

# AN EMPIRICAL STUDY OF ARBITRATORS ACTING AS MEDIATORS IN CHINA

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“Persuade your neighbors to compromise, whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses and waste of time.”

Abraham Lincoln

“Measure what is measurable, and make measurable what is not so.”

Galileo Galilei

## I. INTRODUCTION

Whether an arbitrator can and should act as a mediator in a pending arbitration is one of the most controversial issues in international arbitration. While mediation is not a new concept for the West, the practice of having the same person acts as both an arbitrator and a mediator in one proceeding has aroused great debate in theory and practice. The debate gives rise to delicate ethical issues, and touches the very core of arbitration, i.e., the mission of arbitrators.<sup>1</sup>

The supporters consider that the arbitrators’ mission is to ensure that arbitration in general provides the parties with a menu of processes that may assist them in resolving their disputes in the most effective way, which includes assistance in reaching a fair resolution of their differences at the earliest practical time. Thus, the arbitrators’ role will include the facilitation of settlement.<sup>2</sup> Another justification for the arbitrators’ facilitation of settlement is based on the parties’ freedom of choice.<sup>3</sup> If the parties want the

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<sup>1</sup> See Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 *ARB. INT’L* 187 (2009).

<sup>2</sup> See Pieter Sanders, *The 1996 Alexander Lecture, Cross-Border Arbitration-A View on the Future*, 62 *ARB*, 172, 173 (1996); Klaus Peter Berger, *Integration of Mediation Elements into Arbitration: ‘Hybrid’ Procedures and ‘Intuitive’ Mediation by International Arbitrators*, 19 *ARB. INT’L* 387, 402 (2003); Michael Schneider, *Combining Arbitration with Conciliation*, in 8 *ICCA CONGRESS SERIES* 57, 76 (Albert Jan van den Berg ed., 1996).

<sup>3</sup> See, e.g., Houzhi Tang, *Is There an Expanding Culture that Favors Combining Arbitration with Conciliation or Other ADR Procedures?*, in 8 *ICCA CONGRESS SERIES* 101, 113 (Albert Jan van den Berg ed., 1996); Berger, *supra* note 2, at 387–403; Julian Lew, *Multi-Institutionals Con-*

arbitrators to carry out a conciliatory role, to use caucus in mediation, and to shift their hat back as arbitrators if the mediation fails, such agreement should be respected. Furthermore, settlement facilitation by arbitrators can be a useful tool to enhance the efficiency of arbitration and to improve the administration of justice.<sup>4</sup>

The opponents of the combination of arbitrator and mediator consider the goal of arbitrators to be solely ensuring that the arbitral process was conducted fairly and resulted in an *enforceable* award. Thus, promoting settlement should fall beyond the mission of the arbitrators.<sup>5</sup> The main argument against the arbitrators' facilitation of settlement is the risk of a breach of due process and natural justice. Fundamental to the notion of natural justice is the right to know and be able to answer an opponent's case. The rule of due process' governing of disputes' fair hearing on the merits forbids *ex parte* communications with the decisionmaker. However, the process of mediation often presupposes that there is a separate meeting with the parties (caucusing). During these caucuses, information communicated confidentially to the mediator is not known to the opposing party, and it is not subject to response or clarification by the opposing party. In consequence, the other party may be deprived of its due process right to rebut those facts.<sup>6</sup> Another drawback to the combined approach is the fear that, in the event that the settlement fails and the arbitration continues, the impartiality of the mediator-turned-arbitrator may be affected, mainly because of the confidential information he or she obtained during the mediation phase, which is not part of the record. On the other side of the debate, there is the concern that if the parties anticipate the mediator's potential reversion to arbitrator, in which role she might decide the case if the mediation fails, they might be less candid than they would be with a "pure" mediator. This concern may weaken the effectiveness of the mediation process.<sup>7</sup>

Despite the academic debates, the combination of mediation and arbitration ("arb-med") is frequently used in China. In this

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*ciliation and the Reconciliation of Different Legal Cultures*, in 12 ICCA CONGRESS SERIES 421–29 (Albert Jan van den Berg ed., 2005).

<sup>4</sup> Kaufmann-Kohler, *supra* note 1, at 205.

<sup>5</sup> See, e.g., Michael Collins, *Do International Arbitral Tribunals Have Any Obligations to Encourage Settlement of the Disputes Before Them?*, 19 ARB. INT'L. 333–43 (2003).

<sup>6</sup> See Kaufmann-Kohler, *supra* note 1, at 197; Emilia Onyema, *The Use of Med-Arb in International Commercial Dispute Resolution*, 12 AM. REV. INT'L. ARB. 411, 415 (2001).

<sup>7</sup> See, e.g., MARTIN HUNTER ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 48 (2009).

respect, the Chinese model may be useful in contributing to the practice in other jurisdictions. How is the role of arbitrators perceived in China? How do Chinese arbitrators usually promote settlement? Can we generalize some good practice of arb-med based on the Chinese experience? Our perceptions about the conduct of arbitrators are often driven by anecdotes, partly because of the confidential nature of arbitration proceedings. Numerous practitioner-oriented symposia, workshops, conferences and round tables are organized annually, in which are heard an array of anecdotes from personal experiences of counsels and arbitrators, either confirming best practices or underscoring problem areas. The problem with anecdotes is that it is difficult to evaluate whether the event or practice described is “typical or atypical, frequent or infrequent, ordinary or extreme, as common as a rabbit or as rare as a rhinoceros.”<sup>8</sup> More systematic research is needed to supplement anecdotes with empirical studies.<sup>9</sup> The purpose of this

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<sup>8</sup> Christopher R. Drahozal, *Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration*, 20 J. INT’L ARB. 23 (2003).

<sup>9</sup> The stage of empirical research on commercial arbitration is starting to change today, fostered by academic and practitioner interest in the subject and the increasing willingness of (at least some) arbitration institutions to permit researchers to have access to case materials. The existing literature has made important beginnings towards an empirical understanding of international arbitration. See, e.g., YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996) (conducting hundreds of interviews with participants in the international arbitration process); Theodore Eisenberg & Geoffrey Miller, *The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335 (2006–2007); Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008) (examining the *ex parte* arbitration clauses in the contracts of publicly held companies); Richard Naimark & Stephanie Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, 30 INT’L BUS. LAW 203 (2002) (asking participants in AAA international arbitrations to rank a list of attributes in order of importance in that particular proceeding); Richard Naimark & Stephanie Keer, *Analysis of UNCITRAL Questionnaires on Interim Relief*, 16 MEALEY’S INT’L ARB. REP. 11 (2001) (surveying arbitrators on the AAA’s international arbitration panel about their experience with provisional measures); Randall Peerenboom, *Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249 (2001); Shengchang Wang, *The Practical Application of Multilateral Conventions Experience with Bilateral Treaties Enforcement of Foreign Arbitral Awards in the People’s Republic of China*, in 9 ICCA CONGRESS SERIES SERIES 461 (Albert Jan van den Berg ed., 1999) (analyzing the enforcement record of arbitral awards); Shari Seidman Diamond, *Psychological Aspects of Dispute Resolution: Issues for International Arbitration*, in 11 ICCA CONGRESS SERIES 327 (Albert Jan van den Berg ed., 2003) (experimental research on arbitrator decision-making). For a collection of empirical work on international commercial arbitration, see CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* (2005).

Article is to present the actual practice of arb-med in China based on empirical evidence, with an attempt to generalize good practice in effective dispute resolution.

Section II of the Article reviews relevant literature on the general attitudes of arbitrators in settlement facilitation. Section III defines the scope of the current study and describes the empirical methodology. Section IV analyzes the results of empirical research and gives a detailed description of the attitudes and practice of arb-med in China. Section V discusses further implications of the Chinese experience on the practice in other jurisdictions. Section VI concludes.

## II. PREVIOUS RESEARCH ON THE GENERAL ATTITUDES OF ARBITRATORS IN SETTLEMENT FACILITATION

In international arbitration practice, how often do the international arbitrators facilitate settlement? What is the overall settlement rate in arbitration proceedings? To what extent do arbitrators actively engage in promoting a voluntary settlement between the parties? What are, if any, the different attitudes and practices between practitioners from different legal backgrounds and cultures? On these issues, the following studies have been conducted through surveys with arbitration practitioners.

### A. *Two Surveys of Arbitration and Mediation Practitioners (1994, 2004)*

One of the first comprehensive empirical studies on the practice of international business dispute resolution was presented by Professor Christian Bühring-Uhle in *Arbitration and Mediation in International Business: Designing Procedures for Effective Conflict Management*.<sup>10</sup> Ten years later, this survey was supplemented by a second survey, presented in the second edition of *Arbitration and*

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<sup>10</sup> CHRISTIAN BUHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* (1996). As reported in his study, almost 150 questionnaires were distributed to practitioners all over the world in the first survey, completed in 1994. A total of ninety-one arbitrators, lawyers and in-house counsel from seventeen countries responded, sixty-seven of which from eight countries were interviewed in person, while the rest responded in writing.

*Mediation in International Business*.<sup>11</sup> The new survey was started in the fall of 2001 and completed in 2004. The quantitative analysis is based on fifty-three completed questionnaires. The fifty-three respondents came from fourteen countries in six continents, twenty from the United States and eight from Germany, eleven from other continental European countries and another eleven from other common law countries. The group included both users and providers of dispute resolution services, i.e., in-house counsel, advocates, arbitrators, and mediators who had participated in the aggregate in more than 2,500 arbitrations and more than 600 mediations. The main research findings of the two surveys of 1994 and 2004 are summarized below.

First, in terms of the role of arbitrators, a large majority of the respondents (86%) thought that facilitating settlement is one of the functions of the arbitral process (a slight increase when compared to the first survey where the figure was 83%). There is a slight country variation depending on the legal background of the respondents. One-hundred percent (100%) of the German and the non-American respondents with a common law background hold this view, whereas 26% of the Americans and 15% of the non-German civil law practitioners thought that voluntary settlement was not a goal of arbitration.<sup>12</sup> Second, on the settlement rate, the survey showed that an overall 43% of the cases were settled before an arbitral decision. The average figure varies markedly according to the background of the respondents. A large divergence of experience exists between German and American practitioners: the German respondents reported that 69% of arbitration settled while American respondents reported that 33% of arbitrations settled.<sup>13</sup> According to the author, this large divergence may be explained:

[B]y the rather different practices and traditions in the respective judicial systems, particularly with regard to the function of judicial proceedings and the role of judges (German procedural laws require settlement attempts by the judges, whilst the traditional American image of the judge is one of a detached and impartial decision maker).<sup>14</sup>

Lastly, on the timing of settlement, settlement occurs at all stages of the arbitral process but “the likelihood of an agreement

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<sup>11</sup> CHRISTIAN BUHRING-UHLE ET AL., *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* (Kluwer Law International 2d ed. 2006).

<sup>12</sup> *Id.* at 110–11.

<sup>13</sup> *Id.* at 112, Figure 8.

<sup>14</sup> *Id.* at 112.

increases as the process evolves.”<sup>15</sup> Based on the average estimate by the respondents of the settlement rate at different stages, 29% of settlement occurred before the first meeting of the tribunal with the parties; 33% of the settlements occurred during the written phase before the main evidence hearing; while 37% of the settlements occurred fairly late—during the evidence hearings or in the post-hearing phase.<sup>16</sup>

B. *Corporate Attitudes and Practices about International Arbitration (2008)*

Another survey was conducted by PricewaterhouseCoopers LLP and the School of International Arbitration, Queen Mary, University of London (QMUL) with respect to corporate attitudes and practices on international arbitration.<sup>17</sup> The research was conducted between November 15, 2007 and April 15, 2008 in two phases: (1) an online questionnaire was completed by eighty-two the respondents (i.e., general counsel, heads of legal departments, or counsel on the authority of the general counsel) between November 15, 2007 and February 28, 2008; and (2) forty-seven face-to-face or telephone interviews with corporate counsel between February 1, 2008 and April 15, 2008 in the United Kingdom, U.S.A., Sweden, Switzerland, Greece, Japan, Mexico and Brazil. The results show that 25% of interviewees reported achieving a settlement before receiving an arbitral award, while a further 7% reported settlements that were followed by an arbitral award by consent. With respect to the timing of settlement, almost three-quarters of the respondents settled the most before the hearing on the merits (i.e., 43% of the respondents indicated that they settled most before the first hearing, and 31% settled the most after the procedural hearing but before the hearing on the merits).<sup>18</sup> Four main reasons for parties to settle included: to preserve business relationships (27%); to avoid high costs (23%); to settle a weak case (21%); and to avoid excessive delay (17%). According to the survey, “[t]he incentive to settle in order to preserve business relation-

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<sup>15</sup> *Id.* at 113.

<sup>16</sup> *Id.* at 113, Figure 9.

<sup>17</sup> PricewaterhouseCoopers LLP & Queen Mary University of London, *International Arbitration: Corporate Attitudes and Practices 2008*, 6 *TRANSNATIONAL DISPUTE MANAGEMENT* 1 (Mar. 2009), available at [http://www.pwc.co.uk/en\\_UK/uk/assets/pdf/pwc-international-arbitration-2008.pdf](http://www.pwc.co.uk/en_UK/uk/assets/pdf/pwc-international-arbitration-2008.pdf) [hereinafter “PWC-QMUL Survey”].

<sup>18</sup> *Id.* at 7.

ships was particularly evident where the parties had been doing business together for a considerable period of time or where the market did not offer a wide range of alternative suppliers.”<sup>19</sup>

C. *A Survey of Arbitration and Settlement in International Commercial Disputes in Asia (2006–2007)*

The above surveys have apparently not included the parallel attitudes of arbitrators working in the Far East, a region in which a strong consensual culture exists. To fill in the gap, Professor Shahla Ali’s survey of 2006–2007 covers practitioners across the region, with a focus on practitioners from East Asia (seventy-seven respondents, 75%)<sup>20</sup> and a small portion from the U.S.A. and Europe (twenty-six respondents, 25%).<sup>21</sup> Almost 250 surveys were distributed to arbitrators, academics, attorneys and in-house counsels and a total of 115 individuals responded. Her survey was essentially based on the questionnaires developed by Professor Bühring-Uhle, and provides additional information on the attitudes of practitioners working in the East Asian region regarding the role of arbitrators in the settlement process.<sup>22</sup>

First, in terms of the role of arbitrators, a significantly higher number of respondents working in East Asia (82%) saw the facilitation of voluntary settlement as one of the goals of arbitration, in comparison with 62% of practitioners working in the Western region.<sup>23</sup>

Second, on the settlement rate, the perspectives varied significantly, from 5% to 85%, with an average rate of 35%. Counter-intuitively, the result shows a lower settlement rate in East Asia (30%) than that reported in the European and North American regions (48%). An explanation offered by the investigator is that the arbitrators working in the East Asian region make greater efforts pre-arbitration to settle disputes (38% believed that settlement options were exhausted prior to initiating arbitration) than their Western counterparts (28%).<sup>24</sup>

<sup>19</sup> *Id.*

<sup>20</sup> SHAHLA ALI, *RESOLVING DISPUTES IN THE ASIA-PACIFIC REGION: INTERNATIONAL ARBITRATION AND MEDIATION IN THE EAST ASIA AND THE WEST* 96, Appendix A (2011).

<sup>21</sup> *Id.* at 102, Appendix B.

<sup>22</sup> *See id.*; SHAHLA ALI, *The Morality of Conciliation: An Empirical Examination of Arbitrator ‘Role Moralities’ in East Asia and the West*, 16 *HARV. NEGOT. L. REV.* 1 (2011).

<sup>23</sup> ALI, *supra* note 20, at 53–54.

<sup>24</sup> *Id.* at 56.

The survey found the highest degree of regional variation in the arbitrators' use of settlement interventions. While all arbitrators surveyed shared the view that it is appropriate to suggest settlement negotiations to parties and to actively participate in settlement negotiations at the parties' request, the result reveals "a greater proclivity on the part of arbitrators working in the East Asian region to effectively carry out settlement."<sup>25</sup> More than 40% of practitioners working in East Asia report regularly suggesting settlement negotiations to the parties, in comparison with 16% of their counterparts working in the West. Over 30% of practitioners working in East Asia reported that the arbitrators regularly participate in settlement negotiations in comparison to 16% of those surveyed working in the West. Meeting separately with parties to discuss a settlement is another technique that is more frequently used by practitioners working in East Asia (26%) compared to their counterparts working in the West (8%). Finally, 17% of East Asian practitioners reported regularly suggesting a settlement formula compared to 4% of practitioners working in the West.

#### *D. Summary of the Previous Empirical Findings and Limitations*

The above empirical studies provide evidence that, despite the theoretical controversies concerning the appropriateness of the same person acting as a mediator and an arbitrator, the majority of the practitioners agree with the arbitrators facilitating settlement. According to Professor Bühring-Uhle's surveys, 86% of the respondents saw settlement facilitation as one of the goals of arbitration. Professor Ali's survey shows a higher rate of acceptance among practitioners in the East Asian region (82%) than their counterparts working in the Western region (62%). A significant number of cases are settled amicably before an award is rendered (an average of 43% in Professor Bühring-Uhle's surveys, and an average of 35% in Professor Ali's survey). The experience varies markedly depending on the legal background of the practitioners. The settlement rate tends to be higher in civil law jurisdictions where judges customarily facilitate settlement than it is in common law jurisdictions where courts have traditionally been entrusted with adjudicating, not settling, disputes (German respondents reported that 69% of arbitrations settled while American respon-

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<sup>25</sup> *Id.* at 68.

dents reported that 33% of arbitrations settled). Practitioners working in East Asia were reported making greater efforts to exhaust settlement options prior to initiating arbitration. The overall settlement rate in East Asia (30%) was, however, slightly lower than that in the West (48%). Finally, the degree of settlement interventions varies significantly across the region. East Asian arbitrators tend to play a more active role in promoting settlement. On average, the frequency of participation in these techniques by practitioners working in East Asia was more than double that reported by their counterparts working in Europe and the U.S.A.

While the previous research has provided important information on the general attitudes among the arbitration practitioners, it tended to focus on the quantitative data to demonstrate the cross-regional differences on the attitudes towards arbitrators facilitating settlement. More qualitative research is needed to understand how the process is typically conducted and what common techniques are used by the arbitrators in settlement facilitation. Qualitative illustrations on the actual practice would be most useful to generalize some good practices so as to provide some guidance for arbitrators, to maximize the benefits of arb-med, and to minimize the disadvantages. Furthermore, Professor Bühring-Uhle's two surveys in 1994 and 2004 were largely confined to European and American survey-takers, and Professor Ali's survey in 2006–2007 had a focus on practitioners in the Asia-Pacific region. Neither survey has examined the country-by-country differences within each region. A country study is needed so as to “test the generalizations one regularly encounters about attitudes and practices there.”<sup>26</sup> In order to theorize the arbitrators' personal experiences in arb-med, we need to investigate the jurisdictions where arb-med is most frequently used. In his original study, Professor Bühring-Uhle noted that other distinct practices exist, particularly in the East, and he noted that such practices represent a unique approach to international arbitration that is of particular importance for continued research.<sup>27</sup>

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<sup>26</sup> Jack Coe, *From Anecdote to Data: Reflections on the Global Center's Barcelona Meeting*, 20 J. INT'L. ARB 11 (2003).

<sup>27</sup> BUHRING-UHLE ET AL., *supra* note 11, at 131.

## III. SCOPE OF THE CURRENT STUDY AND METHODOLOGY

Psychologists have increasingly recognized the important role that culture and cultural values have in shaping conflict and conflict resolution. It has been argued that in societies where interpersonal relationships are more stable and long-lasting, procedures that allow for compromises are preferred.<sup>28</sup> China is a very long-term-oriented society, according to Professor Geert Hofstede's definition of cultural dimensions.<sup>29</sup> In a society where relationships play an essential role not only for social, but economic reasons. Parties tend to seek an arbitrator who is often viewed as someone who is familiar with the parties and their dispute. Moreover, parties seek an arbitrator who will not only end their dispute, but will also assist them in reaching a mutually agreeable solution with as little loss of face as possible. Power distance may be another cultural dimension relevant to dispute resolution.<sup>30</sup> Research shows that people with a high level of power distance place less weight on procedural justice than on distributive justice concerns. In other words, procedural fairness was considered to be less important by those who accept the legitimacy of the authority (high on power distance).<sup>31</sup> Chinese culture places a high level on power distance,<sup>32</sup> i.e., China is a society which believes that inequalities between people are acceptable. The Chinese parties may care less about the due process and natural justice concerns raised by the opponents of arb-med, and they may focus more on having the disputes resolved in the most efficient manner. As a result, arbitrators acting as mediators may be easily acceptable in China. How is arb-med perceived and practiced in China? Can arbitration practitioners draw any experience or lesson from the Chinese model? The attitudes and practices of arb-med in China are worth further examination.

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<sup>28</sup> LAURA NADER & HARRY F TODD, *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* (1978); P. H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSSCULTURAL PERSPECTIVE* (1979).

<sup>29</sup> Data is collected from THE HOFSTEDE CENTRE, <http://geert-hofstede.com/dimensions.html> (last visited Feb. 8, 2014, 4:09 PM).

<sup>30</sup> This cultural dimension expresses the degree to which the less powerful members of a society accept and expect that power is distributed unequally. See GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES, COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS* (2d ed. 2001).

<sup>31</sup> Tom Tyler et al., *Cultural Values and Authority Relations: The Psychology of Conflict Resolution Across Cultures*, 6 *PSYCHOL. PUB. POL'Y & L.* 1138 (2000).

<sup>32</sup> Data is collected from THE HOFSTEDE CENTRE, <http://geert-hofstede.com/dimensions.html> (last visited Feb. 8, 2014, 4:09 PM).

Dr Shengchang Wang conducted two empirical studies on the attitudes of arb-med in China.<sup>33</sup> In the first study, Dr. Wang made an analysis of the cases that were settled at the Beijing headquarters of the China International Economic and Trade Arbitration Commission (CIETAC) between 1993 and 2000,<sup>34</sup> and concluded that the arb-med was widely welcomed by the parties with different legal backgrounds. This analysis also showed that there was a relatively higher settlement rate in joint venture disputes (an average of 40% of the settled cases involved joint venture disputes). This finding may be explained by the parties' strong appreciation of maintaining a friendly cooperative relationship and their potential long-term interests. A second study was an informal survey conducted by the CIETAC in September 2000, among Chinese arbitrators who participated in the seminar on the practice of arbitration in Beijing.<sup>35</sup> Fifty-six of the participants completed the questionnaire. The survey showed that all of the respondents (100%) considered that it was appropriate for the arbitrators to facilitate settlement. A majority of the arbitrators had made the effort to mediate during the arbitration proceedings, with 37% having had conducted mediation in more than 50% of their cases. Furthermore, a majority of the arbitrators (71%) believed that the combination of mediation and arbitration would become more acceptable and be practiced in an increasing number of countries.

There are unanswered questions that need to be further explored in order to get a full picture of the actual practice of arb-med in China. Who raises the idea of mediation: the parties or the arbitral tribunal? When is the mediation proposal made? When does the settlement offer occur? How do arbitrators facilitate settlement in practice? What are the common techniques used by the Chinese arbitrators to promote settlement? What safeguards do arbitrators take when they act as mediators?

Based on previous studies, the author conducted further empirical research on the attitudes and practice of arb-med in China by way of in-depth personal interviews and a subsequent online survey.

Firstly, in a series of interviews with Chinese practitioners conducted by Professor Gabrielle Kaufmann-Kohler and the author

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<sup>33</sup> 王生长《仲裁与调解相结合的理论实务》，法律出版社2001年，第177-87页。  
[SHENGCHANG WANG, *THE COMBINATION OF ARBITRATION AND MEDIATION: THEORY AND PRACTICE*] 177-87 (2011).

<sup>34</sup> *Id.* at 177-80.

<sup>35</sup> *Id.* at 180-87.

during a research trip in March and April 2007,<sup>36</sup> a total of twenty arbitrators working in China were asked specific questions about their attitudes and practice on promoting settlement. The arbitrators interviewed were among the most frequently appointed at the CIETAC, Beijing Arbitration Commission (BAC) and Wuhan Arbitration Commission (WAC), who have extensive experience in international arbitration in China.<sup>37</sup>

Secondly, on the basis of the findings from the interviews, the author designed a detailed questionnaire in respect of the following four broad aspects: (1) whether it is appropriate for the arbitrators to promote settlement, and also what kind of interventions by arbitrators, if any, are acceptable; (2) when arbitrators typically make the first proposal of mediation and when settlement often occurs; (3) what common techniques do arbitrators adopt in promoting settlement; and (4) the comments and suggestions on the prospect of arb-med in China. Between November 2011 and April 2012, questionnaires (in Chinese)<sup>38</sup> were sent to more than 100 Chinese arbitrators sitting on the panel of the CIETAC and the BAC, with the assistance of the two institutions and by the author's direct distribution to the arbitrators by e-mail. A total of thirty-eight responses were received. After filtering out two incomplete responses, the analysis was based on thirty-six complete responses. From a statistical point of view, thirty-six responses was not a very large sample. It should be emphasized that the target of our survey was limited to 'active' arbitrators, who have actual arbitration experience. Counsels without the experience of acting as arbitrators were excluded from the survey. Those who are on the panel list but have never acted as arbitrators were also excluded. To put this number into perspective, despite the large number of arbitrators on the panel lists of arbitrators from numerous arbitration institutions, only a small portion are frequently nominated by the parties or appointed by the arbitration institutions. The reason is obvious: the arbitration is as good as the arbitrators. Parties, advised by their lawyers, generally have their own list of active arbitrators who

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<sup>36</sup> The research trip was conducted while the author worked at the Geneva University Law School on a research project on international arbitration in China. The research project was directed by Prof. Gabrielle Kaufmann-Kohler and funded by the Swiss National Science Foundation. The names of the interviewees will be kept anonymous, unless specifically authorized.

<sup>37</sup> The research findings on arb-med in China based on the series of interviews were published in Gabrielle Kaufmann-Kohler & Kun Fan, *Integrating Mediation into Arbitration: Why It Works In China?*, 25 J. INT'L. ARB. 479-92 (2008).

<sup>38</sup> The questionnaires were sent to the arbitrators either by way of direct distribution of a hard copy or by email attaching a link to the online survey.

they trust to have extensive experience and a good reputation. The same concern applies when arbitration institutions are called upon to appoint arbitrators on the parties' behalf.

It is acknowledged that each empirical method has its own inherent limitations. For instance, "statements by survey respondents may themselves be based on the very anecdotes that a researcher is trying to get beyond."<sup>39</sup> People surveyed or interviewed may not necessarily speak frankly about what they actually do in practice.<sup>40</sup> No individual study will be dispositive of a given research question.<sup>41</sup> Contemporary studies have found that using a variety of approaches allows the studies, in combination, to balance out their respective limitations and to provide a broader foundation for critical analysis.<sup>42</sup> The data generated by the survey will be verified against the qualitative information obtained through in-depth personal interviews with arbitrators who have repeated experience, data provided by the arbitration institutions, as well as direct discussions with case managers at the CIETAC and the BAC, who oversee arbitration proceedings taking place in China on a day-to-day basis. A number of respondents of the survey have also made specific comments, and this offers additional qualitative resource for our assessment.

#### IV. EMPIRICAL RESULTS AND DISCUSSIONS

This section will report the empirical results and describe the actual practice of arb-med in China from the following aspects: (A) what the perceptions are on the appropriateness of arbitrators to facilitate settlement; (B) who raises the idea of mediation during the arbitration proceedings; (C) evaluation on the success rate of mediation; (D) when do arbitrators suggest the use of mediation and when does settlement occur; and (E) how do arbitrators promote settlement; and (F) the overall evaluation of the arb-med.

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<sup>39</sup> Drahozal, *supra* note 8, at 27.

<sup>40</sup> *Id.*

<sup>41</sup> Michael Saks, *Improving APA Science Translation Amicus Briefs*, 17 L. & HUM. BEHAV. 235, 240 (1993).

<sup>42</sup> Judith Cook & Mary Margaret Fonow, *Knowledge and Women's Interests*, in FEMINIST RESEARCH METHODS: EXEMPLARY READINGS IN THE SOCIAL SCIENCES 68–93 (Joyce McCarl Neilson ed., 1990); ROBERT LAWLESS ET AL., EMPIRICAL METHODS IN LAW 46–49 (2010).

A. *The Perceptions of the Appropriateness of Arbitrators to Facilitate Settlement*

During the interviews conducted in 2007, all of the Chinese arbitrators interviewed were in favor of using mediation. They considered that it is an effective means to improve efficiency and to find a “win-win” solution acceptable to both parties. Furthermore, the combined mechanism enjoys a high degree of success. In the survey from 2011–2012, 88.9% of the respondents considered that it is appropriate for the arbitrators to facilitate settlement. As can be seen from Table 1, the most relevant reasons the Chinese arbitrators consider when they agree to take up a conciliatory role are as follows (in order of relevance): (1) to reduce cost and improve efficiency; (2) to more easily enforce an agreed outcome than a decided outcome in an arbitral award; (3) to respect the free will and voluntariness of the parties; and (4) to maintain the relationship between the parties.

TABLE 1: THE MAIN REASONS FOR ARBITRATORS TO TAKE UP A CONCILIATORY ROLE, 2011–2012

<i>Reasons</i>	<i>Response</i>
A. The combined procedure reduces cost and improves efficiency	29
B. In order to maintain the relationship between the parties	23
C. The case is too complicated and it is not easy to render an award	8
D. A settlement may avoid the possible injustice (in a decided outcome)	17
E. An agreed outcome is easier to be voluntarily enforced than a decided outcome in an arbitral award	31
F. In order to respects the free will and voluntariness of the parties	27
G. The mission of arbitrators is to resolve the disputes in the most efficient way, which includes facilitating settlement	13
H. The influence of traditional Chinese culture	6
I. Other considerations (please specify)	
<i>Mediation is one important means of dispute resolution.</i>	
<i>Mediation reflects the parties' interests.</i>	
<i>Mediation can enhance the trust between the tribunal and the parties.</i>	
<i>Mediation reflects the local culture in China and therefore is more easily accepted by the Chinese.</i>	

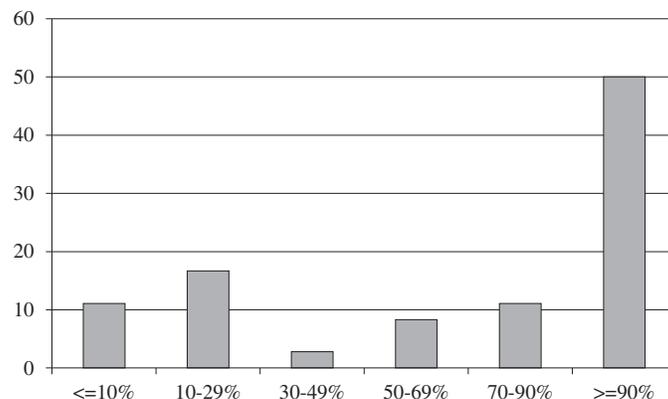
The Chinese arbitrators generally consider that it is appropriate for the arbitrators to suggest the use of mediation to the parties at the arbitrators' own initiative (91.7% of the respondents), to

meet the parties separately during the mediation (80.6% of the respondents), and to raise a settlement proposal (27.8% consider it appropriate at the arbitrators' own initiative and 63.9% consider it appropriate with the parties' joint request). The arbitrators' views are more divergent in respect to the appropriateness of conducting a case evaluation. Only 19.5% of the respondents consider that the arbitrators may conduct a case evaluation at their own initiative, 47.2% consider it appropriate, but only with the parties' joint request, and the remaining 33.3% consider it inappropriate.

*B. Who Raises the Idea of Mediation during the Arbitration Proceedings, the Parties or the Arbitral Tribunal?*

Most commonly, the proposal to attempt mediation is raised by the arbitrators on their own initiative (77.8% of the respondents). The arbitrators were also asked to respond, based on their personal experience, how often they propose mediation to the parties. According to the survey, 50% of the respondents have proposed mediation to the parties in over 90% of the cases when they act as arbitrators (Figure 1). This is consistent with our observations during the research trip in 2007: most of the Chinese arbitrators interviewed said that as a matter of good practice, they would systematically take the initiative of asking the parties whether they wished the tribunal to assist them in reaching an amicable solution.

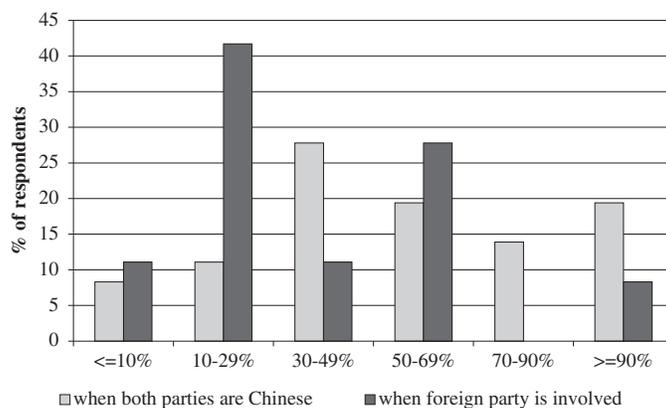
FIGURE 1: HOW OFTEN DO ARBITRATORS PROPOSE THE PARTIES TO USE MEDIATION (%), 2011–2012



C. *Willingness of Parties to Participate and the Outcomes of Arb-Med*

Both the interviews and the survey show a wide range of variation in the percentage of positive responses from both parties when arbitrators propose the use of mediation, ranging from 10% to 90%. Generally, the percentage is higher when both parties are Chinese than when a foreign party is involved. When both parties are Chinese, the mean response is 54.65%, and the median is 59.50%. When a foreign party is involved, the mean response is 37.50%, and the median is 19.50% (Figure 2). This may be explained by the fact that Chinese parties are used to this practice and hence are willing to cooperate to avoid making a bad impression on the tribunal. By way of contrast, foreign parties are less receptive because they expect to argue the case and obtain an award.<sup>43</sup>

FIGURE 2: CIRCUMSTANCES WHEN BOTH PARTIES ACCEPT THE ARBITRATORS' PROPOSAL TO MEDIATE (%), 2011–2012



The CIETAC experience shows that 50% of the parties, both from civil law and common law countries, have agreed to mediation when approached by the arbitrators. Approximately 30–40% of disputes are settled through successful mediation.<sup>44</sup> The BAC

<sup>43</sup> Kaufmann-Kohler & Fan, *supra* note 37, at 487.

<sup>44</sup> Interview with Prof. Houzhi Tang, Honorary Sec'y Gen. of the CIETAC, in Beijing (Mar. 27, 2007).

experience shows a success rate of approximately 15–18%.<sup>45</sup> In 2010, 272 of the cases accepted by the BAC were settled by mediation (in an arb-med process), which is 17.2% of the total cases concluded in the same year.<sup>46</sup> In 2011, the number of cases settled by mediation (in an arb-med process) had increased to 18.45% of the total cases concluded in the same year.<sup>47</sup>

In the survey, arbitrators were asked about the factors contributing to settlement and the barriers to settlement. The main factors contributing to settlement are identified as follows (in order of preference): (1) the gap between the bottom line of the two parties is not important; (2) the cooperation of the parties; (3) the mediation skills of the arbitrators; and (4) the guidance and assistance of the lawyers (Table 2). The main reasons for the failure of mediation are identified as follows (in order of relevance): (1) the parties are overconfident and are unwilling to make concessions; (2) the gap between the bottom line of the two parties is significant; (3) the lawyers are overconfident about the outcome of the arbitration and are not supportive of mediation; and (4) mediation participants are concerned about the pressure from the company and the boss if they accept a settlement (Table 3).

TABLE 2: THE MAIN FACTORS CONTRIBUTING TO SETTLEMENT, 2011–2012

<i>Factors</i>	<i>Response</i>
A. The cooperation of the parties	30
B. The guidance and assistance of the lawyers	18
C. The mediation skills of the arbitrators	24
D. The parties' direct negotiation has achieved a preliminary result	15
E. The gap between the bottom line of the two parties is not important	32
F. The outside pressure to settle	3

<sup>45</sup> Interview with Madame Hongsong Wang, Sec'y Gen. of the BAC, in Beijing (Apr. 10, 2007).

<sup>46</sup> The BAC Working Report of 2010, available at <http://www.bjac.org.cn/introduce/2010zj.html> (last visited May 1, 2013). The BAC introduced a separate Mediation Rules in 2008, to allow the parties to choose a stand-alone mediation procedure, separate from the arbitration procedure. The data indicated above only include mediation conducted by arbitrators, and does not include separate mediation procedures under the Mediation Rules, or the parties' voluntary settlement without the assistance of the arbitrators.

<sup>47</sup> The BAC Working Report of 2011, available at <http://www.bjac.org.cn/introduce/2011zj.html> (last visited May 1, 2013). The data indicated above only include mediation conducted by arbitrators, and does not include separate mediation procedures under the Mediation Rules, or the parties' voluntary settlement without the assistance of the arbitrators.

- G. Others (please specify)  
*The parties consider that they may sacrifice some economic interests in exchange for efficiency.*  
*In China there is often a fixed payment to lawyers. Lawyers therefore cannot afford to spend too much time on the case, and are more willing to persuade the parties to settle.*  
*Parties have trust in the arbitrators.*
- 

TABLE 3: THE MAIN BARRIERS TO SETTLEMENT, 2011–2012

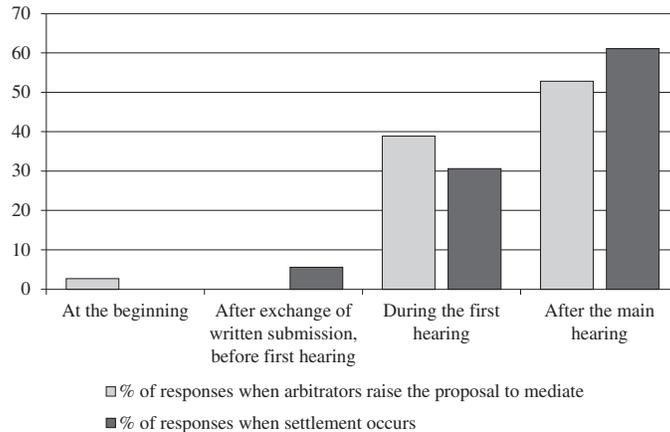
<i>Factors</i>	<i>Response</i>
A. The gap between the bottom line of the two parties is significant	29
B. Lawyers are overconfident about the outcome of the arbitration and are not supportive of mediation	19
C. The arbitrators lack mediation skills	10
D. Mediation participants lack settlement authority	9
E. Mediation participants are concerned about the pressure from the company and the boss if they accept a settlement	18
F. The parties are overconfident and are unwilling to make concessions	30
G. Others (please specify) <i>The lawyers are not responsible, lack competence, have independent economic interests, or make errors in their case analysis.</i> <i>Parties are sometimes very indecisive.</i> <i>The improvement of the law gives the parties less incentive to settle their disputes.</i>	

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D. *When Do Arbitrators Suggest the Use of Mediation and When Does Settlement Occur?*

When is the best moment to suggest that the use of mediation? Experience varies and the decision is often made on a case-by-case basis. According to the empirical survey, the respondents generally make the first mediation proposal either during the first hearing (38.9%) or after the main hearing (52.8%) (Figure 3).

FIGURE 3: THE STAGE WHEN ARBITRATORS RAISE THE PROPOSAL TO MEDIATE AND WHEN SETTLEMENT OCCURS



On the timing of settlement, according to the Chinese arbitrators' experience, settlements often occur at a relatively late stage of the arbitration proceeding: 30.6% of the respondents see settlement occurring mostly during the first hearing, while 61.1% see settlement occurring mostly after the main hearings. Only 5.6% see most settlement occurring before the main hearing (Figure 3). In contrast, in Bühring-Uhle's survey, 62% of the settlement occurred before the main hearing.<sup>48</sup> In the PWC-QMUL Survey, 74% of the respondents settled the most before the main hearing.<sup>49</sup>

When reading the above figures, one should bear in mind that arbitration proceedings conducted in China are generally much shorter than arbitration in many other jurisdictions. A typical hearing at the CIETAC lasts from half a day to one day.<sup>50</sup> In BAC arbitrations, for instance, in 2011, it takes on average sixty-seven days from the constitution of the arbitral tribunal to the closure of the case.<sup>51</sup> To put it into perspective, in an ICC arbitration, the main hearing typically lasts for seven days or more. While the length of the whole proceeding varies significantly, it is not uncom-

<sup>48</sup> BUHRING-UHLE, *supra* note 11, at 113, figure 9.

<sup>49</sup> PWC-QMUL Survey, *supra* note 17, at 7.

<sup>50</sup> Based on discussions with case managers at the CIETAC and interviews with the CIETAC arbitrators.

<sup>51</sup> The BAC Working Report of 2011, *supra* note 47, at Section 5.

mon for an ICC arbitration to last for one year or longer.<sup>52</sup> In a relatively short proceeding, the incentives for an early settlement talk in order to save transaction costs became weaker. On the other hand, barriers to settlement are more likely to be removed as the process evolves. Some Chinese arbitrators explained that parties may be more prepared to consider settlement when they begin to realize the weaknesses of their position and the strengths in the other side's position, after the parties have exchanged documentary evidence and witness statements.<sup>53</sup>

### E. *How Do Arbitrators Promote Settlement?*

#### 1. Facilitative or Evaluative Mediation

In case of a combined practice, the arbitrators are unlikely to be purely facilitative during the mediation process. Consciously or subconsciously, evaluation is often involved when the arbitrators engage in settlement activities. Eighty and six-tenths percent (80.6%) of the respondents of the survey considered that when they conduct mediation, both evaluative and facilitative elements are involved.

#### 2. Meeting the Parties Separately or Caucusing

The Chinese arbitrators have no hesitation in meeting parties privately, as far as both parties give their consent. In actual practice, 63.9% of the respondents "almost always" or "often" use caucusing during the mediation phase (Figure 4). The use of private meetings is often described by the Chinese arbitrators as the "back-to-back" technique, in order to clarify the positions and to facilitate a negotiated settlement: the arbitrators meet the parties separately to ask for each party's bottom line, so as to have a better understanding of the real interests at stake. If the difference between the parties' bottom line is considerable, then the arbitrators terminate the mediation and render an award; if the difference is less important, then they may try to narrow the gap in an effort to reach settlement. Meeting the parties separately also allows the arbitrators to conduct a so-called "reality check" which can en-

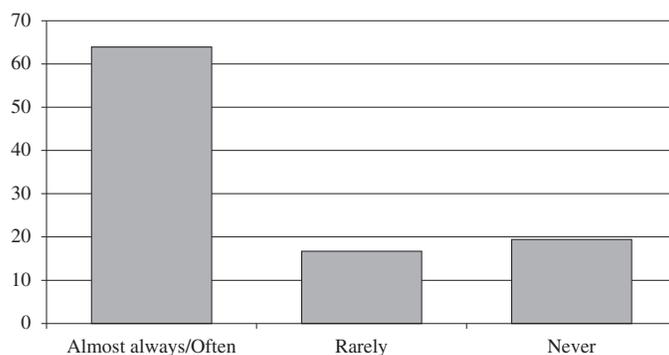
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<sup>52</sup> Based on the observation of the author while working as a Deputy Counsel at the ICC International Court of Arbitration from 2008 to 2009, during which the author had overseen over 100 arbitration proceedings administered by the ICC Court of Arbitration.

<sup>53</sup> Interviews conducted in March-April 2007 during the above-mentioned research trip, *see supra* note 36. *See also* Kaufmann-Kohler & Fan, *supra* note 37, at 487.

courage a party with an overly optimistic view of its chances of success to reconsider its case on its merits, and thereby increase the possibility that the parties reach a settlement.<sup>54</sup>

FIGURE 4: FREQUENCY WHEN ARBITRATORS USE CAUCUSING (%) 2011–12

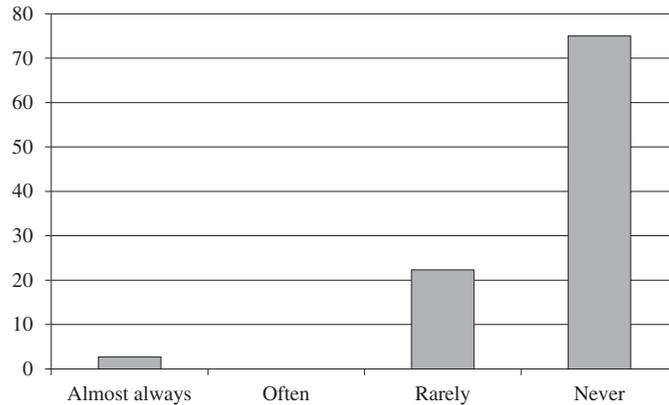


#### i. Giving Opinions on the Merits

Interestingly enough, even though evaluation is always present, all of the Chinese arbitrators interviewed were quite careful not to express any opinion on the merits to the parties. Ninety-seven and three-tenths percent (97.3%) of the respondents to the survey say that they “rarely” or “never” express their opinion on the merits even when the parties request them to do so (Figure 5). The arbitrators do sometimes indicate to the parties the strength and weakness of their respective positions in order to draw the parties’ positions closer together. However, their analysis is limited to a party’s “possible” deficiencies and they will not pronounce on the outcome of the arbitration. Expressing views as to the merit of the dispute is taken with extreme caution by Chinese arbitrators, because they think it may affect their impartiality.

<sup>54</sup> Interviews conducted in Mar. – Apr. 2007 during the above-mentioned research trip, see *supra* note 36. See also Kaufmann-Kohler & Fan, *supra* note 37, at 488.

FIGURE 5: FREQUENCY WHEN ARBITRATORS EXPRESS OPINION ON THE MERITS (%) 2011–2012

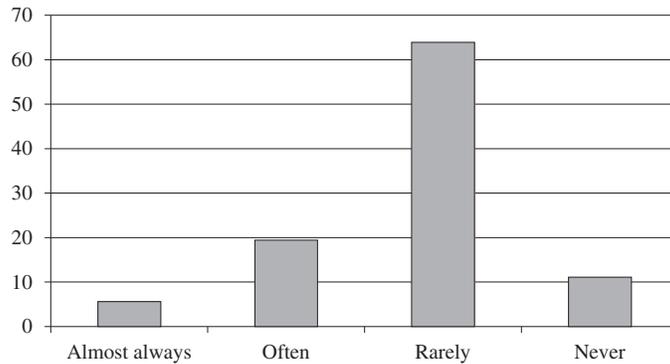


## ii. Proposing a Settlement Formula

Among the Chinese arbitrators who participate in mediation, there is some controversy on the practice of proposing a settlement formula. Sixty-three and nine-tenths percent (63.9%) of the respondents “sometimes” give a settlement proposal upon the parties’ request, and 25% do so “almost always” or “often” (Figure 6). Those who do make a settlement proposal believe that a quantified proposal may speed up the process, after they have learnt the differences in the parties’ expectations if the gap is not huge. Generally, the arbitrators would not make a concrete settlement proposal before the facts are about 90% clear. Usually, a concrete settlement proposal is made at the last stage of mediation when the parties narrow the gap as much as possible.<sup>55</sup> If an arbitrator makes a settlement proposal, it may be specific and state the amounts to be paid and the actions to be taken, or more frequently provide a range of numbers within which he or she suggests the final solution should lie. On certain occasions, the arbitrator may propose a business arrangement, so as to encourage the parties to compromise and continue their business relationship. Whatever the form of the proposal may be, the arbitrators are careful not to give any party the impression that a refusal of their proposal will upset them and elicit an unfavorable award.

<sup>55</sup> *Id.* at 547.

FIGURE 6: FREQUENCY WHEN ARBITRATORS PROPOSE A SETTLEMENT FORMULA (%) 2011–2012



### iii. Other Frequently Used Mediation Techniques

The arbitrators were asked to identify other frequently used mediation techniques according to their personal experience both during the in-person interviews and through the survey. We can summarize these commonly used techniques, as follows:

- *Back-to-back:*

The most common approach is to start with the “back-to-back” technique, in order to understand the parties’ respective expectations and estimate the gap between them. If the gap is not significant and there is still the possibility of settlement, then the arbitrator will use various techniques to narrow the gap with the aim of reaching an agreement.

- *Facilitative:*

The following facilitative means are often used to draw near the parties’ differences and promote settlement, such as: to identify and highlight the common grounds between the parties; to remind the parties of their interest to maintain their relationship; to remind the parties of their interest to save costs and achieve efficiency; to guide the parties to focus on their interests, not positions; to guide the parties to prioritize their interests and to compromise on the minor issues in dispute; and to raise a reasonable settlement proposal that may be acceptable to both parties.

- *Evaluative:*

The following means are often used to draw near the parties’ differences and promote settlement, such as: to make analysis of

the strengths and weaknesses of each party's position; and to remind the parties of the risk that a decided outcome may not be in their favor.

- *Cooling-off:*

In situations where emotion runs high, the arbitrators may give the parties a cooling-off period, so as to let them calm their emotions down, and to allow them to focus on finding a solution of their disputes.

- *To separate single items for partial settlement:*

When there are many issues at stake, the arbitrators may attempt to assist the parties to reach an agreement on one or several separate items to achieve a partial settlement, even if the overall agreement is not achievable.

- *To emphasize the gradual process:*

The arbitrators can remind the parties that mediation is a gradual process and that it is not often achieved all at once. They will encourage the parties to continue their negotiation efforts and not to give up when they hear that the other parties' proposal is far from their own expectations.

## V. FURTHER IMPLICATIONS FOR OTHER JURISDICTIONS

Having examined the attitudes and practice of arb-med in China, the next question is: what implications does the Chinese practice have for international arbitrators and parties in other jurisdictions? Can the Chinese model of arb-med be acceptable elsewhere? What precautions should arbitrators take in reaction to the concerns of procedural justice raised by the opponents?

The Chinese arbitrators are generally optimistic about the prospect of the arb-med. Eighty and six-tenths percent (80.6%) of the respondents believe that the practice of combining arbitration with mediation in China will be accepted and adopted by an increasing number of jurisdictions. Indeed, the arb-med practice is not a uniquely Chinese phenomenon, as is shown in previous empirical research. There is already an expanding culture that favors combining arbitration with mediation in the world. As Professor Houzhi Tang noted at the ICCA conference in 1996, "this culture

has been existing in the East for a long time and is now expanding to the West and other parts of the world in one way or another.”<sup>56</sup>

Having said that, a number of respondents and interviewees in China have raised the concern to the excessive use of mediation. Not all cases are suitable for mediation. Whether mediation is appropriate depends on the specific circumstances of the case. The free will and voluntariness of the parties should be fully respected.

Furthermore, labeling a process as “arb-med” does not mean that anything goes. There are appropriate and inappropriate ways of conducting such a proceeding. On April 12, 2011, the Hong Kong Court of First Instance (CFI) held in *Gao Haiyan* that a purported med-arb process was tainted by apparent bias, and thus refused to enforce the resulting award based on public policy ground.<sup>57</sup> The CFI’s decision was later reversed by the Court of Appeal on December 2, 2011, which took a more restrictive interpretation on public policy.<sup>58</sup> **The decision of *Gao Haiyan* rings a bell to mediators (who might later become arbitrators) to avoid, wherever possible, conduct which might give rise to allegations of procedural irregularities or other grounds to challenge an award or its enforcement.**<sup>59</sup>

In light of the potential risks, when the same person exercises two roles, an arbitrator needs to take necessary safeguards if he or she also acts as a mediator. How can the Chinese model work without impeaching the concerns of due process and natural justice by the opponents? This is particularly important for jurisdictions with a low level of power distance and thus a greater emphasis on procedural fairness.

The respondents in the survey have identified the most relevant safeguards that an arbitrator should take in an arb-med process (in order of relevance): (1) where mediation fails and arbitration resumes, any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of mediation, shall not be invoked by either party as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings, judicial

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<sup>56</sup> Tang, *supra* note 3, at 101.

<sup>57</sup> *Gao Haiyan v. Keeneye Holdings Ltd.*, [2011] 3 H.K.C. 157, (C.F.I.).

<sup>58</sup> *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. 627 (C.A.).

<sup>59</sup> **For a detailed discussion of the *Gao Haiyan* case and its implications, see Kun Fan, *The Risks of Apparent Bias When An Arbitrator Act As a Mediator—Remarks on Hong Kong Court’s Decision in *Gao Haiyan**, 13 Y.B. PRIVATE INT’L L. 535–56 (2011).**

proceedings, or any other proceedings;<sup>60</sup> (2) an arbitrator should inform the parties of the typical conduct and process of the combination of arbitration and mediation, the consequences if the mediation attempts fail, and the possible risks associated with caucusing; and (3) where mediation fails and arbitration resumes, if both parties request a replacement of an arbitrator on the ground that the results of the award may be affected by the mediation proceedings, such request can be approved (Table 4).<sup>61</sup>

TABLE 4: THE SAFEGUARDS ARBITRATORS SHOULD TAKE WHEN THEY ACT AS A MEDIATOR, 2011–2012

<i>Safeguards</i>	<i>Response</i>
A. To avoid the use of caucusing during the mediation process	11
B. Arbitrators should inform the parties of the typical conduct and process of the combination of arbitration and mediation, the consequences if the mediation attempts fail, and the possible risks associated with caucusing	19
C. If both parties agree to use caucusing (after being informed of the risks) and to have the same person acting as a mediator and an arbitrator, the arbitrators should seek the parties' written consent	11
D. Where mediation fails and arbitration resumes, the arbitrator should disclose to all parties any confidential information obtained during the mediation which he or she considers to be material to the arbitral proceedings	4
E. Where mediation fails and arbitration resumes, any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of mediation, shall not be invoked by either party as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings, judicial proceedings, or any other proceedings	20
F. Where mediation fails and arbitration resumes, if both parties request a replacement of an arbitrator on the ground that the results of the award may be affected by the mediation proceedings, such request can be approved	16
G. Where mediation fails and arbitration resumes, the arbitrator may request a replacement at his or her own initiative if he or she considers that the impartiality may be affected by the mediation process	10
H. Other suggestions (Please specify) <i>The BAC's approach in allowing the replacement may be effective, but there is the risk of delay and cost of extra expenses by a respondent who is acting in bad faith.</i>	6

<sup>60</sup> This is the approach suggested by the CIETAC and the BAC. See Article 45(9) of the CIETAC Rules 2012, Article 39(4) of the BAC Rules 2008.

<sup>61</sup> This is the precaution suggested by the BAC. See Article 58(2) of BAC Rules 2008.

*The arbitrators should tell the parties before the caucusing that: "if you don't like the other party to know what you tell me, then don't tell me during the caucusing."*

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One may still argue that the arbitrators' brain could have been contaminated after receiving confidential information during the mediation phase, especially during the caucus. One response is that arb-med is not the only situation in which the arbitrator has to disregard information received. There are occasions when judges need to disregard improperly submitted documents after having taken cognizance of them. There are cases when jurors need to make a decision after having heard inadmissible witness statements. Arbitrators are legally trained to make a decision based on proven facts according to applicable law, and their thoughts should be less likely to be contaminated than those of the juries, which are composed of layman.<sup>62</sup> During the interviews, a few CIETAC arbitrators shared their personal experiences in respect of the impact on the impartiality of the arbitrator. They stated that the information obtained during the caucus would not affect their view on the merits if they needed to make a binding decision later, which will be based solely on proven facts.<sup>63</sup> For instance, an experienced Chinese arbitrator shared an arb-med proceeding under the CIETAC Rules: in the mediation process, one party disclosed to him the fact that the machine was defective during a caucus. Mediation was not successful and arbitration resumed. In the subsequent arbitration proceeding, there was not sufficient evidence to prove the defects of the machine in breach of the contract. The arbitrator said that he was able to ignore the confidential facts obtained during the mediation process (the admission of the defects by one party), and rendered the award only based on admissible evidence.<sup>64</sup>

Further adjustments and adaptations can be explored to make the Chinese model more suitable in other jurisdictions.<sup>65</sup> One al-

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<sup>62</sup> Recent empirical study shows, however, that judges also struggle to perform the challenging mental task of ignoring inadmissible evidence in their decision-making. The experiments illustrate that judges are generally unable to avoid being influenced by relevant but inadmissible information of which they are aware, such as the demands disclosed during a settlement conference. See Andrew Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

<sup>63</sup> Interviews conducted in Mar. – Apr. 2007 during the above-mentioned research trip, *supra* note 36.

<sup>64</sup> Interview with a CIETAC arbitrator, in Beijing, on Mar. 28, 2007.

<sup>65</sup> For a discussion on the safeguards, see Kaufmann-Kohler, *supra* note 1, at 199–202; CEDR Commission on Settlement in International Arbitration (2009); Harold Abramson, *Pro-*

ternative is the Swiss and German approach, in which arbitrators give the parties a preliminary assessment on the merits (upon parties' joint request), as a means to facilitate settlement. Another adaptation is to have only two arbitrators (in a three-member arbitral tribunal) participate in the caucus session during the mediation phase. If mediation fails and arbitration resumes, at least one arbitrator is free from any potential impacts of information obtained during private meetings.

## VI. CONCLUSION

The article provides empirical evidence on the attitudes and actual practice of arb-med in China. Because arbitration is now being criticized for becoming “judicialized,”<sup>66</sup> due to the slowness and expense of the procedure, practitioners are beginning to see the merits of integrating mediation and other ADR means into arbitration. The arbitrators' facilitating settlement is in line with the general trend of the dispute-resolution process.<sup>67</sup> As Abraham Lincoln said of the role of lawyers: “[p]ersuade your neighbors to compromise, whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses and waste of time.”<sup>68</sup> On this account, the Chinese concept and practice of arb-med may be of valuable reference for other jurisdictions. Greater efforts still need to be made in order to familiarize arbitrators with the practice of facilitating settlement and to implement the necessary procedural safeguards, so that arb-med can be used effectively to improve the efficiency of the dispute resolution.

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*ocols For International Arbitrators Who Dare to Settle Cases*, 10 *AM. REV. INT'L. ARB.* (1999); Fan, *supra* note 59, at 552–56. .

<sup>66</sup> BRUNO OPPETIT, *THÉORIE DE L'ARBITRAGE* 27–34 (1998).

<sup>67</sup> See Kaufmann-Kohler, *supra* note 1, at 205.

<sup>68</sup> Abraham Lincoln, *Notes for a Law Lecture* (July 1, 1850), in *COLLECTED WORKS OF ABRAHAM LINCOLN* 82 (2001).

ANNEX 1: SURVEY SUMMARY ON THE COMBINATION OF  
ARBITRATION AND MEDIATION IN CHINA<sup>69</sup>

**Should Arbitrators Promote Settlement?**

1. Do you think it is appropriate for an arbitrator to act as a mediator in a pending arbitration proceeding?

- |        |       |
|--------|-------|
| A. Yes | 88.9% |
| B. No  | 11.1% |

If your answer is yes, please turn to Question 2.

If your answer is no, please turn to Question 3.

2. What are the main reason(s) for arbitrators to take up a conciliatory role? (you can choose more than one answer)

- |  |  |    |
|--|--|----|
| A. The combined procedure reduces cost and improves efficiency   |  | 29 |
| B. In order to maintain the relationship between the parties   |  | 23 |
| C. The case is too complicated and it is not easy to render an award   |  | 8  |
| D. A settlement may avoid the possible injustice (in a decided outcome)  |  | 17 |
| E. An agreed outcome is easier to be voluntarily enforced than a decided outcome in an arbitral award                      |  | 31 |
| F. In order to respects the free will and voluntariness of the parties   |  | 27 |
| G. The mission of arbitrators is to resolve the disputes in the most efficient way, which includes facilitating settlement |  | 13 |
| H. Influence of traditional Chinese culture  |  | 6  |
| I. Other considerations (please specify)   |  |    |
| <i>Mediation is one important means of dispute resolution.</i>   |  |    |
| <i>Mediation reflects the parties' interests.</i>  |  |    |
| <i>Mediation can enhance the trust between the tribunal and the parties.</i>   |  |    |
| <i>Mediation reflects the local culture in China and therefore is more easily accepted by the Chinese.</i>                 |  |    |

3. What are the main concern(s) that make you believe that arbitrator should not act as a mediator? (you can choose more than one answer)

- |   |  |   |
|---|--|---|
| A. Violation of due process   |  | 2 |
| B. Impact on the impartiality of the arbitrator   |  | 3 |
| C. The mission of arbitrators is to render a binding decision. Facilitating settlement is incompatible with that mission  |  | 1 |
| D. The parties may be less candid in the mediation process, if they know that the same person will act as an arbitrator later to render a binding decision if the mediation attempt fails |  | 1 |
| E. Other considerations (please specify)  |  |   |

<sup>69</sup> The original survey was conducted in Chinese. The results were summarized and translated in English.

*Arbitrators are not themselves mediators, but they are promoting settlement in their capacity of arbitrator during a pending arbitration proceeding. In such circumstances, mediation has become part of the arbitration proceeding, and both parties are clear that it is the arbitrators who promote settlement. This is different from a stand-alone mediation conducted by mediators. In a pure mediation process, it is more demanding for the mediators, who need to possess adequate mediation skills, communication abilities and extensive experience.*

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4. Is it appropriate for the arbitrators to suggest the use of mediation to the parties at their own initiatives?		
A. Yes	91.7%	
B. No	8.3%	

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5. With the parties' consent, is it appropriate for the arbitrators to meet the parties separately (caucusing)?		
A. Yes	80.6%	
B. No	19.4%	

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6. Is it appropriate for the arbitrators to conduct a case evaluation for the parties?		
A. Yes, the arbitrators can do so at their own initiative	19.5%	
B. Yes, but only at the request of both parties	47.2%	
C. No	33.3%	

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7. Is it appropriate for the arbitrators to give the parties a specific settlement proposal?		
A. Yes, the arbitrators can do so at their own initiative	27.8%	
B. Yes, but only at the request of both parties	63.9%	
C. No	8.3%	

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**When do arbitrators promote settlement?**

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8. According to your experience, the proposal to mediate is often raised by whom?		
A. The parties jointly request the arbitrators to mediate	0	
B. One party requests the arbitrators to mediate, then the arbitrators seek the other party's agreement	16.7%	
C. The arbitrators propose the use of mediation at their own initiative	77.8%	
D. Other circumstances (please specify) <i>Both B and C happen often.</i>	38.9%	

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9. When do you typically raise the proposal to mediate?		
A. At the beginning of the arbitration	2.7%	
B. After the parties' exchange of written submissions, before the first hearing	0	
C. During the first hearing	38.9%	
D. After the main hearing	52.8%	
E. Other circumstances (please specify) <i>Any time during the proceedings, with the parties' consent.</i>		

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10. According to your experience, when does the settlement often occur?
- |   |       |
|---|-------|
| A. At the beginning of the arbitration  | 0     |
| B. After the parties' exchange of written submissions, before the first hearing | 5.6%  |
| C. During the first hearing   | 30.6% |
| D. After the main hearing   | 61.1% |
| E. Other circumstances (please specify)   |       |
- After all the hearings are completed. In principle, when the parties may have a better judgment on the legal issues and possible result, settlement is more likely to happen, but not necessarily to happen.*
- 

11. How often do you propose that the parties use mediation when you act as an arbitrator?
- |                  |       |
|------------------|-------|
| A. Less than 10% | 11.1% |
| B. 10–29%        | 16.7% |
| C. 30–49%        | 2.8%  |
| D. 50–69%        | 8.3%  |
| E. 70–90%        | 11.1% |
| F. More than 90% | 50%   |
- 

12. When you propose the use of mediation to the parties, what is the percentage where both parties accept your mediation proposal (when both parties are Chinese)?
- |                  |       |
|------------------|-------|
| A. Less than 10% | 8.3%  |
| B. 10–29%        | 11.1% |
| C. 30–49%        | 27.8% |
| D. 50–69%        | 19.4% |
| E. 70–90%        | 13.9% |
| F. More than 90% | 19.4% |
- 

13. When you propose the use of mediation to the parties, what is the percentage where both parties accept your mediation proposal (when a foreign party is involved)?
- |                  |       |
|------------------|-------|
| A. Less than 10% | 11.1% |
| B. 10–29%        | 41.7% |
| C. 30–49%        | 11.1% |
| D. 50–69%        | 27.8% |
| E. 70–90%        | 0     |
| F. More than 90% | 8.3%  |
- 

**How do arbitrators promote settlement?**

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14. When you act as a mediator in an arbitration proceeding, what is the typical mode of mediation you adopt?
- |                 |       |
|-----------------|-------|
| A. Evaluative   | 2.7%  |
| B. Facilitative | 16.7% |
| C. Both         | 80.6% |
- 

15. When you act as a mediator in an arbitration proceeding, do you meet the parties separately (with the parties' consent)?
- |                  |       |
|------------------|-------|
| A. Almost always | 33.3% |
| B. Often         | 30.6% |

C. Rarely	16.7%
D. Never	19.4%

16. When you act as a mediator in an arbitration proceeding, do you indicate to the parties your opinion on the merits of the case (upon the parties' request)?

A. Almost always	2.7%
B. Often	0
C. Rarely	22.3%
D. Never	75%

17. When you act as a mediator in an arbitration proceeding, do you propose a specific settlement proposal to the parties (upon the parties' request)?

A. Almost always	5.6%
B. Often	19.4%
C. Rarely	63.9%
D. Never	11.1%

18. What are the common techniques you use in the mediation process (please specify)?

- “Back-to-back”: The most common approach is to start with the “back-to-back” technique, in order to understand the parties’ respective expectations and to estimate the gap between them. If the gap is not significant and there is still the possibility of settlement, then the arbitrator will use various techniques to narrow the gap with the aim of reaching an agreement. The following facilitative and evaluative means are often used to draw near the parties’ differences and promote settlement.
- Facilitative:
  - To identify and highlight the common ground between the parties;
  - To remind the parties their interest in maintaining their relationship;
  - To remind the parties their interest in saving costs and achieving efficiency;
  - To guide the parties to focus on their interests, not positions;
  - To guide the parties to prioritize their interests and compromise on minor issues in dispute; and
  - To raise a reasonable settlement proposal that may be acceptable to both parties.
- Evaluative:
  - To make an analysis of the strengths and weaknesses of each party’s positions; and
  - To remind the parties of the risk that a decided outcome may not be in their favor.
- Cooling-off: In situations where emotion runs high, the arbitrators may give the parties a cooling-off time, so as to let them calm their emotions down and to allow them to focus on finding a solution of the disputes.
- To separate single items for partial settlement: When there are many issues at stake, the arbitrators may attempt to assist the parties to reach an agreement on one or several separate items to achieve a partial settlement, even if the overall agreement is not achievable.
- To emphasize the gradual process: The arbitrators may remind the parties that mediation is a gradual process and is not often achieved all at once. They should encourage the parties to

continue the negotiation efforts and not to give up when hearing the other parties' proposal is far from his own expectations.

- 
19. What are the main factors contributing to the success of mediation?  
(you may choose more than one answer)
- |  |    |
|--|----|
| A. The cooperation of the parties                                      | 30 |
| B. The guidance and assistance of the lawyers                          | 18 |
| C. The mediation skills of the arbitrators                             | 24 |
| D. The parties' direct negotiation has achieved a preliminary result   | 15 |
| E. The gap between the bottom line of the two parties is not important | 32 |
| F. The outside pressure to settle                                      | 3  |
| G. Others (please specify)   |    |
- The parties consider that they may sacrifice some economic interests in exchange for efficiency.*  
*In China it is often fixed payment to lawyers. Lawyers therefore cannot afford to spend too much time on the case, and are more willing to persuade the parties to settle.*  
*Parties have trust in the arbitrators.*
- 
20. What are the main reasons for the failure of mediation?  
(you may choose more than one answer)
- |  |    |
|--|----|
| A. The gap between the bottom line of the two parties is significant   | 29 |
| B. Lawyers are overconfident about the outcome of the arbitration and are not supportive of mediation                | 19 |
| C. The arbitrators lack mediation skills   | 10 |
| D. Mediation participants lack settlement authority  | 9  |
| E. Mediation participants are concerned about the pressure from the company and the boss if they accept a settlement | 18 |
| F. The parties are overconfident and are unwilling to make concessions   | 30 |
| G. Others (please specify)   |    |
- The lawyers are not responsible, lack competence, have independent economic interests, or make errors in their case analysis*  
*Parties are sometimes very indecisive.*  
*The improvement of the law gives the parties less incentive to settle their disputes.*
- 
21. What safeguards should the arbitrators take when they act as a mediator?  
(you may choose more than one answer)
- |   |    |
|---|----|
| A. To avoid the use of caucusing during the mediation process   | 11 |
| B. Arbitrators should inform the parties of the typical conduct and process of the combination of arbitration and mediation, of the consequences if the mediation attempts fail, and the possible risks associated with caucusing | 19 |
| C. If both parties agree to use caucusing (after being informed of the risks) and to have the same person acting as a mediator and an arbitrator, the arbitrators should seek the parties' written consent                        | 11 |
| D. Where mediation fails and arbitration resumes, the arbitrator should disclose to all parties any confidential information obtained during the mediation which he or she considers to be material to the arbitral proceedings   | 4  |

- E. Where mediation fails and arbitration resumes, any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of mediation, shall not be invoked by either party as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings, judicial proceedings, or any other proceedings 20
- F. Where mediation fails and arbitration resumes, if both parties request a replacement of an arbitrator on the ground that the results of the award may be affected by the mediation proceedings, such request can be approved 16
- G. Where mediation fails and arbitration resumes, the arbitrator may request a replacement at his or her own initiative if he or she considers that the impartiality may be affected by the mediation process 10
- H. Other suggestions (please specify)  
*The BAC's approach in allowing the replacement may be effective, but there is the risk of delay and cost of extra expenses by a respondent who acts in bad faith.*  
*The arbitrators should tell the parties before the caucusing that: "if you don't like the other party to know what you tell me, then don't tell me during the caucusing."*

**Overall Evaluation of the Arb-Med System in China**

22. What are your suggestions to improve the arb-med system in China? (please specify)
- 1) *To establish an independent system of mediation.*
  - 2) *To professionalize mediators.*
  - 3) *Not to over rely on mediation.*
  - 4) *Mediation can only be used as an alternative means of dispute resolution. Not all cases are suitable for mediation. Whether mediation is appropriate depends on the specific circumstances of the case.*
  - 5) *The practice of arb-med is quite successful in China. The values of mediation have been fully explored.*
  - 6) *The free will and voluntariness of the parties should be fully respected.*
  - 7) *The arbitrators should inform the parties of the advantages and risks of the combination of mediation and arbitration.*
  - 8) *If one party is represented by lawyers and the other is not, arbitrators should be cautious about the use of mediation.*
  - 9) *Arb-med should be further promoted.*
  - 10) *To establish and improve independent mediation institutions. The cases that the arbitral tribunal considers inappropriate for arb-med could be transferred to the independent mediation institutions for a stand-alone mediation.*
  - 11) *There is a need to develop a theoretical framework of mediation, so as to provide some guidance on the practice.*
  - 12) *There is a need for more legislative support for mediation.*
  - 13) *The arbitration statute and relevant judicial interpretations should provide further guidance on the practice of arb-med.*
  - 14) *Arbitrators cannot rely on the use of mediation to avoid deciding complicated legal issues. Those important but ambiguous legal issues need to be interpreted through legal practice.*
  - 15) *The arbitrators should maintain their integrity and professional responsibility throughout the process, so as not to undermine the trust from the arbitration institutions and the parties.*

16) *When conducting the arb-med proceedings, the arbitrators should always seek the parties' consent on the procedural issues.*

17) *The BAC's stand-alone mediation rules should be applied (for the parties who are concerned with the combined role).*

18) *Conciliation should not be used excessively, which could prolong the arbitration proceedings. Arbitrators sometimes go too far, trying hard to avoid making a decision, when there are different views among the arbitrators themselves on certain issues.*

19) *The arbitrators should review the legality of the settlement agreement before making a consent award.*

20) *The arbitrators should review the authentication, legality and enforceability of documents when confirming the parties' own conciliation agreement. This is true especially in financial disputes, such confirmation may expand the parties' non-reliance risk. So the consent award should be rendered with extreme care.*

21) *Arbitration institutions should provide more training for arbitrators on mediation skills.*

22) *To avoid the concerns about the arbitrators' impartiality, arbitrators should only ask the parties about fact and not tell the other party any confidential information obtained during a caucus without the party's consent. Arbitrators should also avoid giving opinions on the merits.*

23. What values in traditional Chinese culture do you think the combination of arbitration and mediation reflect? (you may choose more than one answer)

A. The pursuit of harmony	33
B. Moderation in all things	19
C. Avoidance of litigation	29
D. Others (Please specify)	19

24. Do you think the practice of combining arbitration with mediation in China will be accepted and adopted by an increasing number of countries? (please specify reasons)

A. Yes	80.6%
B. No	19.4%

Summary of reasons for the positive answer

*Mediation is conducted with the parties' consent.*

*If mediation leads to a settlement, then the result is the most efficient and effective means of resolving the parties' disputes.*

*The combination reduces costs and improves efficiency.*

*It enhances the chances of enforcement.*

*It meets the objectives of commercial practice.*

*It establishes or maintains the basis for the future collaboration between the parties.*

*It reflects the principles of efficiency.*

*It is in line with the general trend of development of dispute resolution.*

Summary of reasons for the negative answer

*It is difficult to reconcile the divergent views from different jurisdictions.*

*The resolution of disputes by mediation may undermine the fairness of arbitration.*

*The mediated outcome does not facilitate the establishment of commercial customs and may undermine the authority of precedents in arbitration.*

