative effects that might result from the adjudication; third, judge-mediators refer to the law to propose a mediation scheme or plan to guide the parties to settle; and fourth, judge-mediators use the law in various ways as a bargaining chip to induce the parties to settle.

From the perspective of western mediation theory, the role of law in mediation is different in different models. Facilitative mediators allow clients to decide when and how they want to utilise legal information, but the bottom line is that the law acts as a dimension for parties to refer rather than as a coercive factor to push. Chinese judicial mediation is an extreme example of the evaluation model, where the mediator uses his position and leverage to push the outcome. Because the mediator can hint at the possible ruling to the parties involved in the mediation session, where the mediator would be the judge if a trial were held, the law acts as a coercive factor to push the parties to settle. Based on this finding, the author argues that China should set forth standards for the use of law in the mediation process to standardise judge-mediators' actions, thus ensuring that the law is not used to coerce settlement and to avoid undermining the principle of self-determination.

Part one of this article provides the theoretical framework and literature review of the study; part two presents and analyses the role of law in court mediation by examining 100 model mediation cases selected by the SPC; and part three evaluates the characteristics and causes of the role of law in Chinese-style court mediation shown in the case studies. Part three also discusses the extent to which law should play a role in court mediation and in what form and exploring the proper role of law. Finally, part four calls for a clear statement of the position of law in Chinese court mediation.

1. Literature review: the facilitative-evaluative debate over mediation

Commentators hold distinct positions on legal evaluation of the claims in mediation. The lawyer-mediator Gerald S. Clay claims that "effective mediation almost always requires some analysis of the strengths and weaknesses of each party's position should be dispute be arbitrated or litigated" (Alfini and Clay, 1994). In 1997, Professor Leonard Riskin pointedly acknowledged that legal evaluation was occurring in mediation.

Specifically, he wrote that he had observed mediators using the following strategies:

- assess the strengths and weaknesses of each side's case;
- predict outcomes of court or other processes;
- propose position-based compromise agreements; and
- urge or push the parties to settle or to accept a particular settlement proposal or range.

Riskin (1996) suggested that these strategies were consistent with an "evaluative-narrow" orientation, the principal strategy of which is to help the parties understand the likely outcome of litigation or whatever other process they will use if they do not reach a resolution in mediation.

This contention drew criticism from some scholars and practitioners. Some claimed that evaluative mediation is an "[o]xymoron", arguing that an evaluative mediator who assesses the strengths and weaknesses of legal claims, proposes settlement terms, pushes parties to accept a particular settlement and predicts court outcomes or the impact of not settling would invariably favour one side over the other and jeopardise neutrality (Kovach and Love, 1998). Others note that insufficient protections against incorrect mediator evaluations exist and suggested that "ethical norms and legal standards" be set to "direct those evaluations". (Love, 1997). Additionally, some contended that the mediator would bully someone into an agreement if the efficiency with which the parties accepted the outcome of mediation were the only criterion for evaluating mediators (Stulberg, 1997). These same critics further focused their disapproval primarily on the dangers of the possible evaluative strategies, such as asserting an opinion or judgment as to the likely court outcome or of what a fair or correct resolution of an issue in dispute would be (Kovach and Love, 1998). These critics concluded that the evaluative-narrow orientation and its most aggressive strategies were inconsistent with the mediation paradigm that has party's self-determination as its primary value.

By contrast, advocators of evaluation mediation acknowledged that evaluative mediation potentially endangers parties' self-determination but argued that there is not a "sufficient record of abuse that would justify banning evaluation *per se*" (Moberly, 1997). Some even insisted that evaluation would make mediation more effective. Stempel (1997) argued that:

> [B]oth economic and sociological analysis tends to suggest that more value is added to the process when the mediator provides some yardstick for assessing the options and some information about the range of default options if the matter is adjudicated rather than settled.

Mnookin and Kornhauser (1979) contended that the legal rights of each party could be understood as bargaining chips that can affect settlement outcomes. Bibas (2004) noted that the conventional wisdom is that litigants bargain towards settlement in the shadow

of expected trial outcomes. Others have even postulated that mediator evaluation can assist the parties in their self-determination efforts (Moberly, 1997). Typically, Weckstein (1997) claimed that:

> [R]ather than interfering with the self-determination of parties to resolve their own dispute, activist interventions by the mediator may enhance the parties' empowerment by educating them and by aiding their realistic understanding of the alternatives to agreement.

Chinese court mediation could be viewed as an extreme case of evaluation mediation. Deng and Xu (2014) found that power is embedded in the mediator's position, and neutrality is less of a concern as compared to justice in the mediator's terms. Jia (2002) claimed that a Chinese mediator plays a role that combines the function of counsellor, educator, pacifier, unifier, problem solver, arbitrator, negotiator, litigant, therapist and consultant. Clarke (1991) mentions:

> As mediation in China has become institutionalised, it has become more and more like adjudication. This is both because of the coercive features of mediation and because of the adjudicatory institutions of the courts.

However, little research has been conducted on exactly how the judge-mediator makes the legal evaluation in practice. This paper tries to fill the gap by studying how the judge-mediator makes a legal evaluation in mediation practice and explores rules to guide such legal evaluation.

2. Methodology

This study is based on a review of the role of law reflected in 100 mediation cases selected as models by the SPC. The selection process itself was part of a programme to promote court mediation and encourage local courts to use mediation to resolve disputes following excellent models. In addition to presenting aggregate statistical information, the goal of this section is to determine whether substantive law is relevant in the mediation process and how it affects mediation outcomes.

In 2010, the SPC established a Mediation Work Leading Group (MWLG) responsible for coordinating, supervising and guiding mediation by national courts. In May 2011, the SPC issued a notice requiring the Higher Courts of 23 provinces, 4 municipalities and 3 autonomous regions, together with the People's Liberation Army (PLA) Military Court and Court of Xinjiang Production and Construction Army Corps, to report closed cases that had been completely resolved by mediation in their jurisdictions from 1 January 2009 to the end of 2010. Before the end of July, courts in various regions reported 421 cases to the SPC, among them 351 civil mediation cases (including 5 enforcement settlement cases), 42 criminal settlement cases of private prosecution and Civil Suit Collateral to Criminal Proceeding, 24 administrative mediation cases and 4 portions of State compensation conciliation cases. The SPC then issued a Notice of the Supreme People's Court on Issuing the Outstanding Examples of Mediation Cases in People's Courts across the Nation, publicising 100 outstanding cases and the top 10 cases of those 100 (Shen, 2013).

The 100 model cases are representative of court mediation cases in China for several reasons. First, the cases' materials generally provide an official perspective and confirmation of the model of court mediation to implement. The SPC announced that the 100 selected cases were the pilots and models for implementing the principle of "Giving Priority to Mediation and Combining Mediation with litigation"; the cases also showcase

the art and wisdom of the local judge-mediators involved and the social effects of mediation and the mediation experiences of courts across the country. The SPC required courts of all levels across the nation to study the model cases to improve mediation skills in court practice. Although the 100 cases represent the official and court perspectives, the cases also represent best practices in court mediation in China to a certain extent.

Second, because the cases were resolved by different local courts across the country, they may provide an overview of the court mediation practices of the whole State rather than of a single court or judge-mediator. The cases were reviewed at the provincial level, with each provincial jurisdiction contributing one to eight cases. Guangdong Province generated the most cases, while the less developed Shanxi Province, Hainai Province, Tibet and Xinjiang each contributed only one case; this difference may be due to variation in the professional quality and capability of judge-mediators in the different districts.

Third, the 100 cases covered various matters, including civil disputes, commercial disputes, criminal-related compensation and administrative-related compensation. The number of civil and commercial cases was the greatest, covering divorces and disputes in the areas of inheritance, labour, contracts, intellectual property and infringements. Figure 1 provides a concise distribution of the types of disputes.

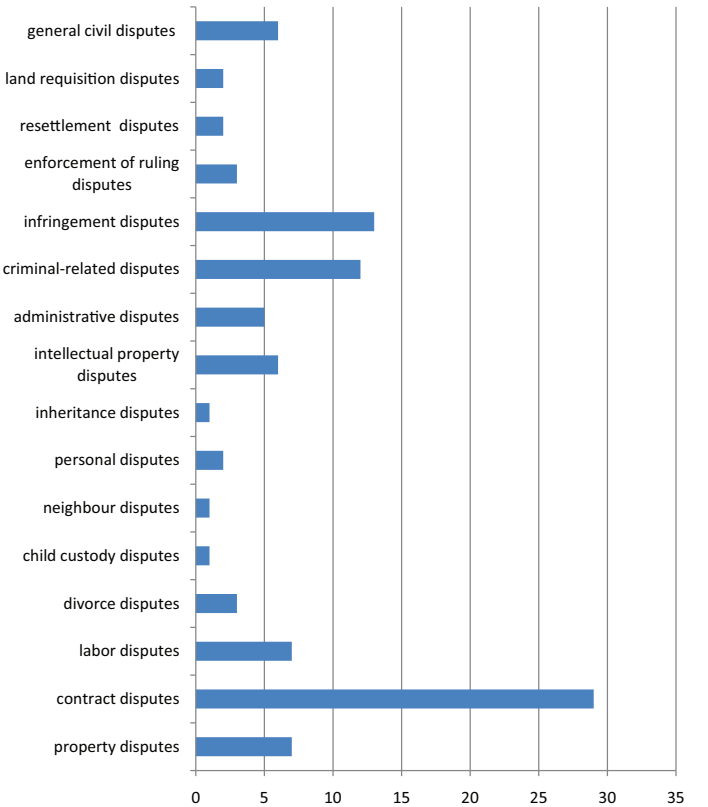

Figure 1.
The distribution of the types of disputes in the 100 cases

Additionally, the cases were handled by different levels of courts at different stages of litigation. Among the 100 cases, 43 were handled by local inferior courts, 32 by intermediate courts and 23 by high courts. However, cases mediated by the SPC were excluded from the selection process to ensure impartiality. Mediation occurred in the first instance in 56 cases, in the second instance in 29, in retrial procedure in 11 and in the enforcement of effective judgments in 4.

The following section analyses the role of the law shown in the 100 cases based on a study of the case materials compiled by the SPC. The case material includes five parts: first, the name of the presiding judge-mediator; second, a case summary stating the claims of the parties and the basic facts found by the court; third, an introduction to the mediation procedure describing how the judge-mediator mediated the dispute successfully, including the strategies and the methods used by the judge-mediators and the court; fourth, the recommendations of the higher court listing the reasons it chose the case; and fifth, comments by the SPC explaining why the case was representative of typical mediations and giving the highlights of the case. This study limited itself to the official case documents, together with limited newspaper reports showing the reactions of the parties involved; it was therefore limited to examining the role of law in court mediation from the perspective of judge-mediators rather than the parties and their attorneys. Additionally, as the 100 model cases are viewed as the best practices in court mediation in China, any deficiencies therein are less grave than those occurring in many courts.

3. The role of the law in 100 model court mediation cases

The judge-mediators in the 100 cases used various techniques, including emotional influence; practical assistance, that is finding a job for one party; raising funds for a medical fee; resolving other conflicts beyond the dispute; atmosphere building; legal analysis and education; interest identification; reliance on a third party (including friends, relatives, industry associations, local government officers, local communist party commissions, lawyers, leaders, teachers or anyone could help to settle the dispute); and persuasion by referring to customs and traditional feudal ethical codes. These techniques are generally coincident with those identified by an empirical study conducted by many scholars (Christiansen, 1997; Pierce, 1994; Wall, 1991, 1990).

Legal analysis is also one of the important techniques as shown by the case study. In 33 of the 100 model cases, the law was practically absent from the mediation procedure, as the judge-mediators made no mention of the effect of law or merely stated they had mediated the disputes according to the law without clarifying how. Although the 33 cases covered various sorts of disputes, substantive law appeared to play little role, particularly in divorce and judgment enforcement cases. In three divorce cases, the judge-mediators more or less settled the cases by pacifying the parties. In two cases of enforcement of judgment, the legal issues had been clarified in the verdicts, and it only remained to have the parties agree to compromises to enforce the verdicts. In the remaining 67 cases, law played various roles in the court process. The 67 cases concerned virtually every type of dispute, including civil matters, IPR, criminal-related civil compensation and administrative disputes. Different sorts of disputes implicated different substantive laws. In contractual and infringement cases, judge-mediators focused on differences in the parties' legal liability. In IPR cases, the problems of the effectiveness of IPR and the similarities between two technologies were addressed. In

criminal-related compensation cases, judge-mediators always explained the legal policy of encouraging compensation to victims. Finally, in administrative disputes, judge-mediators focused on the legitimacy of the administrative action. In terms of the role of law in court mediation, the case studies show that substantive law shapes the procedure and outcome of court mediation in four ways: first, lack of clear substantive law or difficulty in construing substantive law motivates judge-mediators to encourage mediation; second, judge-mediators may also pursue mediation to avoid negative and unfair effects that may result from application of substantive law; third, judge-mediators may also rely on substantive law to prepare and revise the mediation scheme for the parties to reference; and fourth, judge-mediators may use substantive law to show parties what might result from adjudication to encourage settlement.

4. Mandating mediation for avoidance of substantive legal problems and challenges

It is commonly acknowledged that contemporary Chinese law suffers from excessive generality, omissions, undefined terms, inconsistencies and vagueness (Peerenboom, 2002). Generality and flexibility are the guiding principles in Chinese legislative drafting to ensure the unitary nature of the state while satisfying the needs of regional diversity and adapting to local conditions (Keller, 1994). Judge-mediators must always construe the law strictly as written or advance rules out of general legal principles. This task may be easy when a statute is straightforward and clear, but is difficult when a statute is unclear or contains omissions. In at least 4 of the 100 model mediation cases, judge-mediators met legal challenges or difficulties in applying the law.

A typical case in this regard is *Luo Caixia* v. *Wang Jiajun*. In this case, a 23-year-old student sued the daughter of the former township leader who stole her identity and examination score to be accepted for enrolment by a college. This case concerned broad corruption in the Chinese education system and presented the novel legal question, as stated by the SPC in its comment, of what legal rights had been infringed upon by the defendant. However, the judge-mediator avoided addressing whether one or multiple legal rights had been infringed upon because she believed a verdict without clear law would have negative social consequences and that the judiciary was incapable of resolving the deep social problems of unfairness and corruption in education. Another similar example concerns the legal effect of traditional customs. In *Xiameng Lide Zhiye Management Co., Ltd* v. *Jiang Quru Dealing with Real Property*, the defendant, who was the employee of the plaintiff, participated in an Autumn Festive Bobbing Competition at the plaintiff's instruction. The Bobbing Competition is a traditional folk game of chance in which the players obtain prizes by rolling dice. The defendant, as the top scorer, was presented with two cars as prizes, and the plaintiff claimed ownership of the cars, stating that the defendant had won the cars by carrying out a duty on behalf of his employer. The judge-mediator was faced with the challenge of determining which factor – the personal luck of the defendant or the opportunity provided by the plaintiff – was essential to obtaining the prizes. Recognising the importance of the legal issue involved, the judge-mediator encouraged the parties to settle, leaving unresolved the question of how to reconcile law and traditional customs. Similarly, in *CCTV International Internet Co., Ltd,* v. *Shen Zhen Top Way Video and Information Inc.*, the question of whether broadcasting an Internet programme created by another party constituted infringement of copyright was left unanswered as the parties settled. *Huang*

Hui v. *Nanyang City Center Blood Station, Naizhao County Health Burea and Nanzhao City People's Hospital* is another similar case, concerning the question of whether blood is a product and how to determinate the causal link between a blood transfusion and disease.

5. Anticipating the negative effects of possible adjudication according to law

Another role of law in Chinese court mediation is for judge-mediators to assess the possible negative effects of adjudication. This duty usually arises when the legal issue in a dispute is especially clear and the judge-mediator can easily determine the result of the case. In 5 of the 100 model cases, judge-mediators stated that it was easy to reach verdicts according to the law, but that such verdicts would not completely resolve the disputes because the judge-mediators anticipated that the losing parties might appeal to higher authorities, produce mass disturbance and unrest or resort to violence.

For example, in *Lu Yu* v. *China Railway Sixteenth Bureau Group and Guang Zhou Subway*, the plaintiffs entered into an agreement to compensate the defendant with a fee for the demolition of the plaintiffs' home. However, the plaintiff then sued to break the contract, arguing that the fee was lower than that awarded to other residents. The judge-mediator determined that the plaintiff would certainly lose the case according to law. However, under the threat of a petition, the judge-mediator persuaded the parties to settle, avoiding ruling against the plaintiff. This tendency is also found in class action lawsuits. Among the 100 model cases, the greatest number of plaintiffs involved in any single one was 1,831. In that case, 1,831 natural person stockholders sued the Yuannan Yunnan Copper Co., Ltd., Yunnan Nonferrous Metals Corporation Limited Ltd. and Jing Yongkang Company for surplus property of Sanjiang Company. The case took years to resolve. The court of first instance denied the plaintiffs' claims, finding that Sanjiang Company was bankrupt and that all of its assets and liabilities had been resolved in the bankruptcy proceedings. However, the plaintiffs, who were poor and had suffered from the bankruptcy of the state-owned enterprises, did not accept the ruling. The issue became a societal problem that could not be resolved by the judge-mediator of the court. If the court made a final ruling against the 1,831 plaintiffs, mass disturbance might have resulted. For this reason, the court, associated with the local party commission and other government departments, settled the case by asking the first defendant, who actually had no legal obligation, to compensate the plaintiffs.

Another typical example in this regard is *He Linjun* v. *Guangdong Education Court, Guangdong Education Bureau*. In this case, a student, whose census registration address was in Jiangxi, was required to take the College Entrance Examination (CEE) in Guangzhou because she had lived in Guangzhou with her father for several years. Even if the Constitution guarantees every Chinese citizen equal rights to receive education, in reality, it is nearly impossible for migrant students to take the college entrance exam in Guangzhou because the college enrollment quotas are allocated in accordance with provinces and municipalities. In fact, the educational administrative regulations issued by Guangdong Province expressly prohibit migrant students from taking the CEE in Guangzhou. The plaintiff would have lost the case if the judge-mediator had ruled according to substantive law. To ensure that the immigrant student could take the CEE without delay, the presiding judge-mediator urged the parties to settle in the end by requiring the student to return to Jiangxi to take the CEE

with the certificate issued by the Guangzhou Education Bureau. In another case, *Wang Shuangxi etc.* v. *Sunshine City Group Inc., Shenzhen Branch of China Securities Depository and Clearing Co., Ltd.*, the judge-mediator was faced with the question of the legitimacy of shares held by an individual in the name of a corporation. In the 1990s, holding shares representing a legal entity was a common way for an individual to become a stockholder and circumvent a law that only allows corporations to purchase corporate shares publicised by a listed company. The judge-mediator settled the case because the law would have required ruling against the investors.

6. Relying on substantive law to propose mediation schemes

For disputes between powerful companies with professional lawyers, the two parties may negotiate with each other and draft the mediation agreement by themselves. The work of the courts and judge-mediators in those cases is limited to guiding the parties to negotiate and providing a forum for negotiation, as occurred in *ZhengTai Group Incorporation* v. *Schneider Electric Low Voltage (Tianjin) Co., Ltd. & Leqing Branch of Sida Electronic Equipment Co., Ltd. of Ningbo Bonded Area*. There, both companies hired teams of lawyers, and the final mediation agreement came out of intensive negotiation between the parties.

However, if a dispute involves parties without lawyers or with little knowledge of the law, the judge-mediators may prepare a mediation scheme for parties to discuss to increase the likelihood of settlement. In this case, the court refers to the governing law to devise a proposed mediation agreement. For example, in *Hu Jianping* v. *Li Gaofu*, the two parties conflicted over mining rights to a piece of land. The judge-mediator, based on the provision that an individual with mining rights should have capital and technology adequate for the scale of the mining, as provided by Regulation of Management Explication of Mineral Resources of Jiangxi Province, proposed a mediation agreement providing that the more economically and technologically powerful party would enjoy the contractual right to mine on the land but would compensate the other party for its loss. The mediation agreement was ultimately accepted by both parties.

Additionally, judge-mediators determine the amount of compensation by referring to relevant law. For example, in *Chen Geng* v. *Nanjin City Second Hospital*, the judge-mediator, noting that the Regulation of Dealing with Medical Dispute and Civil Code provided different compensation criteria, proposed a number between the amounts in the law for the parties to consider.

7. Using substantive law to encourage the parties to settle

Except for cases in which judge-mediators disregard or intentionally avoid using the law, judge-mediators typically use substantive law to persuade the parties to reach settlement. In fact, whether judge-mediators have interpreted the law and answered legal questions (Shi Fa Jie Yi) is used as a criterion to evaluate the quality of mediation procedures.

The purpose of noting and interpreting the law is to help the parties understand what might result from adjudication. Judge-mediators and courts have adopted different approaches to accomplishing this task. Judge-mediators usually explain the burden of proof and admissibility of evidence to the parties, giving them a clear understanding of these standards. If the parties cannot settle beforehand, the judge-mediator permits

cross-examination, determines the facts of the case and then presses the parties to settle from the consensus on the facts.

For legal issues, in other cases, judge-mediators explain the definitions of legal terms and elements of legal liabilities, helping the parties understand the legal results and liabilities of their activities. For example, in *Chen Yanjun and etc.* v. *Zhejiang Hangxiao Steel Structure Co., Ltd.,* the judge-mediator explained the definition of and requirements for a finding of false statement as specified by Security Law of China. The judge-mediator required the defendant to pay compensation because the China Security Regulatory Commission had issued a written decision of administrative penalty concluding that the defendant had failed to disclose information and disclosed misleading information. Additionally, in *Wang Xuewu* v. *Weifang Wansheng Biology Agricultural Chemical Co., Ltd.*, a product liability dispute, the plaintiff refused to mediate with the defendant, who had suffered damage from incorrect use of a pesticide produced by the plaintiff. The plaintiff insisted that it had included clear instructions on the package of the pesticide as required by the Regulation of Agriculture Chemical. The judge-mediator performed a detailed analysis of the legal effect of the instructions on the package using the regulatory criteria of the clarity of instructions, obligation of the producer, cognitive competence of the user and words of the instructions. The judge-mediator concluded that the plaintiff had failed to fulfil its legal obligation, as the instructions, which contained abstract and complicated chemical terms, would not be understandable to a layman with little chemical knowledge. In the end, the defendant was persuaded to settle with the peasants.

Judge-mediators may also provide precedent cases to parties to construe the application of law. In *Lei Ming Ping* v. *Chongqing Branch of Fu Zhou Third Construction Engineering Company and Third Construction Engineering Company*, the judge-mediator shared rulings from similar cases with the parties, guiding them to understand the possible ruling in their case and establishing reasonable expectations of the result. This approach is also found in *Chen Yeyou* v. *Nanyang City High Technology District Planning Bureau*, in which the judge-mediator collected similar cases and showed them to the parties, guiding the plaintiffs to reassess their demand for compensation.

In another retrial case, the defendants (also the plaintiffs in the first instance) thought the court's ruling in their case could not be reversed, as the period for applying for a retrial had expired. However, the judge-mediator explained that the court could retry the case and change its original effective judgment on its initiative, reversing the negative judgement against the defendants. At the same time, the judge-mediator informed the plaintiff that the effective ruling would not necessarily be reversed even if the court began the retrial procedure. By suggesting that adjudication could have several possible results, the judge-mediator persuaded the parties to pursue mediation. Some judge-mediators go even further, showing their hand directly. In the administrative licensing and compensation case *Liancheng County Xin Du Mining Industry INC.* v. *Fujian Province Department of Land Resources et al.*, the judge-mediator, seeking to persuade the defendant, Department of Land Resources, to settle with the plaintiff, the Fujian Higher Court, suggested before issuing a verdict that the administrative action in the case had been illegal and required the Department of Land Resources to correct its error. The court suggestion disabused the defendant of any notion that it would evade responsibility and induced it to return to the negotiation table.

Finally, a judge-mediator may issue a ruling in one case to encourage settlement in related cases. For example, in *Anhui Jushen Dianqi Co., Ltd.* v. *Anhui Junxin Electronic Co., Ltd.,* the plaintiff filed three lawsuits against the defendant for, respectively:

(1) "using the special name of famous commodity";

(2) "infringing exclusive trademark"; and

(3) "infringing name of enterprises".

The presiding judge-mediator, on the basis of an analysis of the evidence, communicated the possible judgements to the parties, excluding the issues of wrongful understanding of fact and application of law. The defendant argued that "Juxing" and "Jusheng" were not identical words and would not cause confusion. The judge-mediator informed the defendant that it might still lose the case because other factors, such as similarities between the products and packaging, would also influence the determination. Additionally, when negotiations were deadlocked over the compensation amount, the judge-mediator issued a verdict in one of the cases, ruling that the trademark concerned was famous, as a result of which the two parties reached consensus on the value of the trademark and mediated the other two cases successfully.

8. Evaluations and implications

The case studies show that the law affects the process, outcomes, and type of justice that parties achieve in court mediation. First, Chinese judge-mediators conduct legal analyses to decide between mediation and adjudication as the strategy in a given case. Mediation has priority if there are legal challenges and difficulties. In cases without legal challenges, judge-mediators refer to the substantive law to anticipate possible rulings and whether such rulings might result in petitions, mass disturbances, criminal action and difficulty in enforcement, appeals or other negative consequences. Substantive law is also important in shaping the outcome of the mediation in most cases. During the mediation, judge-mediators help the parties understand the relevant law. Judge-mediators play an active role in assisting litigants to establish reasonable expectations of the adjudication by either explaining how the law will apply to the facts or even suggesting the possible ruling directly. Indeed, judge-mediators control the extent to which the law influences the mediation session and how this influence ultimately affects the outcome. In some cases, judge-mediators' avoidance of the law encourages settlement, whereas in other cases, judge-mediators focus on the legal merits of the case to encourage settlement. The case studies reveal that the role of law in court mediation differs among judge-mediators and cases. In most of the cases in this study, the law is a major factor in the formation of the final settlement. Notions that the Chinese approach to court mediation proceeds solely from facts rather than the law and that mediation is naturally incompatible with the law are too arbitrary to fit the actual situation. The case studies also show that legal norms and developments may occasionally be disregarded in cases where the legal difficulties would be advanced but not fully addressed in court mediation. Moreover, the case studies prove that the law is still used as a bargaining tool by judge-mediators during mediation.

The role of the law in Chinese mediation shows that it hardly follows that all evaluative mediation is bad or that all non-evaluative mediation is good (Moberly, 1997).

As we mentioned above, in nearly one-third of the 100 cases under study, the judge-mediator successfully settle the disputes without legal evaluation. However, in

most cases, the judge-mediator provides various legal evaluations. It could be observed that the approaches taken by Chinese judge-mediator are consistent with the strategies developed by Riskin (1996). The Chinese judge-mediators provide legal analysis and opinions, assess the strengths and weaknesses of each side's case, propose position-based compromise agreements and persuade parties to accept the judge-mediators' assessments. Uniquely, in Chinese court mediation, the judge-mediator would push the parties to settle to avoid legal difficulties rather than respect the voluntariness of the parties. Additionally, another characteristic of Chinese court mediation is that the judge-mediator would not just predict the possible court dispositions but actually hint at the possible rulings.

The western debate over facilitate mediation and evaluation mediation reveals a vision of self-determination anchored in party-centred empowerment that shifts to a vision that is more reflective of the norms and traditional practices of lawyers and judge-mediators, as well as the courts' strong orientation to efficiency and closure of cases through settlement. It is quite clear that court-connected mediators are providing evaluations of the parties' legal arguments. When offered in the context of a party-centred, facilitative mediation, evaluation can serve a useful educational function and can aid party self-determination by assisting the parties in making informed decisions (Welsh, 2001). However, at bottom, in the end, the disputing parties are still responsible for making the final decision and the pressure of legal evaluation of their claims should not become coercion (Hedeen, 2005). Indeed, mediator evaluation has the potential to aid party self-determination by insuring that the parties who have invoked the law and legal institutions are adequately informed regarding their choices. However, legitimate concerns about the potential negative impact of such evaluation existed. Some states in the USA have responded by endorsing a thinner vision of self-determination as a core principle and prohibiting coercion to counterbalance the temptation to push inappropriately for settlement in mediation (Welsh, 2001).

Following the principles set out above, I would like to evaluate each of the four roles of the law in mediation identified by the case studies. First, avoiding legal questions should not be considered a sign of success in court mediation. Judge-mediators could mediate with complete respect for the consensus of the parties. However, judge-mediators should be prohibited from avoiding adjudication due to legal challenges because such avoidance would impede the clarification and development of the law. Instead, judge-mediators should address legal problems as thoroughly as possible to reduce ambiguity in the law. Even if a case is not publicised in a formal adjudication because it ultimately settles, fully addressing the legal issues can at least make the parties in that particular dispute negotiate according to the law. Additionally, in cases under pressure of petition, mass disturbance or other negative out-of-court outcomes, judge-mediators should pay more attention to presenting relevant law to the parties, guiding them to compromise in accordance with the law. The aim of individualised justice might be weakened if the law is always used as a yardstick rather than disregarded. Moreover, mediation agreements created with reference to the law would provide a frame or foundation for the parties to negotiate. However, judge-mediators should not go so far as to coerce the parties to accept the proposed agreements. Finally, there is no problem with judge-mediators using the law to guide the parties to

bargain with each other. Judge-mediators are obligated to share and interpret the law, especially for those without attorneys. However, judge-mediators should be prohibited from suggesting the final ruling of adjudication because that tactic would coerce the parties and violate the principle of voluntariness in mediation. Generally, the author believes judge-mediators must share and discuss the impact of the law with the parties involved in mediation. That obligation is also implied in the principle of lawful mediation specified by Chinese law. However, judge-mediators should avoid using law to coerce the disadvantaged party to settle. Suggesting adjudication before finishing the entire civil procedure or issuing a court suggestion before the close of a case presents a danger, as these may be disguised methods to coerce the parties to settle.

In conclusion, there should be guidance for the use of law in Chinese-style court mediation. Judge-mediators should guide the parties to negotiate in accordance with the law. They must present and explain relevant law to the parties but should not provide legal advice to any single party nor give direct legal decisions on specific facts of specific cases. It is the right and obligation of the parties to apply relevant law to the facts and to determine their requirements in mediation. Moreover, judge-mediators should interpret the law, potential legal risks and the distribution of legal liabilities in a neutral, calm, precise, accurate, clear and moderate manner according to common sense. It is also possible for judge-mediators to interpret legal principles in similar cases. However, judge-mediators should not implicitly or explicitly suggest the final outcome of adjudication or show particular support for any party.

9. Conclusion

The maintenance of the disputant parties' self-determination is among the most important and defining characteristics of mediation. A mediator must respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their differences (Bush and Folger, 2004). However, in the context of court-annexed mediation, evaluation techniques become more and more effective and welcome, because they indicate an expansion in self-determination. Indeed, Court-referred mediation is a sort of hybrid mediation, meaning compulsory of the beginning and voluntary at the end (Galin, 2014). Control over the final settlement by the parties, namely, that the parties determine whether to settle or not without coercive pressure, has been identified as the fundamental, core characteristic of the mediation process. Otherwise, mediation would be the name, but not the reality.

In contrast to the western style, the fundamental virtue underlying Chinese conflict management and resolution is harmony. During the past 10 years, Chinese political leaders have adopted the creation of a harmonious society as their political slogan (Minzner, 2011). This goal is immediately evident by Chinese institutions addressing the management of business disputes. Both the civil judicial code and the state-sponsored commercial arbitration code permit the judge-mediator or arbitrator to act as informal mediator and to work to resolve dispute and various social conflicts informally. Due to the emphasis on harmony and political pressure in China, Chinese judge-mediators show a way to cross the line of self-determination and make encouragement become coercion. This paper presents this phenomenon and suggests that it is necessary to build legal or ethical standards for evaluation mediation.

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