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## Integrating Mediation into Arbitration: Why It Works in China

Gabrielle KAUFMANN-KOHLER and Fan KUN\*

*Despite the divergent views on the acceptability of arbitrators facilitating settlement in a pending arbitration, a merged system seems to work well in Asia, especially in China due to its legal culture that emphasizes mediation. This article examines the reasons why mediation has been successfully integrated into arbitration in China from its specific historical, cultural and political perspectives, and analyzes how it could impact the contemporary practice of integrating mediation into arbitration in the world.*

### I. INTRODUCTION

Recently there has been much discussion on integrating mediation and other alternative dispute resolution (ADR) methods into arbitral proceedings in order to improve the efficiency of dispute resolution. Various combinations have long been practiced in certain parts of the world. However, due to the different legal cultures and views of the role of the arbitrator, transnational consensus has not yet been reached over the acceptability of arbitrators facilitating settlement in a pending arbitration. Some see the roles of arbitrator and mediator as incompatible and thus the two processes should be kept separate, while others believe that a combination of the two is ideal in that it has the potential of bringing together the best of both worlds.<sup>1</sup> Despite the divergences between these two, a merged system seems to work well in Asia, especially in China due to its legal culture that emphasizes mediation. What is the exact practice in China? Why does such a practice work there? Is China's experience a unique one or could it have any implications for the rest of the world?

The present article attempts to answer these questions by looking at the overall predominance of mediation in China in light of its specific historical, cultural and political background, and how it impacts the contemporary practice of integrating mediation into arbitration. First, the article discusses mediation in general and analyzes the reasons for its continued existence in the Chinese system. Second, the article discusses the Chinese way of integrating mediation into arbitral proceedings and explores the history, practice and benefits of such a combination. Finally, this article speculates as to how the Chinese model might be useful in contributing to create a uniform practice throughout the world.

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<sup>1</sup> Michael Schneider, *Combining Arbitration with Conciliation*, in *International Dispute Resolution: Towards an International Arbitration Culture*, ICCA CONGRESS SERIES No. 8, 57 (Albert van den Berg ed., 1996); Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Harmonization Standard?*, *ARB. INT'L* (forthcoming 2008).

## II. MEDIATION IN GENERAL

### A. MEDIATION IN THE PAST

Mediation has a long history in China, which emphasizes amicable dispute resolution and avoids confrontation in conformity with the Confucian values that dominated political philosophy in pre-Communist China. For the Chinese, a dispute is considered an evil in that it disturbs the harmony that governs all of social life. The Chinese believe that if it is impossible to avoid a dispute in the long run, it is imperative for the parties (either by themselves or with the aid of a mediator) to take the necessary steps early on to amicably remove the root causes of the potential dispute.<sup>2</sup> As early as the West Zhou Period, there were local magistrates called *Tiao Ren* whose main function was to help settle disputes through amicable means.<sup>3</sup> Since then, mediation had been widely used throughout the ancient Chinese feudal society. Deep philosophical and social factors explain the existence and development of mediation in ancient China. Four main factors are described below.

#### 1. *Philosophical Basis: Confucianism*

Confucianism, with its emphasis on harmony (or *He Wei Gui*) and disdain for litigation, is the conceptual basis for mediation's predominance in China. Confucian doctrine molded mainstream thought in traditional Chinese political culture. The main Confucian values are benevolence (*Ren*), loyalty (*Yi*), ritualism (*Li*), wisdom (*Zhi*), and sincerity (*Xin*).<sup>4</sup> Confucius believed that the optimal solution of most disputes was to be achieved not by the exercise of sovereign force but by moral persuasion:

[U]nder law, external authorities administer punishments *after* illegal actions, so people will try to avoid punishment but have no sense of shame; whereas with ritual, patterns of behavior and rules of duty are *internalized* and exert their influence *before* actions are taken, so people behave properly because they fear shame and want to avoid losing face.<sup>5</sup>

In this sense, traditional Chinese society was considered a “rule of Li society” where ritualism (or *Li*), instead of legalism (or *Fa*), served as the main source of social norms.<sup>6</sup> Confucian morality was based on sympathy and empathy, with the overarching aim being the pursuit of social harmony. Under that tradition, society saw litigation as disgraceful

<sup>2</sup> See Jerzy Jakubowski, *Reflection on the Philosophy of International Commercial Arbitration and Conciliation*, in *THE ART OF ARBITRATION: ESSAYS ON INTERNATIONAL ARBITRATION* 175, 187 (Jan C. Schultz & Albert Jan van der Berg eds., 1982).

<sup>3</sup> See SONG CAIFA & LIU YUMIN, *OUTLINE AND TECHNIQUES OF CONCILIATION: MAIN DISCUSSIONS* 7 (2007).

<sup>4</sup> With respect to Confucianism, see CHANG HUA, *STUDIES OF CONFUCIANISM (KONG ZI GUO XUE YUAN)* (2006); LIU SHUXIAN, *UNDERSTANDING CONFUCIAN PHILOSOPHY: CLASSICAL AND SUN-MING* (1998); see also <<http://en.wikipedia.org/wiki/Confucianism>>.

<sup>5</sup> See Confucius, *ANALECTS (LUN YU)* II-3, in which Confucius was quoted as saying “lead the people with administrative injunctions and put them in their place with penal law, they will avoid punishments but will be without a sense of shame; lead them with excellence and put them in their place through roles and ritual practices, and in addition to developing a sense of shame, they will order themselves harmoniously.”

<sup>6</sup> See Fei Xiaotong, *The Rural China*, available at <[www.myrice.com/](http://www.myrice.com/)>.

conduct because it signified the total breakdown of social harmony. Mediation afforded people a socially acceptable method of resolving disputes in light of Confucian morals, and it therefore became the main method of dispute resolution.

## 2. *Legal Basis: Uncertain Results from Lawsuits*

Ancient China's legal system had a vague distinction between civil and criminal cases. Many disputes that would be civil cases by modern standards were classified as criminal. Formal law and legal processes were principally concerned with punishment, which enabled the rulers to control the people to a large extent. Furthermore, many cases in both the criminal and civil realm were decided in accordance with ritualism (*Li*) rather than legalism (*Fa*), which gave broad discretion to enforcers of the law. The enormous uncertainty in lawsuits, together with the corruption of government officials, effectively discouraged resolution through litigation. This situation left people with few alternatives to the non-adversarial means of settling disputes.<sup>7</sup>

## 3. *Social Basis: Social Units as Dispute Settlement Fora*

The basic unit of traditional Chinese society was not the individual but the basic group to which those individuals belonged. The most basic of these was the family, where rules of customary behavior emphasized the authority of the older generations over the younger ones. Families themselves were organized into clans (or a "transitional grouping between the family and village"), which instructed members on Confucian morality and settled disputes among members. Yet another collective grouping was the guild, which was an organization of merchants or artisans in the same trade or craft. The guilds controlled prices, competition, training and admission to practice the trade or craft.<sup>8</sup> These social groups (the family, clan, village and guild) dominated the individual, and they generally strove to avoid involving government officials in quarrels between their members. The local group generally actively encouraged—or in case of clans and guilds, *required*—the parties to exhaust their remedies within the group before looking to the magistrate for relief.<sup>9</sup> As one commentator noted:

The magistrate, overburdened with the duties of administering the country and of disposing of homicide, theft and other cases in which the government had a vital interest, often cooperated in enforcing this requirement by sending back to the village, clan or guild minor disputes that had not been proceeded by it.<sup>10</sup>

<sup>7</sup> See Wang Guiguo, *The Unification of the Dispute Resolution System in China Cultural Economic and Legal Contributions*, 13 J. INT'L ARB. 5, 9 (1996).

<sup>8</sup> Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIFORNIA L. REV. 1284, 1294 (1967).

<sup>9</sup> *Id.* at 1297; see also Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIFORNIA L. REV. 1201, 1223 (1966).

<sup>10</sup> Cohen, *supra* note 9.

Hence, the limits on individuals' rights to litigation imposed by these social norms left mediation as the first and sometimes the only method of resolution for certain disputes.

#### 4. *Economic Basis: The Small-Scale Peasant Economy*

The preference for amicable dispute resolution in China also has its roots in China's economic structure. Historically, the Chinese economy was mainly a small-scale peasant economy in which people were self-sufficient and self-employed (*Zi Ji Zi Zu*) on their own land without the need for trade from the outside. Civil disputes primarily were concerned with matters of marriage, land, and personal property, and were often raised between acquaintances. In such a small, closed society, there was a high degree of interdependence, and neighbours could not afford to make enemies by bringing lawsuits, but preferred to settle their disputes by amicable means in order to preserve harmony within the community.

For these reasons, mediation in the traditional Chinese legal culture was an essential and integral part of the legal system, not merely one alternative among several dispute settlement mechanisms. Even with the evolution of China's legal system and the burgeoning of commercial disputes, these same reasons for wanting to avoid conflict and promote social harmony in ancient China seem equally relevant in contemporary China.

### B. MEDIATION AT PRESENT

#### 1. *Impact of Communist Ideology*

Apart from the traditional legal culture, the prominence of mediation in contemporary China also appears to be attributable to the Communist ideology of society, social control, and social conflict. Like Confucianism, Communism is hostile to litigation and places a great emphasis upon "criticism-education," self-criticism, and "voluntarism."<sup>11</sup> The impact of Communism on Chinese dispute resolution tendencies is traceable from the early period when the Maoist strategy for mobilizing the masses was developed in the late 1930s and the 1940s:

The technique embodying the Maoist approach to mobilization of the people is the celebrated "mass line," under which the Communist Party maintains constant and close contact with the general populace, engaging in propaganda, discussion, persuasion, and exhortation to gauge mass reactions to policy and to lead mass action.<sup>12</sup>

This general approach follows the admonition of Mao Zedong that "disputes among the people [as distinguished from those involving enemies of the people] ought to be resolved, whenever possible, by democratic methods, methods of discussion, of criticism,

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<sup>11</sup> *Id.* at 1226.

<sup>12</sup> Lubman, *supra* note 8, at 1303.

of *persuasion and education*, not by coercive, oppressive methods.”<sup>13</sup> Thus, most civil disputes between individuals are settled by extrajudicial mediation, which also involves cajoling the parties into adopting the Communist Party’s values of conformity.<sup>14</sup>

## 2. *Modern Mediation System in General*

Inasmuch as Communism still dominates Chinese society, the Communist brand of mediation permeates every corner of Chinese society where disputes arise. In this setting, mediation is used on its own and in combination with adversarial procedures such as litigation and arbitration. In general, the modern mediation system in China can be divided into five categories: (1) people’s mediation, or mediation undertaken by people’s mediation committees;<sup>15</sup> (2) administrative mediation, or mediation conducted by local people’s governments or administrative departments; (3) institutional mediation, or mediation conducted by permanent mediation centres; (4) mediation within litigation proceedings; and (5) mediation within arbitral proceedings.

Before going into a specific analysis of mediation within the arbitration system, a few words should be said about people’s mediation, and mediation within litigation proceedings.

### a. *People’s mediation*

People’s mediation is mediation undertaken by people’s mediation committees (PMCs), which clearly reflects the impact of Communist ideology. It came into being during the period of land revolution, and was formally established in 1954 when the Government Administration Council issued the Provisional Organic Rules of People’s Mediation Committees (1954 Provisions). During the early days after this declaration, PMCs were mainly used to “articulate and apply the ideological principles, values, and programs of the Communist Party and help mobilize the people to increase their commitment to Party policies and goals,”<sup>16</sup> by correcting the disputants’ views in terms of Communist tenets, and resolving the dispute in a way so that the result was consistent with national policy.

The PRC Constitution confirmed the legal status of the people’s mediation, and a new set of Regulations on the Organization of the People’s Mediation Committees was promulgated in 1989 to replace the 1954 Provisions. The major themes were “the

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<sup>13</sup> Cohen, *supra* note 9, at 1201. See Mao Zedong, *On the Current Handling of Contradictions Among the People*, in COLLECTIONS OF LAWS AND REGULATIONS OF THE PEOPLE’S REPUBLIC OF CHINA (February 27, 1957) (emphasis added).

<sup>14</sup> See Aaron Halegua, *Reforming the People’s Mediation System in Urban China*, 35 HONG KONG L. J. 715, 717 (2005).

<sup>15</sup> According to art. 11 of the Constitution of the People’s Republic of China, PMCs are one of the work committees under the basic self-governing organizations such as residents’ committees or villagers’ committees, and they are specifically responsible for conciliating civil disputes.

<sup>16</sup> Lubman, *supra* note 8, at 1339.

pre-eminence of law and the resulting need for accountability to the law.”<sup>17</sup> Currently, PMCs are far less politicized than their Maoist predecessors, but they nonetheless continue to play an important role in settling civil disputes and in maintaining stability in Communist China. People’s courts also have a role in promoting people’s mediation, at a time when China is experiencing a “litigation explosion,” by providing guidance for PMCs in their daily work, by encouraging parties filing civil lawsuits to first try people’s mediation, by going to communities to work with people’s mediators, and by having people’s mediators watch court proceedings.<sup>18</sup> To give the reader a general sense of the success of these people’s mediators, before 1998, there had been 987,000 PMCs and 10 million mediators in China. In 2000 alone, PMCs resolved 5.02 million civil disputes, with a success rate of 94.8%.<sup>19</sup> Such figures reflect virtually exponential growth of mediation through PMCs in China.

b. *Mediation within litigation proceedings*

Parallel to the development of PMCs, the practice of mediation conducted within the people’s court system has also grown. The practice of combining mediation with litigation was created in the Liberated Areas to reduce the pressure on courts and judicial costs, especially during the time when judicial functionaries were being cut under a policy of “trimming staff and simplifying administration” at the Border Region of Shan (Shanxi)-Gan (Gansu)-Ning (Ningxia) before the establishment of the PRC.<sup>20</sup> Such practice has continued after the establishment of the PRC. In 1962, the Supreme People’s Court (SPC) issued Several Opinions on the Civil Judicial Work that institutionalized the principles of “investigation and research, on-site trial, and relying mainly on mediation,” which were affirmed in the Civil Procedure Law (Trial Implementation) of the PRC in 1982.

In 1991, the Civil Procedure Law (CPL) was adopted, which amended the principle of mediation promulgated in the Trial Implementation. In addition, the CPL emphasized the following: (1) mediation should be conducted with the parties’ consent, with the goal of ascertaining the facts and distinguishing between right and wrong;<sup>21</sup> (2) a settlement agreement reached between the parties must be made on their own free will and without compulsion;<sup>22</sup> and (3) if no agreement is reached through mediation or if either party backs out of the settlement agreement before the mediation statement is served, the court

<sup>17</sup> Eric Glassman, *The Function of Mediation in China: Examining the Impact of Regulations Governing the People’s Mediation Committees*, 10 U.C.L.A. PACIFIC BASIC L.J. 460, 478 (1992).

<sup>18</sup> Halebua, *supra* note 14, at 744.

<sup>19</sup> Xiao Xiaogan, *Zhuanxi Shiqi Renmin Tiaojie ZHidu de Gaige yu Wanshan (Reforming and Perfecting the System of People’s Mediation in the Period of Transition)*, available at <[www.dffy.com](http://www.dffy.com)>.

<sup>20</sup> For details of the historical background in the Border Region and the background of the policy of “trimming staff and simplifying administration,” see *China in Brief, History: New Democratic Revolution Period (1910–1949)*, available at <[www.china.org.ch/e-china/history/New.htm](http://www.china.org.ch/e-china/history/New.htm)>.

<sup>21</sup> See CPL, art. 85, promulgated by the National People’s Congress on and effective as of April 9, 1991.

<sup>22</sup> See *id.* art. 88.



is to render a judgment without delay.<sup>23</sup> In other words according to the CPL, the court, when trying a civil case, must conduct mediation in accordance with the parties' consent and in accordance with the law. If mediation fails, judgments are to be rendered without delay.<sup>24</sup>

Bearing these points in mind, it is not difficult to understand why the practice of combining mediation with the arbitral proceedings has developed in China the way it has, which may differ from the reasons for mediation's popularity in other countries.<sup>25</sup>

### III. MEDIATION WITHIN ARBITRATION PROCEEDINGS

#### A. HISTORICAL DEVELOPMENT

Deeply influenced by the practices in Chinese courts, the China International Economic and Trade Arbitration Commission (CIETAC) (previously called the Foreign Trade Arbitration Commission of China Council for the Promotion of International Trade) empowered its arbitral tribunals to mediate arbitration cases from the beginning of its establishment. Prior to the enactment of the Arbitration Law, CIETAC attempted to mediate its arbitration cases even though the first Arbitration Rules of CIETAC did not contain provisions on mediation but merely a provision stating that an arbitration case should be dismissed if the parties reached an amicable settlement agreement.<sup>26</sup> Mediation was first provided for in the CIETAC Rules of 1989, which stated that CIETAC and its arbitral tribunals may mediate the cases accepted by CIETAC, and, if an amicable settlement was reached by the parties through mediation, the arbitral tribunal should render an arbitral award in accordance with the contents of the settlement agreement.<sup>27</sup> The statistics show that from the 1950s to the 1980s most CIETAC arbitrations were concluded by way of mediation. In the 1980s and 1990s, CIETAC still enjoyed a considerable rate of success with the combination of mediation and arbitration.<sup>28</sup>

Apart from the impact of Confucian philosophy and Communist ideology, CIETAC's mediation practice also has its own historical reasons. Although the modern commercial arbitration process is a product of the market economy, the Chinese arbitration system emerged and developed in the environment of a planned economy. As a consequence, there were few laws in China that could be applied to commercial disputes before the 1980s. In such a legal vacuum, arbitral tribunals could only decide cases in accordance with the principles of fairness and reasonableness, or they could encourage the parties to resolve their disputes by mediation with the assistance of the arbitral tribunal.

<sup>23</sup> See *id.* art. 91.

<sup>24</sup> See *id.* art. 9.

<sup>25</sup> For details regarding modern mediation, see CHRISTIAN BUHRING-UHLE, *DESIGNING PROCEDURES FOR EFFECTIVE CONFLICT MANAGEMENT* 272 (1996).

<sup>26</sup> See WANG SHENGCHANG, *THE THEORY AND PRACTICE OF COMBINING ARBITRATION WITH CONCILIATION* 84 (2001).

<sup>27</sup> See CIETAC Rules 1989 art. 37.

<sup>28</sup> Wang Wenying, *The Role of Conciliation in Resolving Disputes: A PRC Perspective*, 20 OHIO STATE J. DISP. RES. 421, 436 (2005).

In addition, the cases submitted to CIETAC in its early stages were relatively easy to mediate, given the simplicity of the disputes, the relatively stable business relations, and the small value of the claims.<sup>29</sup>

## B. CONTEMPORARY LEGAL REGIME AND PRACTICE

Driven by CIETAC's initiative, the Arbitration Law, 1995, permits, and even actively encourages, the combination of mediation and arbitration.<sup>30</sup> CIETAC also has amended its Rules several times to add provisions that are more favorable to mediation. The current CIETAC Rules, 2005, have established a relatively complete system of combining mediation with arbitration.<sup>31</sup> To examine how this is carried out in practice, the authors conducted a series of interviews with Chinese arbitrators mainly acting within the CIETAC framework, as well as with the Beijing Arbitration Commission and the Wuhan Arbitration Commission in late March and early April 2007. The arbitrators' use of mediation, determined through these interviews, suggests that the influence from people's mediation or mediation conducted by the courts remains strong, although more emphasis is placed on party autonomy. Their practice is summarized in the following paragraphs.

### 1. *Who Raises the Idea of Mediation During the Arbitration Proceedings: The Parties or the Arbitral Tribunal?*

Either the parties or the arbitral tribunal can raise the idea of mediation, notwithstanding the commencement of the arbitration proceedings. The Arbitration Law provides that the arbitral tribunal *may* carry out mediation prior to rendering an arbitral award. If the parties request mediation, the arbitral tribunal *must* carry out the mediation proceedings.<sup>32</sup> The CIETAC Rules seem to be more restrictive than the national law, which provides that "if both parties wish to mediate, or if one party so desires and the other party agrees to mediate upon the arbitral tribunal's proposal, the arbitral tribunal may commence mediation in the process of arbitration proceedings."<sup>33</sup> This, however, does not expressly preclude the possibility of the arbitrator proposing mediation.

<sup>29</sup> *Id.* at 443–46.

<sup>30</sup> See Arbitration Law, arts. 51 and 52. Art. 51 provides that "[t]he arbitration tribunal may carry out conciliation prior to giving an arbitration award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If conciliation is unsuccessful, an arbitration award shall be made promptly. If conciliation leads to a settlement agreement, the arbitration tribunal shall make a written conciliation statement or make an arbitration award in accordance with the result of the settlement agreement. A written conciliation statement and an arbitration award shall have equal legal effect." Art. 52 further provides that "[a] written conciliation statement shall specify the arbitration claim and the results of the settlement agreed upon between the parties. The written conciliation statement shall be signed by the arbitrators, sealed by the arbitration commission and then served on both parties. The written conciliation statement shall become legally effective immediately after both parties have signed for receipt thereof. If the written conciliation statement is repudiated by a party before he signs for receipt thereof, the arbitral tribunal shall promptly make an arbitral award."

<sup>31</sup> See CIETAC Rules 2005, art. 40.

<sup>32</sup> Arbitration Law of the People's Republic of China, art. 51, promulgated by the Standing Committee of the National People's Congress on August 31, 1994, and effective as of September 1, 1995 [hereinafter "Arbitration Law"] (emphasis added).

<sup>33</sup> CIETAC Rules 2005, art. 40(2).

In practice, although not obligated to do so by law, Chinese arbitrators systematically take the initiative to ask the parties if they wish the tribunal to assist them in reaching an amicable solution. If the response from both parties is positive, the arbitral tribunal will commence the mediation proceedings. Although the percentages vary depending on the experience of the arbitrators, both parties will respond positively to such a request on average fifty percent of the time. Generally, Chinese arbitrators dealing with domestic cases experience a much higher percentage of positive responses, as Chinese parties are used to this practice and are more willing to cooperate when the arbitrators make such a proposition in order to avoid conveying a negative image to the tribunal. On the other hand, foreign parties that are fully prepared to argue their case probably are not immediately receptive to such a suggestion from the arbitrators, given that they expect the arbitrators to make an impartial adjudication of the dispute based on the merits.

## 2. *When are Arbitrators to Make the Mediation Proposal?*

Deciding the best moment to propose mediation is done on a case-by-case basis. Chinese arbitrators generally make the first mediation proposal at the hearing after the parties' oral statements of facts. In general, Chinese arbitrators tend to believe 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 through the process of pleading and the exchange of documentary evidence and witness statements. Furthermore, when the parties have completed their written submissions, certain issues also tend to crystallize and the core issues in disputes are narrowed down. The mediation process conducted thereafter generally is believed to be most effective, as the process will have focused the parties on the core issues.

It is important to understand that the Chinese combination of arbitration and mediation occurs *during the ongoing process of arbitration*. If the first mediation proposal is unsuccessful, the arbitrators, after taking some evidence and hearing some witnesses, may make another proposal to mediate. If those efforts at mediation fail, they may return to the receipt of evidence and the hearing of witness, ready to attempt mediation again at another time during the course of the proceedings. The mediation proposal can be raised several times *at any stage* of the proceedings before an arbitral award is rendered. In general, there is no clear distinction made between the "mediation phases" and the "arbitration phases." This differs from other Asian countries (for example, South Korea and Indonesia) where an arbitrator only attempts to mediate at the outset of the arbitration, or if the parties agree to mediation during the course of arbitral proceedings, an arbitrator will suspend the arbitration during the period that mediation is attempted. The Chinese model thus represents the most complete integration of mediation into arbitration.<sup>34</sup>

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<sup>34</sup> M. Scott Donahey, *Seeking Harmony: Is the Asian Concept of the Conciliator/Arbitrator Applicable in the West?*, 50 DISP. RES. J. 74 (1995).

### 3. *How to Conduct the Mediation During an Arbitration Proceeding*

#### a. *Meeting the parties separately: "caucusing"*

Chinese arbitrators do not hesitate to meet with the parties privately, or "caucus" with the parties, so long as both parties give their consent. They believe that private caucusing is the best way to clarify the positions and to facilitate a negotiated settlement. During the caucusing, the arbitrators ask for each party's bottom line separately, 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 parties separately also allows the arbitrators to conduct a so-called "reality check" that can encourage 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.

#### b. *Facilitative or evaluative*

In case of a combined proceeding, the arbitrators are unlikely to be purely facilitative during the mediation process. Consciously or subconsciously, evaluation is always involved when the arbitrator engages in settlement activities.

#### c. *Opinions on the merits*

Interestingly enough, even though assessment is always involved, Chinese arbitrators all seem to be quite careful not to express their opinions on the merits to the parties. They do sometimes indicate to the parties the strengths or weaknesses of their respective positions in order to draw the parties' positions closer together. However, the analysis is limited to a party's "possible" deficiencies and will not pronounce on the outcome of the arbitration. Expressing views as to the merits of the dispute is taken with extreme caution by Chinese arbitrators, as they think it may affect their impartiality.

#### d. *Settlement proposals*

Among Chinese arbitrators who participate in mediation, there is some controversy over whether it is suitable for them to make a settlement proposal. Some rarely give formal proposals unless requested by the parties, since they think that it is for the parties to make such proposals. Others believe that a proposal may be helpful to speed up the process once they know the difference between the parties' expectations is not too significant. In CIETAC's practice, arbitrators will not make a concrete settlement proposal before the facts in the case are almost entirely clear and the parties know their relative positions.

Usually a concrete settlement proposal is made at the last stage of mediation when the gap between the parties has been narrowed down as much as possible.<sup>35</sup>

If an arbitrator does make a settlement proposal, it may be specific and state amounts to be paid and 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 also propose a business arrangement, so as to encourage the parties to compromise and continue their business relationship. Whatever the form of the proposal might 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.

#### 4. *Post Mediation*

##### a. *If mediation leads to a successful settlement: mediation statement or consent award*

If mediation leads to a settlement agreement, the arbitral tribunal will draw up a written mediation statement or a consent award.<sup>36</sup> The written mediation statement becomes legally effective immediately after both parties signed for its receipt. If one party repudiates the mediation statement before it signs for receipt, the arbitral tribunal must promptly make an arbitral award.<sup>37</sup>

Both a mediation statement and a consent award are based on the terms of the settlement, signed by the arbitrators, sealed by the arbitration institution, and served on both parties.<sup>38</sup> Article 51 of the Arbitration Law provides that a mediation statement shall have the same legal effect as an arbitral award.

The main difference between the two is that a consent award becomes effective immediately after being rendered. By contrast, a written mediation statement is not an award, and it becomes binding upon parties only when they have subsequently signed for its receipt, which means that a party may still change its mind before signing the receipt, in which case the arbitral tribunal shall proceed to render an award in time. There are further implications on enforceability: with a consent award, the complying party may institute enforcement proceedings before a court in China, or if appropriate, seek enforcement overseas under the New York Convention. A written mediation statement, on the other hand, is not an enforceable "award." Therefore, parties who are concerned about the enforceability of the settlement may prefer a consent award.<sup>39</sup>

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<sup>35</sup> Tang Houzhi, *Combination of Arbitration with Conciliation: Arb/Med, in New Horizons in International Commercial Arbitration and Beyond*, ICCA CONGRESS SERIES No. 12, 547 (Albert Jan van den Berg ed., 2005).

<sup>36</sup> Arbitration Law, art. 51.

<sup>37</sup> *Id.* art. 52.

<sup>38</sup> *Id.*

<sup>39</sup> See Cao Lijun, *Combining Conciliation and Arbitration in China: Overview and Latest Developments*, 9 INT'L ARB. L. REV. 84, 91 (2006).

b. *If mediation fails*

Either party, at any stage of the proceedings, is free to withdraw from mediation. The arbitral tribunal also may decide to terminate the mediation proceedings when it believes that further efforts to mediate will be futile. If mediation fails, the arbitration proceedings resume, and the mediator must shift his or her role back to being an arbitrator and render an arbitral award.

Although there is no express provision under the Arbitration Law with respect to the use of the confidential information obtained during the mediation phase, most Chinese arbitration institutions prohibit any use of it in the subsequent arbitral proceedings. For instance, the CIETAC Rules 2005 provide:

[W]here conciliation fails, 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 conciliation shall not be invoked as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings, judicial proceedings or any other proceedings.<sup>40</sup>

The Arbitration Rules 2004 of the Beijing Arbitration Commission (BAC) contain similar provisions.<sup>41</sup> This practice is different from that adopted in Hong Kong, where the mediator-turned-arbitrator is required by law to disclose to all other parties to the proceedings “so much of that (confidential) information as he considers material to the arbitral proceedings” before resuming the arbitration proceedings.<sup>42</sup>

#### IV. ADVANTAGES AND CONCERNS OF THE COMBINED PRACTICE

Having discussed the roots, the law, and the practice of integrating mediation into arbitration in China, the next question to consider is: In reality, is this integration desirable? In other words, what are the advantages and concerns?

##### A. ADVANTAGES

Obviously, a combined proceeding encompasses all the benefits that usually are attributed to settled, rather than decided, outcomes, such as the saving of costs, gains in efficiency and the maintaining of a friendly cooperative relationship between the disputing parties.

By comparison to mediation conducted separately, mediation combined with arbitration has certain obvious advantages. First, the arbitrator already knows the case, and the parties do not need to educate another neutral party, which would include duplication of work, additional expenses, and delays. Second, the arbitrator may choose the appropriate moment in the course of the proceedings to offer the tribunal’s services for settlement purposes. Third, a settlement agreement entered into in the course of a pending arbitration may form part of a consent award and become enforceable under the New York

<sup>40</sup> CIETAC Rules 2005, art. 40(8).

<sup>41</sup> BAC Rules 2004, art. 38(4).

<sup>42</sup> Hong Kong Arbitration Ordinance (2000), Cap. 431, s. 2B(3).

Convention.<sup>43</sup> The Chinese experience also shows that combining methods of dispute settlement makes mediation more likely to produce a settlement than when conducted separately.<sup>44</sup> Furthermore, if no settlement is reached, the ultimate arbitral award often is more acceptable. Previous negotiations will have served to narrow down the issues and result in procedural measures (for example, a third party evaluation on key findings of fact) that could lead to more predictable and acceptable solutions.<sup>45</sup>

#### B. CONCERNS

On the other hand, the following concerns arise when mediation and arbitration are conducted by the same person. First, there is a risk of breach of due process safeguards if caucusing is used in the mediation phase. On such an occasion, a party may disclose facts that the other side is unaware of and has no opportunity to respond to. Second, in the event that the settlement fails and the arbitration continues, the impartiality of the mediator-turned-arbitrator may come into question because of the confidential information he or she may have obtained during the mediation phase. Moreover, if the parties anticipate that the mediator may become an arbitrator and decide the case if the mediation fails, they might be less candid during the caucusing, which could weaken the effectiveness of the mediation process.<sup>46</sup>

#### C. CHINESE PERSPECTIVE

For the Chinese, the problem of caucusing is much less serious in practice than it is in theory, as they believe that the parties are not likely to reveal to the mediator damaging facts during the mediation phase that the mediator/arbitrator could not have found out from the record. In addition, the view is that caucusing is not the only situation in which the arbitrator has to disregard information received. There are cases where improperly submitted documents or arguments are rejected or discarded after the arbitrator has taken cognizance of them.<sup>47</sup> The Chinese believe that if the judges are trusted to be capable of disregarding inadmissible evidence when they make the adjudication, there should be no reason to doubt those well-trained arbitrators in their ability to remain impartial despite the information obtained during mediation.

With respect to the concern that parties may be reluctant to put all their cards on the table before a mediator in anticipation that the same person may arbitrate their dispute if mediation fails, Professor Tang Houzhi states:

[M]ediation is not arbitration; you don't need all the cards of the parties put on the table; when about 80% or even less than 80% of the cards of the parties have been put on the table, you would

<sup>43</sup> See Kaufmann-Kohler, *supra* note 1.

<sup>44</sup> Wang Shengchang, *CIEAC's Perspective on Arbitration and Conciliation Concerning China*, in *New Horizons in International Commercial Arbitration and Beyond*, ICCA CONGRESS SERIES No. 12, 27 (Albert Jan van den Berg ed., 2005).

<sup>45</sup> M.E. TELFORD, *MED-ARB: A VIABLE DISPUTE RESOLUTION ALTERNATIVE* 4 (2005).

<sup>46</sup> See Kaufmann-Kohler, *supra* note 1.

<sup>47</sup> Schneider, *supra* note 1, at 94.

be able to have a good conduct of mediation; as a mediator, your job is to bring about an amicable settlement and not to make an award.<sup>48</sup>

The Chinese consider that following a failed mediation, the mediator “is the best person to be appointed as an arbitrator just because he knows everything of the case.”<sup>49</sup> This is particularly true in arbitral proceedings (as compared to litigation), because trust is built up between the parties and the arbitrators whom they have voluntarily appointed. If the parties have gained such strong confidence in the mediator during the course of the mediation that they actually would prefer to have him or her arbitrate the remaining issues despite any caucusing that might have taken place, this choice should be respected, notwithstanding concerns about the possible confusion of roles.

## V. CONCLUSION

With the growth of international arbitration in China, it may be expected that Western arbitrators, whilst sitting on the same arbitral tribunals, will learn from their Chinese colleagues the advantages of the combined approach. Indeed, it already appears that objections to such a combined approach raised elsewhere are less strong now, and that the opponents are beginning to see that the combination may have some merits.<sup>50</sup>

At the same time, the recent development in Western countries has sparked a re-examination of the values of mediation in China. One example is the reforms undertaken by the BAC in its latest Arbitration Rules. To address the concerns of impartiality of the mediator-turned-arbitrator, the BAC now allows the parties to request the *replacement* of an arbitrator on the ground that the results of the award may be affected by his involvement in the mediation proceedings.<sup>51</sup> This rule appears to be in line with the IBA Guidelines on Conflicts of Interest, which require the arbitrator to resign if he or she considers him or herself to lack objectivity as a result of a failed mediation attempt.<sup>52</sup> Another development that deserves attention is the BAC’s recent initiative to promulgate separate mediation rules, similar to those of the ICC and AAA, which came into force on April 1, 2008.

Adaptations in both directions demonstrate a trend towards harmonization. Through a phenomenon of cross-fertilization, divergent systems progressively move towards a harmonized transnational approach.<sup>53</sup> To this end, 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,<sup>54</sup> so that the integration can be used effectively to improve the efficiency of arbitration.

<sup>48</sup> Tang Houzhi, *The Use of Conciliation in Arbitration*, in WIPO CONFERENCE ON MEDIATION 6 (1996).

<sup>49</sup> Tang, *supra* note 35, at 13.

<sup>50</sup> Schneider, *supra* note 1, at 97.

<sup>51</sup> See BAC Rules 2004, art. 56(2).

<sup>52</sup> See Otto L.O. de Witt Wijnen, Nathalie Voser, & Neomi Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 BUS. L. INT’L 433, 452 (No. 3, 2004).

<sup>53</sup> Tang Houzhi, *Is There an Expanding Culture that Favors Combining Arbitration with Conciliation or Other ADR Procedures?* in *International Dispute Resolution: Towards an International Arbitration Culture*, ICCA CONGRESS SERIES NO. 8, 101 (Albert van den Berg ed., 1996).

<sup>54</sup> For discussion on the safeguards on the arbitrators’ activity, see Kaufmann-Kohler, *supra* note 1.



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