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# COMMERCIAL MEDIATION IN MAINLAND CHINA: PITFALLS & OPPORTUNITIES

Meng Chen\*

## ABSTRACT

This article offers insight into the practice of Chinese mediation, especially in resolving commercial disputes, considering the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) entered into force on September 12, 2020. First, this article evaluates the attractiveness, vulnerabilities, and popularity of mediation as a means of dispute resolution. The article then introduces the Chinese model of using mediation to resolve commercial disputes, specifically in judicial and arbitral proceedings. Based on empirical data and rules analysis, this article concludes with the benefits of using mediation in China to resolve disputes and exposes a discrepancy between the Chinese perception of mediation and prevailing international practice. This article illustrates highlights of the Singapore Convention and elaborates on its possible impacts on the Chinese market.

**Keywords:** Dispute Resolution; Mediation; Chinese Market; The Singapore Convention

## I. INTRODUCTION

The adoption of the 2018 United Nations Convention on International Settlement Agreements Resulting from Mediation (the

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Singapore Convention) greatly inspired the international dispute resolution community to develop international mediation as an independent, efficient, and enforceable dispute resolution regime.<sup>1</sup> Academic debates and relevant empirical research have provided data for predicting the impact of an international convention for enforcing international settlement agreements.<sup>2</sup> With unsolved differences in the practice of mediation between jurisdictions, expanding the use of mediation will rely on compromise and coordination between both national and international authorities.<sup>3</sup> This article presents insight into the practice of Chinese mediation, especially in resolving commercial disputes.

First, this article evaluates the attractiveness, vulnerabilities, and popularity of mediation as a means of dispute resolution. The article also introduces the Chinese model of using mediation to resolve commercial disputes, specifically in judicial and arbitral proceedings. The article then discusses the Chinese experience in the mediation revolution—based on empirical data and rules analysis—and exposes a discrepancy between the Chinese perception of mediation and prevailing international practice. Finally, the article illustrates highlights of the Singapore Convention and elaborates on its possible impact on the Chinese market.

## II. THE ATTRACTIVENESS & VULNERABILITIES OF MEDIATION AS A MEANS OF DISPUTE RESOLUTION

Mediation predicates itself entirely upon the consent of interested parties and is assisted by a neutral with no advisory or determinative power over the outcome.<sup>4</sup> Mediation's informal, flexible, and more autonomous process appeals to international commercial disputants.<sup>5</sup> All mediation procedures—including but not limited to initiating a mediation process, organizing the mediation, and appointing a mediator—are based on all parties'

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<sup>1</sup> S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*, U. MO. SCH. L., LEGAL STUD. RSCH. PAPER SERIES, RSCH. PAPER NO. 2014-28, 50 (Nov. 17, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2526302](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302).

<sup>2</sup> *Id.* at 22–23.

<sup>3</sup> *Id.*

<sup>4</sup> MICHAEL HOLLINGDALE, *ARBITRATION AND DISPUTE RESOLUTION IN THE RESOURCES SECTOR: AN AUSTRALIAN PERSPECTIVE* 103 (Gabriël A. Moens & Philip Evans eds., 2015).

<sup>5</sup> Don Peters, *Can We Talk? Overcoming Barriers to Mediating Private Transborder Commercial Disputes in the Americas*, 41 VAND. J. TRANSNAT'L L. 1251, 1257–58 (2008).

consent whether a settlement is reached.<sup>6</sup> Therefore, parties have complete control over the whole mediation process and are free to exit it if they are not satisfied.<sup>7</sup> Significant party autonomy may lead to other favorable features: For example, a tailored, informal, and flexible mediation procedure will resolve disputes efficiently and economically.<sup>8</sup> Moreover, mediation mitigates harm to disputants' relationships because the remedies and outcomes of the mediation are pliable.<sup>9</sup> A strict "win-lose" model does not exist in the final settlement agreement.<sup>10</sup> In Prof. S.I. Strong's empirical research, respondents most often cited cost savings (36%) and time savings (28%) as reasons for using international mediation and conciliation.<sup>11</sup> Other attractive features were "a desire for a more satisfactory process," "a cultural disinclination towards litigation or arbitration," and "the desire to preserve an ongoing relationship."<sup>12</sup> According to Prof. Strong's study, "complexity of disputes" and "mediators' expertise" were less relevant.<sup>13</sup> The whole mediation process can be simple, flexible, and fast, and can respond to the specific needs of the parties.<sup>14</sup> However, if it fails to yield a satisfactory settlement, the mediation process will increase the cost of the whole dispute resolution.<sup>15</sup> All parties' consent is thus essential to achieve successful mediation.<sup>16</sup>

In recent years, there have been fierce debates on whether the practice of mediation is sufficiently developed to establish a complete and independent international dispute resolution regime.<sup>17</sup> Complaints about the vulnerabilities of mediation have become increasingly obvious.<sup>18</sup>

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<sup>6</sup> *Id.* at 1259–61.

<sup>7</sup> *Id.* at 1256–58.

<sup>8</sup> See Jaqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 55–56 (1996); see also Peters, *supra* note 5, at 1295–97.

<sup>9</sup> Peters, *supra* note 5, at 1287.

<sup>10</sup> *Id.* at 1269.

<sup>11</sup> Strong, *supra* note 1, at 22.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 23.

<sup>14</sup> Peters, *supra* note 5, at 1258.

<sup>15</sup> See Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 7–12 (1998).

<sup>16</sup> Strong, *supra* note 1, at 27.

<sup>17</sup> Peters, *supra* note 5, at 1260–75.

<sup>18</sup> *Id.* at 1261.

### A. OBSTACLES TO ACCESS

The preliminary question is whether disputants are willing to choose mediation to solve their disputes. Prof. Don Peters has examined several cognitive biases and cultural barriers faced by disputants in choosing dispute resolution methods.<sup>19</sup> He asserts that even though mediation has proven more effective than arbitration or other dispute resolution methods, competitive business cultures and adversarial legal educations strongly favor adjudication over mediation or negotiation.<sup>20</sup> When outside attorneys are involved in dispute resolution, the mediation process becomes particularly difficult to initiate because they may feel reluctant to participate in a process with which they are neither familiar nor trained for.<sup>21</sup> Many surveys have indicated that only a small proportion of practitioners use mediation frequently,<sup>22</sup> and that mediation proposals often fail due to resistance from legal counsel.<sup>23</sup>

Indeed, mediation is not suitable for many international commercial disputes, especially when disputes involve broader interests or irreconcilable differences.<sup>24</sup> For example, when a party sues for breach of contract caused by government policy or seeks an exemption from damages due to a legitimate excuse, a judgment and arbitral award are considered more desirable than a settlement, which would focus more on resolving disputes than making judgements on the merits of each case.<sup>25</sup>

Ample empirical evidence has exposed the low application and success rates of mediation, even with vigorous market promotion by both academics and arbitration institutions.<sup>26</sup> Inquiry into what prevents practitioners from selecting mediation—even with the enforceability of consent awards—is increasing.<sup>27</sup> Making mediation a successful alternative dispute resolution regime begins with persuading a growing number of people to use it.<sup>28</sup> Practitioners can utilize negotiation techniques themselves to overcome cognitive and cultural barriers.<sup>29</sup> Indeed, cultural background is not always an obstacle to choosing mediation.<sup>30</sup>

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<sup>19</sup> *Id.* at 1261–80.

<sup>20</sup> *Id.* at 1270.

<sup>21</sup> *Id.* at 1293 n.283.

<sup>22</sup> *Id.* at 1274.

<sup>23</sup> *Id.* at 1275.

<sup>24</sup> McEwen, *supra* note 15, at 3.

<sup>25</sup> *Id.* at 22–23.

<sup>26</sup> Strong, *supra* note 1, at 18.

<sup>27</sup> *Id.* at 18–19.

<sup>28</sup> Peters, *supra* note 5, at 2181.

<sup>29</sup> *Id.* at 1283–90.

<sup>30</sup> Gabrielle Kaufmann-Kohler & Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China*, 25 J. INT'L ARB. 479, 480–86 (2008).

Asian society's high praise of harmonization in human relationships has gone far in promoting the acceptance of mediation.<sup>31</sup> Transitions in practitioners' ideology will lead to further improvements because users' actual experience of mediation is generally satisfactory.<sup>32</sup> Therefore, the impediments to accessing mediation for resolving international commercial disputes are considerable, but not insurmountable.

## B. EFFECTIVENESS OF THE MEDIATION PROCEDURE

Parties' consent is a requisite for a cost-effective mediation process.<sup>33</sup> Without the regulation of an international convention, procedural rules, and binding guidance, the mediation process is vulnerable to evasion and delay tactics.<sup>34</sup> Bargaining strategies and techniques are to be expected in mediation. Indeed, disputants and their attorneys may treat mediation like a "recessive battle" and abuse litigation tactics to maximize their gains in the dispute resolution.<sup>35</sup> To keep the mediation process simple and efficient, all participants are encouraged to consent to procedural rules in advance and abide by them throughout the process.<sup>36</sup> Some experienced mediators will play more prominent roles in directing the mediation process.<sup>37</sup> However, the binding effect of the procedural agreement and mediator's guidance cannot always be guaranteed because there is no effective method to ensure voluntary cooperation in the first place.<sup>38</sup>

Legitimacy issues also arise when mediators communicate with one party in the absence of other participants (known as a caucus), especially when mediation is commenced in an adjudicative context.<sup>39</sup> A caucus is a useful and common mediation

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<sup>31</sup> Don Peters, *To Sue Is Human; To Settle Divine: Intercultural Collaborations to Expand the Use of Mediation in Costa Rica*, 17 FLA. J. INT'L L. 9, 12 (2005).

<sup>32</sup> Kevin C. Clark, *The Philosophical Underpinning and General Working of Chinese Mediation Systems: What Lessons Can American Mediators Learn?*, 2 PEPP. DISP. RESOL. L.J. 117, 120–30 (2002).

<sup>33</sup> HOLLINGDALE, *supra* note 4, at 119–20.

<sup>34</sup> Steven J. Hoffman, *Mending Dispute Resolution Under the International Health Regulations*, 19 INT'L ORG. L. REV. 241, 261–64 (2022).

<sup>35</sup> Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 PA. STATE L. ARB. L. REV. 219, 224 (2013).

<sup>36</sup> HOLLINGDALE, *supra* note 4, at 119–20.

<sup>37</sup> *Id.* at 120.

<sup>38</sup> *Id.* at 249.

<sup>39</sup> *See* Deason, *supra* note 35, at 226–27.

technique for urging parties to settle.<sup>40</sup> It also increases doubts regarding the impartiality and independence of mediators, which may have negative impacts on procedural efficiency and increase challenges to ultimate settlement agreements.<sup>41</sup> For example, parties may be reluctant to reveal important information in mediation, fearing that this information could be used against them in subsequent arbitration.<sup>42</sup> Sometimes parties are more willing to cooperate with a mediator if they know the mediator has authority to make decisions later as judges or arbitrators if a settlement cannot be reached in mediation.<sup>43</sup> Parties generally appoint the same neutral entity to reduce costs and simplify the combining process,<sup>44</sup> but the cost of mediators and arbitrators is generally marginal compared to the total cost of dispute resolution.<sup>45</sup> Thus, some scholars suggest enlisting different neutral entities to prevent conflicts of interest and potential challenges in the enforcement stage.<sup>46</sup> Additionally, some scholars have asserted that because the qualifications of mediators and arbitrators vary, there is no need to appoint the same neutral entity at the risk of serious procedural challenges.<sup>47</sup> Overall, scholars suggest that if parties believe mediation might be fruitful, they should keep these two proceedings separate to avoid potential challenges.<sup>48</sup>

Appointing the same neutral entities does not seem problematic in the Asia–Pacific region, where there is a deep cultural history of using mediation to resolve disputes.<sup>49</sup> However, this cultural understanding is not always the case.<sup>50</sup> Because well-designed procedural rules can ameliorate procedural challenges, many institutions and jurisdictions tailor procedural rules to offer various solutions to this problem.<sup>51</sup> Further analysis will be presented in the next section.

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<sup>40</sup> CHRISTIAN BÜHRING-UHLE, LARS KIRCHHOFF & GABRIELE SCHERER, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 264 (2d ed. 2006).

<sup>41</sup> Deason, *supra* note 35, at 226.

<sup>42</sup> *Id.* at 224–25.

<sup>43</sup> See BÜHRING-UHLE, KIRCHHOFF & SCHERER, *supra* note 40, at 238.

<sup>44</sup> See *id.* at 242.

<sup>45</sup> HOLLINGDALE, *supra* note 4, at 11.

<sup>46</sup> Deason, *supra* note 35, at 224.

<sup>47</sup> *Id.* at 246.

<sup>48</sup> *Id.*

<sup>49</sup> Kaufmann-Kohler & Kun, *supra* note 30, at 480–86.

<sup>50</sup> *Id.*

<sup>51</sup> Dilyara Nigmatullina, *The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study*, 33 J. INT'L ARB. 37, 70 (2016).

### C. ENFORCEMENT OF THE OUTCOME

Empirical research has demonstrated that settlement agreements are the most common outcomes of international mediation.<sup>52</sup> The enforcement of settlement agreements generally relies on parties' voluntary performance.<sup>53</sup> National provisions may provide different instruments to enforce settlement agreements.<sup>54</sup> Generally, settlement agreements are considered contracts signed by parties and thus enforced based on relevant provisions.<sup>55</sup> If parties refuse to comply with a settlement agreement, a party's only recourse is to sue for breach of contract as no coercive instrument exists.<sup>56</sup> Therefore, some practitioners desire to record settlement agreements in more enforceable forms, such as arbitral awards.<sup>57</sup>

Controversies arise when parties require arbitral tribunals to record their settlement agreements as arbitral awards.<sup>58</sup> Academic debates focus on three issues: (1) whether arbitral tribunals have the authority to record settlement agreements as consent awards; (2) whether these consent awards can be enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention); and (3) whether developing an international convention to promote the enforcement of settlement agreements is appropriate and/or necessary.<sup>59</sup> The arbitration community has observed that reaching a settlement before, during, or after arbitration proceedings is not rare.<sup>60</sup> Another survey indicated that 40% of disputants chose to reach a settlement even after arbitral awards were rendered.<sup>61</sup> Some organizations have

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

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 54.

<sup>56</sup> David F. Herr, Roger S. Haydock & Jeffrey W. Stempel, *Motions to Enforce Settlements: An Important Procedural Tool*, 8 AM. J. TRIAL ADVOC. 1, 1–9 (1984).

<sup>57</sup> Stavros Brekoulakis, *Enforcement of Foreign Arbitral Awards: Observations on the Efficiency of the Current System and the Gradual Development of Alternative Means of Enforcement*, 19 AM. REV. INT'L ARB. 415, 434 (2013).

<sup>58</sup> *Id.* at 436.

<sup>59</sup> *Id.*

<sup>60</sup> See Yaroslau Kryvoi & Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 40 BROOK. J. INT'L LAW 827, 829 n.3 (2015) (“For example, in 2013, 40 out of 471 awards rendered by the International Chamber of Commerce (‘ICC’) International Court of Arbitration were consent awards. See INT'L COURT OF ARBITRATION, *2013 Statistical Report*, 25 ICC INT'L CT. ARB. BULL. 1, 14 (2014).”).

<sup>61</sup> Brekoulakis, *supra* note 57, at 419–20.



taken on projects to improve the enforcement of settlement agreements and consent awards.<sup>62</sup> Many scholars contend that the enforcement of consent awards under the New York Convention regime is workable.<sup>63</sup> However, according to Article I(1) of the New York Convention, the Convention applies to the sought-after “arbitral awards” that arise out of differences between persons.<sup>64</sup> Therefore, if parties reach a settlement agreement before the initiation of the arbitration proceeding, no genuine “difference” exists between parties and national courts cannot consider rendered consent awards to be covered by the New York Convention.<sup>65</sup> Some practitioners suggest that parties reach settlement agreements after the commencement of arbitration proceedings to avoid challenges to the application of the New York Convention.<sup>66</sup> Controversies and challenges are not limited to technical problems.<sup>67</sup> Additionally, recording settlement agreements as consent awards involves more profound jurisprudential considerations—for example, arbitrators’ jurisdiction on settlement agreements<sup>68</sup> and the legitimacy of consent awards.<sup>69</sup> The United Nations Commission on International Trade Law (UNCITRAL) and many practitioners expect that a convention on the enforcement of settlement agreements would promote the application of mediation and end the reliance on arbitration, litigation, or the New York Convention.<sup>70</sup> These appeals and efforts culminated in the adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention).<sup>71</sup>

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<sup>62</sup> *Id.* at 415–16.

<sup>63</sup> Harold I. Abramson, *Mining Mediation Rules for Representation Opportunities and Obstacles*, 15 AM. REV. INT’L ARB. 103, 108 (2004).

<sup>64</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I(1), June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

<sup>65</sup> Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553, 580–92 (2005).

<sup>66</sup> Kryvoi & Davydenko, *supra* note 60, at 850.

<sup>67</sup> Deason, *supra* note 65, at 580.

<sup>68</sup> *Id.* at 589 n.173.

<sup>69</sup> Christopher Newmark & Richard Hill, *Can a Mediated Settlement Agreement Become an Enforceable Arbitration Award?*, 16 ARB. INT’L L, 81 (2000); James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT’L ARB. 83, 88 (1997).

<sup>70</sup> Deason, *supra* note 65, at 572–73.

<sup>71</sup> James Claxton, *The Singapore Convention for Mediation: From Promotion to Workable Standards by Way of New York*, J. ASIA-PACIFIC STD. 358–59 (2020).

### III. DEVELOPING CHINESE MEDIATION

Practitioners are fully aware that different cultural backgrounds result in significant differences in perceptions of mediation.<sup>72</sup> A preference for mediation in Asian culture is not uncommon.<sup>73</sup> The Asia–Pacific region’s preference for mediation originates from ancient Chinese philosophy: For example, Confucianism.<sup>74</sup> According to Confucianism, the optimal resolution of most disputes and social stability are achieved not via a public authority, but via moral persuasion.<sup>75</sup> Ancient Chinese culture did not advocate for adversarial dispute resolution methods.<sup>76</sup> The fact that Chinese culture strongly favors harmonization in human relationships provides a solid foundation for expanding mediation in the modern dispute resolution market.<sup>77</sup>

Administrative inclination and the limitations of judicial resources have also fueled the prosperity of alternative dispute resolution in China.<sup>78</sup> The caseloads of Chinese national courts is exceptionally large: For example, in 2021, the average number of cases administered by one judge was over 200.<sup>79</sup> With courts so inundated, it is not difficult to see why the Chinese judiciary system is so in favor of alternative dispute resolution methods—including mediation.

Generally, four types of mediation exist in China: (1) people’s mediation; (2) administrative mediation; (3) judicial mediation; and (4) institutional mediation (including mediation combined with arbitration).<sup>80</sup> Because people’s mediation and administrative mediation mainly address domestic disputes related to rural land use, labor disputes, and so on,<sup>81</sup> and due to the limitations of this research, this article concentrates on Chinese courts and institutional practices in mediating commercial disputes.

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<sup>72</sup> Kaufmann-Kohler & Kun, *supra* note 30, at 482.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 480.

<sup>75</sup> *Id.* at 480–81.

<sup>76</sup> Xianyi Zeng, *Research on Traditional Chinese Mediation Institution*, 4 CHINA LEGAL SCI. 34, 35 (2009).

<sup>77</sup> Kaufmann-Kohler & Kun, *supra* note 30, at 480.

<sup>78</sup> *Id.* at 480–82.

<sup>79</sup> 2021 National Judicial Statistical Bulletin of Courts, SUPREME PEOPLE’S COURT OF THE PEOPLE’S REPUBLIC OF CHINA (SPC) (2021), <http://gongbao.court.gov.cn/Details/a6c42e26948d3545aea5419fa2beaa.html> [hereinafter 2021 Statistic].

<sup>80</sup> Kaufmann-Kohler & Kun, *supra* note 30, at 483.

<sup>81</sup> *Id.* at 482.

### A. AN EMPIRICAL PERSPECTIVE ON CHINESE JUDICIAL MEDIATION

Judicial mediation constitutes an important part of—and is considered the “wind direction” indicator of—the whole Chinese mediation system.<sup>82</sup> Relevant legislation includes the Civil Procedure Law of the People’s Republic of China (CCPL), Chapter 8;<sup>83</sup> People’s Mediation Law of the People’s Republic of China;<sup>84</sup> and Law of the People’s Republic of China on Labor-Dispute Mediation and Arbitration.<sup>85</sup> The Supreme People’s Court of the People’s Republic of China (SPC) has established a series of legal interpretations on regulating judicial mediation. Chapter 8 of the CCPL stipulates that judges can mediate at any stage of a civil litigation proceeding.<sup>86</sup> Article 90 of the CCPL states that judges should record parties’ settlement agreements as mediation statements annexed with courts’ seals and judges’ signatures.<sup>87</sup> The mediation statements are official court documents and are coercively enforceable after they are delivered to the parties.<sup>88</sup> The following flow chart illustrates how mediation is incorporated into Chinese litigation proceedings.<sup>89</sup>

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<sup>82</sup> Zeng, *supra* note 76, at 35.

<sup>83</sup> Civil Procedure Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 9, 1991), ch. 8 (China).

<sup>84</sup> People’s Mediation Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Jan. 1, 2011) (China). People’s mediation is mediation undertaken by people’s mediation committees, which clearly reflects the impact of Communist ideology. *See* Aaron Halegua, *Reforming the People’s Mediation System in Urban China*, 35 HONG KONG L.J. 715, 717 (2005).

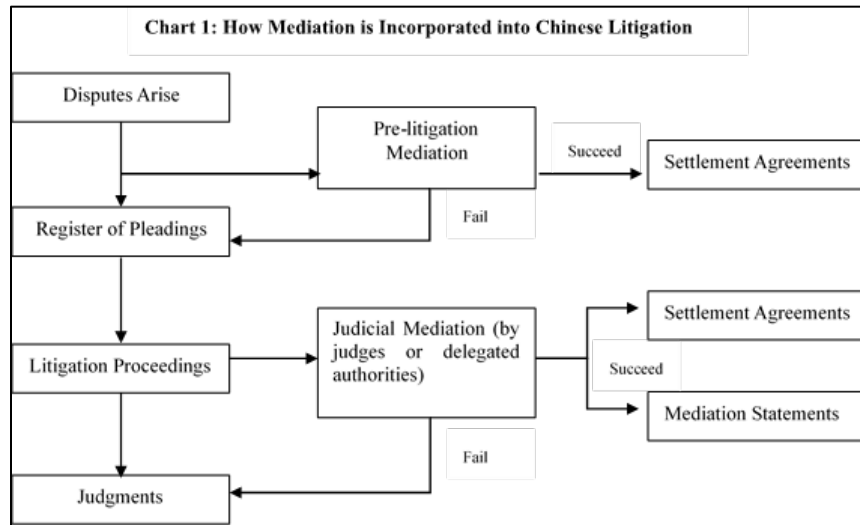
<sup>85</sup> Law of the People’s Republic of China on Labor-Dispute Mediation and Arbitration (promulgated by the Nat’l People’s Cong., May 1, 2008) (China).

<sup>86</sup> Civil Procedure Law of the People’s Republic of China, *supra* note 83, art. 86.

<sup>87</sup> *Id.* art. 90.

<sup>88</sup> *Id.* art. 87.

<sup>89</sup> The chart is of the author’s own making.



This research collects data related to the number of mediation cases in first-instance civil litigation cases resolved by all Chinese courts from 2009 to 2022, published in annual Chinese Law Yearbooks (the Yearbook of each year publishes the collected data of the previous year) and the Supreme People’s Court of the People’s Republic of China Annual Reports.<sup>90</sup> The relevant data may present a complete image of how mediation is used in litigation proceedings to resolve civil cases. From a statistical perspective, Chinese judges use mediation through litigation proceedings at a comparatively high rate. For example, in 2022, all Chinese courts resolved 16,113,798 first-instance civil litigation cases.<sup>91</sup> Chinese judges made judgments in 7,657,032 cases, which constituted only 47.5% of the total number.<sup>92</sup> 3,547,192 of these cases (22%) were resolved via mediation, ending in settlement agreements or mediation statements.<sup>93</sup> The remaining cases were closed as withdrawals, lawsuits dismissed or denied, or other dispositions.<sup>94</sup> Considering that not every mediation taken in litigation will succeed, the actual application rate of mediation in civil litigation is

<sup>90</sup> See generally CHINESE LAW YEARBOOK 2010–2022, CHINESE L. Y.B. ASS’N (Zhu Ge Pingping ed.) (relevant data were published in “Chapter 11: Statistic” of the Yearbooks); *Judicial Statistics*, SPC, [http://gongbao.court.gov.cn/ArticleList.html?serial\\_no=sftj](http://gongbao.court.gov.cn/ArticleList.html?serial_no=sftj) (last visited Apr. 28, 2023) [hereinafter *Statistics*].

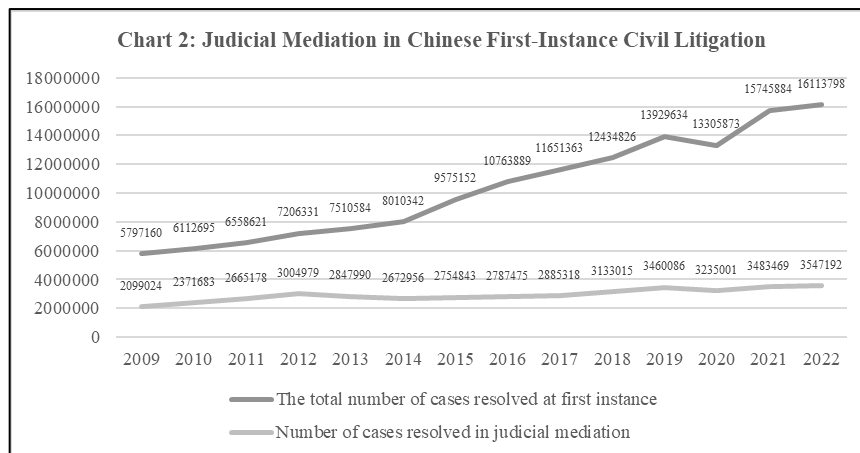
<sup>91</sup> 2022 National Court Judicial Statistics Bulletin, SPC (2022), <http://gongbao.court.gov.cn/Details/20587eaf248beb61ed6596018865c.html> [hereinafter 2022 *Statistic*].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

much higher.<sup>95</sup> The detailed numerical statistics are illustrated in Chart 2.<sup>96</sup>



The collected data do not distinguish civil litigation related to commercial disputes from other civil disputes (which is also the case for Chinese laws). The Chinese Law Yearbook of every year up until 2018 classified subject matters of all civil litigations into three categories: (1) family issues; (2) contract issues; and (3) tort and property issues.<sup>97</sup> The Yearbooks of 2019 and 2022 classified subject matters of civil litigation into ten categories, including infringement of personal rights, family issues, property issues, contract issues, intellectual property issues, labor issues, maritime and other commercial issues, securities issues, and torts.<sup>98</sup> Generally, all civil lawsuits relating to property issues, contract issues, intellectual property issues, maritime issues, and securities issues can have commercial characteristics.<sup>99</sup> Specific to the mediation rate of each category, mediation resolves most family disputes.<sup>100</sup> For example, in 2022, mediation resolved approximately 42.76% of family lawsuits.<sup>101</sup> The mediation rate of lawsuits related to contract issues was steadily around 21% from 2016 to 2022.<sup>102</sup>

Data from 2019 and 2022 related to the categories of maritime and commercial issues may be more accurate in presenting applications of judicial mediation in resolving commercial

<sup>95</sup> Kaufmann-Kohler & Kun, *supra* note 30, at 484–85.

<sup>96</sup> *Statistics*, *supra* note 90.

<sup>97</sup> See generally CHINESE LAW YEARBOOK 2010–2022, *supra* note 90.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> 2022 *Statistic*, *supra* note 91.

<sup>102</sup> 2021 *Statistic*, *supra* note 79.

disputes.<sup>103</sup> The following table illustrates the numbers and rates of judicial mediation cases in 2022 for ten subject-matter categories.<sup>104</sup>

<b>2022 Judicial Mediation Cases in Chinese First-Instance Civil Litigation</b>		
<b>Subject Matter</b>	<b>Number of Mediation Cases</b>	<b>Rate of Judicial Mediation</b>
<b>Infringement of Personal Rights</b>	35,095	20.7%
<b>Family Issues</b>	776,502	42.8%
<b>Property Issues</b>	45,398	13.7%
<b>Contract issues</b>	2,212,434	19.9%
<b>Intellectual Property Issues</b>	44,155	9.6%
<b>Labor Issues</b>	115,090	22.6%
<b>Maritime Issues</b>	3,434	22.3%
<b>Securities Issues</b>	86,843	14.2%
<b>Torts</b>	226,584	22.6%
<b>Other</b>	1,657	2.0%

Overall, the mediation rates in Chinese civil litigations reveal that Chinese judges commonly use mediation to resolve various civil disputes.<sup>105</sup> However, the rate of judicial mediation reached a peak around 2012 and decreased steadily afterwards, stabilizing after 2016.<sup>106</sup> The next section analyzes the underlying reasons. Chart 3 illustrates the specific mediation rates from 2009 to 2022.<sup>107</sup>

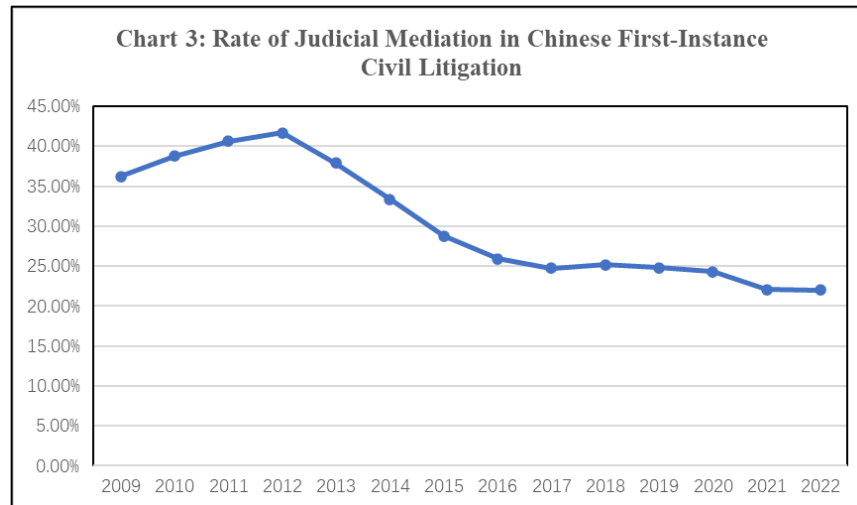
<sup>103</sup> *Id.*

<sup>104</sup> 2022 *Statistic*, *supra* note 91.

<sup>105</sup> *Id.*

<sup>106</sup> *See generally* CHINESE LAW YEARBOOK 2010–2022, *supra* note 90.

<sup>107</sup> 2021 *Statistic*, *supra* note 79.



## B. INTROSPECTION ON CHINESE JUDICIAL MEDIATION

Chinese judicial mediation has passed through four phases: (1) preference for mediation (1960–1990), when mediation was the major dispute resolution method for resolving various disputes; (2) voluntary mediation (1990–2004), when courts emphasized the protection of parties’ judicial rights and respected parties’ feelings regarding whether mediation should commence;<sup>108</sup> (3) priority for mediation (2004–2012), when courts restressed the positive effect of mediation and flexibly used multi-channel mediation sources in judicial proceedings; and (4) restrictive mediation (2012–present), when courts applied mediation with a more prudential attitude. Many studies have introduced the reasons for using—and features of—Chinese traditional mediation and judicial mediation.<sup>109</sup> Due to the limitations of this research, this article concentrates on Chinese judicial experience in using mediation to resolve commercial disputes after 2009. The varying popularity of judicial mediation reflects the Chinese judicial system’s introspection regarding the mediation system.<sup>110</sup> Chinese judicial mediation gradually developed into a mature dispute resolution regime with comparatively sophisticated legal sources and versatile working

<sup>108</sup> Guiguoa Wang & Xiaoli He, *Mediation and International Investment: A Chinese Perspective*, 65 ME. L. REV. 215, 227 (2012); see Guodong Du & Meng Yu, *Mediation in China: Past and Present*, CHINA JUST. OBSERVOR (Aug. 11, 2019), <https://www.chinajusticeobserver.com/a/mediation-in-china-past-and-present>.

<sup>109</sup> Jiaqi Liang, *The Enforcement of Mediation Settlement Agreements in China*, 19 AM. REV. INT’L ARB. 489, 493–505 (2008).

<sup>110</sup> Weixia Gu, *Responsive Justice in China During Transitional Times: Revisiting the Juggling Path Between Adjudicatory and Mediator Justice*, 14 WASH. U. GLOBAL STUD. L. REV. 49, 54 (2015).

models after 2012.<sup>111</sup> This part presents the highlights and pitfalls that exist regarding current Chinese judicial mediation practice.

### 1. PRECAUTION AGAINST OVERUSE

The major reason that the judicial mediation rate calculated in the last section decreased from more than 60% in Phase 1 to approximately 40% in Phases 2 and 3, then to approximately 25% after 2016, is that the Chinese judicial system is aware that overuse of mediation may produce potential injustice and unfairness.<sup>112</sup> The Chinese judicatory system's desperate expansion of mediation has resulted in using the mediation rate as an important indicator for performance assessment.<sup>113</sup> To impress higher courts, lower courts sometimes asked their judges to achieve a certain mediation rate in civil litigation.<sup>114</sup> This policy caused judges to mediate nearly every civil litigation and sometimes forced parties to settle against their will and the substantive merits of the case in question.<sup>115</sup> This policy had an instant effect, and the mediation rate of some Chinese courts reached over 60%.<sup>116</sup> However, some studies revealed that a high mediation rate may not necessarily lead to high voluntary enforcement of settlement agreements.<sup>117</sup> To the contrary, most settlement agreements were not voluntarily honored by parties, resulting in relitigating or an application for coercive enforcement from Chinese courts.<sup>118</sup> The whole Chinese judicial system realized that this unfavorable result due to the high mediation rate would eventually aggravate enforcement pressure and make no contribution to promoting dispute resolution and social harmonization.<sup>119</sup> Therefore, the Chinese judicial system eventually adopted a more prudential attitude towards the application of mediation in civil litigation by respecting parties' desires, and removed the mediation rate from the performance assessment of judges and courts.<sup>120</sup>

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<sup>111</sup> *Id.* at 50–58.

<sup>112</sup> Jie Li, *What Does the Mediation Rate Mean?*, 10 J. LAW APPLICATION 49, 54 (2008).

<sup>113</sup> *Id.* at 51.

<sup>114</sup> *Id.* at 50.

<sup>115</sup> *Id.* at 51.

<sup>116</sup> Hao Li, *A Noticeable Phenomenon in Mediation Conducted by Courts*, 1 LAW SCI. 139, 139 (2012).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Gu, *supra* note 110, at 50–58.

<sup>120</sup> *Id.*



## 2. SEPARATING MEDIATION PROCESSES

The overuse of mediation in practice does not merely cause unfavorable results.<sup>121</sup> As mentioned earlier, judges can seek mediation in any stage of a civil litigation proceeding, from the registration of pleadings to the issuance of a judgment.<sup>122</sup> Even though Chinese judges have continuously practiced and trained in mediation and technical skills over several decades, most judges conduct mediation processes like litigation.<sup>123</sup> In mediation initiated by judges, parties can easily yield to the judge's authority or are reluctant to reveal information that may be used against them in subsequent litigation proceedings.<sup>124</sup> Some commentators and practitioners have appealed to separate the mediation and litigation processes to avoid one judge from performing both roles in a single proceeding.<sup>125</sup> In 2016, the SPC published the Opinions on Further Revolution of Alternative Dispute Resolution System (Opinions on ADR) to explore a full-time mediator system.<sup>126</sup> The full-time mediator system requires courts to appoint judges with both mediation skills and abundant mediation experience as full-time mediators to conduct all mediation proceedings.<sup>127</sup> Most Chinese courts actively executed this policy, finding success to different extents and of course encountering various challenges.<sup>128</sup> Even though employment of the same judge as the mediator is still the common practice in current Chinese judicial mediation, the tendency of separating mediation and litigation proceedings and relevant revolutions are becoming increasingly obvious.<sup>129</sup>

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<sup>121</sup> Li Tang, *Between Compulsion and Consent Dilemma and Direction of Chinese Judicial Mediation*, 3 MOD. LEGAL SCI. 86, 96 (2012).

<sup>122</sup> See discussion *supra* Section III.A.

<sup>123</sup> Hao Li, *Mediation Is Mediation, Trial Is Trial: The Separation of Mediation and Trial in Civil Trial*, 3 CHINA LEGAL SCI. 5, 6–9 (2013).

<sup>124</sup> Tang, *supra* note 121, at 96.

<sup>125</sup> Yongku Zhao, *Promoting Judicial Efficiency by Professionalizing Mediation*, 6 MOD. LEGAL SCI. 11, 15 (1989); Cui Zhou, *Relationship Between Mediation and Judiciary: Rethink and Restatement*, 1 COMPAR. LEGAL RSCH. 46, 52 (2014).

<sup>126</sup> SPC, *Opinions on Further Revolution of Alternative Disputes Resolution System*, Fa Fa (2016) No. 14.

<sup>127</sup> Youngzhu Chen, *The Judge as Mediator in China and Its Reform: A Problem in Chinese Civil Justice*, 10 J. COMP. L. 106, 107 (2015).

<sup>128</sup> Yingzi Wu, *Priority of Mediation*, 25 CHINESE & FOREIGN LEGAL SCI. 536, 550 (2013).

<sup>129</sup> Chen, *supra* note 127, at 118.

### 3. MULTI-CHANNEL MEDIATION SOURCES

The SPC's Opinions on ADR not only propose separating mediation and litigation, but also emphasize cooperation between the Chinese judicial system and other ADR authorities.<sup>130</sup> There are numerous authorities that can provide mediation services.<sup>131</sup> In a specific area of commercial mediation, these authorities include specific mediation associations, industry mediation associations, arbitration institutions, and so on.<sup>132</sup> For example, in 2016, the Bank Mediation Center—the first mediation association in the Chinese banking industry for mediating disputes related to bank services—was established in Shanghai.<sup>133</sup> In 2016, the Shenzhen Intellectual Property Association established an Intellectual Property Mediation Center in Shenzhen to mediate intellectual property disputes.<sup>134</sup> Additionally, arbitration institutions are actively expanding their mediation services.<sup>135</sup> The Chinese judicial system not only promotes institutional mediation, but also explores cooperation with these entities by delegating them to participate in judicial mediation proceedings.<sup>136</sup>

Ultimately, the latest established Chinese International Commercial Court (CICC) further demonstrates the Chinese judicial system's preference for mediation.<sup>137</sup> The CICC is “a permanent adjudication organ established by the Supreme People's Court to deal with international commercial disputes . . . .”<sup>138</sup> The establishment of the CICC aimed to resolve cross-border commercial disputes and improve the legal environment for foreign

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<sup>130</sup> SPC, *supra* note 126.

<sup>131</sup> Du & Yu, *supra* note 108.

<sup>132</sup> *Id.*

<sup>133</sup> *Pudong Gets China's First Banking Dispute Mediation Center*, CHINA DAILY NEWS, chinadaily.com.cn/m/shanghai/lujiazui/2016-05/13/content\_25262313.htm (May 13, 2016).

<sup>134</sup> *Shenzhen Intellectual Property Mediation and Arbitration Center Unveiled*, SHENZHEN COPYRIGHT SOC'Y (Sept. 1, 2016, 1:04:41), [http://www.scs.org.cn/news\\_detail.php?id=118&cid=2](http://www.scs.org.cn/news_detail.php?id=118&cid=2).

<sup>135</sup> See, e.g., Cao Yin, *Intellectual Property Mediation Center Opens in Beijing*, CHINADAILY.COM.CN, [http://www.chinadaily.com.cn/china/2017-01/12/content\\_27938409.htm](http://www.chinadaily.com.cn/china/2017-01/12/content_27938409.htm) (Jan. 12, 2017, 17:56).

<sup>136</sup> Chen, *supra* note 127, at 108.

<sup>137</sup> Meng Chen, *The Reforming Chinese Chapter of International Dispute Resolution Under the Belt and Road Initiative*, 34 PACIFIC REV. 469, 471–73 (2019), <https://doi.org/10.1080/09512748.2019.1677749>.

<sup>138</sup> *A Brief Introduction of China International Commercial Court*, CHINA INT'L COM. CT. (CICC) (June 28, 2016), <https://cicc.court.gov.cn/html/1/219/193/195/index.html>.

investment.<sup>139</sup> The SPC specifically indicated that the work of the CICC will encourage the adoption of alternative dispute resolution.<sup>140</sup> For example, the CICC has established an International Commercial Expert Committee that consists of thirty-one experts on international law to mediate disputes at parties' request.<sup>141</sup>

#### IV. UNIFYING INSTITUTIONAL COMMERCIAL MEDIATION

Numerous Chinese intuitions can provide mediation services, including mediation centers established by industry associations to mediate disputes that arise in certain industries, mediation centers established by public authorities to mediate disputes with certain subject matters, and mostly the large number of arbitration institutions that are capable of mediating a wide range of disputes.<sup>142</sup>

##### A. INSTITUTIONAL MEDIATION: AN INTERNATIONAL MODEL

The popularity of mediation relies on joint efforts of numerous international entities. The European Union is encouraging international mediation both in the commercial and investment spheres.<sup>143</sup> Both UNCITRAL and the International Bar Association (IBA) have established relevant rules and regulations on regulating the international mediation process.<sup>144</sup> The International Centre for Settlement of Investment Disputes (ICSID), American Arbitration Association (AAA), International Chamber of Commerce (ICC), and other institutions are all actively exploring mediation services, either independently or combined with

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<sup>139</sup> *See id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*; SPC, Decision of the Supreme People's Court on the Establishment of an Expert Committee on International Commercial Affairs, Fa Fa (2018) No. 224.

<sup>142</sup> CHINA COMMERCIAL MEDIATION ANNUAL REVIEW 9–16 (Beijing Arb. Comm'n ed., 2022).

<sup>143</sup> *See generally* Katia Fach Gómez, *The Role of Mediation in International Commercial Disputes: Reflections on Some Technological, Ethical, and Educational Challenges*, in *MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES* 3–20 (2019).

<sup>144</sup> *See generally* Note by the Secretariat, *Possible Reform of the Investor–State Dispute Settlement (ISDS) Draft Guidelines on Investment Mediation*, UNCITRAL (July 20, 2022), [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp218\\_draft\\_guidelines.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp218_draft_guidelines.pdf).

arbitration.<sup>145</sup> Furthermore, additional mediation associations have been established around the world to enrich the emerging mediation market.<sup>146</sup> However, in the international dispute resolution market, the application of mediation is still limited compared to the application of arbitration—especially in the international commercial area.<sup>147</sup> This part examines an international model of conducting commercial mediation independently or combined with arbitration.

In the dispute resolution market, arbitration and mediation operate in such similar realms that almost all practitioners in international mediation are also active players in arbitration.<sup>148</sup> International arbitration institutions are sensitive to the increasing popularity of mediation and are actively seeking to expand their mediation services.<sup>149</sup> The complete dependence of mediation on consent is eased when the process is combined with arbitration. The main purpose behind combining mediation and arbitration is to take advantage of mediation's cost-effective proceedings and arbitration's enforceable outcomes.<sup>150</sup> Arbitrators can record settlement agreements in the form of consent awards that have worldwide enforceability with limited judicial review.<sup>151</sup> With more economical proceedings and enforceable outcomes, the combination of mediation and arbitration appears to be a panacea for international disputes. Therefore, before mediation is developed into a mature and independent resolution, this combination is still an attractive model in practice.

Incorporating mediation into arbitration normally takes three forms: (1) Med-Arb; (2) Arb-Med-Arb; and (3) Arb-Med, indicating different sequences of mediation and arbitration proceedings.<sup>152</sup> In practice, the combination is much more diverse.<sup>153</sup> Scholars use the term “mediation window” to describe the mediation process held in arbitration proceedings.<sup>154</sup> The “mediation window” can be

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<sup>145</sup> Fach Gómez, *supra* note 143, at 7.

<sup>146</sup> S.I. Strong, *Applying the Lessons of International Commercial Arbitration to International Commercial Mediation: A Dispute System Design Analysis*, in *MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES* 39–42 (Catharine Titi & Katia Fach Gómez eds., 2019).

<sup>147</sup> *Id.* at 39–47.

<sup>148</sup> Deason, *supra* note 35, at 219.

<sup>149</sup> *Id.* at 222.

<sup>150</sup> *Id.* at 219.

<sup>151</sup> Kryvoi & Davydenko, *supra* note 60, at 832.

<sup>152</sup> Deason, *supra* note 35, at 219.

<sup>153</sup> *Id.* at 220.

<sup>154</sup> *Id.* at 222.

accessed at any stage between the start of the dispute and enforcing an arbitral award.<sup>155</sup>

At the international level, almost all leading arbitration institutions have established mediation rules to regulate their mediation services.<sup>156</sup> One study compared the mediation services of eight international institutions, including the London Court of International Arbitration (LCIA), ICC, AAA, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Australian Centre for International Commercial Arbitration (ACICA), China International Economic and Trade Arbitration Commission (CIETAC), Hong Kong International Arbitration Centre (HKIAC), and Singapore International Arbitration Centre (SIAC).<sup>157</sup> Of these eight institutions, SIAC is the only institution that does not provide a mediation service directly.<sup>158</sup> A separate organization called the Singapore International Mediation Centre (SIMC) facilitates the mediation service in Singapore.<sup>159</sup> SIMC and SIAC administer the mediation and arbitration proceedings, respectively, under the SIAC–SIMC Arb-Med-Arb Protocol jointly signed by those organizations.<sup>160</sup> Almost all arbitration institutions have established specific rules for regulating independent mediation processes.<sup>161</sup> Rule examinations further indicate that arbitration institutions are generally uniform in terms of the rules governing the organization of independent mediation processes, access to mediation in arbitral proceedings, and mediators' discretion in conducting mediation proceedings.<sup>162</sup> However, these institutions vary widely on whether they allow the same neutral entity to be appointed as the arbitrator and the mediator in combined proceedings.<sup>163</sup> The ICC, SCC, and UNCITRAL Model Law on International Commercial Conciliation (UNCITRAL Model Law on Conciliation) do not allow this arrangement as a default rule unless the parties agree otherwise.<sup>164</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> Meng Chen, *Practical Trend of Combining Mediation and Arbitration Chinese Perspective*, 21 CHINESE Y.B. INT'L PRIV. & COMPAR. LAW 143, 159 (2017).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Arb-Med-Arb*, SING. INT'L MEDIATION CTR. (SIMC), <https://simc.com.sg/dispute-resolution/arb-med-arb/> (last visited May 21, 2023).

<sup>160</sup> *See generally SIAC–SIMC Arb-Med-Arb Protocol*, SIMC, <https://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf> (last visited May 21, 2023).

<sup>161</sup> Chen, *supra* note 156, at 149.

<sup>162</sup> *Id.* at 151.

<sup>163</sup> *Id.* at 152.

<sup>164</sup> UNCITRAL Model Law on International Commercial Conciliation, U.N. Sales No. E.05.V.4 (June 24, 2002) [hereinafter UNCITRAL Model

ACICA and HKIAC do not permit the same neutral entity to be appointed in any situation.<sup>165</sup> CIETAC allows this approach by default, unless the parties agree otherwise.<sup>166</sup> LCIA, AAA, and SIAC do not stipulate provisions on this issue.<sup>167</sup> Both ICC and AAA offer supplemental guidance for practice, specifically notifying their clients that appointing the same neutral entity as an arbitrator and a mediator may be acceptable practice in some countries but can produce risks in enforcing settlement agreements and consent awards.<sup>168</sup> Regarding the enforceability of mediation agreements, although mediation rules generally do not stipulate that mediation agreements are enforceable, they all allow one party to submit to mediation even without the other party's consent, and the arbitration institutions will invite another party to participate in mediation.<sup>169</sup> Some practitioners note that forcing parties to enter into mediation is unnecessary, as their reluctance signals that the settlement will likely break down.<sup>170</sup> To maximize procedural efficiency and avoid overlapping proceedings, some rules discourage parties from commencing both proceedings at the same time.<sup>171</sup> For example, the UNCITRAL Model Law on Conciliation limits the freedom of initiating arbitral or judicial proceedings when parties would have specifically agreed to waive their rights to initiate arbitral or judicial proceedings if mediation were pending.<sup>172</sup> Article 17.1 of the ACICA Mediation Rules stipulates that parties shall generally not initiate arbitral proceedings during mediation proceedings.<sup>173</sup> All institutional mediation rules and provisions are silent on the enforceability of settlement agreements.<sup>174</sup> The

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Law on Conciliation]; *ICC Mediation Rules*, INT'L CHAMBER OF COM. (ICC) (Jan. 1, 2014), <http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/>; *SCC Mediation Rules*, SCC ARB. INST. (SCC) (2014), [http://www.sccinstitute.com/media/49819/medlingsregler\\_eng\\_web.pdf](http://www.sccinstitute.com/media/49819/medlingsregler_eng_web.pdf).

<sup>165</sup> *ACICA Mediation Rules*, AUSTRALIAN CTR. FOR INT'L COM. ARB. (ACICA) (July 17, 2007), [https://acica.org.au/wp-content/uploads/Rules/Mediation\\_Rules\\_2007/ACICA-Mediation-Rules-2007.pdf](https://acica.org.au/wp-content/uploads/Rules/Mediation_Rules_2007/ACICA-Mediation-Rules-2007.pdf); *HKIAC Mediation Rules*, H.K. INT'L ARB. CTR. (HKIAC) (Aug. 1, 1999), [hkiac.org/mediation/rules/hkiac-mediation-rules](http://hkiac.org/mediation/rules/hkiac-mediation-rules).

<sup>166</sup> See Chen, *supra* note 156, at 151–54.

<sup>167</sup> See *id.*

<sup>168</sup> *Id.* at 160.

<sup>169</sup> *Id.*

<sup>170</sup> John S. Kiernan, *Reducing the Cost and Increasing the Efficiency of Resolving Commercial Disputes*, 40 CARDOZO L. REV. 187, 224 (2018).

<sup>171</sup> See, e.g., UNCITRAL Model Law on Conciliation, *supra* note 164.

<sup>172</sup> *Id.*

<sup>173</sup> *ACICA Mediation Rules*, *supra* note 165, art. 17.1.

<sup>174</sup> See UNCITRAL Model Law on Conciliation, *supra* note 164; *ACICA Mediation Rules*, *supra* note 165.

UNCITRAL Model Law on Conciliation approaches this issue from a more ambitious perspective by claiming that the settlement agreement is binding and enforceable, echoing UNCITRAL's efforts in promoting the Singapore Convention.<sup>175</sup>

In conclusion, numerous arbitration institutions jointly confirm the value of mediation as a useful dispute resolution method, generally conducting their respective mediation services in a proceeding separate from arbitral proceedings or independently.<sup>176</sup> The international community is aware of the discrepancy of mediation practice in different areas, especially on the issue of appointing the same neutral entity as the arbitrator and mediator.<sup>177</sup> Empirical research has shown that the most common model of combining mediation and arbitration is Med-Arb, appointing different neutral parties to conduct each proceeding.<sup>178</sup> Furthermore, the use of caucuses in mediation procedures has been found to be fairly common.<sup>179</sup> The UNCITRAL Model Law on Conciliation takes more ambitious approaches to enforcing mediation agreements and settlement agreements.<sup>180</sup> Even though studies have revealed that the use of mediation as a separate dispute resolution method or combined with arbitration is comparatively rare in practice, a unifying international model of conducting international mediation is emerging.<sup>181</sup>

## B. INTERNATIONALIZING CHINESE INSTITUTIONAL MEDIATION

After arbitration developed in Mainland China, mediation has spontaneously penetrated into the Chinese alternative dispute resolution market due to cultural preference and legislative support.<sup>182</sup> Articles 49 to 52 of the Arbitration Law of the People's Republic of China (the Arbitration Law) specifically govern settlement agreements reached in arbitration proceedings.<sup>183</sup> These articles recognize the legitimacy of settlement agreements reached in arbitration and stipulate that arbitral tribunals should conduct

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<sup>175</sup> See UNCITRAL Model Law on Conciliation, *supra* note 164, art. 15; Singapore Convention, *infra* note 215.

<sup>176</sup> Chen, *supra* note 156, at 149.

<sup>177</sup> *Id.* at 160.

<sup>178</sup> Nigmatullina, *supra* note 51, at 63–65.

<sup>179</sup> *Id.* at 65.

<sup>180</sup> See UNCITRAL Model Law on Conciliation, *supra* note 164, art. 15.

<sup>181</sup> Nigmatullina, *supra* note 51, at 51.

<sup>182</sup> Kaufmann-Kohler & Kun, *supra* note 30, at 480–86.

<sup>183</sup> Arbitration Law of the People's Republic of China, arts. 49–52 (Aug. 31, 1994), [http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383756.htm) [hereinafter Arbitration Law].

mediation at the parties' request.<sup>184</sup> Similar to mediation statements made by judges, Article 51 of the Arbitration Law provides that “[i]f conciliation leads to a settlement agreement, the arbitration tribunal shall make a written conciliation statement or make an arbitration award in accordance with the result of the settlement agreement. A written conciliation statement and an arbitration award shall have equal legal effect.”<sup>185</sup>

Therefore, the Arbitration Law provides conciliation statements, a unique legal result of mediation conducted by arbitral tribunals. Similar to arbitral awards, conciliation statements have coercive enforceability so long as all parties sign them.<sup>186</sup> The Arbitration Law also implies that the mediation process should be conducted by the same arbitral tribunal, which contradicts international common practice.<sup>187</sup> These Chinese legal provisions form a basic model of combined mediation and arbitration in Mainland China.

All Chinese arbitration institutions provide a mediation service independently or combined with arbitration.<sup>188</sup> In 2022, China maintained approximately 270 arbitration institutions.<sup>189</sup> These Chinese arbitration institutions share one rapidly growing dispute resolution market in Mainland China.<sup>190</sup> However, almost 80% of international commercial disputes are administered by a small number of institutions, including CIETAC, the Shanghai International Arbitration Centre, the Shenzhen Court of International Arbitration (SCIA), the Beijing Arbitration Commission (BAC), the China Maritime Arbitration Commission (CMAC), the Guangzhou Arbitration Commission, and the Shanghai Arbitration Commission.<sup>191</sup> Mediation is frequently used in Chinese arbitration practice.<sup>192</sup> The settlement rates of leading Chinese arbitration institutions range from 12.5% to 70%.<sup>193</sup> Based on the Annual Report on International Commercial Arbitration in China published by CIETAC, the mediation rate of commercial arbitration administered by all Chinese arbitration institutions fluctuates greatly.<sup>194</sup> For example, in 2021, all arbitration

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* art. 51.

<sup>186</sup> *Id.* art. 52.

<sup>187</sup> *See id.*

<sup>188</sup> ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA 2020–2021, CHINA INT’L ECON. & TRADE ARB. COMM’N (CIETAC) 61 (2021) [hereinafter 2020–2021 CIETAC ANNUAL REPORT].

<sup>189</sup> *Id.* at 8.

<sup>190</sup> *Id.* at 49–51.

<sup>191</sup> *Id.* at 12.

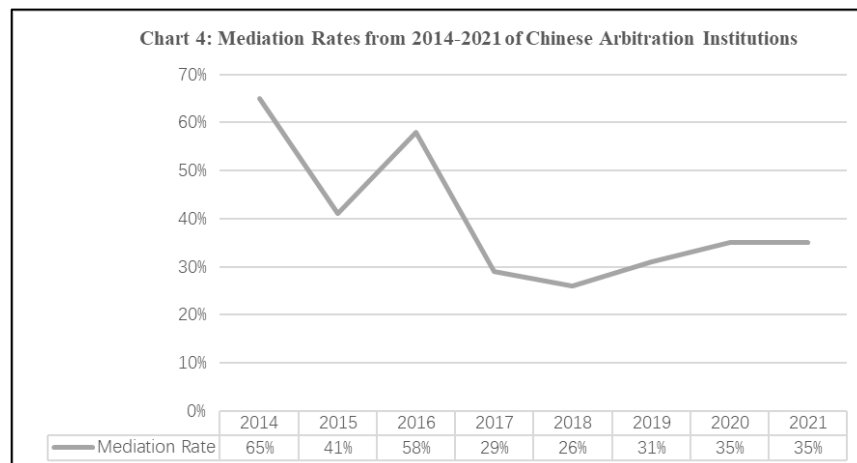
<sup>192</sup> *Id.* at 11.

<sup>193</sup> Chen, *supra* note 156, at 162.

<sup>194</sup> 2020–2021 CIETAC ANNUAL REPORT, *supra* note 188, at 5.



institutions in Mainland China administered 415,889 arbitrations.<sup>195</sup> Parties reached settlement agreements in 93,162 arbitrations, which constituted 35% of all commercial cases.<sup>196</sup> The fluctuating mediation rate may work in concert with a revolution of internationalizing Chinese institutional mediation. A few additional years may be needed to yield more stable data. However, even though the data fluctuate, the mediation rate in commercial arbitration administered by Chinese institutions is comparatively high.<sup>197</sup> Considering that parties may require tribunals to record their settlement agreements as consent awards, the actual application of mediation is more frequent.<sup>198</sup> However, because the number of international cases administered by Chinese arbitration institutions is comparatively small, the relevant mediation rate has not been published.<sup>199</sup> Although there is no difference between these institutions regarding the mediation of domestic and international disputes, the mediation rate in international cases might be lower than that in domestic cases. The following chart presents detailed mediation rates of Chinese institutional arbitration from 2014 to 2021.<sup>200</sup>



According to Chinese law, it is a common practice to combine arbitration and mediation.<sup>201</sup> Chinese legislation generally provides mediation as a supplemental dispute resolution method to

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 11.

<sup>197</sup> *See id.*

<sup>198</sup> *See Kryvoi & Davydenko, supra* note 60, at 832.

<sup>199</sup> *See* 2020–2021 CIETAC ANNUAL REPORT, *supra* note 188, at 13.

<sup>200</sup> *See Research, CIETAC, <http://www.cietac.org/index.php?m=Article&a=index&id=47&l=en>* (last visited May 21, 2023) (listing referenced studies).

<sup>201</sup> Deason, *supra* note 35, at 222.

litigation and arbitration.<sup>202</sup> Therefore, mediation that takes place in arbitration proceedings has traditionally been conducted by arbitral tribunals.<sup>203</sup> In addition, all institutional arbitration and mediation rules require arbitral tribunals to record parties' settlement agreements as consent awards at parties' request.<sup>204</sup> Even in the absence of pre-existing arbitration agreements, some institutions offer to facilitate their clients' efforts to obtain an enforceable arbitral award by signing an arbitration agreement after settlement.<sup>205</sup> Arbitrators typically state the existence of a settlement agreement in the consent award and declare that the award shall not cause prejudice to public interests and other persons' legal rights.<sup>206</sup> However, this practice causes potential injustice and contradiction in some circumstances.<sup>207</sup>

The Chinese arbitration community is fully aware of the discrepancy between Chinese traditional mediation practice and prevailing international models and is willing to actively reform its mediation system to comply with international standards.<sup>208</sup> For example, some leading Chinese arbitration institutions (such as SCIA, BAC, CIETAC, and CMAC) have established separate mediation centers and independent mediation rules to facilitate the mediation service.<sup>209</sup> The BAC Mediation Rules explicitly state that the institution governs mediation processes that are not conducted by arbitral tribunals.<sup>210</sup> Separating mediation and arbitration proceedings not only decreases potential challenges stemming from violations of due process but also provides a pure mediation service, allowing the expansion of institutions' businesses.<sup>211</sup> However, it may also lead to a waste of resources and cooperation problems between different departments. Although some arbitration

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<sup>202</sup> 2020–2021 CIETAC ANNUAL REPORT, *supra* note 188, at 61.

<sup>203</sup> *See id.*

<sup>204</sup> Arbitration Law, *supra* note 183, art. 49.

<sup>205</sup> *See Beijing Arbitration Commission Mediation Center Mediation Rules*, BEIJING INT'L ARB. COMM'N (2011), [http://www.bjac.org.cn/page/tj/tjgz\\_en.html](http://www.bjac.org.cn/page/tj/tjgz_en.html).

<sup>206</sup> Chen, *supra* note 156, at 149.

<sup>207</sup> For example, a party on the verge of bankruptcy may intend to transfer property via sham mediation.

<sup>208</sup> *Chinese Arbitration Association (Taipei)*, GLOB. ARB. REV. (Apr. 23, 2021), <https://globalarbitrationreview.com/survey/the-guide-regional-arbitration/2021/organization-profile/chinese-arbitration-association-taipei>.

<sup>209</sup> *See, e.g., China Hi-Tech Fair Center for Dispute Resolution Service*, SHENZHEN CT. OF INT'L ARB. (SCIA), <http://www.scia.com.cn/index.php/En/index/serviceinfo2/id/29.html> (last visited May 21, 2023).

<sup>210</sup> Chen, *supra* note 156, at 151–54.

<sup>211</sup> *Id.* at 155.

institutions do not establish independent mediation centers, they may have a separate mediation team within their respective organizations to provide a comparatively separate mediation service.<sup>212</sup> For example, in 2018, CIETAC officially reorganized its internal mediation department into an independent mediation center to administer pure mediation applications.<sup>213</sup> Responding to criticism to the default use of the same neutral entity, SCIA, BAC, and SAC revised their respective mediation rules to stipulate that mediators cannot serve as arbitrators in arbitral proceedings unless all parties have otherwise agreed to that course of events.<sup>214</sup>

## V. THE IMPACT OF THE SINGAPORE CONVENTION

UNCITRAL's efforts to promote international mediation finally resulted in the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, as well as the Singapore Convention), published in 2018.<sup>215</sup> The Singapore Convention opened for signature on August 7, 2019, and is currently signed by fifty-one states.<sup>216</sup> China actively participated in the drafting of this convention and is one of the forty-six states that signed it on its opening day.<sup>217</sup> With Singapore, Fiji, Qatar, Saudi Arabia, and Belarus having deposited instruments of ratification or approval, the Convention entered into force on September 12, 2020.<sup>218</sup> This part briefly concludes by describing the innovations of the Singapore Convention and demonstrating the latter's impacts on Chinese mediation.

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<sup>212</sup> See, e.g., CIETAC 2018 REPORT CARD, CHINA BUS. LAW J. (June 11, 2019), <https://law.asia/cietac-performance-2018/>.

<sup>213</sup> *Id.*

<sup>214</sup> Chen, *supra* note 156, at 155–56.

<sup>215</sup> See generally UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, UNCITRAL (2018), [https://uncitral.un.org/en/texts/mediation/modellaw/commercial\\_conciliation](https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation); United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation"), [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements) [hereinafter Singapore Convention].

<sup>216</sup> See Singapore Convention, *supra* note 215.

<sup>217</sup> See *id.*

<sup>218</sup> Tomas Navarro Blakemore & Jean Marguerat, *The Singapore Convention on Mediation Entered into Force on 12 September 2020*, MEYERLUSTENBERGER LACHENAL FRORIEP LTD (MLL) (Sept. 24, 2020), <https://www.mll-news.com/the-singapore-convention-on-mediation-entered-into-force-on-12-september-2020-2/?lang=en>.

### A. HIGHLIGHTS OF THE SINGAPORE CONVENTION

The Singapore Convention's major purpose is to promote mediation as an alternative and effective method to resolve trade disputes by enhancing the reliability and enforceability of settlement agreements reached in international mediation.<sup>219</sup> Many commentators have introduced and compared highlights of the Singapore Convention to that of its sister convention, the New York Convention.<sup>220</sup> Except for the sphere of application, relevant innovations include:

(1) Instead of using the terms “recognition and enforcement” of the New York Convention, the Singapore Convention uses the phrase “reliance on settlement agreements.”<sup>221</sup> This change indicates that the Singapore Convention not only aims to promote coercive enforcement of settlement agreements but to use these agreements for other functions: For example, as a defense to judicial jurisdiction, considering that relevant disputes have been settled.<sup>222</sup>

(2) Following Article III of the New York Convention, the Singapore Convention does not stipulate any specific procedural rules for executing settlement agreements and leaves relevant areas to national provisions.<sup>223</sup> However, the Singapore Convention vests provisions regarding the validity of the electronic signature.<sup>224</sup>

(3) Article 5 of the Singapore Convention provides permissive and exhaustive grounds for refusal tailored to features of mediation.<sup>225</sup> Notably, this article does not include “violation of due process” as a ground for refusal.<sup>226</sup> A drafter of the Singapore Convention explained that the due process standards of the mediation procedure were unclear, but that drafters believed a

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<sup>219</sup> *Convention Text*, SING. CONVENTION ON MEDIATION, <https://www.singaporeconvention.org/convention/text> (last visited May 21, 2023).

<sup>220</sup> Herman Verbist, *United Nations Convention on International Settlement Agreements Resulting from Mediation*, 2019 BELGIAN REV. ARB. 53, 54 (2019).

<sup>221</sup> United Nations Convention on International Settlement Agreements Resulting from Mediation, UNCITRAL 5 (Mar. 2019), [https://uncitral.un.org/sites/uncitral.un.org/files/singapore\\_convention\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf).

<sup>222</sup> Verbist, *supra* note 220, at 53–86.

<sup>223</sup> See New York Convention, *supra* note 64, art. III; Singapore Convention, *supra* note 215, art. 5(2).

<sup>224</sup> Singapore Convention, *supra* note 215.

<sup>225</sup> *Id.* art. 5.

<sup>226</sup> *Id.*

mediation procedure's due process standards are less relevant if parties voluntarily agree to the final resolution.<sup>227</sup>

(4) Article 5(1)(e) applies if the party can evidence a serious breach of standards applicable to the mediator or the mediation without which that party would not have entered into the settlement.<sup>228</sup> One can apply these standards based on the mediator's licensing regime, the location of the mediation, or international rules and usage.<sup>229</sup> These standards may cover basic requirements regarding independence, impartiality, confidentiality, and fair treatment of the parties.<sup>230</sup> This provision places a comparatively heavy burden of proof on opposing parties, considering that proving that either these standards exist or that the party would not have entered into the settlement is generally difficult in practice.

(5) Article 5(1)(f) provides, as grounds to refuse granting relief, a "failure by the mediator to disclose to the parties' circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement."<sup>231</sup> This provision refers to the conflict-of-interest factor of mediators.<sup>232</sup> The involved conflict of interest must be significant and unknown by the opposing party.<sup>233</sup> Both abovementioned grounds provided in Articles 5(1)(e) and (f) related to mediator misconduct provide basic requirements for the independence and impartiality of mediators to supplement the Singapore Convention's silence on mediation due process requirements.

(6) The Singapore Convention intends to not tie a settlement agreement to a particular state of origin but merely to treat a settlement agreement with an international nature.<sup>234</sup> The Singapore Convention disregards the location of the mediation or nationality of a settlement agreement and thus discards relevant judicial supervision on settlement agreements.

In summary, except for similar provisions provided by both the New York Convention and Singapore Convention, the Singapore Convention weakens the due process requirements and

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<sup>227</sup> Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for The Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 43–44 (2019).

<sup>228</sup> Singapore Convention, *supra* note 215, art. 5(1)(e).

<sup>229</sup> Schnabel, *supra* note 227, at 7.

<sup>230</sup> *Id.* at 52–53.

<sup>231</sup> Singapore Convention, *supra* note 215, art. 5(1)(f).

<sup>232</sup> Schnabel, *supra* note 227, at 51–52.

<sup>233</sup> *Id.* at 53.

<sup>234</sup> *Id.* at 36.

judicial review jurisdiction of courts at the place of mediation while supplementing provisions regarding recognizing other settlement agreements' functions and mediators' professional ethics. The Singapore Convention is indeed a pioneering treaty in promoting international commercial mediation and alternative dispute resolution. UNCITRAL expects that the application of mediation—like arbitration—will experience vigorous growth after enforcing the Singapore Convention.<sup>235</sup> Considering the current number of signatories, the future of the Singapore Convention is promising so long as more stakeholders become aware of the potential benefits of international mediation.

## B. CHALLENGES IN IMPLEMENTING THE SINGAPORE CONVENTION IN MAINLAND CHINA

If the Singapore Convention, the UNCITRAL Model Law on Conciliation, and numerous international institutions' mediation rules reflect a prevailing model of conducting international mediation, the discrepancy between Chinese approaches and international standards is still obvious. After China signed the Singapore Convention, the Chinese legal community fiercely discussed the Convention's impact on Chinese mediation and future implementation in Mainland China.<sup>236</sup> Although the practice of Chinese mediation has outgrown its relevant national laws, the challenges remain significant.<sup>237</sup>

### 1. SPHERE OF APPLICATION

Article 1 of the Singapore Convention applies to international settlement agreements concluded in writing by parties to resolve a commercial dispute, excluding agreements that are approved by a court or concluded in the course of proceedings before a court or enforced as judgements and arbitral awards.<sup>238</sup> Chinese law provides at least four outcomes for a successful mediation: (1) settlement agreements; (2) mediation statements recognized and produced by judges; (3) consent awards; and (4)

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<sup>235</sup> Hal Abramson, *New Singapore Convention on Cross-Border Mediated Settlements: Key Choices*, 19 *MEDIATION INT'L COM. & INV. DISP.* 1, 360–89 (2019).

<sup>236</sup> See generally Carrie Shu Shang & Ziyi Huang, *The Singapore Convention in Light of China's Changing Mediation Scene*, 2 *ASIAN PACIFIC MEDIATION J.* 1 (2020).

<sup>237</sup> *Id.*

<sup>238</sup> Singapore Convention, *supra* note 215, art. 1.

conciliation statements produced by arbitral tribunals.<sup>239</sup> Chinese law provides that the latter three documents can be submitted to Chinese courts' enforcement departments for coercive execution if relevant documents are delivered to all parties.<sup>240</sup> Chinese law establishes these outcomes to enhance enforceability of agreements reached in mediations.<sup>241</sup> However, practitioners should be aware that these documents likely do not fall into the Singapore Convention's scope of application.<sup>242</sup> Therefore, if the Singapore Convention is enforced in China in the future, stakeholders should prudentially select the respective forms of agreements reached in mediation.

The Singapore Convention requires a commercial character for settlement agreements, excluding agreements related to family, consumer, inheritance, and employment laws.<sup>243</sup> This restriction is similar to the commercial reservation provided in the New York Convention.<sup>244</sup> Generally, if the subject matter is one in which the parties are allowed to dispose of relevant rights, parties are free to decide how they want to resolve their respective disputes.<sup>245</sup> Therefore, except for some mandatory administration regulations, parties are allowed to choose mediation in most civil disputes. However, to expedite the adoption of the Singapore Convention, it excludes settlement agreements reached in disputes that involve public interests.<sup>246</sup> One commentator indicated that these exclusions not only ensured that UNCITRAL would avoid treading on the turf of the Hague Conference on Private International Law, but would also exclude the categories of disputes in which fears of unequal bargaining power might make some states reluctant to apply the Singapore Convention.<sup>247</sup> In the Chinese legal system, no clear boundary exists between commercial and other civil disputes.<sup>248</sup> The SPC used to declare what kinds of disputes are arbitrable based

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<sup>239</sup> See, e.g., Qian Zhou, *Dispute Resolution in China: Litigation, Arbitration, and Mediation*, CHINA BRIEFING (Sept. 7, 2022), <https://www.china-briefing.com/news/dispute-resolution-in-china-litigation-arbitration-and-mediation/>.

<sup>240</sup> See generally Civil Procedure Law of the People's Republic of China, *supra* note 83.

<sup>241</sup> *Id.*

<sup>242</sup> See generally Singapore Convention, *supra* note 215.

<sup>243</sup> *Id.* art. 1.

<sup>244</sup> New York Convention, *supra* note 64, art. I(3).

<sup>245</sup> Singapore Convention, *supra* note 215, arts. 1–3.

<sup>246</sup> *Id.*

<sup>247</sup> Schnabel, *supra* note 227, at 24.

<sup>248</sup> *Dispute Resolution Around the World—China*, BAKER & MCKENZIE, [https://www.bakermckenzie.com/-/media/files/insight/publications/2016/10/dratw/dratw\\_china\\_2013.pdf?1a=en](https://www.bakermckenzie.com/-/media/files/insight/publications/2016/10/dratw/dratw_china_2013.pdf?1a=en) (last visited Sept. 11, 2022).

on the Chinese commercial reservation under the New York Convention.<sup>249</sup> Chinese courts may apply this provision in deciding whether disputes are mediatable. One controversy is that the abovementioned SPC declarations explicitly excluded investor–state investment disputes, whereas the Singapore Convention seems to include at least some investor–state disputes in areas such as construction or natural resource extraction.<sup>250</sup>

Article 5(2)(b) of the Singapore Convention also allows refusal to mediate a particular issue because “the subject matter of the dispute is not capable of settlement by mediation under the law of that Party.”<sup>251</sup> Even though Chinese judges have adopted mediation in almost all civil litigations, Chinese law is silent on the kinds of disputes that are capable of settlement.<sup>252</sup> Another potential controversy is whether judges conducting mediations in all civil litigations means that all civil disputes are capable of settlement in Mainland China, but this conclusion is presently uncertain. Considering the SPC’s negative decision on the arbitrability of disputes involving competition laws in 2019, the Chinese court system is taking a very prudential approach to the kinds of disputes that can be resolved by authorities other than courts.<sup>253</sup> The “mediatability” issue will be an ongoing controversy in Mainland China’s implementation of the Singapore Convention.

## 2. ETHICS, QUALIFICATIONS & CONFLICTS OF INTEREST

The Singapore Convention provides for refusal based on a mediator’s misconduct according to the standards applied to them.<sup>254</sup> As discussed above, these standards refer to professional ethics codes adopted in the mediators’ licensing regime or some international rules.<sup>255</sup> Chinese law does not provide complete and unified ethics rules for mediators, except for internal ethics guidelines established by several arbitration and mediation institutions, and some sporadic provisions provided by several relevant laws. In addition, no rules relevant to mediator

<sup>249</sup> Meng Chen, *Embracing Non-ICSID Investment Arbitration? The Chinese Perspective*, 39 NW. J. INT’L L. & BUS. 249, 268–69 (2019).

<sup>250</sup> Schnabel, *supra* note 227, at 22; *see* Chen, *supra* note 249, at 268–69; discussion *supra* Sections III.B.2, 3.

<sup>251</sup> Singapore Convention, *supra* note 215, art. 5(2)(b).

<sup>252</sup> Knut B. Pissler, *Mediation in China: Threat to the Rule of Law?*, 19 OXFORD ACAD. 959–1010 (Nov. 2012).

<sup>253</sup> SPC Civil Verdict, (2019) Zui Gao Fa Zhi Min Xia Zhong No. 27.

<sup>254</sup> *See* Singapore Convention, *supra* note 215, art. 5(1)(e).

<sup>255</sup> Schnabel, *supra* note 227, at 50–51.



qualifications and conflict-of-interest issues exist in Chinese law.<sup>256</sup> Especially in Chinese mediation practice, mediators generally believe that they have broad discretion when conducting mediation proceedings and communicating with parties.<sup>257</sup> Particularly—in judicial mediations—judges typically shift between two roles spontaneously and take a more dominant approach to mediating, which raises doubts and challenges regarding the mediators’ impartiality and independence.<sup>258</sup> International rules such as the UNCITRAL Model Law on Conciliation and relevant guidelines published by the IBA can provide some basic directions for mediator conduct.<sup>259</sup> Although it is good that ethics regulations in international mediation exist, more challenges to forming a uniform practice in the international community are likely.<sup>260</sup> Participants often believe that they are bound by ethical obligations imposed by their respective home jurisdictions, or at least they unconsciously follow professional habits formed by complying with those rules.<sup>261</sup> Regulations governing professional responsibilities in different countries can differ significantly. When practitioners from different professional backgrounds practice in the same proceeding (for example, in international mediation), this discrepancy can cause problems and skepticism.<sup>262</sup> For instance, a mediator may persuade one party to accept a settlement agreement by “threatening” disadvantageous outcomes should the party refuse to do so—a scenario quite common in Chinese judicial mediation.<sup>263</sup> Therefore,

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<sup>256</sup> Qionqiong Tang, *Improvement of Chinese Commercial Mediation Under the Singapore Convention*, 36 SHANGHAI UNIV. J. 116, 121–25 (2019).

<sup>257</sup> Benjamin J. Reeds & Ethan Michelson, *Mediating the Mediation Debate: Conflict Resolution and the Local State in China*, 52 J. CONFLICT RESOL. 773, 740–46 (2008).

<sup>258</sup> Diego M. Papayannis, *Independence, Impartiality and Neutrality in Legal Adjudication*, 28 ISSUES CONTEMP. JURIS. 33, 40–50 (2016).

<sup>259</sup> Joe Tirado & Elisa Vicente Maravall, *Codes of Conduct for Commercial and Investment Mediators: Striving for Consistency and a Common Global Approach*, in *MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES* 342–50 (Catharine Titi & Katia Fach Gómez eds., 2019).

<sup>260</sup> *Id.*

<sup>261</sup> IVO G. GAYTAS, *TRANSNATIONAL LEGAL PRACTICE: CONFLICTS IN PROFESSIONAL RESPONSIBILITY* 3 (1992); Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT’L L. 341, 348–49 (2002); see generally Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Process: What’s Happening and What’s Not*, 56 U. MIAMI L. REV. 949 (2002).

<sup>262</sup> Menkel-Meadow, *supra* note 261, at 970–74.

<sup>263</sup> See generally Tang, *supra* note 256.

it will be difficult for Chinese practitioners to adjust to international standards and for the international community to tolerate this discrepancy. Fortunately, a settlement agreement ultimately requires the parties' acceptance. Parties are free to walk away if they have doubts regarding the fairness of the procedure and are dissatisfied with the outcome(s).<sup>264</sup> Conversely, because mediation does not require complete fairness and due process, if parties voluntarily accept the settlement, the settlement agreement is enforceable.<sup>265</sup>

### 3. THE POSSIBILITY OF SHAM MEDIATION

While the large number of disputes greatly benefits the Chinese mediation and arbitration market, it also causes various pitfalls. For instance, some parties transfer property by taking advantage of dispute resolution methods.<sup>266</sup> This sham arbitration, litigation, or mediation will eventually negatively impact third-party or public interests.<sup>267</sup> Balancing procedural efficiency and protection of the public interest is the eternal rhythm of any dispute resolution regime.<sup>268</sup> The same problem also exists in arbitration, especially regarding consent awards.<sup>269</sup> However, tribunals and institutions will perform an initial screening of consent awards.<sup>270</sup> National courts' judicial review in both setting aside and enforcing proceedings will provide additional supervision.<sup>271</sup> To mitigate the increase in sham arbitration, the SPC published legal guidelines allowing an interested person who is not a party to the arbitration to appeal to a people's court to refuse enforcement if that person has evidence proving that the relevant arbitral award is based on malicious and false statements.<sup>272</sup> Because the Singapore Convention placed all supervisory responsibility on the competent authority of the party to the Singapore Convention where relief of settlement agreements is sought, the potential public interest violations and the possibility of sham mediation are subsistent.<sup>273</sup> The public policy doctrine provided in Article 5(2)(b) of the

<sup>264</sup> Schnabel, *supra* note 227, at 44.

<sup>265</sup> *Id.* at 43–44.

<sup>266</sup> See generally Xianseng Li, *The Study on Ways to Protect People's Rights Outside the False Arbitration Within the Framework of Current Laws*, 1 BEIJING ARB. 20 (2016).

<sup>267</sup> *Id.*

<sup>268</sup> See generally BÜHRING-UHLE, KIRCHHOFF & SCHERER, *supra* note 40.

<sup>269</sup> Meng Chen, *Reforming Judicial Supervision of Chinese Arbitration*, 10 J. INT'L DISP. SETTLEMENT 542, 558 (2019).

<sup>270</sup> Kryvoi & Davydenko, *supra* note 60, at 850.

<sup>271</sup> Chen, *supra* note 269, at 542–43.

<sup>272</sup> *Id.* at 543.

<sup>273</sup> *Id.* at 551–52.

Singapore Convention can provide a basic safeguard.<sup>274</sup> Additional research is required to determine whether such potential risks require the establishment of additional supervisory mechanisms.

## VI. CONCLUSION

Many researchers have proved that mediation has not gained popularity in the international dispute resolution market.<sup>275</sup> As a traditional dispute resolution method, mediation has obvious benefits and deficiencies.<sup>276</sup> Practitioners are sensitive to the effectiveness and cost-saving aspects of dispute resolution methods.<sup>277</sup> Compelling evidence of these benefits is key to expanding mediation.<sup>278</sup> UNCITRAL expects that adopting the Singapore Convention will significantly empower the international mediation market.<sup>279</sup> If this expectation is realized, China will certainly become an important player in the international mediation community. Empirical data reveal that Chinese courts and numerous institutions have rich experience in mediating commercial disputes and have developed their own revolutions and innovations in procedure management.<sup>280</sup> Chinese mediation experience indicates that although expanding mediation in Mainland China is not a difficult matter, overemphasizing the mediation rate and enforceability does not comply with market needs.<sup>281</sup> The obstacles and pitfalls faced by Chinese mediation practitioners serve as a useful reference for developing the international mediation regime. Additionally, both China and the international community have recognized the difference between traditional Chinese perceptions of mediation and prevailing international practices.<sup>282</sup> Although separating mediation proceedings from other proceedings is gradually becoming common practice, the lack of both a mediator ethics code in the Chinese legal system and special outcomes of mediation provided by Chinese law will affect the implementation of the Singapore Convention in Mainland China.<sup>283</sup> In addition, the limited supervision provided in the Singapore Convention increases the risk of sham mediation and public interest violations.<sup>284</sup> Both

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<sup>274</sup> See Singapore Convention, *supra* note 215, art. 5(2)(b).

<sup>275</sup> Strong, *supra* note 1, at 16.

<sup>276</sup> *Id.* at 21–27.

<sup>277</sup> *Id.* at 28.

<sup>278</sup> *Id.*

<sup>279</sup> UNCITRAL Model Law on Conciliation, *supra* note 164, at 1.

<sup>280</sup> Chen, *supra* note 156, at 149.

<sup>281</sup> Gu, *supra* note 110, at 50–58.

<sup>282</sup> Kaufmann-Kohler & Kun, *supra* note 30, at 480–86.

<sup>283</sup> Tang, *supra* note 256, at 121–25.

<sup>284</sup> See generally Singapore Convention, *supra* note 215.

China and the rest of the international community must make efforts to reconcile national practices with international standards to foster the highly anticipated international mediation regime.