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**The Combination of
Arbitration and Mediation in China**

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Under the Guidance of Professor Gabrielle Kaufmann-Kohler

GU Xuan

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INTRODUCTION

The combination of mediation and arbitration systems has always been considered a characteristic of Asian dispute resolution. Many have praised its advantages, while others consider it to violate the nature of justice and due procedure. This article explores the development of arbitration in China, analyzes the foundation for the combination of mediation and arbitration, looks into current functions and existent problems, and finally introduces the reforms China has made to the system in recent years.

This article is divided into four parts. First, it will introduce China's legal environment and arbitration culture, promulgation of Arbitration Law, and legislation in recent years. Second, it will explain the development and rise of China's institutional arbitration. Third, it will explore the emergence of the combination of mediation¹ and arbitration systems and analyze its advantages and disadvantages. Finally, it will focus on reforms made recently to the Chinese system.²

I. CHINESE LEGAL TRADITION AND ARBITRATION CULTURE

A. Historical Development of Arbitration in China

China has a long history of arbitration. However, the beginnings of a formal arbitration system didn't begin until the mid-20th century. Following the founding of the People's Republic of China (PRC) in 1949, China established two separate systems of arbitration, the foreign-related system and the labor system. Gradually, new separate systems were established specifically for the fields of economic contracts, technology contracts, intellectual property, real property, consumer protection, and so on³.

During that period, the PRC government actively promoted arbitration and mediation as the preferred means for resolving domestic economic disputes. Beginning in the early 1960's, various regulations were put into effect, providing for the mandatory arbitration of economic contract disputes by Economic Commissions at various levels. This was called arbitration by name, but it was actually another form of administrative control.⁴ These regulations effectively denied party autonomy. These domestic arbitral institutions fell under the remit of administrative organs and did not exercise jurisdiction based on the agreement of the disputing parties.

In December 1981, the Standing Committee of the National People's Congress promulgated the Economic Contract Law. It stipulated that parties to a dispute arising from economic contracts should first engage in informal negotiation in order to resolve the dispute. If they failed to reach resolution via negotiation, they were allowed three options: to apply for mediation or arbitration via

¹ In China, mediation, when conducted as part of arbitration or legal proceeding is often referred to as "conciliation."

² Note: there are different legal systems existing in China, namely, China's mainland, Hong Kong, Macao and Taiwan, the legal system referred to herein is that of mainland China.

³ Guangzhou Arbitration Commission, *The Collection of Arbitration Articles, The Arbitration System After the Founding of PRC <The Review and Prospect of Chinese Arbitration System>* Law Press China, 2005.2, Page 2-3

⁴ Wang Yongqing, *Several Questions for reforming the Chinese Arbitration Commission, <The Manual for Reform of Arbitration Commission>*, the Legislative Affairs Office of the State Council PRC, Legislative Affairs Press, 1996.2, Page 54-55

the competent contract administrative authorities or to file a suit directly before the People's Court. If, following arbitration, a party refused to accept the arbitration award, that party was entitled to challenge the award before the People's Court within fifteen days of being informed. The arbitration award was thus only binding if not challenged by either party after 15 days.⁵

After this, the National People's Congress (NPC) promulgated several regulations which stipulated the establishment of economic contract arbitration commissions at different levels. These economic contract arbitration commissions were subject to the State Administration of Industry and Commerce (SAIC), and had the power to issue binding awards. These commissions were established SAIC at both the state and various local levels. In August 1983, the State Council promulgated the Regulation on Economic Contract Arbitration of the People's Republic of China, which stipulated that all economic contract arbitration should be handled by the new economic contract arbitration commissions. In December of the same year, SAIC issued the Organizational Rules of Economic Contract Arbitration Commission, which confirmed that economic contract arbitration undertaken by economic contract arbitration commissions must be based on the Regulations on Economic Contract Arbitration of the People's Republic of China.⁶ Under the frame of these regulations, the modern day system of Chinese arbitration commissions began to take shape.

These regulations lead to the development of a domestic administrative arbitration system that was distinctly different from the separate system of foreign-related arbitration.⁷ The modern system of arbitration commissions was born. Each arbitration commission was to be affiliated to a government authority at varying levels, and each was to specialize in the arbitration of disputes arising in a particular field, such as economic and commercial contracts, technology contracts, labor matters, intellectual, property, real estate, consumer protection and so on.

B. Characteristics of Chinese Arbitration (1949 – 1995)

The modern Chinese arbitration system developed very quickly. The Chinese instituted a process of continual development with respect to the current situation at the time. The system developed alongside the government, instead of being implemented by an already well established government. Thus, Chinese culture and the policies during the period of the PRC's founding heavily influenced the establishment of the Chinese modern arbitration. These influences were embodied in the following characteristics:

Firstly, prior to the enactment of the Arbitration Law, domestic arbitration commissions accepted arbitration applications based on administrative law and regulations rather than the parties' voluntary arbitration agreement. At that time, domestic arbitration adopted jurisdiction by different level and territorial jurisdiction, thereby denying parties the autonomy to select the arbitration commission of their choice.⁸ This is different from current times, in which it is the arbitration agreement, and not administrative regulations, that determines jurisdiction.

⁵ Qiao Shiming, Liu Jingyi, *The Arbitration System in New China <The Theories and Practice of Arbitration>*, People's Court Press, 1997.8, Page 10-11

⁶ *The Grand Book of Arbitration of PRC*, the Publishing House of Law, Bureau of Law Committee of the National People's Congress, 2, 1995, Page 5

⁷ Li Hansheng, Yuan Hao, *The coming into being and the development of Chinese Arbitration System, <the Illumination of Arbitration Law>*, China Law Press, Page 16-18

⁸ Huang Jin, Song Lianbin, Xu Qianquan, *The Administrative Characteristics of Chinese Arbitration at the Beginning of New China, <the Arbitration Law>*, China University of Political Science and Law Press, 2007.1, Page 18-19

Secondly, the jurisdiction of domestic arbitration commissions was restricted to disputes arising exclusively between domestic Chinese legal and natural persons. Foreign natural persons and investment enterprises such as equity joint ventures, co-operative joint ventures, and wholly foreign owned enterprises, which are established partially or wholly by foreign capital, were deemed to constitute foreign-related arbitration.⁹ Only the Chinese International Economic and Trade Arbitration Commission (CIETAC) and the Chinese Maritime Arbitration Commission (CMAC) had the jurisdiction of foreign-related disputes. With the implementation of economic reform and “opening up” policies, the number of the foreign-related arbitration disputes began to rise very fast. This exclusive jurisdiction placed a lot of pressure on CIETAC and CMAC. It also gave these two organizations a monopoly on foreign cases, and did nothing to improve the competitiveness of domestic commissions.

Thirdly, the arbitration commissions were under the control of governmental administrative authorities, and their members were drawn primarily from those authorities. Domestic arbitration also adopted jurisdiction by forum level and territorial jurisdiction. This hierarchical system ensured that arbitration commissions established at lower levels were subject to those established at higher levels. Therefore, most of the arbitration commissions had a complete lack of independence; they were subordinated to administrative authorities and affected by their policies.¹⁰

Finally, prior to the Arbitration Law the awards of these arbitration commissions did not have binding force on the parties. If a party was dissatisfied with an arbitration award, it could initiate civil proceeding with the People’s Court. The implementation of the Arbitration Law heralded fundamental changes to this aspect of the domestic arbitration system in China.

C. The Successes of the Current Arbitration Law

On September 1, 1995 the Arbitration Law became effective. In order bring domestic arbitration inline with international practice the Arbitration Law adopted many internationally recognized principles of arbitration, such as party autonomy, the independence of arbitration commissions, and the binding force of the award.¹¹ For the first time, conditions and procedures for the establishment of the arbitration commissions were set. Following the introduction of the Arbitration Law, several big cities such as Beijing, Shanghai, Shenzhen, etc. were designated as pilot cities for the establishment of domestic arbitration commissions.¹² Since that time, some 148 domestic arbitration commissions have been reorganized or established throughout China. The majority of arbitration commissions were established through the consolidation of the existing arbitration institutions, the only exception being labor dispute and rural contract arbitration commissions.

⁹ Li Xianglin, Luo Sang, *The Status of Chinese Foreign-relative Arbitration*, <*The international Convention and Chinese Foreign-relative Arbitration*>, China Youth Press, 1995.4, Page 163-165

¹⁰ Liu Shaoxiong, *The function and the limitation of Commercial Arbitration System in the Early PRC*, <*The Instruction for lawyers when dealing with the Commercial Arbitration Cases*>, China Procuratorate Press, 2001.3, Page 19

¹¹ Han Jian, *Theory and Practice of Modern International Commercial Arbitration*, Law Press China, 2000.6, Page 273

¹² *The Grand Book of Arbitration of PRC*, the Publishing House of Law, Bureau of Law Committee of the National People’s Congress, 2, 1995, Page 8

1. Jurisdiction via the Arbitration Agreement¹³

Before the effectiveness of the Arbitration Law the jurisdiction of arbitral commissions was based upon Article 9 of the Regulations on the Arbitration of Economic Contracts, which established jurisdiction only over those disputes that fell within the scope detailed in the regulations. Article 10 stipulated the jurisdiction of different levels. In the years following those regulations, some new laws such as the Foreign Economic Contract Law, the Technology Contract Law, the Copyright Law, and the Civil Procedure Law provided for the arbitration of disputes on the basis of an arbitration agreement, but only for those specific issues. Any disputes arising beyond the scope of those laws were required to use the jurisdiction requirements of Articles 9 and 10.¹⁴

The Arbitration Law did away with forum level jurisdiction and territorial jurisdiction entirely. Article 6 of the Arbitration Law states: “An arbitration commission shall be selected by the parties by agreement. The jurisdiction by level system and the district jurisdiction system shall not apply in arbitration.” This is not only important because the parties can select which commission they want to use, but also because when the parties are selecting an arbitration commission, they are not limited by the geographical place of residence, or the location of the dispute, nor are they limited by hierarchical jurisdiction of commissions at different levels. This embodies the principle of party autonomy by allowing the parties to choose if they will arbitrate, and where they would like to do so.

2. The Independence of Arbitration Commissions

As mentioned earlier, Chinese arbitration commissions were subordinated to the administrative authorities. The Arbitration Law changed this by requiring arbitration to be independent from the administration of government and free from government intervention. Furthermore, subordinate relationships between arbitration commissions and administrative authorities, or between different arbitration commissions, are specifically prohibited by the Arbitration Law. The most important article is Article 8, which states, “Arbitration shall be conducted in accordance with the law, independent of any intervention by administrative organs, social organizations or individuals.” Article 14 defines this further, “Arbitration commissions are independent of administrative organs and there are no subordinate relations with any administrative organs nor between the different arbitration commissions.” For the first time in the history of the Chinese arbitration, the law relieved domestic arbitration commissions of government interference and local protectionism. In being independent, the commissions could better serve parties because of greater neutrality.

3. Greater Scope for Arbitrable Disputes

Prior to the Arbitration Law, the only disputes that qualified for arbitration were those that fell within the scope of the subject matter detailed in the Regulations on the Arbitration of Economic Contracts. When compared to the new regulations under the Arbitration Law, the scope of what disputes qualified was greatly expanded. The Arbitration Law Article 2 states, “Disputes over contracts and disputes over property rights and interests between citizens, legal persons and other organizations as equal subjects of law may be submitted to arbitration.” Article 3 states, “The

¹³ Li Jingshao, *The fundamental elements of Arbitration Agreement*, <*The Research on Arbitration Agreement and Arbitration Award*>, China University of Political Science and Law Press, 2000.9, Page 84

¹⁴ *The Grand Book of Arbitration of PRC*, the Publishing House of Law, Bureau of Law Committee of the National People’s Congress, 2, 1995, Page 10

following disputes shall not be submitted to arbitration: (1) Disputes over marriage, adoption, guardianship, child maintenance and inheritance; and (2) Administrative disputes falling within the jurisdiction of the relevant administrative organs according to law.”¹⁵ By not limiting the type of dispute to a specific subject matter, the Arbitration Law allowed for arbitration in many areas where it was previously unavailable.

4. Binding Force of the Arbitration Agreement

Article 9 of the Arbitration Law provides the follows:

*“The single ruling system shall be applied in arbitration. The arbitration commission shall not accept any application for arbitration, nor shall a people's court accept any action submitted by the party in respect of the same dispute after an arbitration award has already been given in relation to that matter. If the arbitration award is canceled or its enforcement has been disallowed by a people's court in accordance with the law, the parties may, in accordance with a new arbitration agreement between them in respect of the dispute, re-apply for arbitration or initiate legal proceedings with the people's court.”*¹⁶

It expressly provides that if a person files suit with a People’s Court or an arbitration commission after the rendering of an arbitral award in the same dispute, the People’s Court or arbitration commission must refuse to accept the case. This was a significant development for China’s arbitration because it allowed arbitration to be the final resolution in the dispute process, and not likely to be overturned by the legal system.

D. Recent Legislative and Practical Development

On September 8th, 2006 the Supreme People’s Court (SPC) issued its latest Interpretation on Certain Issues Relating to the Application of the Arbitration Law. This interpretation is essentially an amendment to the Arbitration Law, and provides further clarification on some aspects of the application of Arbitration Law.

Firstly, about the validation of the arbitration agreement, the Arbitration Law stipulates in Article 16:

*“An arbitration agreement shall include the arbitration clauses provided in the contract and any other written form of agreement concluded before or after the disputes providing for submission to arbitration. The following contents shall be included in an arbitration agreement: 1. the expression of the parties' wish to submit to arbitration; 2. the matters to be arbitrated; and 3. The Arbitration Commission selected by the parties.”*¹⁷

The Interpretation defines the “other written form” more clearly, stating that the “written form” of an arbitration agreement may be satisfied where such agreement is evidenced through correspondence and electronic forms of exchanges, for example, facsimiles and emails. This corresponds to the provision of the Contract Law of the People’s Republic of China which states, “The written forms mean the forms which can show the described contents visibly, such as a written contractual agreement, letters, and data-telex (including telegram, telex, fax, EDI and

¹⁵ Article 2 and 3, Arbitration Law, 9, 1995

¹⁶ Article 9, Arbitration Law, 9, 1995

¹⁷ Article 16, Arbitration Law, 9, 1995

e-mails).” These new standards for the “written form” of an arbitration agreement coincide more closely with international practice.¹⁸

Secondly, in Article 16(3) of the Arbitration Law, the arbitration commission selected by the parties must be mentioned in the arbitration agreement. In practice, if the name of the arbitration commission is incorrectly phrased in the arbitration agreement, the arbitration agreement may face the risk of invalidation. The Interpretation changes this situation by stipulating where an arbitration agreement has not specified the accurate name of an arbitration institution, but that institution can be readily identified, the arbitration agreement will also be deemed as valid.¹⁹

Thirdly, the Interpretation defines the principle of automatic transfer. When the rights, property, assets, debt, etc. of one party are transferred to a new person or entity the arbitration agreement remains valid to the transferee, unless the parties agree otherwise, or the transferee has no knowledge of the agreement. Thus, the Interpretation clarifies the heritability of the arbitration agreement that the arbitration agreement is valid to the inheritor or the undertaker of the right and obligation unless the parties have other agreement when conclude the arbitration agreement. These stipulations unify the different measures of dealing with the problems in practice.

Fourthly, under the Arbitration Law, any challenge on the validity of an arbitration agreement may be filed with either the arbitration institution or the People’s Court. The most important development of the Interpretation is that it provides that where an arbitration institution has previously made a ruling on the validity of the arbitration agreement, the People’s Court shall not accept any further application to revisit the issue.²⁰

II. THE DEVELOPMENT OF INSTITUTIONAL ARBITRATION

Institutional arbitration in China is undergoing rapid development and continuous advancement. Some particular aspects of development are as follows:

A. The Independence of Arbitration Commissions

As arbitration commissions gradually break away from the control of government administration, they become more focused on meeting the needs of a market economy.

The market economy is the root of the modern arbitration system. Arbitration commissions must be able to meet the needs of a rapidly developing market if they desire to expand. Most Chinese arbitration commissions realize this. The Bureau of Legislative Affairs of the State Council has emphasized more than once in the National Working Meetings of Arbitration that the key to developing Chinese arbitration is to harmonize the arbitration system with the market economy. Nowadays, with the recent advancement of the Chinese market economy, people are beginning to accept that arbitration is a legal service and arbitration commissions are the providers of that service. These services are paid for via case acceptance fees; the relationship between the

¹⁸ Michael J.Moser, *New Supreme People’s Court Interpretation on the Arbitration Law*, Arbitration in Beijing ,No. 60, China Legal Publishing House, 1, 2007, page 101

¹⁹ Song Lianbin, *Comment on the Supreme Court’s Interpretation on the Arbitration Act of P. R. China* , Arbitration in Beijing ,No. 60, China Legal Publishing House, 1, 2007, page 2

²⁰ Song Chaowu, *Understanding and Analysis of the Supreme Court’s Interpretation on the Arbitration Act of P. R. China*, No. 60, China Legal Publishing House, 1, 2007, page 44

arbitration commission and the parties is a kind of exchange transaction. However, Chinese arbitration commissions do not strive for profit; rather their services are aimed at welfare. While profit is not their goal, they must nevertheless strive to provide the best and most efficient services if they wish to remain viable, and in order to grow the institution. The shift from government administration to a market economy is a significant change in consciousness. They cannot afford to rely on the aid of government. The only way to expand and develop is to take part in competition and embrace the market.

B. The Quality of Arbitration

Arbitration commissions are constantly improving the quality of arbitration services. Accordingly, the reputation of arbitration commissions continues to grow. There are four factors in this improved quality.

Firstly, the qualities of the arbitration commissions are expanding. The expansion has two aspects: one is the number and the amount of the accepted cases; the other is increased variety of the types of cases. The caseload of the Beijing Arbitration Commission (BAC) has increased annually by 33% on average since 1998. And the disputed amount of accepted cases has continuously increased and reached 10.4 billion yuan in 2006. The types of the cases mainly include financial cases, sales contract cases, construction contract cases, real estate cases, intellectual property cases etc.

Secondly, the quality of arbitrators continues to improve. Arbitration commissions rely on the arbitrators who have significant experience in their professional area, as well as experience in arbitration. At the BAC, arbitrators are strictly selected according to the requirements and conditions of the Arbitration Law. As arbitration becomes more popular and the caseloads of commissions continue to grow, arbitrators are obtaining more experience and learning how to become better arbitrators.²¹ In addition, regular arbitrator training is conducted in order to maintain and grow the skills and knowledge of the arbitrators. In September 2006, the BAC issued two regulations to improve transparency in the employment of arbitrators and regulate the activities of the arbitrators: Administrative Measures for the Employment of Arbitrators and Ethical Standards for Arbitrators. As a result of the improvement of the quality of arbitrators, the handling of cases and the rendering of arbitration awards have become more standardized.²²

Thirdly, arbitration commissions are focused on greater efficiency. Arbitration can usually provide much greater efficiency than litigation, and this efficiency is an important factor in the selection of arbitration over litigation. One example has been the implementation of limits as to how long the arbitration process can last. For BAC, the average duration from the formation of the arbitral tribunal to conclusion for of the case is less than 70 days.

Fourthly, there is a trend to build up a brand for the arbitration commissions. The brand name is the representation of the qualifications of the arbitration commission that relies on the number, quality and the efficiency of the arbitration cases. Along with the increase of the qualifications, there are a number of domestic arbitration commissions have built up very good reputations that become the brand name of the Chinese arbitration. It is helpful for the expansion of arbitration both

²¹ Huang Jin, Song Lianbin, Xu Qianqian, *The Quality of the arbitrators*, <the Arbitration Law>, China University of Political Science and Law Press, 2007.1, Page 66

²² Wang Hongsong, *Review the past decade of BAC*, <Theory and Practice of Commercial Arbitration> by Yang Runshi, the People's Court Press, 4, 2006, page 252

in domestic and international markets.

C. Specialization in Different Professional Areas

There is a trend for arbitration commissions to become specialized in order to satisfy certain demands of the market.

The development of a market economy requires division of labor to become more and more granular, and this is no exception in the development of arbitration as a service. At present, many arbitration commissions have attempted to specialize in certain fields. Some of them gained great reputation in the areas of finance, intellectual property, real estate, negotiable securities, etc. Many of the larger organizations started with one specialty and have now expanded into several areas. The BAC, for instance, handled mainly construction disputes, but has now diversified. With greater resources the BAC is able to maintain areas of specialization by conducting training according to different types of cases and hiring arbitrations with particular expertise in those areas.

D. Globalization and Internationalization

To keep up with globalization, Chinese arbitration commissions are making an effort to maintain international standards. Prior to the implementation of the Arbitration Law, only the Chinese International Economic and Trade Arbitration Commission (CIETAC) and the Chinese Maritime Arbitration Commission (CMAC) had jurisdiction over foreign-related disputes. The Arbitration Law changed that: Domestic arbitration commissions now can accept foreign-related disputes, while CIETAC and CMAC now can accept domestic ones.²³ At the same time, in order to conform to international arbitration standards, the BAC modified its Arbitration Rules several times. The most recent revision was enacted on 1 April 2008, and included its first Mediation Rules.

E. The Utilization of Information Technology

Chinese Arbitration commissions have developed modern office information systems to deal with the cases. For example, the BAC first developed a comprehensive case-management software system, which enables staff to handle cases with digital technology and enhances the efficiency and quality of cases management. This system is utilized during the acceptance of the cases, organization of arbitration tribunals, the proceeding of the arbitration hearing, and statistical analysis of cases, time management, and information gathering. This technology greatly enhances efficiency. In addition, it promotes more transparency during arbitration proceedings, which is a large factor in the selection of arbitration.²⁴

F. The Development of Arbitration Theory

Nowadays, most arbitration commissions believe healthy development of arbitration includes

²³ Huang Jin, Song Lianbin, Xu Qianqian, *The Administrative Characteristics of Chinese Arbitration at the Beginning of New China*, <the Arbitration Law>, China University of Political Science and Law Press, 2007.1, Page 18-19

²⁴ Yang Runshi, *Review the past decade of BAC*, Wang Hongsong, <Theory and Practice of Commercial Arbitration> the People's Court Press, 4, 2006, page 257

a combination of improved practice and refinement of theory.

New theory and ideas guide the development of arbitration practice. Normally, these new ideas are manifested in questions or difficulties encountered during the current process. This should be solved in theories essentially in order to guide the direction of the arbitration development. In the early years of Chinese arbitration, many commissions were content to grow their caseload, but paid little attention to the development of new ideas. This has changed a lot. CIETAC first realized this problem and published a series of research achievements in the area of arbitration. Other arbitration commissions such as the BAC and Guangzhou Arbitration Commission have promoted their own academic publications. The BAC's publication, *Beijing Arbitration* has produced more than 60 issues. The BAC also organizes monthly Arbitrator's Salons, in which current issues are discussed. Chinese commissions are also beginning to build relationships with foreign commissions and institutions. Through these exchanges, the experience of foreign commissions and experts has helped to shape development. Cooperation on a global level has raised even greater questions, and greater opportunities for the development of theory.

III. DEVELOPMENT AND REFORM OF CHINA'S ARBITRATION –MEDIATION SYSTEM

The combination of arbitration and mediation, or "Arb-Med," as it is often called, is an outstanding characteristic of Chinese dispute resolution. During the Arb-Med process parties first initiate arbitration proceedings.²⁵ Then, during the arbitration proceedings, the arbitrator conducts mediation, or conciliation of the case. This section examines the formation of this system, its advantages and disadvantages in practice, and recent reform efforts.

A. Analysis on the Formation of China's Arb-Med System

1. Characteristics of Arb-Med

There are some inherent similarities between arbitration and conciliation proceedings, which form the foundation for an Arb-Med combination.

First, arbitration and mediation can only obtain jurisdiction on the basis of the parties' voluntary acceptance – this principle of party autonomy forms a common ground. Arbitration, without a written arbitral agreement between the parties, cannot occur. Likewise during mediation, where the free will of the parties is paramount; the parties have the power to voluntarily enter, and exit the mediation. In addition, the principle of party autonomy lends itself to a non-state system. In a state system, the government determines jurisdiction for trial, and uses administrative power for awards. However, arbitration and mediation can both operate effectively outside the realm of government; they do not rely on any state power to deal with any disputes.²⁶ Arbitration and mediation also both involve a neutral third party in dealing with disputes. Arbitrators and mediators are chosen voluntarily by the parties; and must be independent and impartial. They

²⁵ Wang ShengChang, *The Theory and Practice of Combining Arbitration with Conciliation*, The Law Publishing House, 2001.8, Page 22

²⁶ Qi Shujie, *The Development of ADR and the Reform of the System of Arbitration*, Publishing by the BAC and the People's Court Daily, 2005.9, Page 90

must also uphold the trust of the parties. Furthermore, arbitration and mediation both have to follow certain procedural norms in order to protect the procedure and the interests of the parties. Arbitration and mediation rules can be negotiated and agreed upon by the parties in advance. Once agreeing upon specific rules, the parties establish contractual relations and should agree to act in good faith. Finally, arbitration and mediation both share the advantages of confidentiality and flexible, simple procedures.

2. Demands of the Business Community

The original intent of arbitration was to provide several benefits over the judicial system, such as efficiency, flexibility, confidentiality, and cost. However, arbitration is now becoming more and more like the court system. Arbitration procedure has been challenged in the court system, which lead to the introduction of more stringent procedural requirements. These new requirements greatly weakened the flexibility and efficiency of arbitration, thereby weakening its advantages relative to litigation. The Arb-Med combination helps reconcile some of these issues:

a. From the point of view of efficiency, combination of the two conducive to realizing the objectives of "cost minimization" and "efficiency maximization".²⁷ First, Arb-Med is one proceeding, not two. It is an arbitration procedure in which the arbitrator does some mediating; it is not a separation of the two, but an organic integration. Compared to the detailed arbitration rules and litigation rules, Arb-Med is less restrictive, and has the ability to adapt more to the unique needs of the parties. Second, Arb-Med is efficient because settlement can occur quickly during the arbitration proceeding, especially with mediation by an arbitrator. A mediation settlement reached by an arbitrator has an immediate effect. The settlement will be rendered as an arbitration award, and will be enforced and treated as such. Third, Arb-Med can significantly reduce the cost of errors and direct cost of dispute resolution.²⁸ Because mediation occurs, the parties have a greater chance to participate in the outcome and resolution of the case, even if they do not reach a settlement via mediation; the rate of the challenge to a rendered award decreased significantly. Furthermore, during Arb-Med arbitration institutions usually do not demand extra mediation registration fees, management fees, etc., and successful mediation will save significant additional costs such as costs of the arbitration, legal fees; and in the result of a successful mediation, documents are more easily completed and rendered.

b. From a business cooperation standpoint, Arb-Med can create safe and stable legal, economic, and interpersonal relations for the parties. Successful mediation helps to end often complex legal disputes, and creates a new and explicit settlement agreement in which both parties have approved.²⁹

Arb-Med also creates stability in the economic relationship between the parties. During the mediation process parties are likely to cooperate with each other to meet mutual interests and reach an acceptable resolution. The parties can ask the arbitrator to render an award based on the mediation agreement, which ensures that the agreement will be enforceable.³⁰ In practice, experienced arbitrators will often find that parties occupying favorable positions in arbitration are

²⁷ Wang Cunxue *The Advantages of Combination of Arbitration and Mediation*, <*The Practice Manual for Chinese Arbitration and Litigation*>, , China Development Press,1993.2, Page 325-326

²⁸ Wang ShengChang, *The Theory and Practice of Combining Arbitration with Conciliation*,, The Law Publishing House, 2001.8,Page 97

²⁹ Chen Zhidong, *Mediation in Commercial Arbitration Procedure*, <*International Commercial Arbitration Law*>, Law Press, 1998.8, Page 199

³⁰ ,Shao Xunyi, *An Introduction to Chinese Mediation Practice*<*Foreign-relative Arbitration Laws and Regulations*>, Cheng Dejun, Chinese People's University Press, Page 97

willing to become more conciliatory during mediation, because cooperation with the other party increases long-term interests.

3. Non-existence of Stand-Alone Mediation

First, Arb-Med possesses traditional Asian characteristics. Since ancient times, China's cultural tradition has placed great value on harmony and understanding. When disputes occur, most Chinese prefer to resolve them with the involvement of a third party. Traditionally, this took the form of seeking out a respected elder who would impart wisdom, offer an evaluation of the situation, and provide solutions for the parties.³¹ Thus, while it is not until recently that China has developed its own formal, stand-alone mediation procedures, mediation has been present for thousands of years.

After the establishment of the People's Republic of China the state abolished civil mediation for the sake of stability and the consolidation of power. This put a stop to the development of any stand-alone mediation procedure. The large number of state-owned enterprises and administrative models arising from the planned economy required enterprises to rely solely on executive and administrative powers. With the reform and opening up of China, and the reduction of state-owned enterprises, and development of a market system, society has again begun to demand more mediation. In order to adapt to economic development, the state and relevant departments have taken the initiative to make adjustments, to encourage, support and develop mediation. Some arbitration institutes have now begun to add independent mediation process into arbitration.

Second, mediation agreements are not enforceable by court system. When one party does not fulfill its obligations under the agreement, the other party cannot apply to the court for direct enforcement; rather it must initiate proceedings with people's court, which can often lead to unsatisfactory results. In order to render a binding agreement, Arb-Med is a step forward because the mediation agreement can be rendered as an arbitration award, and can be submitted to the court for enforcement. This plays an important role in protection of the interests of the two parties.

Third, China has a lack of professional mediators, when compared to international standards. This is due in part to culture and history. Culturally speaking, the involvement of third parties is inherent in nearly all methods Chinese dispute resolution, thus the need for formal procedures was not realized. While most Chinese arbitrators have experience performing some type of mediation, there are few individuals with a great amount of stand-alone mediation experience because of the abolishment of civil mediation during the periods of reform of the PRC.

B. Pros and Cons of the Arb-Med System

1. Advantages

The popularity of Arb-Med has increased because of several advantages:

First, mediation during commercial arbitration promotes stability and flexibility, helping to promote quick and reasonable resolution. Arb-Med is not held to the same procedural requirements of simple arbitration. Mediation occurs with the consent of both parties, and under the supervision of the arbitral tribunal. It offers creativity in procedure and reaching an agreement. The flexibility of this system also is reflected in the fact that mediation can be brought forward at any stage after

³¹ ,Tang Houzhi ,*The Mediation in China*, <*Foreign-relative Arbitration Laws and Regulations*>, Cheng Dejun, Chinese People's University Press, Page 107

the hearing begins. If mediation is unsuccessful, the tribunal will continue the hearing, and make arbitration award, ensuring enforceability.³²

Second, mediation is an interest-based approach, and parties have full autonomy in accepting a settlement, and are able to create solutions based on their own interests.³³ Arbitration is a largely rights-based approach, based on a decision by the arbitrator, rather than by participation from the parties; the arbitrator, not the parties, decides what's best. Because parties are involved in the crafting of their own agreement, they are more likely to follow through with the resolution when it is reached.

Third, mediation is better for the continuing relationship of the parties. Not only is it usually a quicker, and less formal process, but it involves a great deal of mutual communication and understanding. This is beneficial to the formation and maintenance of long-term business relations. Even if parties do not reach a settlement, they have still taken part in the mediation proceeding, which more than likely has improved communication and understanding.

2. Disadvantages

a. Conflicting Roles of the Arbitrator

The primary role of an arbitrator is that of a judge who assesses the situation and makes a decision while the primary role of a mediator is to facilitate communication and assist the parties in reaching a settlement. These functions have fundamental differences. They are not always complimentary, and in combining them it is necessary that an arbitrator must have a clear understanding of the two different roles.³⁴ As a mediator, the arbitrator is privy to communication that would often not be disclosed during arbitration. Parties fear that the arbitrator's judgment and impartiality would likely be affected by interacting as a mediator. While arbitrators may promise neutrality, it is difficult to tell if the arbitration award has been based on information obtained during the mediation.³⁵

b. Trusting the Mediator

Likewise, if parties are afraid that an arbitrator may be influenced by information presented in mediation, they will be unlikely to disclose as much as they would otherwise. This could negatively impact the communication process during mediation.³⁶

c. Arbitrator's Influence during Settlement

Mediation settlements are supposed to be agreed upon by the parties of their own will. Some parties are concerned that the arbitrator may have significant influence on the parties in drafting their settlement, because of the arbitrator's influence during the arbitration process. It would be possible to use the threat of an arbitration award, directly or indirectly, in order to motivate the parties to settle, even if the settlement is not ideal.

d. Arbitration is Always Present

In order to reach the mediation process, parties must first apply for arbitration, and begin

³² Li Changbin, *Consummation of mediation system in our country's commercial arbitration*, Arbitration and Judicature in China, No. 2006.5, Publishing by China Society of Private International Law, Page53

³³ Wang Cunxue, *The Advantages of Combination of Arbitration and Mediation*, <*The Practice Manual for Chinese Arbitration and Litigation*>, China Development Press,1993.2, Page 326

³⁴ Han Jian, *The obligation of an Arbitrator*, <*Theory and Practice of Modern International Commercial Arbitration*>, Law Press China, Page 191

³⁵ Qiao Xing, *The Different Right in Arbitration and Mediation*, <*The research on Arbitration Right*>,China Law Press, 2000.9, Page 27

³⁶ Chen Zhidong, *Mediation in Commercial Arbitration Procedure*, <*International Commercial Arbitration Law*>, Law Press, 1998.8, Page 203

arbitration proceedings; this is not always needed by the parties. For example, prior to the filing some parties are already motivated to reconcile with the other party, but with the absence of a neutral third party, have been unable to reach a resolution. In situations in which parties already have the will to mediate, they lose the opportunity to resolve their dispute solely through mediation.

e. Not Fully Flexible

The existing Arb-Med system does not fully reflect the characteristics of flexible mediation. In international mediation institutions, mediators may make contact with the parties through a variety of means, such as email, telephone, fax, etc. However, in China's Arb-Med, mediation must be conducted during the hearing, and the hearing may only take place at predetermined times and must be located at the arbitration institution. Furthermore, mediation is entirely confidential. Arbitration is not, and through interaction with arbitration, Arb-Med is less confidential than stand-alone mediation.

Many arbitration commissions, in order to avoid these disadvantages, have taken measures to adopt new standards in their arbitration rules, Article 39, Section 4 of the BAC arbitration rules, which states "If the conciliation fails to lead to a settlement, neither party shall invoke any of the statements, opinions, views or proposals expressed by the other party or the Arbitral Tribunal during the conciliation as grounds for any claim, defence or counterclaim in the arbitral proceedings, other judicial proceedings or any other proceedings." However, without stand-alone mediation procedures, conciliation that takes place during arbitration will continue to be affected by the arbitration process.

IV. REFORM ON THE MEDIATION SYSTEM

A. The Need to Reform Arb-Med

1. Inevitable Deficiencies

China's Arb-Med system rose out of and adapted to the conditions of national development. However, because of the system's limitations, it has become necessary to develop mediation as a separate procedure. The first obvious reasons are those discussed within the previous section: the conflicting roles of the arbitrator, trust, possible undue influence on settlement, necessity of arbitration, and flexibility of the system.

2. Strict Requirements of the Arbitration Law

In order to begin Arb-Med, the Arbitration Law requires that there must be an arbitration agreement in place, which specifies a particular institution. In reality, parties do not often anticipate disputes or how to settle them. It is difficult to predict what means of dispute resolution will be appropriate for a dispute that has not yet occurred. Unfortunately, without an arbitration clause, those who wish to use Arb-Med must instead use the court system. Therefore, the development of an independent mediation system that is not subject to an arbitration clause has become necessary. As long as the parties have the will to mediate, they can resolve their disputes through independent mediation, without the need of an arbitration clause.

3. Arbitration May Not Be Appropriate

Arbitration is like a scalpel and surgery can pose a considerable risk; much is dependent on doctor's judgment and ability. Mediation, on the other hand, is like therapeutic healing, and is dependent on the desire of the parties, and greatly limits the damage that can occur. As arbitration becomes more judicial in nature, and courts continue to prove a harsh means for resolution, many parties may want to choose independent mediation as an alternative, and not require an arbitration award, or arbitration procedure.

4. Demands of Economic Development and Globalization

The function of mediation is to meet the parties' business expectations, and the expectations should be fully met. Although Arb-Med met the needs of economic development during the past decade of China's development, it is unique to China's "national situation." It is not adapted, however, to the 'new situation' of rapid development and economic globalization. If China's dispute resolution systems do not focus on parties' specific needs for change, opportunities to reform will be lost, and increase the gap between China and international community will grow.

As mentioned by Wang Hong Song, Secretary General of the BAC, in the BAC's Decade Review, "the key purpose and principle in legislating arbitration laws are to 'adopt a modern foreign arbitration system' so that China's arbitration system will develop simultaneously with the international modern arbitration system". Arbitration is an area which "emphasizes internationalization and is sensitive to adapting to commercial changes".³⁷ As an arbitration institution, it needs to uphold the same international standards if it wants to make a place for itself among the world's reputable arbitration institutions. In the process of the globalization, the demands of the foreign and local parties on arbitration are increasingly converging; arbitration institutions are also facing more and more parties and representatives from different countries and regions with different cultural backgrounds. Placing too much emphasis on the "national situation" and rejecting those international commercial rules and practices that meet the parties' requirements, and which generally adopted by most of the countries in the world will not only cause Chinese arbitration institutions to lose international competitiveness, but also cause Chinese enterprises to lose their corresponding safeguard and equal treatment in international commercial arbitration.³⁸

5. Cost consideration

The cost of arbitration comes from case acceptance and administrative fees, which can often be quite high. Mediation, on the other hand, has more flexible means of payment, like charging the mediator's fee via an hourly rate. This is often preferred by the parties, as they are charged only for the time they spend.

B. Applying Reforms

There are several means of reform that can be used to improve the current mediation system: first, allowing complete separation of mediation and arbitration systems, and allow mediation and

³⁷ Song Lianbin *From Ideology to Rules: Several Problems in Revision of Arbitration Law*, People's Court Newspaper, July, 21st, 2004.

³⁸ Wang Hongsong, *Decade Review of the Development of the Beijing Arbitration Commission*, <*Theory and Practice of Commercial Arbitration*> by Yang Runshi, the People's Court Press, 2006.4

arbitration to operate independently of each other; second, existing institutions should begin to offer mediation services. Some of China's arbitration agencies have made attempts, such as the establishment of a number of mediation centers by the China Council for the Promotion of International Trade. Third, amend the existing framework via the Arbitration Law.

1. Reform the Existing Framework

We can examine the Arbitration Rules of the Korean Commercial Arbitration Board as reference for adding mediation standards to the existing arbitration rules. The Article 18 of revised *Arbitration Rules of the Korean Commercial Arbitration Board* in 2000 defined special rules for Settlement by Conciliation:

“The Secretariat shall, upon the receipt of a conciliation request from both parties within 15 days in case of Domestic Arbitration and within 30 days in case of International Arbitration from the Basic Date, conduct conciliation proceedings before the dispute is presented for arbitration.

(1) The conciliation proceedings shall be followed by the appointment of one or three conciliators by the Secretariat from among those in the Panel of Arbitrators. The Conciliator(s) shall have the discretion to determine the conduct and manner of the conciliation proceeding.

(2) If the conciliation succeeds in settling the dispute, the conciliator shall be regarded as the arbitrator appointed under the agreement of the parties; and the result of the conciliation shall be treated in the same manner as such award as to be given and rendered upon settlement by compromise under the provision of Article 53, and shall have the same effect as an award.

(3) When the conciliation fails to settle the dispute within 30 days after the appointment of conciliator(s), the conciliation procedure shall come to an end and the arbitration procedure under these Rules, inclusive of appointment of arbitrator(s), shall commence immediately. However, the parties may extend the above period by mutual agreement.”³⁹

Using Korea's rules as a reference, consideration for the amendment of China's arbitration rules can be made. For instance, during case acceptance the case officer can consult the applicants to see if they have a desire to mediate. If they are willing to mediate, they would be requested to file a mediation application before entering the arbitration process. Moreover, institutions should start now to select and train a number of mediators, and compile lists of mediators for the parties to make selection. Med-Arb could be used; if mediation fails to reach an agreement by a certain deadline, arbitration shall commence (with or without the mediator acting as the arbitrator). In this procedure, if a mediation agreement is reached by the parties, the arbitration commission shall designate an arbitrator to make the award; if mediation proceedings terminate, parties enter into arbitration proceedings if they have requested.

The advantages of this are: (1) One can set separate rules and procedures for mediation (2) Mediation settlements achieved in are enforceable via an arbitration award. This method counters the parties' fear of a weak mediation agreement. (3) Cases intended for arbitration will have the probability of being unlimited to mediation, and will usually last less time and be more efficient, thus conserving the resources of the Arbitration Commission, who must appoint a secretary, deliver

³⁹ Arbitration Rules of the Korean Commercial Arbitration Board, <http://www.cietac.org.cn/readshiwu.asp?swid=478>

arbitration documents, serving applicant respondents, cover transportation and communication costs in the hearing, duplicate document, etc (4) This method is not restricted by a written arbitration agreement, and so long as the parties have a willingness to mediate they will have access to mediation. This could also attract more parties to arbitration. (5) In this way the mediator no longer acts as the arbitrator, and is not hindered by the conflict of having to uphold different roles.⁴⁰

2. Establishment of Mediation Centers

The establishment of independent mediation centers could go a long way to further mediation. The China Council for the Promotion of International Trade began doing this, but has not had great success. Arbitration commissions are poised to do so with greater efficiency, due to their existing resources, and economies of scale. Arbitration commissions already have considerable resources, including a network of arbitrators, employees, facilities, and reputation. The question, of course, is whether or not existing arbitration commissions will be able to train and build a cadre of mediators; this could be done by training existing arbitrators or creating an entirely new list.⁴¹ The Beijing Arbitration Commission has taken some measures to establish its own mediation rules and panel of mediators, and this will be discussed later in further detail.

3. Amend the Arbitration Law with respect to mediation

Amending the Arbitration Law would strengthen mediation by giving confidence to parties applying for mediation. Ideally these amendments would set for basic protection of mediation systems, such as the enforcement of mediation agreements and protection to confidentiality, and not introduce restrictions on procedure.

C. Reforms by Chinese Arbitration Commissions

Many of China's arbitration commissions have begun to take measures to reform and improve mediation.

1. The Wuhan Arbitration Commission

The Wuhan Arbitration Commission has taken some innovative approaches to mediation, established the Wuhan Arbitration Commission Mediation Centre, and formulated specific mediation rules.

The Wuhan Arbitration Commission's mediation rules contain some provisions that are quite advanced. For example, there are provisions which determine the actual operation workflow of mediation, and provide the supplementary option of an arbitration agreement, so that the results of mediation can be implemented through an arbitral award. Also, the mediation rules give full respect to the parties' principle of autonomy, which implies that, the Mediation Center will by no means take compulsive measures to force the two parties to reach a settlement.

With the authorization of the Arbitration Commission, the Mediation Centre established five mediation centers: one dedicated to overall acceptance and hearing of various cases, one to

⁴⁰ Song Lianbin, Lin Yifei, *The Information Selection of International Business Arbitration*, The Knowledge Publishing House 2004.4, Page 201

⁴¹ Guo Shoukang, Zhao Xiuwen, *The Mediation conducted by Chinese Arbitration Commissions in Foreign-relative Cases*, <International Commercial Arbitration Regulations in China>, China Legal Press, 1995.6, Page 279

consumer complaints; another to real estate transactions, commodity house transactions, decoration, and other aspects of the dispute; a fourth to disputes relating to the operation and distribution activities of private enterprises'; and a fifth dedicated to logistics, business etc. The five mediation centers establish good network for arbitration work. It is a good way to solve contradictions between a highly centralized acceptance system and decentralized market main body, reduces the cost of resolving disputes and has played a positive role in implementation of arbitration legal system, standardizing model contract text, helping enterprises to strengthen contract management, and resolving disputes in civil and commercial matters.

These reforms at the Wuhan Commission have set an example, and helped to strengthen the reputation of mediation. Over the years, the success rate of mediation of arbitration cases at the Wuhan arbitration commission has always been above 80%, with a compliance rate of 90%, and 60% of cases finishing sooner than expected.

2. The Beijing Arbitration Commission

The BAC has consistently taken measures to improve the quality of its Arb-Med system, and has established its own stand-alone mediation procedure. The BAC has taken several measures to improve mediation, and uphold international standards:

a. The BAC has established separate mediation rules. Separate mediation rules allow for an independent procedure which is separated from arbitration procedure. This began with the modification of the existing arbitration rules in response to issues with the Arb-Med process. For example, Article 56 of the Arbitration Rules allows for the replacement of arbitrator after mediation proceedings, as to not affect the final judgment. Observing that share of mediation during arbitration was increasing year after year Secretary General Wang Hong Song pushed forth the idea to develop separate mediation rules. The mediation rules formulated by the BAC provide the parties with a clearer, systemic procedure to settle disputes through mediation, and make mediation more detailed, specialized, and strengthen the sense of trust of the parties who tend to settle disputes through mediation. The new rules also allow an arbitration award to be rendered after a mediation settlement.

b. The BAC has also compiled a separate mediator roster. At present, the majority of Chinese arbitration commissions appoint mediators from their arbitration roster. The BAC, modeling several prominent organizations in the United States and Europe, developed a special mediator roster, including well-known foreign mediators, in order to give parties of international commercial arbitration disputes more opportunities to choose.

c. The BAC has established a strong reputation for its arbitrator training and assessment system; following this practice, it has been active in establishing a mediator training system. In March 2008, BAC cooperated with the Straus Institute for Dispute Resolution at Pepperdine University School of Law and held a mediation training courses for its mediators.⁴²

d. The BAC has reformed its remuneration system. Compensation of arbitrators has been consistently raised. With the establishment of the mediation rules, the BAC prepared methods by which to pay for mediation. The first is in accordance with standard practice in China, where the procedure is paid for up-front and based on the total amount of the case. The second is in accordance with international standards, and charges the mediator fee on an hourly rate chosen by the mediator and/or the parties.

⁴² The course was conducted by the Straus Institute for Dispute Resolution at Pepperdine University School of Law (Straus Institute), located in the USA. The program was a huge success.

e. Through relationships with international organizations and other arbitration commissions, the BAC has actively developed programs and seminars addressing current issues, with the goal of continuously improving mediation standards.

The BAC's reforms have helped to improve China's mediation system. Particularly, they have helped in developing an atmosphere of collaboration inline with international standards. Past Chinese dispute resolution models have been heavily based on evaluative concepts in which an authoritative figure, whether it be a village elder, the government, or an arbitrator has the final say and provides a solution to the parties. Globalization is beginning to change the way this concept is viewed. More and more business demand mutually satisfying dispute solution conducive to long-term cooperation. As such, from a practical point of view, the BAC has, within the current legal framework, referred to the International Commercial Arbitration Model Law of the United Nations International Trade Council and the arbitration legislation, rules, standards of some countries and arbitration institutions in the world, and carried out reforms to the arbitration fee collection system, constitution, arbitration rules and arbitration procedures.⁴³ Furthermore, in seeking out renowned mediators from the international community, and providing extensive training to Chinese mediators, the BAC has improved the overall quality of mediators in China, and brought a level of prestige to the field of mediation, which was not present previously.

V. CONCLUSION

China's arbitration has gone through a long and varied course of development. Through a process of continuous learning and innovation China's mediation system it has made tremendous achievements the last ten years since the enactment of Arbitration Law. Arbitration has shifted from administrative intervention to institutional arbitration via independent commissions. China's arbitration is gradually converging with international standards. One way this has been done is through the combination of arbitration and mediation. However, in today's climate of rapid economic development and globalization, China must make corresponding changes to adapt. Fortunately, in recent years, the mediation system is undergoing great development, and through a series of positive changes, it is likely that it will serve as a very effective method of dispute resolution, and play a more and more important role in China, and internationally as well.

⁴³ Wang Hongsong, *Review the past decade of BAC, <Theory and Practice of Commercial Arbitration>* by Yang Runshi., the People's Court Press, 4, 2006

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