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Oriental Experience Of Combining Arbitration With Conciliation: New Development Of Cietac And Chinese Judicial Practice

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ORIENTAL EXPERIENCE OF COMBINING
ARBITRATION WITH CONCILIATION: NEW
DEVELOPMENT OF CIETAC AND CHINESE
JUDICIAL PRACTICE

*Christine Kang**

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I. INTRODUCTION

The “combination of arbitration with conciliation”¹ is a hybrid dispute settlement mechanism that permits the parties to make use of conciliation in the process of arbitration,² which is well known as the “oriental experience” or “Chinese experience.”³ It is widely used in arbitration proceedings by almost all of the 235 Chinese arbitral institutions, including the China International Economic and Trade Arbitration Commission (“CIETAC”),⁴ the Beijing Arbitration Commission (“BAC”),⁵ the Shanghai International Arbitration Center (“SHIAC”),⁶ and the Shenzhen Court of International Arbitration (“SCIA”).⁷ It is also explicitly supported by the Arbitration Law of the People’s Republic of China (“PRC Arbitration Law”), which allows the arbitral tribunal to proactively conciliate the dispute during arbitration proceedings and even requires the arbitral tribunal to do so if the parties voluntarily apply for conciliation.⁸ If the parties reach

1. “Conciliation” is used interchangeably with “mediation” but more popular term than the latter in China. Although they may differ with each other in different jurisdictions, for the purpose of this article, conciliation means a process whereby the parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons. Usually, the third person or persons lack(s) the authority to impose a solution upon the parties to the dispute. However, it should be noted that, in arbitral proceedings combined with conciliation, for example, under the CIETAC Arbitration Rules, arbitrators are allowed to directly conciliate the dispute and have the authority to render an award based on the merits of case in case of a failure of conciliation.

2. Wang Sheng Chang, *CIETAC’s Perspective on Arbitration and Conciliation Concerning China*, in ICCA CONGRESS SERIES NO. 12: NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 27, 40 (Albert Jan van den Berg ed., 2005).

3. Song Lianbin, *From Combining Arbitration with Mediation to Professional Mediation*, 11 J. KUNMING U. SCI. & TECH. 95 (2009).

4. See China International Economic and Trade Arbitration Commission Arbitration Rules (Nov. 4, 2014) art. 47, available at <http://www.cietac.org/Uploads/201703/58c0fe0c7337a.pdf> [hereinafter CIETAC Arbitration Rules].

5. See Beijing Arbitration Commission Arbitration Rules (July 9, 2014) art. 42, available at http://www.bjac.org.cn/english/page/zc/guize_en.html.

6. See Shanghai International Economic and Trade Arbitration Commission Arbitration Rules (Jan. 1, 2015) art. 41, available at http://www.shiac.org/upload/day_141230/SHIAC_ARBITRATION_RULES_2015_141222.pdf.

7. See Shenzhen Court of International Arbitration Arbitration Rules (Dec. 1, 2016) arts. 45-46, available at <http://www.sccietac.org/download/files/document/20161031184962.pdf> [hereinafter SCIA Arbitration Rules].

8. 中华人民共和国仲裁法 [Arbitration Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, effective Sept. 1, 1995) art. 51(1) [hereinafter China Arbitration Law] (“Before giving an award, an arbitral tribunal may first attempt to conciliate. If the parties apply for conciliation voluntarily, the arbitral tribunal shall conciliate.”).

settlement during conciliation in the arbitration proceedings, the arbitral tribunal shall issue a conciliation statement⁹ recording the claims and the terms of the settlement between the parties, which will be signed by the arbitrators, sealed by the arbitration institution, and served on the parties.¹⁰ Specifically, the PRC Arbitration Law vests in the conciliation statement with the “same legal force as that of an arbitral award” rendered based on the merits of case.¹¹

Indeed, the combination of arbitration with conciliation is vibrant and widely applied in most arbitral proceedings in China. According to the statistics published by the Legislative Affairs Office of the PRC State Council, the 235 Chinese arbitral institutions nationwide concluded 74,200 cases through conciliation and settlement in 2014, accounting for sixty-five percent of all of their concluded cases.¹² Besides those cases finally concluded through conciliation and settlement, it is typical in practice for the arbitral tribunal, when having a clearer picture about what has taken place between parties at the end of the oral hearing, to invite the parties to consider whether they would like the arbitral tribunal to conciliate their disputes.¹³ Thus, it is fair to say that conciliation is far more frequently used in Chinese arbitral proceedings than is shown in the above formal statistics published by the Chinese authority.

Rome was not built in a day. To figure out the reasons why the combination of arbitration with conciliation is so popular in China, one should look at the historical background of the Chinese arbitration practice. The combination of arbitration with conciliation has been deeply rooted in the Chinese arbitration practice for over half a century. Before the PRC Arbitration Law came into effect in

9. *Id.* art. 51(2) (“When a settlement agreement is reached by conciliation, the arbitral tribunal shall prepare the conciliation statement or the award on the basis of the results of the settlement agreement. A conciliation statement shall have the same legal force as that of an award.”).

10. *Id.* art. 52(1) (“A conciliation statement shall set forth the arbitration claims and the results of the agreement between the parties. The conciliation statement shall be signed by the arbitrators, sealed by the arbitration commission, and served on both parties.”).

11. *Id.* art. 51(2) (“A conciliation statement shall have the same legal effect as that of an award.”).

12. Zhang Wei, *All Docketed Arbitration Cases Last Year More Than 110,000*, *LEGAL DAILY* (July 13, 2015) <http://epaper.legaldaily.com.cn/fzrb/content/20150613/Article06004GN.htm>.

13. See Lu Song, *National Report for China (2014)*, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* 46 (Jan Paulsson & Lise Bosman eds., 1984, Supp. 2014).

1994, CIETAC and China Maritime Arbitration Commission (“CMAC”) were the only two arbitration institutions established in the 1950s to handle international or foreign-related arbitration cases.¹⁴ According to Professor Tang Houzhi,¹⁵ CIETAC conducted arbitration in the mediation-arbitration (“med-arb”) model at the very beginning, as it tried every effort to conciliate the dispute before rendering an award.¹⁶ The first CIETAC Arbitration Rules, promulgated in 1988, set up a rule explicitly vesting in the arbitral tribunal with the authority to conciliate disputes.¹⁷ In 1994, the PRC Arbitration Law accepted this mechanism in its text honoring the successful CIETAC experience of combining arbitration with conciliation. Subsequently, many newly established Chinese arbitral institutions also adopted a similar mechanism in their arbitration rules.¹⁸ Therefore, the combination of arbitration with conciliation has developed for more than half a century in China and has been strongly promoted by both Chinese law and the leading Chinese arbitration institutions. Given the leading role of CIETAC in creating and promoting the combination of arbitration with conciliation, the oriental experience is considered the main characteristic of the CIETAC arbitration practice.¹⁹ This Article will take the CIETAC practice of the combination of arbitration with conciliation as an example to discuss the relevant issues of this mechanism in China.

Among all kinds of factors contributing to the success and popularity of conciliation in Chinese dispute resolution practice both in litigation and in arbitration, the Confucianism that advocates harmony and opposes litigation is widely regarded as the philosophical basis of conciliation in China.²⁰ The prominent character of Chinese society given that the basic unit of traditional Chinese society was not based on individuals but rather every small

14. *See supra* note 2, at 26.

15. Professor Tang Houzhi was then the Vice Chairman of CIETAC and now the honorary Vice-Chairman of CIETAC, and has worked with CIETAC since the late 1950s.

16. Song, *supra* note 3, at 95.

17. *See* CIETAC Arbitration Rules, *supra* note 4, art. 37.

18. Song, *supra* note 3, at 95.

19. Song Lianbin, *New Developments of Arbitration System of China after Implementation of Arbitration Law*, 3 *BEIJING ARB.* 34, n. 5 (2009).

20. Gabrielle Kaufmann-Kohler & Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China*, 25 *J. INT’L. ARB.* 479, 480-81 (2008).

community²¹ causes people to gravitate towards conciliation rather than adversarial proceedings.²² Besides the long-standing and deep-rooted culture and social factors, China's government intensively promotes conciliation and other alternative dispute resolution mechanisms. The conciliation is regarded as an important part of harmonious society, a political goal of the Chinese Central Government of the day, and has been strongly promoted for decades.²³ Following this guideline, the Chinese Supreme People's Court and the Ministry of Justice officially required the Chinese courts to promote and enhance conciliation in judiciary practice.²⁴ Since recently, the conciliation was further elevated to an unprecedented priority in the Chinese judiciary practice²⁵ as one of the alternative dispute resolution methods for the purpose of achieving the rule of law in China.²⁶

In Part II of this Article, we will analyze the CIETAC Arbitration Rules and practice as a typical case of the combination of arbitration with conciliation in China. We will then compare conciliation under the CIETAC Arbitration Rules with the rules of other major arbitral institutions in Part III. Part IV will focus on the legal effects and the enforcement of the result of conciliation both in China and abroad. Part V of this Article will address concerns about the combination of arbitration with conciliation and the relevant regime safeguard adopted by arbitral institutions.

21. See FEI XIAOTONG, *FROM THE SOIL: THE FOUNDATIONS OF CHINESE SOCIETY* (1992).

22. Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1223 (1966).

23. See *Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning the Construction of a Socialism Harmonious Society* (中共中央关于构建社会主义和谐社会若干重大问题的决定), *Zhong Fa* [2006] No.19.

24. See *Opinions of the Supreme People's Court and the Ministry of Justice on Further Strengthening the Work of People's Mediation under New Circumstances* (《最高人民法院、司法部关于进一步加强新形势下人民调解工作的意见》), *Si Fa* [2007] No.10.

25. See *Notice of the Supreme People's Court on Issuing Several Opinions on Further Implementing the Work Principle of "Giving Priority to Mediation and Combining Mediation with Judgment"* (最高人民法院印发《关于进一步贯彻"调解优先、调判结合"工作原则的若干意见》的通知), *Fa Fa* [2010] No.16.

26. See *Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law* (《中共中央关于全面推进依法治国若干重大问题的决定》).

II. CIETAC PRACTICE OF MED-ARB AND ITS NEW DEVELOPMENT

A. History of the CIETAC Arbitration Rules on Med-Arb Practice

In as early as 1988, CIETAC adopted rules of settlement and conciliation into its arbitration rules, namely Article 31 & 37 of the CIETAC Arbitration Rules (the “1988 Rules”), which provide that:

- (i) The parties may choose to settle their dispute by themselves;
- (ii) If a settlement is reached, the Claimant shall immediately apply to the arbitral tribunal or the CIETAC Chairman (if the arbitral tribunal has not been formed when the settlement is reached) for withdrawing its application for arbitration;
- (iii) If any party applies for arbitration after the withdrawal, the CIETAC Chairman may decide whether to accept such new application at its discretion;
- (iv) The CIETAC and the arbitral tribunal may conciliate the dispute during the arbitral proceedings. In case of a settlement resulted from such conciliation, the arbitral tribunal shall render an award based on the settlement.²⁷

The provisions on settlement and conciliation in the 1988 Rules were relatively simple. However, the principle of combining arbitration with conciliation was explicitly and firmly established in the 1988 Rules since the parties may reach settlement by themselves through arbitration, and the arbitral tribunal may conciliate the disputes during the arbitral proceedings.²⁸

Thereafter, the provisions on settlement and conciliation were further developed in detail in the subsequent versions of CIETAC Arbitration Rules. There are seven articles regarding settlement and conciliation in each version of the CIETAC Arbitration Rules, respectively published in 1994, 1995, 1998, and 2000. These provisions in the four versions of CIETAC Arbitration Rules are basically the same, and are much more developed than those in the 1988 Rules. In the subsequent versions of the CIETAC Arbitration Rules respectively published in 2005, 2012, and 2015, the provisions

27. See CIETAC Arbitration Rules, *supra* note 4, arts. 31, 37.

28. *Id.*

on the combination of arbitration with conciliation are further developed and integrated into one single article as follows:

- (i) If parties reach a settlement by themselves, they may either request the arbitral tribunal to render an award based on their settlement agreement, or apply for a withdrawal;
- (ii) The arbitral tribunal may conciliate the dispute only when parties agree;
- (iii) The arbitral tribunal may conciliate the case in a manner it considers appropriate;
- (iv) During the conciliation, the arbitral tribunal shall terminate the conciliation proceedings if either party so requests or if the arbitral tribunal considers that further conciliation efforts will be futile;
- (v) Where conciliation is not successful, neither party may invoke any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation as grounds for any claim, defense or counterclaim in the subsequent arbitral proceedings, judicial proceedings, or any other proceedings;
- (vi) The facts of the dispute and the reasons on which the award is based on may not be stated in the award if the award is based on the settlement.

According to Article 47 of the latest CIETAC Arbitration Rules (“2015 Rules”), the dispute can be settled/conciliated in two different ways: (i) conciliation by the arbitral tribunal during the arbitration procedure; or (ii) settlement/conciliation conducted outside the arbitral tribunal. These two approaches will be further discussed in the following paragraphs.

B. CIETAC Practice of Med-Arb: Conciliation by the Arbitral Tribunal

1. Principle of Party Autonomy

The Principle of Party Autonomy is the fundamental principle that the arbitral tribunal must follow when conducting conciliation in arbitration procedure under the CIETAC Arbitration Rules. First, the arbitral tribunal may conciliate the dispute during the arbitral proceedings only if: (i) both parties wish to conciliate; or (ii) one

party wishes to conciliate and the other party's consent has been obtained by the arbitral tribunal. Second, the arbitral tribunal shall terminate the conciliation proceedings if either party so requests, and the arbitral proceedings shall then resume. Third, the case shall be conciliated in a manner agreed by the parties.²⁹

2. Conciliation Procedure under Arbitral Tribunal's Control

Subject to parties' consent, the conciliation procedure is under the arbitral tribunal's complete control. The arbitral tribunal will host the conciliation and may conciliate the case in a manner it considers appropriate, such as back-to-back *ex parte*, face-to-face, or other ways agreed to by the parties. Furthermore, in the event that the conciliation turns out to be inefficient and the arbitral tribunal considers further conciliation efforts will be futile, the arbitral tribunal shall terminate the conciliation proceedings and resume the arbitral proceedings.

3. Outcome: Settlement Agreement, Conciliation Statement, Award, or Claims Withdrawal

If the conciliation is successful (i.e. the parties reach settlement through conciliation), the parties shall first sign a written settlement agreement and may further choose either to (i) withdraw their claim or counterclaim, or (ii) request the arbitral tribunal to render an arbitral award or a conciliation statement in accordance with the terms of the settlement agreement.³⁰ Specifically, the conciliation statement shall clearly set forth the claims of the parties and the terms of the settlement agreement, shall be signed by the arbitral tribunal sealed by CIETAC, and shall be served upon both parties.³¹

4. Tribunal's Role and Function

The arbitral tribunal plays a critical role in the process of conciliation during the arbitration procedure. The arbitral tribunal is not only a conciliator who promotes and implements parties' intent to conciliate, but also an arbitrator who is required by the parties to render a binding arbitral award or a conciliation statement on the

29. *Id.* art. 47.

30. *Id.*

31. *Id.*

basis of the terms of the settlement agreement. Although some Western arbitration practitioners express their concern about this “switching hats” method, this combination of different roles and functions performed by the arbitrators enables the arbitral tribunal to settle the dispute in an efficient and flexible way, and has been widely welcomed by the parties of the CIETAC arbitration.³²

C. CIETAC Practice of Med-Arb: Settlement/Conciliation outside the Arbitral Tribunal

Besides the conciliation by the arbitral tribunal, parties can also choose to settle or conciliate the dispute outside the arbitral tribunal.

1. Settlement by Parties

Parties may settle the dispute by themselves and without the participation of the arbitral tribunal or any third party.

2. Conciliation with the assistance of CIETAC

If parties wish to conciliate their dispute but do not wish to have conciliation conducted by the arbitral tribunal, CIETAC may, with the consent of both parties, assist the parties to conciliate the dispute in a manner and procedure it considers appropriate. Once parties reach settlement by themselves or with the assistance of CIETAC—like the conciliation by arbitral tribunal—they shall also first sign a written settlement agreement and may further choose either to (i) withdraw their claim or counterclaim, or (ii) request the arbitral tribunal to render an arbitral award or a conciliation statement in accordance with the terms of the settlement agreement.³³

3. Tribunal’s Role and Function

In the settlement/conciliation outside the arbitral tribunal, the arbitral tribunal has only one role of traditional arbitrator (i.e., rendering a binding arbitral award or conciliation statement on the basis of the parties’ settlement agreement).

32. *Annual Report on International Commercial Arbitration in China*, CHINA ACAD. ARB. L. 49-50 (Sept. 8, 2015), <http://www.cietac.org/Uploads/201610/57fc0d50a1742.pdf>.

33. See CIETAC Arbitration Rules, *supra* note 4, art. 47.

III. COMPARISON WITH ICDR, ICC, HKIAC, AND SIAC PRACTICES

In this section, we will compare the CIETAC practice of conciliation with that of the major international arbitration institutions, such as the International Centre of Dispute Resolution of the American Arbitration Association (“ICDR”), the International Court of Arbitration of the International Chamber of Arbitration (“ICC Court”), the Hong Kong International Arbitration Center (“HKIAC”), and the Singapore International Arbitration Center (“SIAC”), specifically the following major similarities and the differences:

A. ICDR

Similarities:

Under the ICDR International Arbitration Rules (the “ICDR Rules”), if the parties settle the dispute before a final award is made, the arbitral tribunal shall terminate the arbitration and, if requested by all parties, may also record the settlement in the form of a consent award based on the agreed terms. The arbitral tribunal is not obliged to give reasons for such an award either.³⁴

Differences:

The ICDR mediation is generally an independent proceeding which shall proceed in accordance with the ICDR International Mediation Rules. The mediation procedure proceeds concurrently with arbitration procedure and the mediator shall not be appointed as arbitrator for the arbitration case unless the parties agree otherwise.³⁵ Typically, the mediator only assists the parties to reach settlement, and does not have the authority to make a final decision or render a binding award.

34. See International Centre for Dispute Resolution International Dispute Resolution Procedures (June 1, 2014) art. 32, available at <https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased> [hereinafter ICDR Rules].

35. See *id.* art. 5.

*B. ICC Court**Similarities:*

Where the parties reach settlement in the mediation proceedings conducted in the course of ICC arbitration, the terms of settlement can be recorded in a consent award, provided that the file has been transmitted to the arbitral tribunal by the time the settlement is reached and the arbitral tribunal agrees to do so. This device in the ICC Arbitration Rules enables the parties to enforce their mediated settlement as an arbitral award.³⁶

Differences:

The ICC mediation is also an independent proceeding which shall proceed in accordance with the ICC Mediation Rules and can proceed in parallel with the judicial, arbitral, or other similar proceedings in respect to the dispute. In addition, according to Article 10 of the ICC Mediation Rules, unless all of the parties agree otherwise in writing, a mediator shall not act nor shall have acted in any judicial, arbitral, or similar proceedings relating to the dispute which is or was the subject of the mediation proceedings, whether as a judge, an arbitrator, an expert, or a representative or advisor of a party.³⁷

*C. HKIAC and SIAC**Similarities:*

Under the HKIAC Administered Arbitration Rules (the “HKIAC Rules”) or the SIAC Rules, the parties may also settle the dispute by themselves, and the arbitral tribunal may render an award in accordance with the settlement if requested by the parties.³⁸

36. See International Chamber of Commerce Rules of Arbitration (Mar. 1, 2017), available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> [hereinafter ICC Arbitration Rules]; International Chamber of Commerce Mediation Rules (Jan. 1, 2014), available at <https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/> [hereinafter ICC Mediation Rules].

37. See *supra* note 36.

38. See Hong Kong International Arbitration Centre Administered Arbitration Rules (Nov. 1, 2013) art. 36, available at <http://www.hkiac.org/arbitration/rules-practice->

Differences:

According to the HKIAC-suggested Mediation Clause, the HKIAC mediation shall proceed prior to the HKIAC arbitration procedure in accordance with the HKIAC Mediation Rules. If mediation is abandoned by the mediator or is otherwise concluded without resolving the dispute or difference, the dispute or difference shall be referred to and determined by the HKIAC arbitration.³⁹

SIAC allows the dispute to be settled through mediation before the Singapore International Mediation Centre (“SIMC”) during the arbitration proceeding, provided that there is an Arb-Med-Arb Clause between the parties,⁴⁰ and that the arbitral tribunal stays the arbitration proceedings before the case is filed with the SIMC.⁴¹ In the event of a settlement of the dispute by mediation, the arbitral tribunal may render an award in accordance with the settlement if requested by the parties. If the dispute was not settled through mediation, the arbitration proceeding shall resume.⁴²

*IV. ENFORCEMENT OF THE OUTCOME OF CONCILIATION**A. Enforcing the Outcome of Conciliation in China*

1. Legal Effect of the Outcome of Conciliation in China

Pursuant to the CIETAC Arbitration Rules, the arbitral proceedings may end up with a conciliation statement or a consent award based on the parties’ settlement agreement, either reached by parties themselves or through conciliation conducted by the arbitral tribunal. The PRC Arbitration Law explicitly confirms these two

notes/administered-arbitration-rules; *see also* Singapore International Arbitration Centre Rules (Aug. 1, 2016) art. 32.10, available at <http://www.siac.org.sg/our-rules/rules/siac-rules-2016>.

39. *See Introduction of the Mediation*, HONG KONG INT’L ARB. CTR. (Aug. 2, 1999), <http://www.hkiac.org/mediation/rules/hkiac-mediation-rules>.

40. *See The Singapore Arb-Med-Arb Clause*, SINGAPORE INT’L MEDIATION CTR., <http://www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause> (last visited Nov. 26, 2016).

41. *See Arb-Med-Arb Protocol*, SINGAPORE INT’L MEDIATION CTR. ¶ 5, <http://simc.com.sg/siac-simc-arb-med-arb-protocol/> (last visited Nov. 26, 2016).

42. *Id.* ¶ 9.

ways to conclude arbitration proceedings in Article 49⁴³ and Article 51.⁴⁴ With regard to the legal effect of consent award and conciliation statement, the PRC Arbitration Law *per se* does not differentiate the consent award made on the basis of the parties' settlement agreement from the arbitral award rendered on the merits of case. Indeed, Article 51(2) of the PRC Arbitration Law explicitly provides that, "[a] conciliation statement shall have the same legal effect as that of an award."

Therefore, it is clear that under the PRC Arbitration Law, both conciliation statements and consent awards are final and binding on the parties in the same way as arbitral awards rendered on the merits of the case. The Chinese courts have implemented this principle of PRC Arbitration Law in the judiciary practice for decades. In 2015, in *Zhou Juxi v. Zhu Xiaohan & Xiaoyao Municipal Flood-control Office*, the Hubei High Court dismissed a party's complaint to challenge the conciliation statement rendered by the Wuhan Arbitration Commission on the basis of the parties' settlement agreement.⁴⁵ The Hubei High Court reasoned in its ruling to the extent that, since an arbitral award is final and binding in accordance with the PRC Arbitration Law,⁴⁶ the conciliation statement shall have the same legal effect as that of an arbitral award, which deprives the parties of the right to resort to an action again before the court with respect to the same dispute.

Moreover, both consent award and conciliation statement are enforceable under Chinese law. According to Article 237(1) of the Civil Procedure Law of the People's Republic of China (the "PRC Civil Procedure Law") and Article 62 of the PRC Arbitration Law, if a party fails to perform an award of an arbitration institution duly established in accordance with law, the other party may apply for the

43. China Arbitration Law, *supra* note 8, art. 49 ("If a settlement agreement by parties themselves, they may request the arbitral tribunal to render an arbitral award based on the settlement agreement.").

44. *Id.* art. 51(1) ("If a settlement reached through conciliation, the Tribunal shall prepare a conciliation statement or an award based on the settlement.").

45. (周菊喜与朱小汉、仙桃市防汛抗旱指挥部办公室水利行政管理再审复查与审判监督民事裁定书) [*Zhou Juxi vs. Zhu Xiaohan & Xiaoyao Municipal Flood-control Office*], Er Min Shen Zi No. 01331 (Hubei High Ct. 2015) (China).

46. China Arbitration Law, *supra* note 8, art. 9 ("The system of final and binding arbitral award shall apply to arbitration. After an arbitral award is rendered, where the parties apply for arbitration or initiate an action to the people's court in respect of the same dispute, an arbitration commission or a people's court accept the action.").

enforcement of the award with the competent court. Since a conciliation statement has the same legal effect as that of an award,⁴⁷ the conciliation statements and consent award should also be enforced by the Chinese courts in accordance with PRC Procedural Law and PRC Arbitration Law.

Article 28 of the Supreme People's Court's Interpretation on the Application of the Arbitration Law of the People's Republic of China ("Interpretation on Arbitration Law") further provides that, "[i]n case an interested party applies for non-enforcement of a conciliation statement or an arbitral award based on the settlement agreement between the parties, the people's court shall not support such request." This provision further confirms the enforceability of conciliation statements and consent awards, making it clear that the Chinese courts will endorse the enforcement of conciliation statements and consent awards in the judicial practice.

In brief, both conciliation statements and consent awards are final and binding on the parties under Chinese law and can be enforced by the Chinese courts if one party fails to perform its obligations under the conciliation statement or consent award.

2. Setting aside the Outcome of Conciliation in China

Pursuant to Article 58 of the PRC Arbitration Law, the parties of a domestic arbitral award may apply to the Chinese intermediate court of the place where the arbitration commission is located for setting aside an arbitral award.⁴⁸ Similarly, the parties to a foreign-related arbitral award may apply for setting aside the award in accordance

47. See China Arbitration Law, *supra* note 8, art. 51(2).

48. China Arbitration Law, *supra* note 8, art. 58 ("[T]he parties may apply to the intermediate people's court at the place where the arbitration commission is located for cancellation of an award if they provide evidence proving that the award involves one of the following circumstances: 1) there is no arbitration agreement between the parties; 2) the matters of the award are beyond the extent of the arbitration agreement or not under the jurisdiction of the arbitration commission; 3) the composition of the arbitral tribunal or the arbitration procedure is in contrary to the legal procedure; 4) the evidence on which the award is based is falsified; 5) the other party has concealed evidence which is sufficient to affect the impartiality of the award; or 6) the arbitrator(s) has (have) demanded or accepted bribes, committed graft or perverted the law in making the arbitral award. The peoples' court shall rule to cancel the award if the existence of one of the circumstances prescribed in the preceding clause is confirmed by its collegiate bench. The people's court shall rule to cancel the award if it holds that the award is contrary to the social and public interests.").

with Article 274 of the PRC Civil Procedure Law.⁴⁹ However, these provisions of PRC Procedural Law and Arbitration Law, as well as the relevant judicial interpretations, do not specify whether the “arbitral award” here covers the consent awards and conciliation statements. In judicial practice, the Chinese courts tend to interpret that the “arbitral award” shall include the consent awards because they are not explicitly excluded by the laws, and the relevant provisions of setting aside the arbitral award shall also apply to the application for setting aside a consent award.⁵⁰

However, the picture for setting aside the conciliation statement in China is different. Chinese courts split on whether a conciliation statements can be set aside. In a retrial case before the Zhejiang High Court,⁵¹ the court supported the rulings of the courts of first and second instance and rejected a party’s application to set aside a conciliation statement rendered by the Hangzhou Arbitration Commission. Zhejiang High Court explained that the PRC Arbitration Law explicitly allows a party to apply for setting aside an “arbitral award,” but there are no provisions in the Arbitration Law concerning setting aside a conciliation statement. Thus, according to the plain

49. Civil Procedure Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 9, 1991) art. 247 (“If the person against whom the application is made presents evidence that the arbitral award made by an arbitration institution of the People’s Republic of China for foreign-related disputes falls under any of the following circumstances, the people’s court shall, after examination and verification by a collegiate bench formed by the people’s court, rule to deny enforcement of the award: 1) the parties have neither included an arbitration clause in their contract nor subsequently reached a written arbitration agreement; 2) the person against whom the application is made was not requested to appoint an arbitrator or take part in the arbitration proceedings or the person was unable to state his opinions due to reasons for which he is not responsible; 3) the composition of the arbitration tribunal or the arbitration procedure was not in conformity with the rules of arbitration; or 4) matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration institution. If the people’s court determines that the enforcement of the said award would be against public interest, it shall rule to deny enforcement.”).

50. See 神州通信集团有限公司与北京九州广信科技有限公司申请撤销仲裁裁决一审民事裁定书 [*China Communication Group Co. Ltd. v. Beijing Jiuzhou Guangxin Technology Co. Ltd.*], San Zhong Min Te Zi No.00172, Beijing Third Intermediate Ct. (2013); 张峥申请撤销仲裁裁决一审民事裁定书 [*Shi Yao v. Zhang Zheng*] Hu Er Zhong Min Si (Shang) Che Zi No.11, Shanghai Second Intermediate Ct. (2015); 武汉万年青生物科技有限公司、刘显快等申请撤销仲裁裁决民事裁定书 [*Wuhan Wannianqing Biotechnology Co. Ltd. v. Liu Xiankuai*] Er 01 Min Te No.90, Wuhan Intermediate Court (2016).

51. 浙江服饰有限公司与浙江万某建设工程有限公司一案一审民事裁定书 [*Zhejiang ABC Clothing Co. Ltd vs. Zhejiang XYZ Construction Co. Ltd*] Zhe Min Zai Zi No.49, Zhejiang High Court (2012).

meaning of the law, there are no legal grounds supporting an application for setting aside a conciliation statement.⁵² In judicial practice, many Chinese local courts, including the Laiwu Intermediate Court,⁵³ the Shanxi High Court,⁵⁴ the Huaibei Intermediate Court,⁵⁵ and the Hubei High Court rendered similar rulings either rejecting to set aside a conciliation statement, or even refusing to docket the party's application for setting aside a conciliation statement.⁵⁶

However, there were also a couple of Chinese courts that docketed and even supported a party's application for setting aside a conciliation statement. When reporting to the Chinese Supreme Court, Guangzhou High Court expressed its view that a conciliation statement could be set aside by reference to the provisions of setting aside an arbitral award, but the judicial review should be limited to procedural aspects of a conciliation statement.⁵⁷ In *Guangzhou Modern Information Engineering College v. Shen Guosong*,⁵⁸ the Guangzhou Intermediate Court echoed the same view ruling that, since a conciliation statement has the same legal effect as that of an award, it should logically be subject to the same judicial review as an arbitral award. Accordingly, the Guangzhou Intermediate Court applied Article 58 of the PRC Arbitration Law and set aside the conciliation statement on the basis that the Guangzhou Arbitration Commission has no jurisdiction over the criminal matters of the

52. *Id.*

53. 苏桂芳、毛瑞玲与崔永祥申请撤销仲裁裁决民事裁定书 [Su Guifang & Mao Ruiling vs. Cui Yongxiang] Lu 12 Min Te No.3, Laiwu Intermediate Ct. (2016).

54. 孝义市金达煤焦公司与武增亮、马力农申请撤销仲裁裁决二审民事裁定书 [Xiaoyi Jinda Coal Co. Ltd. vs. Wu Zengliang & Ma Linong] Jin Min Zhong Zi No.416, Shanxi High Ct. (2015).

55. 吕晓雁与淮北市泽福商贸有限责任公司申请撤销仲裁裁决民事裁定书 [Lv Xiaoyan vs. Huaibei Zefu Trade Co. Ltd.] Wan 06 Min Te Zi No.12, Huaibei Intermediate Ct. (2016).

56. *Tan Zhaohong et al. vs. Chen Yuping*, Er Min Li Zi No. 00037, Hubei High Court, (2015).

57. The Supreme People's Court's Reply on South China International Leasing Co., Ltd.'s Application for Setting Aside [2007] Shen Zhong Zi No.20-1 Amend to Conciliation Statement of Shenzhen Arbitration Commission, [2010] Min Si Ta Zi No.45. available at 《最高人民法院于申请人南方国际租赁有限公司申请撤销深圳仲裁委员会(2007)深仲调字第20—1号补正调解书一案的请示的复函》.

58. 广州现代信息工程职业技术学院与沈国松申请撤销仲裁调解书其他民事裁定书 Hui Zhong Fa Zhong Shen Zi No.26, Guangzhou Intermediate Ct. (2013).

dispute. In *Chen Jingqing v. Zeng Cheng*,⁵⁹ the Shenzhen Intermediate Court found more serious defects in the conciliation statement in dispute and the arbitral proceedings to the extent that the signatures of Mr. Zeng on the arbitration agreement and the conciliation statement were forged. The Shenzhen Intermediate Court eventually ruled to set aside the conciliation statement according to Article 58 of the PRC Arbitration Law.

So far, the Chinese Supreme Court has not published a leading case to elaborate on this issue, so its opinion is not clear. In the reply to the Guangzhou Intermediate Court in *Guangzhou Modern Information Engineering College v. Shen Guosong*, the Chinese Supreme Court did not comment on the Guangzhou Intermediate Court's view on setting aside a conciliation statement, merely finding that the revision to the conciliation statement constituted an award in essence, and thus was be subject to juridical review.⁶⁰ However, the Research Office of the Chinese Supreme People's Court ("SPC Research Office") seems to take a view that Chinese courts shall not docket the application for setting aside a conciliation statement.⁶¹ In its formal publication, the SPC Research Office sets forth the following reasons: first, Article 58 of the PRC Arbitration Law is silent on whether or not the parties can apply for setting aside a conciliation statement. Without a clear legal basis, the courts have no authority to set aside a conciliation statement. Second, since the conciliation statement is based on the parties' settlement agreement, the court shall defer to a party's autonomy and limit its judicial review thereon. Lastly, it is not necessary to docket a party's application for setting aside a conciliation statement because other legal mechanisms are sufficient to ensure the parties' autonomy in the arbitral proceedings and the courts' basic judicial review. For instance, the parties can refuse to sign and accept the conciliation statement and accordingly request the arbitral tribunal to promptly render an award.⁶²

59. 陈敬青与曾城申请撤销仲裁裁决一审民事裁定书 Shen Zhong Fa She Wai Zhong Zi No. 154, Shenzhen Intermediate Ct. (2015).

60. See China Arbitration Law, *supra* note 8, art. 51(2).

61. Chen Longye, *The Research Office of the Supreme People's Court's Opinions on Whether Courts shall have Docketed Application for Setting Aside Conciliation Statement*, 2 LEGAL RES. & GUIDANCE 90 (2012).

62. China Arbitration Law, *supra* note 8, art. 52. ("A conciliation statement shall set forth the arbitration claims and the results of the agreement between the parties. The

In summary, the dominant view of the Chinese judiciary is that the court has no authority to set aside a conciliation statement, because most Chinese courts view the conciliation statement made on the basis of the parties' settlement agreement differently from the arbitral award rendered by the arbitral tribunal based on the facts and the law. A conciliation statement is final and binding on the parties because it was made in accordance with the parties' autonomy and should not be set aside later by the court.

3. Enforcing the Outcome of Conciliation in China

Under Chinese Law, the parties of an arbitral award can choose to either apply for setting aside the arbitral award or refuse the enforcement of the award in the enforcement proceedings according to Article 237 or 274 of the PRC Civil Procedure Law.⁶³ However, if the application for setting aside an arbitral award is rejected, the party's application for non-enforcement on the same grounds shall not be supported by the Chinese court enforcing the arbitral award.⁶⁴

Similarly, there are debates on whether the parties are entitled to apply for non-enforcement of conciliation statements and consent awards. Article 237 and 274 of the PRC Civil Procedure Law are not clear on whether the non-enforcement of the arbitral award apply to the conciliation statements and consent awards. Article 28 of the

conciliation statement shall be signed by the arbitrators, sealed by the arbitration commission, and served on both parties. A conciliation statement shall have legal effect once signed and accepted by the parties. If the parties fall back on their words before the conciliation statement is signed and accepted by them, an award shall be made by the arbitral tribunal promptly.”)

63. Chinese law adopts different standards of judicial review for domestic arbitral awards and foreign-related arbitral awards in the enforcement proceedings. Chinese courts have broader authority in reviewing domestic awards than the foreign-related awards. In defining the foreign-related arbitral awards, reference is made to Article 1 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on Foreign-Related Civil Relations, which provides that a foreign-related character could be determined in the following circumstances: 1) either party or both parties are foreign citizens, foreign legal persons or other organizations or stateless persons; 2) the habitual residence of either party or both parties locate outside the territory of the People's Republic of China; 3) the subject matter is outside the territory of the People's Republic of China; 4) Where the legal fact that leads to establishment, change or termination of the civil relation happens outside the territory of the People's Republic of China; and 5) other circumstances that may be determined as a foreign-related civil relation.

64. See Article 26 of the Interpretation on the PRC Arbitration Law, which provides that, “[w]here the application of cancellation of the arbitral award through the court is overruled, and the concerned party presents the same reasons for non-enforcement of the award in the enforcement proceedings, the court shall not support the application for non-enforcement.”

Interpretation on Arbitration Law provides that, “[i]n case an interested party applies for non-enforcement of a conciliation statement or an arbitral award based on the settlement agreement between the parties, the people’s court shall not support the request.” Many Chinese courts interpret this provision to prohibit the courts from reviewing conciliation statements and consent awards in the enforcement procedure and thus dismiss the parties’ application for non-enforcement of the conciliation statement and consent award.⁶⁵ Accordingly, the Guangzhou High Court published a set of provisions in 2009 to provide that it shall not docket any application for non-enforcement of a conciliation statement or consent award.⁶⁶

Moreover, according to the publication issued by the SPC Research Office, the courts should refuse the enforcement of the conciliation statement, because enforcing a conciliation statement may be against the public interest according to Article 274 of the PRC Civil Procedure Law. In *Gansu China Youth Travel Agency v. Lin Jiafeng & Chen Guoliang*, the Supreme Peoples’ Court confirmed the Lanzhou Intermediate Court’s ruling to refuse enforcement of a conciliation statement, stating that the enforcement of the conciliation statement would illegally dispose of state-owned assets and is contrary to the public interest.⁶⁷ In *Wang Yougang v. Longcheng Construction Co. Ltd.*,⁶⁸ Nanjing Intermediate Court also ruled that the enforcement of the conciliation statement would be against the public interest.

In *Beijing Jingdeyuan Real Estate Development Co. Ltd. v. Taiyuan Deidre Enterprise Management Consulting Co., Ltd.*, the Beijing High Court reviewed the procedures of the Jinan Arbitration

65. 郑州东泽置业有限公司与郭锦波民事一案执行裁定书 [Zhengzhou Dongze Real Estate Co. Ltd. vs Guo Jinbo] Yu Fa Zhi Fu Zi No.00013, Henan High Ct. (2014); 天津市恒增房地产开发有限公司其他合同纠纷执行裁定书 [Tianjin Hengzeng Real Estate Development Co. Ltd. vs, Zhang Shengbao], Er Zhong Zhi Shen Zi No.0017, Tianjing Second Intermediate Ct. (2015); 陈振林与广州市金盛房地产开发有限公司、王善锦不予执行仲裁裁决执行裁定书 [Chen Zhenlin vs. Guangzhou Jinsheng Real Estate Development Co. Ltd], Yue 01 Zhi Yi No.295, Guangzhou Intermediate Ct. (2016).

66. 《广东省高级人民法院关于办理申请不予执行仲裁裁决案件的若干规定（试行）》 [Provisions of Guangzhou High Court on Application for Non-Enforcement of Arbitral Award], Yue Gao Fa Fa [2009] No.17 (2009).

67. 甘肃省中国青年旅行社与林嘉锋、陈国良房屋买卖合同纠纷审判监督民事判决书 Min Ti Zi No.216, (Sup. People’s Ct. 2014) (China).

68. 申请人王友刚与被申请人龙成建设工程有限公司申请执行仲裁裁决一案的执行意见书 Ning Min Zhong Shen Zi No.91 (2014).

Commission in making the conciliation statement and finally refused its enforcement.⁶⁹ The Beijing High Court found that the settlement agreement between parties, upon which the conciliation statement was based, was reached before commencing the arbitral proceedings and that the arbitral tribunal did not conduct conciliation during the arbitration proceedings. The PRC Arbitration Law does not allow an arbitral institution to make a conciliation statement without actual conciliation.⁷⁰

In *Beijing Sinozonto Mining Investment Co. Ltd v. Goldenray Consortium (Singapore) Pte Ltd*,⁷¹ the consent award based on the parties' settlement was issued by the CIETAC in 2012. When dismissing the parties' application for non-enforcement of the consent award according to Article 28 of the Interpretation on Arbitration Law, the Beijing Second Intermediate Court reviewed the arbitral proceedings and found that the arbitral tribunal examined the settlement, that the settlement was reached with the parties' true intention, and that it was not contrary to any mandatory law provisions.

Recent judicial practice shows a tendency to review conciliation statements at the stage of enforcement to a limited extent of protecting the public interests and complying with the principle of party autonomy and the applicable laws and arbitration rules. Article 28 of the Interpretation on Arbitration Law should be narrowly interpreted in terms of prohibiting parties from applying for non-enforcement of conciliation statements and consent awards with reference to the principle of estoppel. However, its literal words do not prohibit the court from proactively reviewing whether the enforcement would be contrary to the public interest. Also, it is legitimate for the court to review whether the conciliation statement qualifies as a conciliation statement in accordance with the laws and arbitration rules. However, it should be noted that in judicial practice, most Chinese courts strictly interpret Article 28 of the Interpretation

69. 北京京德苑房地产开发有限公司与太原戴德勒企业管理咨询有限公司不予执行仲裁裁决执行复议裁定书 Gao Zhi Fu Zi No.104 (Beijing High Ct. 2013).

70. *Id.*

71. 张世铿等与新加坡兆璟财团私人有限公司执行行为异议裁定书 [*Beijing Sinozonto Mining Investment Co. Ltd vs. Goldenray Consortium (Singapore) Pte Ltd*] Er Zhong Zhi Yi Zi No.00711 (Beijing Second Intermediate Ct. 2014) (China).

on Arbitration Law and refrain from fully reviewing the conciliation statements and consent awards at the stage of enforcement.

B. Enforcing the Outcome of Conciliation Outside of China

1. Recognizing and Enforcing Consent Awards Outside of China

The worldwide enforceability of the arbitral award, thanks to the New York Convention, is the main reason why the parties enter into arbitration agreements and refer to arbitration for the resolution of their dispute. However, the New York Convention neither defines the term “arbitral award,” nor mentions the consent awards. Although a consent award could be generally viewed as one kind of arbitral award,⁷² the absence of a clear reference to consent awards in the New York Convention raises the same question found in Chinese Law of whether consent awards qualify as arbitral awards under the New York Convention.

The *travaux préparatoires* of the New York Convention did not provide any clarifications on this issue either. However, Article 30(2) of the UNCITRAL Model Law on International Commercial Arbitration (“UNCITRAL Model Law”) states that, “[a]n award on agreed terms . . . has the same status and effect as any other award on the merits of the case.” Since the UNCITRAL Model Law had been adopted by seventy-three Member States and 103 jurisdictions,⁷³ and most developed legal systems have similar arbitration statutes,⁷⁴ it is a prevailing view around the world that consent awards fall within the general definition of arbitral awards rendered based on the merits of cases. Given that the grounds for refusing the recognition or enforcement of an arbitral award is very limited in accordance with

72. INT’L COUNCIL FOR COMMERCIAL ARBITRATION, ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES 18 (Pieter Sanders ed., 2011), available at http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf (“Consequently, the following arbitral decisions qualify as awards: . . . [c]onsent awards, i.e., awards recording the parties’ amicable settlement of the dispute.”).

73. *Status of UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, U.N. COMMISSION ON INT’L TRADE L., http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited on Nov. 18, 2016).

74. GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 125-29 (2d ed. 2014).

the UNCITRAL Model Law, the same limited grounds should apply when recognizing and enforcing a consent award.⁷⁵

The New York Convention also restricts the grounds for the competent authority where the recognition and enforcement of an arbitral award is sought to refuse the recognition and enforcement of arbitral awards.⁷⁶ As for the enforcement of consent awards, the party against whom enforcement is sought may challenge the enforcement on the same grounds as those apply to a normal arbitral award on the merits of a case, but some of these grounds, such as public policy, may be applied more frequently to the consent awards.

In *Beijing Sinozonto Mining Investment Co. Ltd v. Goldenray Consortium (Singapore) Pte Ltd*,⁷⁷ Sinozonto applied for the Singaporean court to enforce a CIETAC's consent award as a result of conciliation by the arbitral tribunal, while Goldenray requested non-enforcement thereof and argued that the award was tainted by fraud and corruption such that its enforcement would be contrary to the public policy under Art V(2)(b) of the New York Convention. Goldenray alleged that Sinozonto had unilaterally entered into an improper arrangement with the CIETAC arbitral tribunal to issue such award in Sinozonto's favor. The Singapore High Court confirmed that the term "public policy" would extend to an award obtained by corruption, bribery, or fraud to the extent that it would violate the basic notions of morality and justice. However, it found that Goldenray failed to produce sufficient evidence proving any improper arrangement between the CIETAC arbitral tribunal and Sinozonto and any irregularity by the CIETAC arbitral tribunal in conducting the arbitral proceedings under the CIETAC Arbitration Rules. Thus, the Singapore High Court dismissed Goldenray's challenge.

75. See *Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* art. 36, U.N. COMMISSION ON INT'L TRADE L., http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited on Nov. 18, 2016).

76. See INT'L COUNCIL FOR COMMERCIAL ARBITRATION, *supra* note 72, at 80.

77. *Beijing Sinozonto Mining Investment Co. Ltd. v. Goldenray Consortium (Singapore) Pte. Ltd.*, 2013 SGHC 248 (Singapore), available at <http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15427-beijing-sinozonto-mining-investment-co-ltd-v-goldenray-consortium-singapore-pte-ltd-2013-sghc-248>.

In *Gao Haiyan v. Keeneye Holdings*,⁷⁸ the Hong Kong Court of First Instance (“HK Court of First Instance”) refused to enforce an arbitral award rendered by the Xian Arbitration Commission on the basis of the public policy grounds. The HK Court of First Instance found that the arbitral tribunal did not conduct the conciliation according to the applicable arbitration rules and the manner in which the conciliation was conducted would give a fair-minded observer an impression that the arbitral tribunal favored Gao. Thus, the HK Court of First Instance ruled that the arbitral award based on an unsuccessful conciliation had been tainted by bias and could not be enforced. Gao appealed against the first instance judgment before the Hong Kong Court of Appeal (“HK Court of Appeal”). The HK Court of Appeal reviewed the conciliation procedures by the arbitral tribunal and found no apprehended bias giving rise to an issue of public policy because it was consistent with public policy in China. As a result, the judgment of the Court of First Instance was eventually overturned by the HK Court of Appeal.⁷⁹

Although the parties can enforce consent awards in foreign jurisdictions according to the New York Convention, the enforcement of the consent awards may be more complex and the challenge thereof may arise more easily because the conciliation process is more likely to deviate from the normal and typical arbitration procedure. As a result, the consent awards may be tainted by any irregular or even illegal activities occurred during the settlement process. Therefore, the arbitral tribunal should be very careful in handling the conciliation procedures, and both the arbitral tribunal and the parties shall ensure that the conciliation procedure is not contrary to the public policy.⁸⁰

78. *Gao Haiyan v. Keeneye Holdings Ltd.*, [2011] H.C.C.T. 41 (C.F.I.) (Hong Kong), available at <https://www.hongkongcaselaw.com/tag/building-management-application-no-41-of-2010/page/3/>.

79. *Gao Haiyan v Keeneye Holdings*, [2011] 1 H.K.L.R.D. 627 (C.A.) (Hong Kong).

80. See Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT’L 249 (2003) (“The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as ‘lois de police’ or ‘public policy rules’; and (iii) the duty of the State to respect its obligations towards other States or international organizations.”).

2. Recognizing and Enforcing Conciliation Statements Outside of China

Different from settlements resulting from a conciliation by the mediator or parties' own negotiation, conciliation statements under the CIETAC Arbitration Rules or Chinese Law are a binding and final result of the arbitration procedure. Although the conciliation statements have basically the same form and same legal force as the consent award in essence, the CIETAC Arbitration Rules and the PRC Arbitration Law *per se* differentiate the conciliation statement from consent awards. Moreover, it seems there are no sufficient grounds to consider conciliation statements as one type of arbitral award under the New York Convention. Even the UNCITRAL Model Law requires the arbitral tribunal to record the settlement reached between the parties in the form of an arbitral award, rather than a statement.⁸¹

Some jurisdictions treat conciliation settlement agreements equivalently to arbitral awards, such as India and Bermuda,⁸² which is similar to China. A number of US states, including California and Texas, maintain the statutes on international commercial conciliation, which confirms the settlement agreements having the same legal effect as arbitral awards.⁸³ However, with the exception of the New York Convention, there is no other international legal instrument enforcing the conciliation statements in different jurisdictions.

Recognizing the popularity of settlements between parties as well as the complexity of the conciliation-related issues, the UNCITRAL is not satisfied with only "relying on the legal fiction of deeming them to be arbitral awards" and expects to "eliminate the need to initiate an arbitration process (with the attendant time and

81. See U.N. Commission on International Trade Law Arbitration Rules 14-15 (July 12, 2010), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf>.

82. UNITED NATIONS, UNCITRAL GUIDE TO ENACTMENT OF THE MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION WITH GUIDE TO ENACTMENT AND USE ¶ 91 (2002) (citing Bermuda, Arbitration Act (1986) and India, Arbitration and Conciliation Ordinance arts. 73-74 (1996)), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.

83. See UNCITRAL, *Planned and Possible Future Work - Part III*, U.N. Doc. A/CN.9/822 (June 2, 2014) (referring to Cal. Civ. Pro. § 1297.401; Tex. Civ. Prac. & Rem. Code Ann. § 172.211), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V14/035/93/PDF/V1403593.pdf?OpenElement>.

costs) simply to incorporate a settlement agreement into an award.”⁸⁴ Thus, in 2014, the UNCITRAL approved the preparation of a new international legal instrument modelled on the New York Convention so as to address the enforceability of international settlement agreements.⁸⁵

After research on the existing legal framework, the underlying issues of settlement agreement, and the consultation with different states, the UNCITRAL has finished the draft provisions of the international instrument on the enforcement of the settlement agreements resulting from conciliation.⁸⁶ According to the draft provisions, this new instrument will “apply to the [recognition and] enforcement of international commercial settlement agreements,” which are made in writing, concluded by the parties for commercial dispute, resulted from the conciliation, and resolving all or part of the dispute.⁸⁷ With respect to the settlement agreements concluded in the course of judicial or arbitral proceedings, but not recorded in a judicial decision or an arbitral award, it was widely agreed that they should fall within the scope of the instrument. The Working Group accordingly drafted several provisions in this regard.⁸⁸ Thus, it is likely that, in the future, the conciliation statement under Chinese law could be enforced as one type of settlement agreement under this new international instrument on the enforcement of the settlement agreement resulting from conciliation. Such development would foster the utilization of mediation and allow mediation to live up to its promise of preserving commercial relationships, enable creative business-oriented solutions, facilitate international transactions, and produce savings in the administration of justice.⁸⁹

84. *Id.* at 4

85. *Id.*

86. See UNCITRAL, *Report of Working Group II (Dispute Settlement)*, U.N. Doc. A/CN.9/896 (Sept. 2016), http://www.uncitral.org/pdf/english/workinggroups/wg_arb/acn9-896-e.pdf.

87. UNCITRAL, *Settlement of Commercial Disputes: Preparation of an Instrument on Enforcement of International Commercial Settlement Agreements Resulting from Conciliation*, U.N. Doc. A/CN.9/WG.II/WP.198 ¶¶ 7, 13 (Sept. 2016), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V16/040/09/PDF/V1604009.pdf?OpenElement>.

88. *Id.* ¶ 19.

89. Edna Sussman, *The Time Has Come: An International Regime for the Enforcement of Mediated Settlement Agreements*, 8 N.Y. DISP. RESOL. LAW. 1 (2015).

V. TRENDS AND CONCERNS

A. *International Trend of Combining Arbitration with Conciliation*

The combination of arbitration with conciliation has been debated in the arbitration and mediation community for decades. However, the business community tends to settle their disputes rather than initiating arbitration procedures, which is usually more time and cost-consuming than settlement procedures. The recent survey shows that over forty percent of settlements were reached before the first arbitration hearing,⁹⁰ and most of these settlement agreements are eventually recorded in consent awards. For example, in 2014, around thirty-eight out of 459 arbitral awards rendered by the ICC Court were consent awards.⁹¹

As early as the late 1990s, AAA's then-General Counsel Michael F. Hoellering, based on the AAA's experience, found that mediation had re-emerged as a popular private dispute resolution technique.⁹² In both domestic and international spheres, mediation has been increasingly used in combination with arbitration to facilitate prompt and effective dispute settlement.⁹³ More and more arbitration institutions are offering arb-med services in various forms. In 2014, the SIMC was officially launched and established a new "Arb-Med-Arb" protocol ("AMA Protocol"),⁹⁴ to be administered by the SIMC

90. Loukas Mistelis, *The Settlement-Enforcement Dynamic in International Arbitration*, 19 AM. REV. INT'L ARB. 377, 379 (2008).

91. See Int'l Chamber Com., *2014 ICC Dispute Resolution Statistics*, 15 ICC DISP. RESOL. BULL. 1 (2015).

92. Michael F. Hoellering, *Comments on the Growing Inter-Action of Arbitration and Mediation*, in ICCA CONG. SERIES NO. 8: INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CULTURE 121-24 (Albert Jan van den Berg ed., 1998).

93. *Id.*

94. Its model Arb-Med-Arb clause reads: "All disputes, controversies or differences ("Dispute") arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC") for the time being in force. The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ("SIMC"), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms." *The Singapore Arb-Med-Arb Clause*, SINGAPORE INT'L MEDIATION CTR., <http://simc.com.sg/the-singapore-arb-med-arb-clause/> (last visited on Dec. 1, 2016).

in conjunction with the SIAC, with the aim of promoting the use of mediation within the framework of international arbitration.

B. Concern in “Switching Hats” and “Due Process”

Chinese law permits arbitrators to conciliate the dispute in the arbitral proceedings. However, in international arbitration, the concern about conflict of interest remains with regard to the combination of arbitration with conciliation. According to the International Bar Association Guidelines on Conflict of Interest in International Arbitration (“IBA Guidelines on Conflict of Interest”), without the parties’ express agreement, the arbitrator shall not assist them in reaching a settlement of the dispute, through conciliation, mediation, or otherwise, at any stage of the proceedings.⁹⁵ Even if the parties waived such conflict of interest by an express agreement in advance, the arbitrator must resign if, as a consequence of settlement efforts, he or she develops doubts as to their ability to remain impartial or independent in the future course of arbitral proceedings.⁹⁶ Article 19 of the UNCITRAL Model Conciliation Rules even explicitly prohibits a mediator from acting as arbitrator.⁹⁷

The 1996 UNCITRAL Notes on Organizing Arbitral Proceedings noted that jurisdictions differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement.⁹⁸ Thus, it recommends that the arbitral tribunal should only suggest settlement negotiations with caution.⁹⁹ In 2016, the Working Group II proposed a revision of the UNCITRAL Notes on Organizing Arbitral Proceedings to reflect that some arbitration law and rules encouraged the arbitral tribunal to facilitate parties’

95. INT’L BAR ASS’N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION 9 (2014), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=E2FE5E72-EB14-4BBA-B10D-D33DAFEE8918>.

96. *Id.* at 10.

97. Article 19 of the UNCITRAL Model Conciliation Rules provides, “[t]he parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings.”

98. U.N. COMM’N INT’L TRADE L., UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS ¶ 47 (1996), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>.

99. *Id.*

settlement, while some prohibit the arbitral tribunal from doing so.¹⁰⁰ However, the Working Group II finally revoked the revision because the different legislative approaches still show remaining concerns on an arbitrator's proactive role in raising or facilitating settlement.¹⁰¹

Common law jurisdictions originating from English law keep the tradition that judges and arbitrators are not supposed to play a proactive role.¹⁰² When it comes to the increasing popularity of Arb-med, many common lawyers raise concerns that the Arb-med may go against natural justice or due process¹⁰³—a party might disclose adverse information to the conciliator that it would not have disclosed to the conciliator who will become the arbitrator. However, under the CIETAC's combination of arbitration with conciliation, the parties have clear knowledge that the arbitrator will render an award in case of a failure of conciliation. With such a knowledge, the parties have sole discretion on whether to commence conciliation by the arbitral tribunal and they can choose a separate conciliation proceedings without the arbitral tribunal. Thus, since the parties agree to commence conciliation by the arbitral tribunal, they shall bear the risk and be careful as to what they disclose. The AAA's Code of Ethics for Arbitrators in Commercial Disputes is helpful to safeguard the parties' discretion by providing that “an arbitrator should not exert

100. See UNCITRAL, *Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings*, U.N. Doc. A/CN.9/879 (Mar. 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/018/29/PDF/V1601829.pdf?OpenElement> (“72. In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties. In some jurisdictions, the arbitration law permits facilitation of a settlement by the arbitral tribunal with the agreement of the parties. In other jurisdictions, it is not permissible for the arbitral tribunal to do more than raise the prospect of a settlement that would not involve the arbitral tribunal. Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations. Certain sets of arbitration rules provide for facilitation of a settlement by the arbitral tribunal.”).

101. UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its Sixty-Fourth Session (New York, 1-5 February 2016)*, U.N. Doc. A/CN.9/867 ¶ 62 (Feb. 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/008/00/PDF/V1600800.pdf?OpenElement>.

102. Christopher Koch & Erik Schafer, *Can it Be Sinful for an Arbitrator Actively to Promote Settlement?*, *ARB. & DISP. RESOL.* L. J. 153, 155 (1999).

103. Houzhi Tang, *Combination of Arbitration with Conciliation - Arb-Med*, in *ICC CONG. SERIES NO. 12: NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* 547-55 (Albert Jan van den Berg ed., 2005).

pressure on any party to settle or to utilize other dispute resolution processes.”¹⁰⁴

Another primary concern is that the arbitrator may become biased during the conciliation, which may render him unfit to continue resolving the dispute as an arbitrator. During the conciliation, the arbitrator may be exposed to confidential and prejudicial information without being required to disclose this information to all parties involved in arbitration.¹⁰⁵ In addition, communication or caucusing between arbitrator and one side may lead to an arbitrator’s impartiality as the cases in *Beijing Sinozonto Mining Investment Co. Ltd v. Goldenray Consortium (Singapore) Pte Ltd*¹⁰⁶ and *Gao Haiyan v. Keeneye Holdings* showed.¹⁰⁷ However, the bias or partiality usually is required to be “evident,”¹⁰⁸ “apparent,”¹⁰⁹ or “apprehended.”¹¹⁰

C. Safeguard Regime: Maintaining the Due Process of Med-Arb Practice

With regard to the various concerns about applying conciliation in arbitration procedures, some safeguard measures have been taken by the major arbitration institutions.

104. The Code of Ethics for Arbitrators in Commercial Disputes, canon IV(F) (American Arbitrators Association, Feb. 9, 2004), available at https://adr.org/aaa/ShowProperty?noDeId=%2FUCM%2FADRSTG_003867&revision=latestreleased (“Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.”).

105. Julian D.M. Lew, *Multi-Institutional Conciliation and the Reconciliation of Different Legal Cultures*, in ICC CONG. SERIES NO. 12: NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 422–23 (Albert Jan van den Berg ed., 2005).

106. See *supra* note 75.

107. See *supra* note 76.

108. See *Commonwealth Coatings Corp. v. Cont’l Cas.I Co.*, 393 U.S. 145, 148 (1968).

109. See *Glencot Development & Design v. Ben Barret*, [2001] EWHC Technology 15 (UK).

110. See *Gao Haiyan v. Keeneye Holdings*, [2011] 1 H.K.L.R.D. 627 (C.A.) (Hong Kong).

1. CIETAC Pre-Conditional Requirements

Under the CIETAC Rules, the conciliation shall not proceed unless the parties' consent is duly obtained. In the event that any party is concerned that the conciliation by the arbitral tribunal may affect the due process of the dispute, they may ask for the conciliation outside the arbitral tribunal or terminate the conciliation and resume the arbitration procedure.

Furthermore, as mentioned above, the confidentiality requirement of the conciliation procedure is provided in Article 47(9) of the CIETAC Rules:

[W]here conciliation is not successful, neither party may invoke any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation as grounds for any claim, defense or counterclaim in the subsequent arbitral proceedings, judicial proceedings, or any other proceedings.¹¹¹

2. ICDR

Under the ICDR Rules, the mediator shall not switch hats without parties' consent, which means that the mediator shall not act as an arbitrator to the case where he or she mediates unless the parties agree otherwise.¹¹² ICDR Rules also require the confidentiality of the mediation (i.e., that the mediator and parties shall neither disclose any confidential information produced in the mediation, nor rely on any views, suggestions, admissions, proposals, or statements made by a party during the mediation as evidence in any arbitral, judicial, or other proceeding).¹¹³

3. ICC

The ICC Mediation Rules also prohibit switching hats without parties' consent: "Unless all of the parties agree otherwise in writing, a Mediator shall not act nor shall have acted in any judicial, arbitral or similar proceedings relating to the dispute" ¹¹⁴ In addition, the

111. CIETAC Arbitration Rules, *supra* note 4, art. 47(9).

112. ICDR Rules, *supra* note 34, art. 5.

113. ICDR Rules, *supra* note 34, art. 10.

114. ICC Arbitration Rules, *supra* note 36; ICC Mediation Rules, *supra* note 36, art. 10(3).

ICC Mediation Rules prohibit parties from producing documents, statements, or communications obtained during the mediation as evidence in any judicial, arbitral, or similar proceedings. ICC further prohibits the mediators in ICC mediation from acting in any judicial, arbitral, or similar proceedings arising from the same dispute except when all of the parties have consented thereto in writing.¹¹⁵

4. Others

As shown above, under CIETAC Rules, if parties wish to conciliate their dispute by the arbitral tribunal, CIETAC Rules take such wish also as permission for the arbitrator to switch hats by acting as a mediator concurrently. On the contrary, under ICDR Rules and ICC Rules, the mediator shall not switch hats unless approved by parties. To balance the concern of the due process problem in “switching hats” and the parties’ wish to conduct mediation in arbitration procedure, some new approaches were launched attempting to address the problem. For example, South China International Economic and Trade Arbitration Commission (also known as the Shenzhen Court of International Arbitration, the “SCIA”) created a new rule in Article 45 of the SCIA Arbitration Rules, providing that the arbitral tribunal may conduct mediation if parties wish to mediate in the arbitration procedure, on the condition that the parties shall first reach an agreement on whether the arbitrator(s) participating in the mediation shall resign from their office as arbitrator in the subsequent proceedings in the case that the mediation fails.¹¹⁶ SIAC also takes steps to address the concern of due process, such as the AMA Protocol.

VI. CONCLUSION

In considering the concerns expressed about a mixed process with the same individual, one should return to the fundamental principle of arbitration (i.e., party autonomy). If one looks at the combination of arbitration with conciliation in a broad context, it is one of many dispute resolution mechanisms, including parties’ own negotiation, conciliation, the Arb-med, arbitration, the Med-arb, etc. As long as the parties have an understanding of the risks and benefits

115. *Id.*

116. SCIA Arbitration Rules, *supra* note 7, art. 45(1).

of a combination of arbitration with conciliation, their willingness should be respected by the arbitral tribunal and the arbitral tribunal shall facilitate their settlement negotiation as much as law and rules permit. There is no reason to deny that more choices of dispute resolution processes will benefit the parties. The parties, with the assistance of their counsel, are in the best position to conduct a pro and con analysis of all the dispute resolution methods. Thus, it is our view that more attention should be paid in considering how to appropriately conduct the combination of arbitration with conciliation rather than focus on excessive concerns about some defects in the method, and thus deprive the parties of the chance to use such methods to resolve their disputes.

