

Mediation As ADR In China

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Mediation is an important choice for alternative dispute resolution in China; it comes in three basic forms:

Varieties of dispute-resolving mechanism exist in China. When a foreigner dealing with a Chinese entity has a complaint, he may have options to make to solve the problem, e.g., amicable negotiation of a settlement between the two disputing parties, conciliation by a commonly chosen neutral third party, mediation by a permanent body, administrative adjudication, arbitration or litigation. To understand the meanings, the advantages and disadvantages of different ways is of extreme importance for those whose legitimate rights and interests are violated to get favorable and time- and cost-saving remedies.

Generally, the enforceability of the settlements by different dispute resolution mechanisms is in direct proportion to the complexity and the cost of each means adopted, i.e., the simpler the proceedings — the lower the cost, the less enforceable the resolution.

However, litigation may produce the strongest enforceable outcome, but it is not the most suitable way to end all disputes. On the contrary, quite a few disputes are finished out of friendly negotiation by the parties themselves.

In my view, to choose the way to settle a commercial dispute is something like seeing a doctor, in which a prescription is given on the doctor's diagnosis. The decision of taking whatever dispute-resolving method should be made in accordance with the nature of the trouble and the prevailing feelings of the parties.

Nowadays, alternative dispute resolution (ADR) is catching in-

creasing worldwide attention. In China, more and more people in the business community prefer ADR. Mediation is becoming one of the most significant dispute-resolving mechanisms.

In a narrow sense, mediation is referred only to those being independent of arbitration or court proceedings. However, the mediation mechanisms in China may be different from those in other countries. From the Chinese perspective, mediation may be conducted by different bodies, e.g., by the so-called People's Mediation Commissions, by administrative authorities, by a permanent conciliation bodies with prescribed procedures, by an ad hoc team formed on a neutral third party without fixed proceedings, by external tribunals or by courts, etc.

According to prevailing Chinese laws, mediators by some bodies shall not be permitted when being used for solving a dispute with foreign interests. Therefore, mediation in China a foreigner may choose to solve a problem with a Chinese entity may take three basic forms.

MEDIATION IN LITIGATION

Courts in China never have a case submitted for mediation only. Nevertheless, if agreeable to the parties, mediation can be conducted by a court in the course of legal proceedings. In practice, judges always try to talk the parties in dispute into accepting a settlement by mediation on a voluntary basis. Thus, a prominent characteristic of Chinese litigation procedures is the combination of trial with mediation. Court conciliation shall be conducted by a single judge or a bench of judges, and may be initiated in the first or second instance, or even in the so-called trial

supervision proceedings. It usually happens at a stage either of pre-hearing or after the combination of court debate. Mediation in litigation is generally characterized by:

1. The judge plays the role of mediator.

2. Mediation is a prescribed proceeding in the Civil Procedure Law and may be initiated by either party's petition, or more frequently by the trial court ex officio.

3. The proceeding shall begin only when the parties agree to take it, and the mediation shall not conciliate against a party's will. The mediator acts as an instructor to get the disputing parties acknowledge all of what are regulated in the relevant laws, and tries to persuade the faulty party to realize his wrong doing.

4. Mediation in litigation can be initiated only after the dispute being admitted by court, and may be converted to throughout the entire court proceedings.

5. The proceeding is usually open unless the parties request otherwise.

6. According to law, entities, other economic organizations or individuals are obliged to accept court mediation if invited.

7. Settlement out of court conciliation is enforceable immediately being served to the parties, and shall not be appealed to the second-instance court. If any party thinks the settlement is wrongly reached, he may lodge a complaint under the trial supervision proceeding.

8. Mediation in litigation is exclusive. Any party shall not bring the case to either an arbitral tribunal or a court again based on the same facts or reasoning.

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According to PRC Civil Procedure Law, if a party proves that an arbitrable settlement has concluded against the principle of voluntariness, or the settlement agreement contains something violating laws, he has a right to appeal to the court that made the settlement for the period of the dispute in accordance with the trial supervision proceeding.

Obviously, mediation in litigation is of a judicial nature, and factually comprises an inseparable part of legal procedure. Since it excludes the possibility of a party going to the appellate court, its value is, in some extent, less than the finality of a court judgment. The inclusion of the appellate proceeding gives quality and more stable settlement of the settlement.

MED-ARB

The term may be borrowed with the emphasis on the role of mediation in arbitration proceedings. Based on China's unique economic structure, arbitration takes a tiered form. Domestic contractual disputes are to be arbitrated by the so-called Economic Contract Arbitration Commission under the supervision of PRC State Administration of Commerce and Industry and its nationwide local offices, which adopt a two-instance practice, i.e. the award made by a lower commission may be reviewed and changed by a commission at a higher level. Most of the contractual disputes by economic nature between two Chinese entities used to be submitted to the Commission. Nevertheless, with establishment of the claimed socialist market economy in China, more and more domestic entities tend to prefer to bring the disputes to court to appealing to the domestic arbitration commissions.

When a dispute involves a foreign interest and the parties would like to opt to arbitration, the case shall be under the jurisdiction of the so-called China International Economic and Trade Arbitration Commission or China Maritime Arbitration Commission. They are empowered by relevant administrative decrees issued by the State Council

to arbitrate disputes with foreign involvements.

As in most countries, jurisdiction is to be based on a written arbitration agreement by the parties either before or after the dispute. Awards made by the Commissions are final and binding. Neither party shall not be allowed to lodge an appeal to court or request any administrative body to review the decisions by the arbitral tribunals.

A written arbitration agreement or clause in a contract shall include the jurisdiction by court over the dispute with a foreign factor. The only way a court may supervise the arbitration is when the execution of the award is refused by the losing party as the cause that certain procedural regulation was violated in the course of arbitration. If the claim is proved true, the court is entitled to make a ruling not to enforce the award. Reasons for court to make a non-enforcement ruling generally are:

1. No written arbitration agreement or clause was concluded between the parties in dispute.
2. The occurrence of the award does not involve any notice of being asked to choose an arbitrator or being informed of the beginning of the proceedings, or does not have a chance to make any statement to the tribunal due to no reason of his responsibility.
3. The formation of arbitral tribunal or the procedure taken violates the arbitration rules.
4. The disputed matter is not arbitrable or beyond the scope of arbitration agreement or clause.

According to the rules of the two Arbitration Commissions, the tribunals may conciliate disputes submitted to them. In case a settlement is reached through tribunal mediation, an award shall be made in accordance with what have been agreed in the settlement. The mediation settlement in the form of an award may be applied for an enforcement.

In practice, after a case is accepted by the arbitral body and before a tribunal being organized, the Commissions usually ask the parties whether to agree to be mediated. If accepted by both parties, the Commissions will appoint an arbi-

trary general or one of his deputies to carry on the proceeding. If successful, the case is to be closed by an award, and no tribunal be formed. If failing, a tribunal is organized to arbitrate the case.

Even after the formation of a tribunal, mediation proceeding may yet be initiated if both parties say yes. Basically, the tribunal may choose its way to perform conciliation either holding direct discussions with the two in dispute or having separate talks with each party. Further, it may leave the disputing parties to negotiate a way out, then tell the tribunal their opinions. In the course of mediation, if either party quits the proceeding, or the tribunal deems it impossible to reach a settlement after lengthy discussions, the mediator may have the option to end the proceeding and begin to arbitrate the case.

Since arbitration is substantively different from litigation, Med-Arb differs mediation from litigation by nature. Major characteristics of Med-Arb generally are:

1. It is conducted based upon a valid written arbitration agreement or clause.
2. It is carried out by a permanent or ad hoc arbitration body in accordance with certain rules.
3. It can only be initiated on the agreement of both parties; compulsory conciliation is invalid.
4. Both parties may ask for mediation either before or after the formation of a tribunal.
5. Mediation of the part is not open unless the parties agree otherwise.
6. The tribunal will make an award based on the settlement concluded by the parties. If either party refuses to execute the award, the other party may go to court for an enforcement ruling.
7. Once the Med-Arb proceeding is over, neither party may submit the same dispute to either an arbitral body or court.
8. If the court makes a non-enforcement ruling, the parties may either go back for re-mediation, if both agree to, or lodge a suit for a court judgment, etc.

To some extent, Med-Arb is still of a nature of arbitration, but shows greater respect to the will, rights

and autonomy of the parties in dispute. Since the settlement is in a form of an award, it offers reliability of getting it enforced. China's accession to the 1928 New York Convention guarantees the recognition and enforcement in more than 80 countries and territories of an award made out of Med-Arb by a Chinese arbitrator body.

INDEPENDENT MEDIATION

Mediation independent of arbitration or litigation is a kind of informal and private dispute-resolving mechanism, by which the parties submit their dispute to a permanent body of an impartial third party, expecting that they, with the involvement of the mediator, may reach a settlement without any damaging harm to the existence of the business relationship between them. Power of the chosen mediation originates from the disputing parties' agreement. He may suggest ways to get the dispute solved, but is not entitled to impose any compulsory requirement upon the parties. His authority is not based on any law, but on the parties' recognition of his fairness, equality and justice.

In practice, independent consultation of a dispute with foreign factor is often carried out by a permanent organization called Beijing Conciliation Centre, which came into being in 1987 and is setting up branches in more than a dozen provincial cities. The organization and its local offices are affiliated with China Council for the Promotion of International Trade (CCPIT) and its sub-centers throughout China.

A lawyer wanting to be mediator first may contact CCPIT and its local counsel. Generally, mediation is conducted on a written agreement by the parties. However, if either party applies with the Centre or its local offices without prior agreement with the other party, the body may begin proceedings by sending a notice to the other party requesting his opinions.

If the party consents, proceedings will continue. According to the prescribed Rules of the Centre, the parties may mutually choose a sole

mediator, or each appoints its chosen person from a provided Panel of Mediators. At the initial stage, consultation goes on by correspondence. With the progress of the proceeding and in case of necessity, the mediator may bring the parties together to have a face-to-face talk. Foreign or Chinese lawyers may represent their claims by proxy.

If both parties agree to a settlement, a written agreement is to be worked out and signed by the parties. Up to now, settlement agreement is not enforceable per se, and may not be applied for court enforcement in current legal frame of the country.

If either party goes back on its promise, the settlement is deemed invalid. If mediation fails, the parties still have the right to subject the dispute to arbitration or court trial. Any opinion, suggestion, acceptance or promise, etc. by either party or mediator shall not be cited in the possible subsequent arbitral or litigious proceedings.

Being quite dissimilar to the above-described two, independent mediation is mainly featured in:

1. The parties' willingness plays an essential role in the whole course of mediation. If either party walks out of the proceedings at its option, conciliation ends immediately.

2. Mediator should try his best to find out as much as possible details of the argument, to make a correct judgment on what is correct and what is wrong based on the prevailing legal stipulation and his personal experience, and suggests a way out of the conflict while trying to talk the parties into accepting the suggestions.

3. Parties may be against the mediator's opinions or recommendations, and the mediator should take the objection into serious consideration.

4. The proceedings are very simple and flexible, even the prescribed Rules may be changed by the parties' unanimous agreement, while being time- and cost-saving and causing no harm to the parties' cooperation if a settlement is being reached.

5. The proceedings do not exclude any other procedures, be it by

administrative authorities, arbitration bodies or courts, irrespective of success or failure, with or without a settlement.

6. Settlement agreement is not enforceable or being applied for enforcement.

In essence, independent mediation is an indirect talk between parties in dispute, i.e. sometimes, antagonistic emotion between the two parties is too strong to make them directly negotiate a solution in an amicable way, the involvement of a neutral third party might ease sharp feelings into mutual understanding. The mediator does not act as an umpire, but plays a role of catalyst or bridge. To my understanding, the most important skill of an experienced mediator is not to make a judgment on who is right and who is wrong, but to lead the way to bridge the gap between the parties and to possess the talent to persuade the parties to make mutual concessions and accept his suggestion for a settlement.

As may be seen, independent mediation has something in common with the above-mentioned two kinds of conciliation, e.g. the autonomy of the parties' will weakens the proceedings and must be imposed by the mediator. The obvious similarities among the three is the different legal status of each means, which suggests differing enforceability. Due to the lack of enforceability of settlement by independent mediator, people tend to think the means an unreliable dispute-resolving mechanism. They are more and more reluctant to resort to independent mediation. To keep the business developing, it seems to be necessary to strengthen the enforceability of the settlement.

CONTRACTUAL NATURE OF MEDIATION SETTLEMENT

In some countries, settlement through mediation is taken as sort of binding contract, which obligates the parties, especially the obligator party, to perform what have been laid down on paper. If the liable party refuses to execute his duties under the agreement, the other party may go to court petitioning for a favorable enforceable court ruling.

The practice has not yet been accepted in China. If a party repents of his prior promised commitment to the settlement out of independent motivation and is reluctant to honor what has been agreed in the document, the agreement is turned into no more than a sheet of useless paper.

In my personal view, however, settlement agreement is concluded by and between the disputing parties under highly autonomous circumstances, and embodies the parties' willingness to set up certain relationships with respect to rights and obligations enjoyed and undertaken by each party. The relationship formed in this way is more or less similar to the relationship concluded by two contracting parties. The involvement of the mediator is to facilitate reaching the relationship. The mediator acts not beyond but between the parties, being somewhat of a middleman in the conclusion of the agreed relationship. The theory of mediator settlement being of a contractual nature is based on the fact that the settlement contains basic elements of a contract.

1. An economic contract forms a relationship between two parties with respect to their mutual rights and obligations in future business activities for certain economic purpose. It is concluded by the parties through dialogue in full autonomy. Neither party shall force the other to accept against the latter's will any term or conditions to be written down in the contract.

Likewise, a mediation settlement is reached and signed by the disputing parties through negotiation facilitated by a mediator whose function is to coordinate the talks instead of making only a decision on who is right and who is wrong. The parties are free to raise or accept relevant terms and conditions. Each party may ask for its rights or be asked for its obligations. Once everything is settled and put down in a paper and signed by the parties, it should mean the being of a new relationship between the two with respect to their mutual rights and obligations based on the original contract in dispute. Therefore, the setting, into being, of a

mediation settlement is also a course by legal meanings, in which certain relationship with respect to some rights and obligations is formed.

2. An economic contract may come out of a multi or bilateral legal act, and is the embodiment of the agreement of the willingness of the parties. Mediation settlement is also an outcome of a multi or bilateral legal act, and can never be reached without the agreed willingness of the parties. A contract may stipulate multi- or bilateral or unilateral rights or obligations, so may the mediation settlement. Any forced terms or obligation imposed, including unilateral or a third party's will shall never be put down in a valid contract, nor in a settlement.

3. Contract is to be reached through negotiation by parties of equal legal status. One party may be in more favorable bargaining position, never could he be in a legally superior position in commercial negotiation. Otherwise, it forms sort of administrative relationship rather than civil relations. The bargaining position of each mediated party varies with different cases, but they are legally equal in negotiating a settlement. If the upper limit of the concession one party would like to give does not at least overlap the lower limit of the offer the other is willing to take, mediation settlement can never be formed.

Equality of legal status, autonomy of wills and agreement of offer and acceptance are the fundamental elements for the being of a settlement.

4. No contract is valid if anything inside violates prevailing laws. Also, mediation settlement shall be null and void if containing any law-violating term or being obviously unfair to either party.

Deducing a point from above analysis, mediation settlement should be taken as a kind of economic contract. Thus its validity should be guaranteed by law. In case either party fails to execute its obligation under the agreement, the other party should be accessible to legal action, as per a case of contractual breach. The contractual nature of a settlement could be embodied

in two basic ways:

1. The settlement agreement is supplemented to the original contract in dispute, and being inseparable from and with same validity as that of the latter. The reason is that, the contractual relationship with respect to mutual rights and obligations under the original contract and the corresponding status quo between the disputing parties as its outcome of the resolved performance of the concluded contract underlie the formation of the new relationship with respect to adjusted rights and obligations set forth in the settlement. Hence, what have been laid down in the document regarded as a supplementary paper is a valid contract should be recognized by law to have the same validity as that in the one to which the said document is affiliated.

2. The mediation agreement is accepted as a new contract with the original contract as its supplement. Even after that act, the original contract was executed, but not in a satisfactory extent. Either party's discontent of the execution produces the dispute between the parties. To rectify the deviation in the course of honoring a contract, and to seek a remedy to cure the existing relationship between the parties, the parties could negotiate a way out by concluding a new document stipulating mutual rights or obligations in conformity with situation after the dispute arises. Such a document should have the same value as a new contract. When this "new contract" is not honored, the abiding party should be entitled to lodge a lawsuit for breach of contract. If the parties would like to put in the settlement an arbitral clause, an arbitral tribunal may have jurisdiction over the dispute.

Irrespective of the different forms, the stipulations in the settlement agreement should be recognized or sustained by either arbitral body or court as given facts.

The major differences among an arbitration award, court judgment and mediation settlement supposed to be a contract is that, a valid judgment can be directly applied for enforcement and its review

shall be conducted again before an execution ruling is made. An award can be applied for enforcement, but the court has the right to refuse an execution if it finds that the making of the award violates the arbitration rules, and if a settlement is refused to be honored and a party brings the new dispute to a court, the court shall not make a direct ruling on the enforcement of the breached settlement, but to conduct a trial according to both the substantive and procedure laws, then make a judgment based on the fact finding, not only including the facts

relating to the dispute under the original contract but those relating to the dispute under the performance of the mediator's settlement. The judgment may be appealed, and if the losing party refused to execute the judgment in force, the winning party may apply for enforcement.

CONCLUSION

Mediation is one of the important choices of ADR in China. Mediation resorted to solve a dispute with foreign interests is of three basic

forms, i.e. mediation in litigation, Med-Arb, and independent mediation. The three proceedings have something in common while differing in many aspects. The major difference among the three is the nature of the operating mechanism and the enforceability of the outcome by each dispute resolution mechanism. Mediator's settlement agreement per se is an independent mediation is not enforceable. However, if it is of contractual nature, and if breached, should be accepted by court as given facts in the possible trial for its enforcement.