

ADR in P.R. China

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This article is to provide a very brief introduction to the development of Alternative Dispute Resolution (ADR) in China. The principal focus of it is the definition and various forms of ADR and the organization and work of Conciliation Center of China Council for the Promotion of International Trade (CCPIT) / China Chamber of International Commerce (CCOIC), the most prominent promoter of ADR in China.

This article is composed of four parts. Part I provides a definition and origin of ADR; Part II describes the development of ADR in China, including the types of conciliation, which is the most important and fully developed form of ADR in China; part III provides a brief overview of conciliation procedures of the Conciliation Center of CCPIT; and finally a conclusion will be given in part IV.

PART I DEFINATION OF ADR

The birthplace of ADR, at least in its most recent form, is the United States of America. Although similar forms of dispute settlement have long existed in China, the study and acceptance of concept of ADR by the Chinese legal circle and business community has been of quite recent origin.

ADR can be seen as dispute resolution involving a structure process with third party intervention which does not lead to a legally binding outcome imposed on the parties.

Like many areas of social practice, definitions are not watertight or conclusive. In order to have a clear understanding of the definitions of ADR, we have to recognize the intent behind the development of ADR.

As the former Chief Justice of the United States of America, Warren Burger, once said:

“The obligation of our profession is... to serve as healers of human conflict. To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with minimum of stress on the participants. This is what justice all about.”

The problems with litigation in terms of the above standards are well recognized and need not be dwelt on in length. Apart from injunctive procedures or other means of rapid relief available in special cases, litigation usually involves parties in delay, costs, distraction from day to day management affairs, and loss of control of the conduct of the case once the case is ‘handed over to the lawyers’. In litigation, the costs of legal representation are very high; and, in many cases, even if litigation is successful, his costs are not recoverable from the unsuccessful party. There is a burden of a system of oral discovery, which can be protracted to intolerable lengths. There are overcrowded lists, leading to great delays in cases coming on for trial. Systems differ in the degree to which parties may face particular difficulty in one or more of these countries, but they tend to recur for litigants in most of jurisdictions.

What about arbitration? Designed initially as a process whereby ‘commercial men determined their own disputes, it boasted some considerable advantages. Parties can agree procedures which simplify the hearing of the case, and which allow for the use of an arbitrator who possesses specific knowledge in a given technical area. In this way arbitration can be held to be an alternative to litigation, that is to say, parties achieve a legally binding adjudication in accordance with law but without the full trappings of litigation, and without its publicity or its judges who may have no particular qualifications in the subject matter in dispute.

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However, arbitration cases may be equally procedurally complex and lengthy, and deliver a judgment equally (or more) uncertain than of a court, while the parties are faced with the additional disadvantage of paying for the private arbitrator when the public judge is free. There are also arguments about whether arbitrators have proved to be sufficiently robust in the face of lawyers trained in the adversarial and over-complex procedures of the courts. Whatever the merits of this debate and its historical twists and turns, it must be said that arbitration remains intrinsically susceptible to these problems because it carries the essential character of litigation---a procedure designed to find for or against the parties on the basis of arguments or evidence presented to the judge.

It is however important to strike a balance in any assessment of litigation and arbitration and to resist the temptation that litigation is never successful or in a client's best interests, or deny the fact that arbitration does still represent a viable 'alternative' to the full litigation procedure, principally in freeing the parties to determine their own procedure, elect their own judge, ensure the privacy of the proceedings, and avoid appeals to the courts in appropriate circumstances.

Notwithstanding that concern, it is now widely accepted that dispute resolution is a service industry and real consumer needs must be recognized. And the pressure from business community and dispute resolution industry itself has led to the creation of the theory of ADR and the expansion of its types and techniques.

PART II THE DEVELOPMENT OF ADR IN CHINA

HISTORICAL ORIGIN

Traditionally, it is generally agreed that there are four ways of resolving commercial disputes of international character in China, i.e. negotiation, conciliation (mediation), arbitration and litigation. Among the above, conciliation is the most widely used alternative way of dispute settlement to litigation arbitration.

The perceived failure of litigation and arbitration, first in the United States, and then in other jurisdictions, which has encouraged the rise of ADR, no doubt has also given rise to wide spread criticism on its length, complexity and cost in China. In addition, the development of ADR in China can be traced back to its unique cultural background. In China, there exists a deep-rooted historical preference for informal and non-adversarial means of dispute resolution which has evolved on the basis of cultural tradition which extends from ancient times. By such non-confrontational dispute resolution procedures, face could be reserved and commercial relationships maintained. This has served to support a firm commitment to conciliation in dispute resolution process in China and may help to explain the existence of various forms of conciliation in litigation and arbitration proceedings.

Accordingly, in China, many forms of ADR are combined with litigation and arbitration, what can be called hybrid processes, which ultimately lead to legally binding outcome under proper circumstances. Therefore, in Chinese legal practice, the definition of ADR shall be slightly different from that given above i.e. the outcome of ADR can lead to a legally binding outcome, in the hybrid processes, if agreed by both parties in dispute.

What has to be clarified here is that a new agreement or contract reached under an ADR process is of course legally binding to both parties, but the obligations cited in the contract cannot be directly enforceable in court. In the Chinese legal practice, the so-called "legally binding outcome" in this particular context shall be defined as a legal document or any obligation expressed in whatever form, which is enforceable by court upon one party's application.

In China, it is widely accepted that a third party intervention to a dispute, whatever the degree, is an indispensable factor to ADR. Therefore, negotiation without a third party's intervention is not regarded as a form of ADR. In the meantime, arbitration, notwithstanding its many advantages and similarities to other forms of ADR, because of its intrinsic nature of ultimately leading to a legally binding outcome imposed on the parties in the form of enforceable arbitral award, arbitration is not seen as a form of ADR by many people. Rather, Alternative Dispute Resolution

has been regarded, as the name itself suggests, as a dispute resolution process which is used as an alternative to litigation and arbitration.

In addition to the reasons stated above, a strong incentive of developing more efficient and effective alternative to litigation and arbitration in business community and legal commentators is the difficulty of enforcing court judgment and arbitral awards in China, particularly in the less-developed regions. It is notable, however, a great importance has been attached to the problem in the enforcement of court judgment and arbitral awards by both the Chinese legislature and executive and significant achievements can be identified in recent years.

TYPES OF ADR

According to the degree to which the parties have control over the process and the outcome, ADR, can be classified as unilateral action, negotiation, mediation, conciliation, early neutral evaluation, adjudication, summary jury, the mini-trial, etc., it must be noted that all legal systems have their own traditions and their own practices; and different legal systems may develop different ways of ADR. Among the above, summary jury does not exist in China because there is no jury system in the Western sense. Also in China, as stated above, negotiation without an intervention, whatever the degree, of a third party is not regarded as ADR. The most commonly seen and widely used forms of ADR are mediation and conciliation.

In China, ADR processes can be classified into hybrid processes i.e. ADR combined with court proceedings and arbitration proceedings and non-hybrid processes, i.e. ADR conducted by ADR institutions, therefore, it is helpful to review the types ADR in accordance with the organizations which deal with ADR. Although the concept of ADR has been accepted by the Chinese legal circle, up to now, the most widely used form of ADR is conciliation (mediation) while the use of other forms of it is of quite rare occurrence, therefore, I herewith describe the most typical forms of conciliation in China.

Given the looseness of alternative dispute resolution terminology, the terms mediation and conciliation are often used interchangeably. In Chinese, the meaning of English words conciliation and mediation are interchangeable and no corresponding Chinese words and distinction of their meaning have been given respectively to the two terms. Both of them are called “*Tiaojie*”. But it still seems that a clear distinction between the two terms has both theoretical and practical importance.

Mediation is an independent third-party technique in which a mediator assists parties to focus on their real interests and strengths as opposed to their emotions in an attempt to draw them together towards possible settlement. Crucial to the mediation process is that the independent third party ordinarily does not make recommendations as to what would be an appropriate settlement but is merely there to assist the parties to assist the parties to find and settle their own agreement.

The conciliator, in conciliation, on the other hand, is usually more interventionist than the mediator while still endeavors to bring disputing parties together and assist them to focus on the key issues.

No matter which one applies, party autonomy reigns supreme. Failing an agreement to conciliate or mediate, judges and arbitrators in hybrid proceedings, i.e. court proceedings and arbitration proceedings, or conciliators in non-hybrid conciliation proceedings cannot force the parties to conciliate. The parties may exercise this freedom in two ways. They may agree to participate conciliation proceedings; they may also retreat from the conciliation proceedings at any time so long as the outcome of conciliation has not yet taken binding legal effect.

1. Conciliation conducted during court proceedings

Conciliation conducted during court proceedings, as the name denotes, shall be regarded as a part of court proceedings (hereinafter referred to as “Court Conciliation”).

When trying a civil case, judges of a Chinese court usually endeavors to conciliate the case, under the principle of parties' autonomy, although it is by no means a mandatory procedure in most cases. In conciliation, the court is only to help the parties to settle the dispute but will not compel them to reach a settlement.

If a settlement is reached, the settlement agreement shall be signed by the judges(s) and the court clerk and stamped with the seal of the court to produce a so-called Conciliation Statement. Although the Conciliation Statement issued by the court is similar in its forms and contents to a court judgment, it does not become effect until it is served to and accepted by the parties with their signature. If any one party retracts his consent to the settlement before his acceptance by signature, the Conciliation Statement becomes invalid and the court proceedings will be resumed.

A Conciliation Statement issued by the court and having gained legal effect thereafter has the same legal effect as a court judgment but no appeal against it is allowed. That is chiefly because the Settlement is reached by the parties with their mutual consent. If one party refuses to perform the court Conciliation Statement, the other party has the right to apply to the court for compulsory enforcement.

2. Conciliation conducted by arbitration institutions

Conciliation conducted during arbitration proceedings is, as the name suggests, shall be deemed as a part of arbitral proceedings (hereinafter referred to as "Arbitration Conciliation").

A couple of provisions concerning conciliation may be found in the Arbitration Law of the People's Republic of China, which clearly reflect the widespread application of conciliation in arbitration proceedings.

The law provides that before giving an award, an arbitral tribunal may first attempt to conciliate; In case a settlement agreement is reached through conciliation, the arbitral tribunal shall issue a Conciliation Statement or arbitral award following the outcome of the settlement agreement; a Conciliation Statement issued therewith has the same legal force as that of an arbitral award.

Although China International Economic and Trade Arbitration commission (CIETAC) is primarily concerned with the promulgation of arbitration, CIETAC has long history in producing initiatives to combine conciliation with arbitration.

The Arbitration Rules of CIETAC stipulates that if both parties have a desire for conciliation or if one party so desires and the other party agrees to it when consulted by the arbitration tribunal, the arbitration tribunal may conciliate the case under its cognizance in the process of arbitration.

The arbitration tribunal may conduct conciliation in a manner it considers appropriate; the parties shall sign a settlement agreement in writing when a settlement is reached through conciliation conducted by the arbitration tribunal. The arbitration tribunal then shall make an arbitral award in accordance with the content of the settlement unless otherwise agreed upon by the parties.

A very important feature of arbitration conciliation is that should the conciliation fail, any statement, opinion, view or proposal which has been made, raised, put forward, acknowledged, accepted or rejected by either party or by the arbitration tribunal shall not be invoked as grounds for any claim, defense, and/or counterclaim in the subsequent arbitration proceedings, judicial proceedings or any other proceedings.

In general practice, arbitrators in China usually lay emphasis on conciliation of dispute during arbitration proceedings. The above provisions of the Arbitration Law and the practice reflect a spirit of "combination of arbitration with conciliation" which has long origin in the Chinese arbitration history.

3. Conciliation by conciliation institutions

If we regard the Court Conciliation and Arbitration Conciliation are hybrid conciliation proceedings subordinated to litigation and arbitration proceedings, conciliation by conciliation institutions (institutional conciliation) is a non-hybrid and rather independent process of conciliation.

The most prominent promoters of ADR is Conciliation Center of CCPIT and an example of CCPIT conciliation illustrates a helpful model for institutional conciliation in China, particularly in terms of its procedures.

In institutional conciliation, as compared with Court conciliation and Arbitration conciliation, parties are vested more freedom in the fact that they are allowed to choose conciliation rules and can exclude or vary any of the provisions thereof by their mutual consent, subject to not violating mandatory provisions of law.

The enforceability of the result of the conciliation is different from those of arbitral award or court judgment. Under the Chinese law, conciliation agreement reached by and between the parties themselves or under conciliation proceeding is unenforceable, that is to say, a court having jurisdiction over an enforcement of legal document shall not enforce the substantive obligations stipulated in the conciliation agreement, although the agreement can be used as evidence in any subsequent legal proceedings.

ADR ORGANIZATION

Conciliation Center of China Council for the Promotion of International Trade (CCPIT)/ China Chamber of International Commerce (CCOIC) (hereinafter referred to as the Conciliation Center) was established in 1987, then called Beijing Conciliation Center. From 1992, it has established 40 sub-centers mainly within the sub-councils of CCPIT in various provinces, municipalities and major cities. The conciliation centers scattered throughout China has formed the so-called conciliation network. The network chiefly deals with international (foreign-related) cases, using a set of uniform conciliation rules, i.e. the CCPIT Conciliation Rules. The mission of the Conciliation Center and its sub-centers is to provide a formal conciliation framework which accords with international practices and standards, thereby improving trading and investment environment of China.

The conciliation network that covers the entire Chinese mainland has, down till 2001, accepted more than 3000 cases. Parties involved in the conciliation spread over more than 30 countries and regions. The collective and strenuous efforts all these years have resulted in a high degree of professionalism and the resolution of 80% of the cases the conciliation network deal with.

With the high quality conciliation service by professional conciliators and support teams and case management service, the Center has kept as the major international ADR center in China for years.

PART III CONCILIATION PROCEDURES OF CCPIT CONCILIATION

1. Scope of Conciliation

The scope of disputes which can be conciliated under the CCPIT conciliation includes disputes of contractual or non-contractual nature relating to trade, finance, security, investment, intellectual property, technology transfer, real estate, construction contract, transportation, insurance and other commercial and maritime business.

The Conciliation Center does not accept cases over the following disputes:

1. Marital, adoption, guardianship, support and succession disputes;
2. Administrative disputes required to be handled by administrative authorities by law;
3. Labor disputes and disputes within the agricultural collective economic organizations over contracted management in agriculture.

2 Party's autonomy

The parties may agree to exclude or vary any of these Rules at any time; where any of these exclusions or variations of these Rules is in conflict with a provision of law from which the parties cannot derogate, the provision prevails.

The Conciliation Centers of CCPIT/CCOIC accept cases in accordance with a Conciliation Agreement between the parties concluded either before or after the occurrence of the dispute, in

which it is provided that the dispute is to be referred to any of the Conciliation Centers to conciliate. In the absence of such an agreement, the Conciliation Centers could accept a case in accordance with an application of conciliation from one party with the consent of the other party to mediate.

Conciliation agreement refers to a mediation clause inserted in a contract or in any other forms in which parties agree to refer the dispute related to contract to mediation.

If the Respondent fails to confirm his agreement to mediation within the time limit (30 days) set forth in these Rules, it shall be deemed that he has rejected conciliation. If the Respondent confirms his agreement to conciliation after the expiry of the 30-day time limit, the Conciliation Center shall at its discretion to decide whether to accept the confirmation or not.

3. The Appointment of Conciliator

Each Conciliation Center keeps its own list of conciliators. The Conciliation Centers maintain a Panel of Conciliators respectively for the parties to choose for their specific cases. The Panel of Conciliators of the Center includes the respected conciliators, arbitrators, judges, facilitators, and neutral advisors.

The Conciliation Center selects its Panel based on their experience, reputation and proven ability to adjudicate cases and settle disputes. Our panel has experience in all case types with specialized knowledge and skill in resolving commercial disputes such as commercial contracts, investment, security, intellectual property, technology transfer, real estate, construction, communication, insurance, etc.

Conciliators shall be neutral and impartial throughout the process of conciliation. No person shall serve as a conciliator in any dispute, in which that person has any financial or personal interest, except by written consent of parties. Parties can waive any conflict of interest. However, if the conflict of interest casts serious doubt on the integrity of the process, the conciliator should withdraw notwithstanding receipt of a full waiver.

Conciliators must disclose any circumstances likely to create a presumption of bias. Such circumstances include but are not limited to:

1. All business or professional relationships the conciliator and/or the conciliator's firm have had with their parties or their law firms within the past five years;
2. Any financial interest the conciliator has in any party;
3. Any significant social, business or professional relationship the conciliator has had with an officer or employee of a party or with an individual representing a party;

In normal practice, a case shall be jointly conciliated by two conciliators respectively appointed by the parties. Unless the parties agree otherwise, the parties shall select conciliator from the Panel of Conciliators. The Conciliation Center will appoint conciliator

- a. If no conciliator is selected by any party, or
- b. Any party entrusts the Center to appoint on its behalf.

The parties may also jointly appoint a sole conciliator to conciliate their case.

Once a conciliator has been selected or assigned from the Panel of Conciliators as stated above, the parties will be provided with information relating to the conciliator's employment, education, as well as information on the conciliator's experience, training, credentials as a conciliator.

4. Ways of Conciliation

The conciliators begin the handling of the case by giving a precise understanding of the nature and complexity of the dispute and the issues and personalities involved. They will then design a process that meets the needs of all parties and fosters a fast dispute resolution.

Conciliation shall be conducted either in the place where the Conciliation Center is located, or in any other place based on agreement between the parties involved and depending on whether the conciliation can be administered in that location. In the latter case, the expenses incurred thereof

shall be borne by the parties.

The conciliator does not have the authority to impose a settlement on the parties but attempts to assist parties in an independent and impartial manner to reach a satisfactory resolution of their dispute. The conciliator may facilitate settlement in any manner that the conciliator believes appropriate. The afore-mentioned manner includes but is not limited to:

1. Following the selection of a conciliator, the conciliator, all parties and their representatives will meet in person or by conference call for all mediation sessions, as determined by the conciliator or by mutual agreement of the parties;
2. The conciliator may request each party to submit to him a further written statement about the case;
3. The conciliator may meet with and communicate separately with each party or their representatives but shall notify all other parties of any such separate meetings or other communication;
4. The conciliator is authorized to conduct joint and separate meeting with the parties and to make oral and written recommendations for settlement;
5. The conciliator is permitted to obtain expert advice concerning technical aspects of disputes with parties' agreement;
6. At his own discretion or upon parties' request, conciliator will provide an evaluation of the parties' case and of the likely resolution of the dispute if not settled;
7. The conciliator may submit to the parties a final settlement proposal.

The conciliator may employ experts of relevant professionals to assist him in the mediation on the basis of the agreement of the parties. The expenses required therefore shall be borne by the parties.

If the parties reach an amicable settlement agreement through conciliation, the parties shall affix their signatures on the agreement. Then, the conciliator(s) shall make a written Conciliation Statement in accordance with the contents of the settlement agreement. The Conciliation Statement shall be signed by the conciliator(s) and affixed with the seal (stamp) of the Conciliation Center.

PART IV CONCLUSION

Nowadays more and more individuals and companies are realizing the benefits of ADR. As one of the major ways of ADR, conciliation offers parties an excellent chance to settle their claims amicably on a business basis and to avoid much of the cost, delay, and adversarial practice associated with arbitration or court litigation. Commonly cited advantages of mediation include:

1. It reduces legal fees and other litigation expenses and facilitates prompt resolution, saving time and energy of executives;
2. It permits parties to fashion their own solutions, including creative, business-driven "win-win" solutions not available in court; circumventing common barriers to negotiation;
3. It identifies and prioritize interests (long and short term economic interests, political concerns, social issues, personal interests, etc., as well as legal interests), preserving business and personal relationships;
4. It retains the option to arbitrate or litigate if the parties do not reach an agreement, and sometimes tailors of dispute resolution to the particular circumstances with the assistance of the conciliator as "process architect"

What is worthy emphasizing here is that, even if a dispute is not settled during mediation, the process usually lays the groundwork for the later resolution of the issues. Even where disputes

proceed to arbitration, mediation can set the stage for that process by narrowing and defining issues, facilitating information exchange, and enabling the parties to agree on specific procedures.

The fact that conciliation is not only a preferred method of dispute resolution in China for historical and cultural reasons, but it has proved to be an effective means of resolving commercial disputes, particularly those of international character, that attention of businessmen and legal commentators is merited to identify and expand the techniques which may serve to build up a business community having higher degree of trust and more efficient and effective means of realizing justice.