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# HYBRID DISPUTE RESOLUTION BEYOND THE BELT AND ROAD: TOWARD A NEW DESIGN OF CHINESE ARB-MED(-ARB) AND ITS GLOBAL IMPLICATIONS

Weixia Gu<sup>†</sup>

*Abstract:* Arb-med is a form of hybrid dispute resolution that combines an adjudicative approach (arbitration) with a non-adjudicative approach (mediation). Dispute resolution clauses requiring arb-med will assume a popular role in resolving disputes that arise under China's Belt and Road Initiative. This article argues that China should regulate arb-med in a way to reconcile local practices (mediation) with international expectations (arbitration) in context of the BRI. As an economic bloc proposed by China, the BRI development has the potential to promote dispute resolution means with Chinese characteristics such as arb-med. Global comparative study of leading arbitration jurisdictions in the East and the West shows a heightened awareness of arb-med due process concerns regarding international enforcement of arb-med awards. Most recent reforms on arb-med by leading Chinese arbitration institutions, such as the CIETAC, BAC and SCIA, evidence a trend toward bifurcating the two processes when facing international clients. China is aware of procedural justice in the hybrid dispute resolution. The establishment of the China International Commercial Court ("CICC"), and its creation of the "One-Stop" Platform shows the need to attract foreign parties, in addition to merely Chinese ones, and the pressure to compete in the BRI dispute resolution market. These are the leading factors that drive Chinese regulators to look beyond sociopolitical imperatives and cultural boundaries in promoting arb-med outside of the Belt and Road. As China is anticipated to propel the BRI arbitration system, Chinese arb-med, and its unique process, will remain a fluid area of localized globalism in contrast with globalized localism in China-led BRI dispute resolution development.

Cite as: Weixia Gu, *Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and Its Global Implications*, 29 WASH. INT'L L.J. 117 (2019).

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## I. INTRODUCTION PART

Arb-med is a form of hybrid dispute resolution that combines an adjudicative approach (i.e., arbitration) with a non-adjudicative approach (i.e., mediation). During arb-med, the arbitration and mediation<sup>1</sup> stages are carried out by the same person in sequence. A typical arb-med proceeding arises when the parties have entered into arbitration and, within that arbitration procedure, decide to mediate. If and when mediation fails, arbitration resumes under the same mediator-turned-arbitrator(s), and an award is rendered. Dispute resolution clauses requiring arb-med will assume, as this article argues, a popular role in resolving disputes that arise under China's Belt and Road Initiative ("BRI"). But what are the reasons and perceived advantages of arb-med that are propelling increased reliance on the same? More importantly, given the due process concerns over hybrid arbitration and mediation procedures in China,<sup>2</sup> how can arb-med be effectively deployed in BRI cross-border disputes without compromising considerations of due process, justice, and efficiency? These issues warrant a systematic study of Chinese arb-med, especially in the context of China's leadership of BRI development and its norm-setting capabilities<sup>3</sup> through the BRI.<sup>4</sup>

What makes arb-med particularly worth studying is not only that it is a hybrid process, but also that it requires the neutral to assume multiple roles that have incompatible aims and serve contradictory functions. Therefore, arb-med is particularly vulnerable to poor dispute-resolution system design.

The popularity and success of establishing an arb-med system with fair procedures varies among individual jurisdictions. Arb-med in China is particularly problematic. Jurisdictions with established arb-med systems in their domestic and cross-border transactions, such as Australia, have had few issues with arb-med. In some Western jurisdictions, such as the United

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<sup>1</sup> Chinese law and rules of Chinese arbitration institutions translate the Chinese term of mediation (*tiaojie*) as "conciliation." They are used interchangeably. See Carlos de Vera, *Arbitrating Harmony: Med-Arb and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 152 (2004).

<sup>2</sup> See Carlos de Vera, *supra* note 1, at 185–187; Weixia Gu, *The Delicate Art of Med-Arb and Its Future Institutionalisation in China*, 31 UCLA PAC. BASIN L.J. 97, 102–110 (2014).

<sup>3</sup> Zheng Sophia Tang, *"The Belt and Road" and Cross-Border Judicial Cooperation*, 49 HONG KONG L.J. 121, 129–131 (2019). Indeed, one of the core tenants of the BRI strategy is the harmonization of the rules to increase predictability of transnational commerce and to reduce costs.

<sup>4</sup> *Id.*, at 122.

States, combinations of arbitration and mediation are controversial largely because the potential for conflicts of interest in such hybrid processes is seen to be too great to overcome. The controversy has limited the popularity of arb-med in these jurisdictions. Due process concerns have not prevented arb-med from gaining popularity in Asia, however, where mediation is strongly rooted in its legal and dispute resolution culture. To prevent arb-med from standing at odds with due process and justice concerns, Japan, Hong Kong, and Singapore—among others in Asia—have recently enacted provisions implementing proper procedural standards for arb-med proceedings.<sup>5</sup> China, where arb-med is widely used in commercial dispute resolution, however, lacks regulatory governance in this area.<sup>6</sup> As such, Chinese arb-med has been challenged, and its practice questioned, over whether it is compatible with procedural justice.

This article focuses on the issues surrounding the resumption of arbitration after the mediation stage and how it is perceived and used in China. In particular, it highlights the procedural difficulties brought about by the Chinese approach to mediation, how these difficulties might prevent parties from adopting arb-med for cross-border disputes, and what China has done and is doing to address procedural concerns to promote greater adoption of arb-med in the context of its ambitious BRI development.

Structurally, this article is organized as follows. Following the Introduction, Part II first discusses the definition of arb-med at the conceptual level. Part III then considers why arb-med is popular in China and how the process is perceived in practice. Part IV studies the procedural concerns that plague the existing Chinese arb-med practice. These concerns include the conflicting roles of the neutral, who “switches hats” from being an arbitrator to a mediator and back, and their challenge of confidentiality. Part V analyzes the regulatory problems of arb-med in China and how China has attempted to mitigate those due process concerns. Market-based regulatory competition among hundreds of Chinese arbitration institutions and their needs to internationalize, and reach out to foreign users, are identified as having caused Chinese arb-med to flourish and develop from a bottom-up institutional aspect. Part VI examines the global experiences in

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<sup>5</sup> MICHAEL PRYLES & VERONICA L. TAYLOR, *The Cultures of Dispute Resolution in Asia*, in DISPUTE RESOLUTION IN ASIA 1, 15–17 (Michael Pryles ed., 3d ed. 2006).

<sup>6</sup> See Paul E. Mason, *Follow-Up Note to ‘The Arbitrator as Mediator, and Mediator as Arbitrator’* (2011), *J. Int. Arb.* 6, 541 *et seq.*, 29 *J. INT’L ARB.* 225, 225 (2012).

regulating arb-med. Among the jurisdictions investigated, Singapore in Asia, Germany in continental Europe, and Australia in the Pacific are of particular relevance to China; the experiences of these jurisdictions have already impacted some rule reform of the most influential Chinese arbitration institutions. Part VII argues that the BRI has led China to consider new initiatives to promote the use of and confidence in Chinese arbitration. In particular, the recently established Chinese International Commercial Court (“CICC”) has set up a One-Stop Multi-tier Dispute Resolution Platform (the “One-Stop” Platform), with the promotion of arb-med as one of its top priorities. Leading Chinese international arbitration institutions designated by the CICC’s “One-Stop” Platform are increasingly seen as norm-setters to address the procedural difficulties of Chinese arb-med in the cross-border BRI dispute resolution setting that has been left out of China’s Arbitration Law. Finally, Part VIII concludes that the development of arb-med, and its unique process in China, will remain a fluid area of localized globalism in contrast with globalized localism in China-led BRI dispute resolution development.

## II. TERMINOLOGY

This section clarifies the usage of terminology. It serves three purposes. First, it argues against using any sort of term with “arb” and “med” hyphenated, in various orders, to describe the hybrid dispute resolution process because of the potential for confusion. Second, it specifies that the use of “med-arb” and “arb-med” in this article will assume that the order of the procedures is what is reflected by the order of the hyphenated words. Third, it clarifies that “arb-med” in this article should be understood to mean “arb-med-arb.”

Conceptually, definitional analysis of arb-med is necessary due to the inconsistent use of “arb-med,” “med-arb,” and “arb-med-arb” in legal scholarship. Interpreted literally, these three terms refer to the order in which arbitration and mediation stages take place. “Med-arb” and “arb-med” are thus not used interchangeably.<sup>7</sup> The confusion sets in when “med-arb” is

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<sup>7</sup> Jacqueline Nolan-Haley, *Mediation: The New Arbitration*, 17 HARV. NEGOT. L. REV. 61, 86 (2012); Jacob Rossof, *Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings*, 26 J. INT’L ARB. 89, 89 (2009) (med-arb and arb-med distinguished).

more often used in literature as an umbrella term for any form of hybrid process involving arbitration and mediation.<sup>8</sup>

I propose that references to any combination of arbitration and mediation should not be made using the above terms, as the “stage dash stage” naming already implies a certain order in which the stages should be conducted. Such naming allows us to discuss various variants of hybrid processes involving arbitration and mediation together without conflating them and should remain exclusive to specific forms of arbitration-mediation combinations. Whatever term the field will settle on for this umbrella meaning, be it “combination of arbitration and mediation” or “hybrid arbitration and mediation”, it should not imply any order at which the respective stages are to be conducted as with the current scheme.

With the umbrella concept settled, discussion must turn to the meanings of “arb-med,” “med-arb,” and “arb-med-arb.” Each of these terms is, for their namesakes, some form of a dispute resolution procedure that combines arbitration and mediation.<sup>9</sup> Arbitration and mediation are performed sequentially in the order described. While hybrid procedures can be performed with multiple neutrals across stages, each of these processes referred to in this article is only performed by the same neutral.<sup>10</sup> In “med-arb,” the parties attempt to mediate from the outset of their dispute, and then enter arbitration proceedings for unsuccessful mediation or their remaining unresolved issues or matters.

By contrast, “arb-med” and “arb-med-arb” require more nuance. Nottage and Garnett, authors of definitive arbitration and mediation scholarship, prefer that the combined procedure begins as an arbitration, not a mediation. And if it starts as a mediation that succeeds, there is logically no further dispute or difference capable of triggering arbitration, and hence

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<sup>8</sup> “Med-arb” is used as an umbrella term in, among others, Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights Into The Roles Arbitrators Play*, 6 Y.B. ON ARB. & MEDIATION 1, 9 (2014); Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157, 204 (2015); Carol A. Ludington, *Med-Arb: If the Parties Agree*, 5 Y.B. ON INT’L ARB. 313, 314 (2017).

<sup>9</sup> Tai-Heng Cheng, *Reflections on Culture in Med-Arb*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS, 421, 421 (A.W. Rovine Ed., 2010).

<sup>10</sup> See Bobette Wolski, *ARB-MED-ARB (and MSAs): A Whole Which Is Less than, Not Greater than, the Sum of Its Parts*, 6 CONTEMP. ASIA ARB. J. 249, 258–260 (2013).

capable of generating an enforceable arbitral award.<sup>11</sup> The procedure in Nottage and Garnett's description is more accurately described as "arb-med-arb." Parties using "arb-med-arb" engage in arbitration from the outset and then, in the course of arbitration, decide to have the arbitrator settle the subject matter through mediation and, based on the parties' wishes, the applicable arbitration rules or *lex arbitri*. The arbitration stage is then stayed, and the same arbitrator proceeds to act as a mediator, subject to arbitration rules governing such mediation. There are two scenarios in which the second arbitration stage may arise. The first scenario is when mediation is entirely successful and a full settlement has been reached. The mediator will then become an arbitrator solely for the purpose of issuing an arbitral award in accordance with the settlement, i.e., the consent award.<sup>12</sup> The second scenario is when mediation efforts are futile or the parties only reach partial settlement. Then, a substantive arbitration hearing will be re-conducted for the remaining matters. The resulting award will be rendered on the basis of the partially settled outcome and the second arbitration proceeding. In both scenarios, the arbitrator ceases to act in their capacity as a mediator and resumes the role of arbitrator for the last stage.

It is helpful to also clarify that "arb-med" in the literal sense does not exist. "Arb-med" does not tend to occur in real practice because a final stage of arbitration must occur to render the award once mediation has ended. In a literal sense, "arb-med" is a process where the parties have opted for arbitration and then agreed to resort to mediation, often to preserve a more harmonious relationship. But given parties who have opted for arbitration from the outset, with the expectation of enjoying the robust global enforceability of arbitration outcomes, it is quite unreasonable that parties would opt for a settlement at the end. Therefore, "arb-med" in actuality refers to "arb-med-arb" processes, where a last arbitration stage will occur either to render a consent award or to render an award after unsettled issues have been ruled on. As such, strictly speaking, and because it is unlikely that "arb-med" might exist, this article uses "arb-med" to mean "arb-med-arb" processes. In other words, "arb-med" and "arb-med-arb" in the present article are interchangeable.

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<sup>11</sup> Luke Nottage & Richard Garnett, *The Top 20 Things to Change in or around Australia's International Arbitration Act*, in INTERNATIONAL ARBITRATION IN AUSTRALIA 149, 179 n.2 (Luke Nottage & Richard Garnett eds., 2010).

<sup>12</sup> Tai-Heng Cheng & Anthony Kohtio, *Some Limits To Apply Chinese Med-Arb Internationally*, 2 N.Y. DISP. RESOL. 95, 95 (2009).

### III. PRACTICE AND PERCEPTION OF ARB-MED IN CHINA

#### A. *Arb-Med Statistics*

While reliable statistics on arb-med are difficult to find, arb-med may be present in nearly half of the arbitrations in China.

Arbitration in China is increasing. In 2017 alone, 239,360 cases were processed by the 253 arbitration institutions in China.<sup>13</sup> Compared to 2016, arbitration caseload increased by 15%.<sup>14</sup> China International Economic and Trade Arbitration Commission (“CIETAC”), China’s leading arbitration institution by caseload—which includes a sizeable portion of all international commercial arbitration in China—handled 2,370 cases or 1% of total arbitration cases in China in 2017.<sup>15</sup>

As for cases where arb-med may be concerned, as of 2001, about 20–30% of CIETAC arbitration cases were withdrawn after settlement or arbitration was concluded on the basis of a settlement agreement.<sup>16</sup> CIETAC reported in 2014 that 21.61% of its foreign-related cases were resolved through mediation.<sup>17</sup>

Data on arb-med adoption in China in general is lacking. However, since September 2015, CIETAC and the China Academy of Arbitration Law have been compiling and publishing statistics on arbitration cases concluded by mediation in the preceding year, i.e., cases concluded by mediation, or cases of consent awards.<sup>18</sup> In 2018, 26% of the arbitration cases in China were concluded through mediation (i.e., 26% of the awards rendered in China in 2018 were consent awards).<sup>19</sup> Despite the steady increase of the

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<sup>13</sup> See CHINA INT’L ECON. & TRADE ARB. COMM’N, ZHONG GUO GUO JI SHANG SHI ZHONG CAI NIAN DU BAO GAO (2017) (中国国际商事仲裁年度报告 (2017)) [ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2017)] 1, 8 (2017).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> WANG SHENGCHANG (王生长), ZHONG CAI YU TIAO JIE XIANG JIE HE DE LI LUN YU SHI WU (仲裁与调解相结合的理论实务) [THE THEORY AND PRACTICE OF COMBINING ARBITRATION WITH CONCILIATION] 1, 83 (2001).

<sup>17</sup> See CHINA ACAD. OF ARB. LAW, ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2014) 1, 50 (2014).

<sup>18</sup> The data of the previous year is only available in the September publication of the current year.

<sup>19</sup> CHINA INT’L ECON. & TRADE ARB. COMM’N, ZHONG GUO GUO JI SHANG SHI ZHONG CAI NIAN DU BAO GAO (2018-2019) (中国国际商事仲裁年度报告 (2018-2019)) [ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2018-2019)] 6, 7 (2018-2019).



overall number of the arbitration cases concluded through mediation, its ratio among all arbitration cases was down from 29% in 2017,<sup>20</sup> 58% in 2016,<sup>21</sup> 41% in 2015,<sup>22</sup> and 65% in 2014.<sup>23</sup> Although caseload data of Chinese arbitration concluded through mediation is more available recently, there is insufficient data to demonstrate the overall adoption of arb-med in China. Even so, the average percentage of cases in which consent awards were given (i.e., the overall ratio of successful arb-med) could be as high as 47.07% (see Table 1 below). The data do not include those cases where mediation attempts were futile, i.e., where mediation was adopted in the arbitration process but for various reasons did not lead to a consent award. As such, the overall adoption rate of arb-med in China could only be higher than 47.07%.

**Table 1: Arb-Med Statistics in China in Recent Years<sup>24</sup>**

Year	2014	2015	2016	2017	2018	Average
Total Number of Arbitration Cases	113,660	136,924	208,545	239,360	539,542	247,606
Number of Arbitration Cases Concluded by Mediation (i.e., by Consent Award)	74,200	56,659	121,527	69,450	140,281	92,441
Percentage of Arbitration Cases Concluded by Successful Mediation (i.e., by Consent Award)	65%	41%	58%	29%	26%	47.07%

<sup>20</sup> CHINA INT'L ECON. & TRADE ARB. COMM'N, ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2017), *supra* note 13, at 13.

<sup>21</sup> See CHINA INT'L ECON. & TRADE ARB. COMM'N, ZHONG GUO GUO JI SHANG SHI ZHONG CAI NIAN DU BAO GAO (2016) (中国国际商事仲裁年度报告 (2016)) [ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2016)] 13 (2016).

<sup>22</sup> See CHINA INT'L ECON. & TRADE ARB. COMM'N, ZHONG GUO GUO JI SHANG SHI ZHONG CAI NIAN DU BAO GAO (2015) (中国国际商事仲裁年度报告 (2015)) [ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2015)] 9 (2015).

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

<sup>24</sup> CHINA INT'L ECON. & TRADE ARB. COMM'N, ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2018-2019), *supra* note 19, at 3, 6-7. CHINA INT'L ECON. & TRADE ARB. COMM'N, ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2017), *supra* note 13, at 8, 13; CHINA INT'L ECON. & TRADE ARB. COMM'N, ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2016), *supra* note 21, at 8, 13; CHINA INT'L ECON. & TRADE ARB. COMM'N, ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2015), *supra* note 22, at 8-9.

## B. Perception of Arb-Med

Arb-med as used in international disputes has an additional international dimension not found in arb-med as used in domestic contexts. In many ways, arb-med adds an international dimension (i.e., arbitration) to the local product (i.e., mediation).<sup>25</sup> Through cross-border arb-med, foreign parties are not only exposed to Chinese mediation, but also to the practices of Chinese-style arbitrators and arbitration institutions. These practices are sometimes too lax and do not square well with international arbitration standards. The Hong Kong case of *Gao Haiyan v. Keeneye*, which concerns the use of hybrid dispute resolution to resolve a share transfer dispute, is a typical example of how Chinese arb-med can potentially frustrate the international enforcement of an award tainted by apparent bias.<sup>26</sup> Although the Court of Appeal of Hong Kong overturned the appellate and enforced the award, *Keeneye* demonstrates that foreign courts of enforcement may not readily accept the arb-med procedural standards deemed acceptable to a Chinese supervisory court.<sup>27</sup>

To understand the mediation stage within arb-med, arbitral institutions should consider how mediation is practiced domestically in China as an independent dispute resolution method. Mediation conducted outside arb-med (e.g., in judicial mediation and mediation by the People's Mediation Committees) contributes to how arbitration institutions think about the proper standard of mediation when designing and conducting their mediation stage of arb-med.

The Chinese approach to mediation has followed the trend of general mediation by adopting certain features of arbitration. These include adversarial advocacy, adjudication by a neutral, and the neutral attempting to

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<sup>25</sup> Weixia Gu, *When Local Meets International: Mediation Combined with Arbitration in China and Its Prospective Reform in a Comparative Context*, 10 J. COMP. L. 84, 84 (2016) (arguing that, while mediation is more culture-laden and jurisdiction-specific, arbitration has largely been harmonized internationally due to the successful efforts by the international legal instruments in the field such as the New York Convention (1958), the UNCITRAL Model Law (1985, amended in 2006), and the UNCITRAL Arbitration Rules (1976, amended in 2010 and 2013)).

<sup>26</sup> *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. 627, 650–60 (C.A.).

<sup>27</sup> See generally Weixia Gu & Xianchu Zhang, *The Keeneye Case: Rethinking the Content of Public Policy in Cross-border Arbitration between Hong Kong and Mainland China*, 42 HONG KONG L.J. 1001 (2012) (in which I argue that, due to the handover of Hong Kong to China under the “one country, two systems” dynamic, Hong Kong courts are more likely to defer to court findings by Mainland Chinese courts than other foreign courts).

steer a mediation proceeding to lead to a certain outcome.<sup>28</sup> While this development is not unique to China, Chinese mediation is noted to be more “adjudicatory, aggressive, and interventionist.”<sup>29</sup> Some practitioners have commented that parties are forced into mediation during arbitration, and some lawyers are even “gaming” mediation to intentionally delay the proceedings and seek more information from the other party.<sup>30</sup> Reflections of Chinese uniqueness, however, are in the courts, where parties often enter into judicial mediation under pressure from the presiding judges.<sup>31</sup> Judges are in turn under pressure to settle cases through mediation to reach performance targets. The policy imperative for judges to encourage mandatory mediation has made reliance on mediation an institutional outcome, which sustains a culture of mediation.<sup>32</sup>

In the context of arb-med, this mediation culture translates into more active arb-med management by arbitrators. Fan, author of empirical study of arbitrators acting as mediators in China, conducted a survey of 36 active arbitrators from CIETAC, Beijing Arbitration Commission (“BAC”), and Wuhan Arbitration Commission (“WAC”) taken between 2011 and 2012 showing a glimpse of arbitrator attitudes towards arb-med and how such attitudes have affected the use of arb-med.<sup>33</sup> According to Fan’s study, 50% of the respondents have recommended the parties to mediate in more than 90% of the cases in which they acted as an arbitrator;<sup>34</sup> more than 10% of the respondents have recommended mediation in more than 70–90% of the cases they arbitrated.<sup>35</sup>

As for parties to disputes, Fan’s survey shows that where both sides are Chinese, the parties are more likely to consent to arb-med than when foreign parties are involved.<sup>36</sup> The survey also shows the reasons that the

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<sup>28</sup> Nolan-Haley, *supra* note 7, at 63.

<sup>29</sup> Hualing Fu & Richard Cullen, *From Mediator to Adjudicatory Justice: The Limits of Civil Justice Reform in China*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 33, 25, 33 (2011).

<sup>30</sup> Thomas J. Stipanowich et al., *East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China*, 9 PEPP. DISP. RESOL. L. J. 379, 395–96 (2009).

<sup>31</sup> Fu & Cullen, *supra* note 29, at 33.

<sup>32</sup> *Id.*

<sup>33</sup> Kun Fan, *An Empirical Study of Arbitrators Acting as Mediators in China*, 15 CARDOZO J. CONF. RESOL. 777, 791 (2014).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 792.

respondents choose to adopt a conciliatory role. Most respondents believed that “the agreed outcome is easier to be voluntarily enforced than a decided outcome in an arbitral award.”<sup>37</sup> The second and third cited reasons are that arb-med can reduce costs and improve efficiency and that mediation respects the free will and voluntariness of the parties.<sup>38</sup>

Compared to arbitration, mediation is more culture-laden and less judicialized. Mediation’s dependency on culture is a result of its aim of inducing voluntary settlement by the parties, and appealing to the cultural backgrounds of the parties is a way of achieving this aim. Arbitration, by contrast, is governed by international rules and norms developed through the deliberations between potential users and regulators of various jurisdictions. It is designed to be an international dispute resolution method.<sup>39</sup> In China, mediation is a product of its Confucian legal culture and the State governance imperative to promote social harmony. Confucianism favors less contentious means of resolving disputes with an emphasis on mediation, and views more contentious means such as litigation and arbitration to be less conducive to the maintenance of social harmony as predefined and constructed by the relationship between the individual and the community.<sup>40</sup> While the ends are the same, the State governance justification to promote mediation is more instrumentalist. Mediation is used to promote better governability of civil society and to reduce visible and publicized conflicts that might potentially reduce the legitimacy of the Party-State. It was not until the enactment of the Civil Procedure Law (1991) that cases were not required to be mediated before adjudication by China’s People’s Courts when the former had failed.<sup>41</sup> Mediation is designed, therefore, to meet the Confucian culture and State governance objectives of dispute resolution in China. As a result, foreign users may find Chinese mediation alien during arb-med processes.

### C. *Culture and Sociopolitics as Drivers of Arb-Med Popularity*

The State has made it very visible that it supports arb-med and the Arbitration Law has mandated all Chinese arbitration institutions to provide

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<sup>37</sup> *Id.* at 790.

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

<sup>39</sup> WEIXIA GU, *ARBITRATION IN CHINA: THE REGULATION OF ARBITRATION AGREEMENTS AND PRACTICAL ISSUES* 3–5 (2012).

<sup>40</sup> *Id.* at 32–34.

<sup>41</sup> Xianchu Zhang, *Rethinking the Mediation Campaign*, 10 J. COMP. L. 44, 45 (2015).

arb-med in domestic and cross-border arbitration when the parties have requested it.<sup>42</sup> But what are the driving factors for arb-med's popularity in China? The original design of China's Arbitration Law, including the requirement that all arbitration institutions must offer arb-med, could be influenced by Chinese sociopolitical needs and Confucian traditions of social harmony.

### 1. *Confucian Culture*

Attributing the success of arb-med to the Confucian tradition for harmony is a trope in Chinese arbitration scholarship.<sup>43</sup> This argument suggests that Chinese culture favors virtues (*li*) over rules or law (*fa*) of the Legalist tradition. Virtues, unlike harsh laws, induce benevolence between predefined social relations that prevent conflict between social actors.<sup>44</sup> Social actors are discouraged from actively asserting their rights and interests if others default their obligations.<sup>45</sup> Legal actors are only individuals in the context of social relations. In dispute resolution, therefore, this translates into a preference for more amicable, less adversarial processes. Thus, under Confucian legal thought, mediation is encouraged over litigation and arbitration to prevent societal contention and the collapse of social relations.

Before assessing the validity of this argument on arb-med's popularity, cultural analysis of legal practice and norms warrants a caveat: this mode of analysis might fall victim to reductionism. It might be more accurate and useful to attribute the differences in practice between jurisdictions beyond references to cultural and traditional stereotypes. These stereotypes become less valid when parties appoint personnel from multiple legal cultures (such as appointing foreign counsel or arbitrators) and when arbitration institutions attempt to internationalize by adopting more widely accepted dispute resolution norms.<sup>46</sup> China may allow arb-med with the same personnel, but that does not mean East Asian jurisdictions in general

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<sup>42</sup> Zhong hua ren min gong he guo zhong cai fa (中华人民共和国仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 51, 8 CHINA L. & PRAC. 23 (1994) (China).

<sup>43</sup> WEIXIA GU, ARBITRATION IN CHINA, *supra* note 39, at 32–34.

<sup>44</sup> Albert H. Y. Chen, *Confucian Legal Culture and Its Modern Fate*, in THE NEW LEGAL ORDER IN HONG KONG 505, 515 (Raymond Wacks ed., 1999).

<sup>45</sup> *Id.* at 517–18.

<sup>46</sup> See Tai-Heng Cheng, *Reflections on Culture in Med-Arb*, *supra* note 9, at 425.

have less respect for due process. Japan, for instance, has taken greater steps than China to avoid due process issues while preserving arb-med as a popular means of dispute resolution. The Japanese Arbitration Law, unlike the Chinese Arbitration Law, stipulates that the neutral can only play the dual role of mediator and arbitrator if both parties have consented in writing, and the dual capacities must end when any one party withdraws such written consent.<sup>47</sup> Such level of protection against irregularities is only afforded by rules of some individual arbitration institutions in China rather than the Chinese Arbitration Law as a whole. Thus, it is too reductionist to conclude that a Confucian legal culture is responsible for less respect toward due process safeguards in Chinese arb-med.

This caveat does not mean all cultural analyses are futile. Despite that the behavior of Chinese parties and practices of Chinese arbitration institutions involved in cross-border arbitration can be seen as products of multiple legal traditions, the practices of arbitration and arb-med promoted by the Chinese government are distinctively Chinese. Cultural analyses are perhaps more accurately tailored as legal-political analyses that are influenced by traditional culture. After all, the way culture manifests itself in legal norms is largely shaped by the legal and political institutions that implement legal norms.

## 2. *Sociopolitical Imperative*

In China, the “design from the top” (*dingceng sheji* 顶层设计)—to use a policy buzzword used by today’s Chinese Central Government to promote judicial reform—may be inspired by foreign trends, but legal reformers are very clear that such trends are specifically selected to reflect the needs of China and the BRI development. Indeed, one of the five basic principles expressed in the Supreme People’s Court’s Diversified Dispute Resolution Opinion is that the “diversified dispute resolution system with Chinese characteristics” must be perfected by “basing it on the circumstances of the nation, reasonable adoption [of foreign experiences].”<sup>48</sup>

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<sup>47</sup> Chūsaihō [Arbitration Law], Law No. 138 of 2003, art. 38 (Japan), translated at <https://japan.kantei.go.jp/policy/sihou/arbitrationlaw.pdf>.

<sup>48</sup> Zui Gao Ren Min Fa Yuan Guan Yu Ren Min Fa Yuan Jin Yi Bu Shen Hua Duo Yuan Hua Jiu Fen Jie Jue Ji Zhi Gai Ge De Yi Jian (Fa Fa [2016] 14 Hao) (最高人民法院关于人民法院进一步深化多元化纠纷解决机制改革的意见) (法发 [2016] 14号) [Opinions of the Supreme People’s Court on People’s Courts Further Deepening the Reform of Diversified

This exercise of selecting what international arbitration norms to adopt in China reflects that Chinese reformers cannot breach certain norms entrenched in domestic sociopolitical context. As more Chinese companies are investing in foreign countries, China is also taking reference from other jurisdictions when designing its own dispute resolution systems. The China International Commercial Court (“CICC”), for example, is inspired by other commercial courts around the world such as the Singapore International Commercial Court.<sup>49</sup> Singapore’s arrangement setting its commercial court within its highest court likely also inspired the CICC’s position and linkage within the Chinese Supreme People’s Court (“SPC”), as CICC is an integral part of China’s SPC.

But it is unlikely that China will adopt international norms beyond its political mandate, even when it might reconcile differences in legal norms among Belt and Road jurisdictions one day in the future. These constraints exist in spite of China’s attempts to internationalize. This is apparent from SPC Justice Gao Xiaoli’s interview regarding the CICC. She noted that other commercial courts have foreign judges and have judgments in English despite it not being an official language of the country.<sup>50</sup> These are areas where China would find it hard to change, even when the Chinese legislature has the legal power to remove such barriers by amending the Organic Law of the People’s Courts, the Judges’ Law, the Arbitration Law, and the Civil Procedure Law.

But there is no indication of this potential internationalization from the legislative comments on the draft of the Arbitration Law in 1994.<sup>51</sup> Instead, the comments focused on attributes of arbitration that would be a feature of “Western law.” Indeed, the comments stated that the consultation

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Dispute Resolution Mechanism] (Court Issuance No. 14 of 2016) (issued by the Sup. People’s Ct., June 28, 2016, effective June 28, 2016), CLI3.273230 (EN) (Lawinfochina).

<sup>49</sup> He Jingjin (何晶晶) & Yan Zhenshan (耿振善), *Da zao guo ji shang shi fa ting si fa bao zhang “yi dai yi lu” jian she—zhuan fang zui gao ren min fa yuan min shi shen pan di si ting fu ting chang gao xiao li* (打造国际商事法庭, 司法保障“一带一路”建设—专访最高人民法院民事审判第四庭副庭长高晓力) [*Creating the International Commercial Court, Legal Protection for the Belt & Road Construction—Interview with Gao Xiaoli, Deputy Chief Justice of the Fourth Division of Civil Trial of the Supreme People’s Court*], RENMIN FAZHI (人民法治) [THE RULE OF LAW OF THE PEOPLE] (Feb. 10, 2018), <https://mp.weixin.qq.com/s/wwM5Obhz069STbeJ73oMda>.

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

<sup>51</sup> Angran Gu (顾昂然), *Guan yu zhong hua ren min gong he guo zhong cai fa (cao an) de shuo ming* (关于《中华人民共和国仲裁法(草案)》的说明) [*Comments on the Arbitration Law of the People’s Republic of China (Bill)*] (1994), [http://www.npc.gov.cn/wxzl/gongbao/2001-01/02/content\\_5003212.htm](http://www.npc.gov.cn/wxzl/gongbao/2001-01/02/content_5003212.htm).

draft was written “on the basis of consolidated working experience of arbitration, on the basis of the need to construct a socialist market economic system”<sup>52</sup> and referenced “the valuable experiences of foreign arbitration systems and international norms.”<sup>53</sup> Besides the need to construct a socialist market, the documented legislative intent does not indicate any need to base China’s arbitration rules on Confucian values. Even when one argues that social harmony is an embedded feature of a socialist market system, the comments manifest social harmony through economic language.

Thus, contemporary cross-border arbitration norms are primarily shaped by the need to attract foreign parties and investors to use Chinese arbitration services. Where there is no such demand, as in domestic arbitration, developments and reforms lag behind. Some measures first implemented in “foreign-related” arbitration were eventually applied to domestic arbitration, but reforms to domestic arbitration were conducted to make arbitration regulations more consistent within China and to reflect the SPC’s pro-arbitration judicial position.

The design of arbitration law, norms, and institutions has affected how arbitrators approach arbitration and arb-med. In Fan’s survey referred to above, the arbitrator respondents who believe arb-med to be appropriate (88.1% of all respondents) chose ease of enforcement of settlement compared to award, advantages in costs and efficiency, and respect to party free will and voluntariness as the primary reasons for conducting arb-med.<sup>54</sup> These reasons are mostly technical and related to the efficiency of dispute resolution rather than cultural factors.

Only a few of such respondents (6 out of 32) stated that traditional Chinese culture has influenced them to conduct arb-med,<sup>55</sup> and only one respondent said “mediation reflects the local culture in China and therefore is more easily accepted by the Chinese.”<sup>56</sup> Though not representative, this respondent’s response reflects how culture can manifest itself through the advantage of dispute resolution efficiency without being an influence on arb-med practices in China per se. However, a more interesting point these six

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

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

<sup>54</sup> Fan, *An Empirical Study of Arbitrators Acting as Mediators in China*, *supra* note 33, at 805.

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

<sup>56</sup> *Id.*



respondents have shown is that domestic legal culture can spill over to influence how cross-border dispute resolution is conducted.

Chinese arbitration institutions and practitioners are conscious of this spill-over effect. CIETAC, for example, has added a provision in its 2015 Rules expressly allowing independent mediation during arb-med with the consent of both parties to address the concerns of “parties and arbitration professionals with western culture background [who] are concerned with or even skeptical of the process in which arbitrators act as mediators at the same time.”<sup>57</sup> Practitioners have expressed that arb-med is noticeably more popular among Chinese users than those from elsewhere.<sup>58</sup>

Although there is some spillover of domestic legal culture to cross-border arbitration, arb-med is not positioned by institutional design as a replacement of hybrid arbitration-mediation by different neutrals or even institutions. As Chinese arbitration institutions and State judicial institutions internationalize and reach out to foreign users, the influence of domestic culture is expected to wane. But as the establishment of the CICC has demonstrated, when domestic culture is necessary for the State to achieve certain legal-political norms, the domestic culture is most likely preserved. One solution, which leading arbitration institutions have discovered, is to make explicit the autonomy that parties have to choose whether to use arb-med—hence satisfying the needs of both Chinese and Western parties. Nonetheless, arb-med in China is not only an area where domestic and international norms co-exist, but they display increasing tension.

#### IV. PROCEDURAL DEFECTS OF CHINESE-STYLED ARB-MED

While the Chinese government has encouraged Chinese arbitration institutions to “go abroad” (*zou chuqu*) and compete with regional institutions, the chronic problem with arb-med procedural defects remains unresolved. This is in spite of the frequent and recent revisions to rules of various Chinese arbitration institutions. Few have fundamentally addressed procedural irregularities embedded in the arb-med system long identified by scholars and practitioners, leaving the usual defects of actual and apparent bias and protection of confidentiality largely unaddressed.

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<sup>57</sup> CHINA ACAD. OF ARB. LAW, ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2014), *supra* note 17, at 50.

<sup>58</sup> Fan, *An Empirical Study of Arbitrators Acting as Mediators in China*, *supra* note 34, at 792.

### A. *Conflicting Roles of Arbitrator and Mediator*

The main criticism of arb-med is the conflict of interest between the arbitral and mediatory roles assumed by the neutral. The concern is whether the neutral can remain impartial given the different approaches and attitudes required for the two dispute resolution methods. It is the norm in China for the arbitrator to “switch hats” and become the mediator when mediation occurs within the arbitration proceedings. In such case, arbitration is stayed and is resumed only when mediation fails.

A source of the conflict of roles is how arbitrators, as opposed to mediators, should conduct themselves in the course of the proceedings. In the proceedings, the arbitrator takes on the role that decides on an appropriate award, based on the merits of the submissions from both parties. It is a legal process in which the arbitrator must interpret relevant laws and apply them to facts, just as a judge would do in a court.<sup>59</sup> The mediator, by contrast, does not inquire into the appropriateness of a settlement reached by the parties. Instead, the mediator is more interested in having the parties reach a settlement agreement developed on their own.

Because of the very different aims of the two forms of dispute resolution, the approach required of the neutral must not be the same in all stages of arb-med. A competent arbitrator should be disinterested and display a “judicial temperament.”<sup>60</sup> She must observe the requirements of impartiality and general legal competence from which she draws respect from the party.<sup>61</sup> A good mediator by contrast should be sensitive to inter-party relationships and to discover the needs of the parties that might hide below mediatory exchanges, or the parties’ opposing positions. In facilitating settlement and communication between the parties, the mediator may take a more involved, personal approach. When practiced separately as single-tier dispute resolution methods, even for the same subject matter, the dispute resolution process generally has no due process concerns. Theoretically, an arbitration proceeding can suffer no irregularities or biases, actual or apparent, when the same person switches between arbitrator and mediator if she can maintain the standards required of her in arbitration and mediation

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<sup>59</sup> Paul E. Mason, *The Arbitrator as Mediator, and Mediator as Arbitrator*, 28 J. INT’L. ARB. 541, 541 (2011).

<sup>60</sup> *Id.* at 543.

<sup>61</sup> *Id.*

respectively. Due process concerns do not arise from hybrid resolutions per se but from the very human difficulty of partitioning information obtained in the two stages to ensure impartiality.

China's Arbitration Law is silent on whether the parties can request third-party mediation from an independent mediator.<sup>62</sup> But the mediatory role of the arbitrators is generally assumed as a matter of practice. The arbitrated rules of leading Chinese arbitration institutions with experience in cross-border arbitration, such as CIETAC, BAC, Shanghai International Arbitration Center ("SHIAC") and Shenzhen Court of International Arbitration ("SCIA"), also reflect this assumption.<sup>63</sup> The 2015 CIETAC Rules, for instance, state that "[w]ith the consents of both parties, the arbitral tribunal may [mediate] the case in a manner it considers appropriate."<sup>64</sup> The rule empowers the tribunal to conduct mediation but is silent on whether third parties can also mediate. It has been reported that CIETAC assembled an independent panel of mediators on the request of a party in one case.<sup>65</sup> The 2015 CIETAC Rules attempt to provide non-CIETAC mediation, but it only vaguely provides that "CIETAC may, with the consents of both parties, assist the parties to conciliate the dispute *in a manner and procedure it considers appropriate*."<sup>66</sup> It is unclear how the parties may be "assisted" under this rule or what arrangements have been made under the rule.

The 2015 BAC Rules are more explicit with alternative arrangements. They provide for independent mediation at BAC's Mediation Center in accordance with the BAC Mediation Center Mediation Rules.<sup>67</sup> But such

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<sup>62</sup> Sally A. Harpole, *The Combination of Conciliation with Arbitration in the People's Republic of China*, 24 J. INT'L. ARB. 623, 627–28 (2007).

<sup>63</sup> See China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules (promulgated by China Council for the Promotion of International Trade/China Chamber of International Commerce, rev'd Nov. 4, 2014, effective Jan. 1, 2015), art. 47(2) [hereinafter 2015 CIETAC Rules], <http://www.cietac.org/Uploads/201902/5c6148b100105.pdf>; Beijing Arbitration Commission (BAC) Arbitration Rules (rev'd July 9, 2014, effective Apr. 1, 2015), art. 42(1) [hereinafter 2015 BAC Rules], available at <http://www.bjac.org.cn/english/page/ckzl/sz2015.html>; Shanghai International Economic and Trade Arbitration Commission (SHIAC) Arbitration Rules (effective Jan. 1, 2015), art. 41 [hereinafter 2015 SHIAC Rules], [http://www.shiac.org/upload/day\\_141230/SHIAC\\_ARBITRATION\\_RULES\\_2015\\_141222.pdf](http://www.shiac.org/upload/day_141230/SHIAC_ARBITRATION_RULES_2015_141222.pdf); Shenzhen Court of International Arbitration (SCIA) Rules (effective Feb. 21, 2019), art. 48 [hereinafter 2019 SCIA Rules], available at [http://www.sccietac.org/web/doc/view\\_rules/914.html](http://www.sccietac.org/web/doc/view_rules/914.html).

<sup>64</sup> 2015 CIETAC Rules, *supra* note 63, art. 47(2).

<sup>65</sup> Harpole, *supra* note 62, at 627.

<sup>66</sup> 2015 CIETAC Rules, *supra* note 63, art. 47(8) (emphasis added).

<sup>67</sup> 2015 BAC Rules, *supra* note 63, art. 43.

mediation is separate from the arbitral proceedings and is thus not a form of arb-med. As with self-settlement, parties who have reached a settlement agreement through the Mediation Center can request the arbitration tribunal to render an award based on that agreement,<sup>68</sup> allowing the agreement to be enforced in foreign jurisdictions under the New York Convention. With the approval of the BAC Chairperson and additional costs borne by the parties, the BAC Rules also allow international arbitrations to replace the arbitrator after mediation fails.<sup>69</sup> The explicit arrangement for a separate mediation mechanism and allowing arbitrator replacement is rare among arbitration rules in China. Similar to other rules, though, the language of the BAC rules still does not expressly allow the possibility of mediation by independent mediators.

Besides language in arbitration rules that tend to lead parties towards institutional arb-med, the parties may also choose their arbitrator to mediate because they are already familiar with the arbitrator, and the arbitrator is familiar with the facts and background of the dispute.<sup>70</sup> The parties can be sure that they can trust the arbitrator. Such an arbitrator will also allow quicker arbitration and award rendering if and when mediation fails.<sup>71</sup>

However, whether trust and the saving of time and costs do draw parties into arb-med is dependent on the legal culture. Empirical study shows that mutual consent for arb-med is far more likely to be given when both parties are Chinese.<sup>72</sup> Presumably Chinese parties are more familiar with the arb-med process embedded in their dispute resolution culture, while foreign parties are less trusting of the process. Foreign parties might also expect an award rather than a settlement agreement by the end.<sup>73</sup>

### B. Confidentiality

A thornier procedural concern has to do with the confidentiality of information. The issue of due process arises when the neutral, such as the mediator, reverts to becoming an arbitrator. In this process, the information obtained by the neutral during the mediation stage might, consciously or

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<sup>68</sup> *Id.* art. 43(2).

<sup>69</sup> *Id.* art. 67(2).

<sup>70</sup> Weixia Gu, *When Local Meets International*, *supra* note 25, at 89.

<sup>71</sup> *Id.*

<sup>72</sup> Fan, *An Empirical Study of Arbitrators Acting as Mediators in China*, *supra* note 33, at 792.

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

otherwise, be relied on by the neutral in the subsequent arbitration stage.<sup>74</sup> Such information would not normally be communicated to the arbitrator in arbitration when practiced alone. Mediators who practice evaluative mediation might also reveal to the parties the merits of their respective cases, which would not be known to the parties in arbitration until the award is rendered.<sup>75</sup>

Distinct from arbitration, mediation allows *ex parte* communication, or caucusing. Information given by a party to the neutral during caucuses is not known to the other party. The other party has no opportunity to defend against such confidential information.<sup>76</sup> It is for the mediator to determine the truthfulness of the information and the extent to which that information should influence her decision in the arbitration stage to come should mediation fail. Parties might also use caucuses to privately influence the neutral in the favor in the subsequent arbitration. Because mediation may involve discussions into personal and emotional issues between the respective parties and the mediator, the neutral may become more sympathetic towards a particular party.<sup>77</sup> Admittedly, whether the parties create bias through these interactions is dependent on the conduct of the individual neutral. The fact that neutrals can and may be biased indicates a gap in the regulation of arb-med. Indeed, partiality might only be known or is apparent to parties when mediation fails, at which point it is too late to remedy the proceedings.<sup>78</sup>

The *Keeneye* case in Hong Kong shows the potential dangers of caucusing in creating bias, actual or apparent. The tribunal, of the Xi'an Arbitration Commission ("XAC") in China, was composed of a presiding arbitrator and two arbitrators nominated respectively by each side.<sup>79</sup> After the first hearing, the tribunal suggested mediation to the parties, and lawyers on both sides expressed their consent to the arbitrators attempting to resolve the matter as mediators.<sup>80</sup> The tribunal also, on its own initiative, proposed

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<sup>74</sup> Weixia Gu, *When Local Meets International*, *supra* note 25, at 90.

<sup>75</sup> James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L. ARB. 83, 83 (1997).

<sup>76</sup> Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 ARB. INT'L. 187, 198 (2009).

<sup>77</sup> Peter, *supra* note 75, at 93.

<sup>78</sup> Weixia Gu, *When Local Meets International*, *supra* note 25, at 89–90.

<sup>79</sup> *Gao Haiyan v. Keeneye Holdings Ltd.*, [2011] H.K.C.F.I. 240, para. 16 (C.F.I.) (H.K.).

<sup>80</sup> *Id.* at paras. 17–19.

that the respondents pay the claimants RMB 250 million as settlement.<sup>81</sup> The tribunal then appointed XAC's Secretary-General and the claimant-nominated arbitrator as mediators and informed the parties of this proposal.<sup>82</sup> The Secretary-General and the claimant-nominated arbitrator contacted a person, who described himself as "a person related to (or affiliated with)"<sup>83</sup> (*guanxiren* 关系人) the respondents. According to the XAC Rules, "[w]ith the approval of the parties, any third party may be invited to assist the mediation, or they may act as the mediator."<sup>84</sup> The Secretary-General and the claimant-nominated arbitrator asked him to a private meeting at a restaurant in the Xi'an Shangri-La Hotel.<sup>85</sup> At the meeting, the Secretary-General asked the respondents' affiliate to "work on" (*zuogongzuo* 做工作) the respondents, which is understood to mean to get the respondents to accept the settlement proposal.<sup>86</sup> The respondents nonetheless rejected the settlement proposal.<sup>87</sup> The arbitration tribunal reconvened after the failed mediation and decided to award the respondents RMB 50 million.<sup>88</sup> The respondents challenged the award before the Xi'an Intermediate People's Court, but the court upheld the award.<sup>89</sup>

The enforcement of the award was then challenged in the Hong Kong Court of First Instance (CFI).<sup>90</sup> The CFI refused enforcement on the grounds that the "wining and dining"<sup>91</sup> meeting would "cause a fair-minded observer to apprehend a real possibility of bias on the part of the Arbitration Tribunal."<sup>92</sup> Although evidence showing actual bias was insufficient, the interactions at the Shangri-La meeting and the contrast between the proposed settlement and the final award were sufficient to constitute apparent bias.<sup>93</sup> This apprehension of bias was enough for the enforcement of such award to contravene Hong Kong's public policy—that is, "the most

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<sup>81</sup> *Id.* at para. 22.

<sup>82</sup> *Id.* at para. 22.

<sup>83</sup> *Id.* at para. 22.

<sup>84</sup> *Id.* at para. 21.

<sup>85</sup> *Id.* at para. 22.

<sup>86</sup> *Id.*

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

<sup>88</sup> *Id.* at para. 48.

<sup>89</sup> *Id.* at para. 7.

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

<sup>91</sup> *Id.* at para. 67.

<sup>92</sup> *Id.* at para. 3.

<sup>93</sup> Gu & Zhang, *supra* note 27, at 1006.

basic notions of justice and morality of the Hong Kong system.”<sup>94</sup> The judge opined that, “[t]he risk of a mediator turned arbitrator appearing to be biased will always be great.”<sup>95</sup> This decision was reversed when the party seeking enforcement appealed. The appellate court decided to uphold the arbitral award on the basis that the enforcement court should have given greater weight to the decision handed down by the Xi’an Court, in the supervisory jurisdiction in Xi’an, which found no apparent bias and held that the arb-med was properly conducted.<sup>96</sup>

It cannot be assumed that the same standard of apparent bias and deference applied by the Hong Kong Court of Appeal will be replicated by foreign courts. The appellate judgment questions whether balancing the exercise of promoting arbitration while ensuring that due process is observed is done correctly.<sup>97</sup> Indeed, reviewing an arbitration and its procedures in light of public policy at the enforcement jurisdiction level is the purpose of the enforcement courts. If deference for the supervisory court is too readily relied on, then public policy grounds to refuse award enforcement can only be applied in excessively narrow circumstances.<sup>98</sup>

Unlike those of other jurisdictions, due process safeguards in arb-med rules are limited in China. A typical set of arbitration rules in China does not contain provisions specifying the use of information collected from mediation. At most, the rules only provide some safeguards that prohibit the parties from relying on any statements expressed during the mediation stage by the other party or the tribunal to support their case.<sup>99</sup> Generally, no provision bars the tribunal from relying on information provided to them during the mediation stage when deciding on an award afterwards. Even if such rules did exist, they might be difficult to put into practice, since they would require the arbitrators to keep secrets from themselves.

Nonetheless, after the initial refusal to enforce the award in *Keeneye*, Chinese arbitration institutions have taken some steps to mitigate potential procedural irregularities. CIETAC revised its rules in 2014 to expressly state

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<sup>94</sup> Hebei Import & Export Corp. v. Polytek Engineering Co., Ltd., [1998] 1 H.K.L.R.D. 287, para. 47 (C.A.) (H.K.).

<sup>95</sup> Gao Haiyan v. Keeneye Holdings Ltd., [2011] H.K.C.F.I. 240, para. 72 (C.F.I.) (H.K.).

<sup>96</sup> Gao Haiyan v. Keeneye Holdings Ltd., [2012] 1 H.K.L.R.D. 627, 650 (C.A.) (H.K.).

<sup>97</sup> Gu & Zhang, *supra* note 27, at 1023.

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

<sup>99</sup> See, e.g., 2015 BAC Rules, *supra* note 63, art. 42(5).

that with the parties' consent CIETAC may assist the parties to mediate the dispute "in a manner and procedure it considers appropriate"<sup>100</sup> if the parties do not wish for mediation to be conducted by the same arbitral tribunal.<sup>101</sup> The previous 2005 CIETAC Rules did not suggest that mediation within arbitration can be conducted by someone other than the tribunal. The change in the subsequent 2012 CIETAC Rules notifies the parties that mediation by the arbitral tribunal is not the only available option. As noted above, however, what CIETAC considers to be an appropriate manner and procedure of mediation is unclear.

In addition, no statutory safeguards targeting caucusing are available in Chinese law. This sets the Chinese statutory regime aside from other jurisdictions. Hong Kong, for example, has the Arbitration Ordinance based upon the UNCITRAL Model Law. The ordinance allows arbitrators to assume the role of mediators so long as the parties consent and have not withdrawn their consent in writing.<sup>102</sup> The ordinance expressly provides for a disclosure safeguard: if and when mediation fails, a neutral having confidential information from a party, "must, before resuming the arbitral proceedings, disclose to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings."<sup>103</sup> Singapore's International Arbitration Act has a similar safeguard provision.<sup>104</sup> This safeguard requires disclosure to both parties of what information was given to the arbitrator, and prompts the parties to defend against such information during the arbitral proceedings.

## V. REGULATORY PROBLEMS OF ARB-MED IN CHINA

Arbitration in China is regulated by several sources of law. There are statutes, judicial interpretations and guiding cases issued by the SPC, and occasional regulations and circulars from the State Council. The rules of individual arbitration institutions also govern how arb-med is practiced. However, governance of arb-med is not well institutionalized, and a bulk of its regulation relies on individual rules of arbitration institutions. This is one of the reasons the procedural defects discussed above are still a pervasive

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<sup>100</sup> 2015 CIETAC Rules, *supra* note 63, art. 47(8).

<sup>101</sup> *Id.*

<sup>102</sup> Arbitration Ordinance, (2019) Cap. 609 § 33(1) (H.K.).

<sup>103</sup> *Id.* § 33(4).

<sup>104</sup> Sing. Int'l Arbitration Act (Cap 143A, 2002 Rev Ed) s 17(3).



problem when practicing arb-med in China and why parties—especially foreign parties—are still suspicious of arb-med in China.

Statutes only play a small, but nonetheless foundational, role in regulating arb-med. China's Arbitration Law (2017) has had no major amendments<sup>105</sup> since its promulgation in 1994 and regulation of arbitration is mainly achieved through the SPC's judicial interpretations issued throughout the past twenty years. Within the Arbitration Law, only Article 51 addresses arb-med but does little to define how it ought to be practiced. However, Article 51(1) does *require* Chinese arbitration institutions to provide for the procedure of arb-med:

The arbitration tribunal may first conduct mediation before rendering an award. If the parties agree to mediation, then the arbitration tribunal shall conduct mediation. When mediation fails, the tribunal shall duly render an award.<sup>106</sup>

This Article empowers all arbitration institutions in China to conduct arb-med, and all domestic and international arbitration institutions in China include such an arb-med clause in their arbitration rules resembling the above statutory language. Although Article 51 requires the tribunal to respect the intentions of the parties to mediate—to the extent that the tribunal is required to conduct mediation when the parties so request—it does not forbid the tribunal from conducting mediation even when a party decides against mediation.

The issue of party consent is dealt with by arbitration rules. For instance, CIETAC's commercial arbitration rules (2015) and investment arbitration rules (2017) expressly state that arb-med can only proceed with the consent of both parties, and that mediation must end when either party withdraws consent.<sup>107</sup> BAC, SCIA and SHIAC have rules that stipulate the

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<sup>105</sup> China's Arbitration Law's first amendment in 2009 changed two article numbers referencing the Civil Procedure Law (2007). Its second amendment in 2017 concerned a minor change to the qualification of arbitrators.

<sup>106</sup> Zhong hua ren min gong he guo zhong cai fa (中华人民共和国仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 51(1), 8 CHINA L. & PRAC. 23 (1994) (China).

<sup>107</sup> 2015 CIETAC Rules, *supra* note 63, art. 47; China International Economic and Trade Arbitration Commission (CIETAC) International Investment Arbitration Rules (For Trial Implementation) (promulgated by China Council for the Promotion of International Trade (China Chamber of International Commerce), Sept. 12, 2017, effective Oct. 1, 2017), art. 43 [hereinafter 2017 CIETAC International

same.<sup>108</sup> In practice, Fan's survey shows that 77.8% of arbitrator respondents take the initiative to propose arb-med without being prompted by the parties;<sup>109</sup> this suggests that arb-med is just a "matter of good practice" in Chinese arbitration settings.<sup>110</sup> However, the survey also found these initiatives mainly take place during or after the main hearing in arbitration.<sup>111</sup> Thus, parties are likely to have the opportunity to argue their case without entering the mediation stage.

### A. *Market-Based Regulation*

As an institutional arbitration dominant jurisdiction,<sup>112</sup> China has de facto delegated the responsibility of arbitration regulation to the market through its 253 arbitration institutions. A danger in this regulatory approach is the inconsistency of standards practiced by arbitrators and a lack of safeguards available to the parties among different Chinese arbitration institutions. Foreign investors are unlikely to arbitrate in local arbitration institutions that do not have much experience with international disputes. It is the institutions focusing on international disputes that are paving the way in modernizing and standardizing Chinese arb-med regulation.

#### 1. *Chinese Leading Arbitration Institutions' Approach to Arb-Med*

China's leading institutions are not high in number and are concentrated in first-tier cities. Of the 253 institutions, only 60 handled "foreign-related" arbitration cases in 2017.<sup>113</sup> This number remained stable from 2016, when 62 institutions handled "foreign-related" cases.<sup>114</sup> According to CIETAC, only CIETAC, Guangzhou Arbitration Commission ("GAC") and SHIAC handled more than 100 "foreign-related" cases in

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Investment Arbitration Rules], available at <http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en>.

<sup>108</sup> 2015 BAC Rules, *supra* note 63, art. 67; 2019 SCIA Rules, *supra* note 63, art. 48; 2015 SHIAC Rules, *supra* note 63, art. 41.

<sup>109</sup> Fan, *An Empirical Study of Arbitrators Acting as Mediators in China*, *supra* note 33, at 791.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 795–96.

<sup>112</sup> See, WEIXIA GU, ARBITRATION IN CHINA, *supra* note 39, at 19–24 (China does not allow ad-hoc arbitration).

<sup>113</sup> CHINA INT'L ECON. & TRADE ARB. COMM'N, ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2017), *supra* note 13, at 14.

<sup>114</sup> CHINA INT'L ECON. & TRADE ARB. COMM'N, ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2016), *supra* note 22, at 14.

2016.<sup>115</sup> These numbers, however, are missing from the 2017 report. The vast majority of Chinese arbitration institutions do not concern themselves with cases involving a foreign party, foreign subject matter, or the performance of obligations outside China.<sup>116</sup> Therefore, market regulation of arb-med, and of arbitration more generally, is shaped by only a handful of leading Chinese arbitration institutions.

Indeed, market regulation in this sense is not a purposive exercise to control how parties and practitioners utilize arb-med in their conflicts. Rather, the leading institutions are constantly reviewing and revising their arbitration rules to remain competitive in the market,<sup>117</sup> whereby they indirectly promote the standard of procedural fairness in cross-border arb-med. Inter-institutional competition remains a potent force of regulating arb-med.

Of the leading Chinese arbitration institutions, the SCIA is the most innovative in dealing with arb-med. After SCIA split from CIETAC in 2012,<sup>118</sup> its rules in 2016 allowed parties to international commercial disputes, investment disputes, and disputes relating to Hong Kong, Macau and Taiwan, to submit their disputes to SCIA using the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL”) in lieu of SCIA Rules.<sup>119</sup> Although this change was in line with CIETAC’s 2015 Rules, which allowed hybrid arbitration clauses specifying CIETAC arbitration using non-CIETAC arbitration rules (e.g., the UNCITRAL Rules),<sup>120</sup> it was the first time institutional arbitration rules in China explicitly referred to the application of the UNCITRAL rules. The 2016 SCIA Rules introduced the “Guidelines for the Administration of

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

<sup>116</sup> These are the three main circumstances where the court would deem a case to be “foreign-related.” The SPC introduced a fourth limb to “foreign-relatedness,” where both companies were wholly-foreign-owned enterprises registered in a free trade zone in Shanghai, China in 2015, in *xi men zi guo ji mao yi (shang hai) you xian gong si yu shang hai huang jin zhi di you xian gong si shen qing cheng ren he zhi xing wai guo zhong cai cai jue an* (西门子国际贸易(上海)有限公司与上海黄金置地有限公司申请承认和执行外国仲裁裁决案) [Siemens Int’l Trading (Shanghai) Co., Ltd. v. Shanghai Golden Landmark Company Limited], CLI.C.9657573(EN) (Shanghai Interm. People’s Ct. Nov. 27, 2015) (Lawinfochina) (case concerning application for recognition and enforcement of a foreign arbitral award).

<sup>117</sup> Weixia Gu, *Piercing the Veil of Arbitration Reform in China: Promises, Pitfalls, Patterns, Prognoses, and Prospects*, 65 AM. J. COMP. L. 799, 826–29 (2017).

<sup>118</sup> *Id.* at 821–23.

<sup>119</sup> Shenzhen Court of International Arbitration (SCIA) Arbitration Rules (effective Dec. 1, 2016), art. 3(4) [hereinafter 2016 SCIA Rules], available at [http://www.sccietac.org/web/doc/view\\_rules/939.html](http://www.sccietac.org/web/doc/view_rules/939.html).

<sup>120</sup> 2015 CIETAC Rules, *supra* note 63, art. 4(3).

Arbitration under the UNCITRAL Arbitration Rules” (“SCIA UNCITRAL Guidelines”),<sup>121</sup> which further regulate how SCIA is to apply the UNCITRAL Rules. This means that foreign parties might opt for the UNCITRAL Rules, with which they might be more familiar than the SCIA Rules. This approach was confirmed in SCIA’s latest revision to its rules in February 2019.<sup>122</sup>

With the UNCITRAL Rules, an arbitrator can be challenged “if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”<sup>123</sup> If, within 15 days from the date of the notice of challenge, the challenged arbitrator refuses to withdraw or the challenge is not agreed upon by all parties, then the challenging party may elect to pursue the challenge.<sup>124</sup> In such a case, the SCIA UNCITRAL Guidelines specify that the SCIA President will decide on the challenge.<sup>125</sup> But other than this provision, whether an arbitrator may also assume the role of mediator is not mentioned. By virtue of Article 51(1) of the China Arbitration Law, Chinese arbitration institutions are required to perform arb-med when both parties are willing and have consented to it. So, it is unclear whether using the UNCITRAL Rules would be consistent with the Chinese statutory requirement. Although the UNCITRAL Arbitration Rules are silent as to arb-med, it might be useful to consider the position of the UNCITRAL Conciliation Rules on arb-med, which require the parties to mediation to:

undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his

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<sup>121</sup> Shenzhen Court of International Arbitration (SCIA) Guidelines for the Administration of Arbitration under the UNCITRAL Arbitration Rules (effective Dec. 1, 2016) [hereafter SCIA UNCITRAL Guidelines], available at [http://www.sccietac.org/web/doc/view\\_rules/941.html](http://www.sccietac.org/web/doc/view_rules/941.html).

<sup>122</sup> 2019 SCIA Rules, *supra* note 63, art. 3(4).

<sup>123</sup> U.N. Comm’n on Int’l Trade Law, UNCITRAL Arbitration Rules (as revised in 2013), art. 12(1) [hereinafter 2013 UNCITRAL Rules], <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf>.

<sup>124</sup> *Id.* art. 13(4).

<sup>125</sup> SCIA UNCITRAL Guidelines, *supra* note 121, art. 7(3).

opinion, such proceedings are necessary for preserving his rights.<sup>126</sup>

Instead of including more detailed safeguards in its arbitration rules, SCIA and CIETAC seem to be moving away from the Chinese-styled arbitrated, despite the fact that hybrid resolution is already deeply embedded in Chinese arbitration culture.

Both SCIA and CIETAC have recently created mediation centers or set up schemes to allow for mediation by mediators other than the arbitral tribunal. SCIA has promoted what it calls “Diversified Harmonious Dispute Resolution” (“DHDR”).<sup>127</sup> The term echoes an SPC opinion issued in 2016 pushing for modernization and promoting alternative dispute resolution systems as part of China’s Fourth Five-Year Court Reform Plan.<sup>128</sup> In 2008, SCIA created its mediation center to encourage mediation before and outside of existing arbitration proceedings.<sup>129</sup> SCIA has also since advertised a combination of Hong Kong mediation and Shenzhen arbitration, as well as established joint mediation arrangements under the Guangdong–Hong Kong–Macau Great Bay Area Commercial Mediation Alliance in December 2013.<sup>130</sup> Likewise, most recently, CIETAC established its own mediation center in May 2018.<sup>131</sup>

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<sup>126</sup> U.N. Comm’n on Int’l Trade, UNCITRAL Conciliation Rules (adopted July 23, 1980), art. 16 [hereinafter UNCITRAL Conciliation Rules], <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf>.

<sup>127</sup> Xiaochun Liu, *Innovations of Chinese International Arbitration* (2017) (presented at 6th Asia Pacific ADR Conference).

<sup>128</sup> *Zui Gao Ren Min Fa Yuan Guan Yu Ren Min Fa Yuan Jin Yi Bu Shen Hua Duo Yuan Hua Jiu Fen Jie Jue Ji Zhi Gai Ge De Yi Jian* (Fa Fa [2016] 14 Hao) (最高人民法院关于人民法院进一步深化多元化纠纷解决机制改革的意见) (法发 [2016] 14号) [Opinions of the Supreme People’s Court on People’s Courts Further Deepening the Reform of Diversified Dispute Resolution Mechanism] (Court Issuance No. 14 of 2016) (issued by the Sup. People’s Ct., June 28, 2016, effective June 28, 2016), CLI.3.273230 (EN) (Lawinfochina).

<sup>129</sup> SCIA set up the SCIA Mediation Center in December 2008, see SHENZHEN CT. OF INT’L ARB., <http://www.sccietac.org/web/doc/mediate.html> (last visited Nov. 2, 2019).

<sup>130</sup> See the official website at *yue gang ao zhong cai tiao jie lian meng* (粤港澳仲裁调解联盟) GUANGDONG, HONG KONG & MACAU MEDIATION ALLIANCE, <http://www.ghmma.com/nav/2.html> (last visited Nov. 2, 2019).

<sup>131</sup> CIETAC set up its Mediation Centre and Signed Cooperation Agreement with NEEQ on May 18, 2018. See *CIETAC Set up its Mediation Centre and Signed Cooperation Agreement with NEEQ*, CIETAC, <http://www.cietac.org/index.php?m=Article&a=show&id=15407&l=en> (last visited Nov. 2, 2019).

## 2. *Investment Arbitration and Arb-Med*

While commercial arbitration is a comparatively developed area of Chinese arbitration, arbitration of investor-state disputes is a more recent phenomenon in China. Again, SCIA and CIETAC are leading the development. SCIA revised its rules in 2016 to include investor-state disputes as one of its arbitrable matters, becoming the first Chinese arbitration institution to do so.<sup>132</sup> The 2016 SCIA Rules mandate that all investment arbitrations submitted to SCIA will be governed by the ready-made international benchmark in the field (i.e., the UNCITRAL Rules applied to ad-hoc investment treaty arbitration), and subject to the SCIA UNCITRAL Guidelines.<sup>133</sup> But as with above, the UNCITRAL Rules are silent on the availability of arb-med.

CIETAC, on the other hand, specially devised a set of rules for investor-state disputes in 2017 independent of its commercial arbitration rules.<sup>134</sup> The regulations on arb-med, however, do not differ significantly compared to the CIETAC general commercial arbitration rules. The investment arbitration rules provide that, for adoption of mediation in the arbitration process, the tribunal must obtain both parties' consent before proceeding to mediation,<sup>135</sup> and the parties may withdraw consent, causing the mediation proceedings to end and arbitration to resume.<sup>136</sup>

To date, SCIA, CIETAC and BAC<sup>137</sup> are the only three arbitration institutions in China that accept investor-state disputes. Indeed, there is traditionally little interest in arbitrating with China as a host state for investment or arbitrating with other host states by Chinese investors under the ICSID Convention, which went into force in China in 1993.<sup>138</sup> As of March 2019, only five cases have been filed by Chinese investors against other host states and only three cases have been filed by foreign investors

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<sup>132</sup> 2016 SCIA Rules, *supra* note 119, art. 2(2).

<sup>133</sup> *Id.* art. 3(5).

<sup>134</sup> See 2017 CIETAC International Investment Arbitration Rules, *supra* note 107.

<sup>135</sup> *Id.* art. 43(1).

<sup>136</sup> *Id.* art. 43(6).

<sup>137</sup> BAC Rules of International Investment Arbitration (effective on Oct. 1, 2019), available at [http://www.bjac.org.cn/page/data\\_dl/2019%E6%8A%95%E8%B5%84%E4%BB%B2%E8%A3%81%E8%A7%84%E5%88%990905%20%E8%8B%B1%E6%96%87.pdf](http://www.bjac.org.cn/page/data_dl/2019%E6%8A%95%E8%B5%84%E4%BB%B2%E8%A3%81%E8%A7%84%E5%88%990905%20%E8%8B%B1%E6%96%87.pdf) (last visited Nov. 2, 2019).

<sup>138</sup> Tong Qi, *How Exactly Does China Consent to Investor-State Arbitration: On the First ICSID Case against China*, 5 CONTEMP. ASIA ARB. J. 265, 268 (2012).

against China as a host state.<sup>139</sup> Of the five cases filed by the Chinese investors, three were actually filed by claimants from outside mainland China. The first case brought involved a Hong Kong resident with Chinese nationality,<sup>140</sup> the second case involved Standard Chartered Bank Hong Kong,<sup>141</sup> and the most recent one involved Sanum Investments, a Macanese company.<sup>142</sup>

As for the two concluded cases filed against China thus far, no investors have been successful. The parties either discontinued the proceeding<sup>143</sup> or the award was rendered in favor of the state party.<sup>144</sup> An explanation for the lack of investor-state arbitration against China is the lack of trust between the two parties. A consultation by the European Commission in 2011 reveals that only 40% of the European investors surveyed would opt for investor-state arbitration against China.<sup>145</sup> Most would rather settle amicably and would consider arbitration for complete

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<sup>139</sup> See the official website of the ICSID database at *Advanced Case Search*, INT'L CTR. FOR SETTLEMENT INV. DISPUTES, <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> (last visited Mar. 13, 2019).

<sup>140</sup> *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, ¶ 1 (July 7, 2011), <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/255/tza-yap-shum-v-peru> (claims arising out of the seizure of the bank account of claimant's enterprise due to tax debt and other alleged actions undertaken by Peruvian tax authorities resulted in the substantive deprivation of claimant's investment).

<sup>141</sup> *Standard Chartered Bank (H.K.) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, ¶ 2 (July 17, 2017), <https://arbitration.org/award/744> (Standard Chartered initiated proceedings against Tanzania for breaching an agreement under which Tanzania undertook against discriminatory action and expropriation to a Tanzanian company that was to develop a power plant. Standard Chartered acquired the loan for the power plant project).

<sup>142</sup> See *Sanum Investments Limited v. Lao People's Democratic Republic*, ICSID Case No. ADHOC/17/1, (pending).

<sup>143</sup> See *Ekran Berhad v. People's Republic of China*, ICSID Case No. ARB/11/15, Order of Discontinuance (May 16, 2013), <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/427/ekran-v-china> (Ekran's subsidiary, incorporated in China, had a 70-year land lease agreement with the Chinese provincial government in Hainan. The Hainan government revoked the subsidiary's leasehold eleven years after it was granted, citing a regulation on land curbing that allows the government to retake without compensation land left undeveloped for more than two years).

<sup>144</sup> See *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, ¶ 50 (Mar. 9, 2017), [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3885/DC10053\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3885/DC10053_En.pdf), 50 (Mar. 9, 2017) (Ansung entered into an agreement with a Communist Party committee of an industrial zone in China to build a golf course, luxury condominiums, and a clubhouse. The committee requested Ansung pay a higher price for land use and receive a smaller area of land than initially agreed).

<sup>145</sup> European Commission Directorate General for Trade, *Summary of contributions to the European Commission's public consultation on "the future investment relationship between the EU and China"*, 10 (2011).

expropriation only.<sup>146</sup> The reluctance stems from the fear of retaliation, harm to existing investments, and loss of potential investment opportunities.<sup>147</sup> 80% of the respondents also noted that they did not have confidence in Chinese law to protect investor rights due to “lack of transparency and consistency of the system which is subject to political pressure.”<sup>148</sup>

China has a history of using various means to limit the applicability of investor protections. Consider, for example, China’s treatment of investors in negotiating its bilateral investment treaties (“BIT”). The national treatment clauses in the BITs include qualifying clauses that limit their applicability.<sup>149</sup> These usually take the form of qualifying clauses that allow for derogation based on laws and regulations of a contracting party. The Japan-China BIT signed in 1988 prevents discriminatory treatment from being deemed as less favorable if “in accordance with [a Contracting Party’s] laws and regulations, to nationals and companies of the other Contracting Party, . . . it is really necessary for the reason of public order, national security or sound development of national economy.”<sup>150</sup> The necessary reasons to invoke this grandfather clause are found in the BIT and its additional protocol.<sup>151</sup> A more recent BIT concluded between China and Tanzania in 2013 does not rely on such broad grounds for derogation. National treatment clauses can only be accorded without prejudicing the applicable laws and regulations of the host state.<sup>152</sup> Similar clause construction is found in the 2011 China-Uzbekistan BIT<sup>153</sup> and the 2009 China-Malta BIT.<sup>154</sup> Although China

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 4.

<sup>149</sup> Wei Shen, *Evolution of Non-Discriminatory Standards in China’s BITs in the Context of EU-China BIT Negotiations*, 17 CHINESE J. INT’L L. 799, 801-802 (2018).

<sup>150</sup> Agreement between Japan and the People’s Republic of China Concerning the Encouragement and Reciprocal Protection of Investment, Japan-China, Aug. 27, 1988, 1555 U.N.T.S. 197 [hereinafter Japan-China BIT].

<sup>151</sup> Shen, *supra* note 149, at 807.

<sup>152</sup> Agreement between the Government of the People’s Republic of China and the Government of The United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments, China-Tanz., Mar. 24, 2013 [hereinafter China-Tanzania BIT], <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5488/download>.

<sup>153</sup> Agreement between the Government of the People’s Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments, China-Uzb., Apr. 19, 2011 [hereinafter China-Uzbekistan BIT], <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3357/download>.

<sup>154</sup> Agreement between the Government of the People’s Republic of China and the Government of Malta on the Promotion and Protection of Investments art. 3(2), China-Malta, Feb. 22, 2009 [hereinafter



continues to be reluctant to offer full national treatment protection to foreign investors, it has made efforts to reduce the force of national treatment qualifiers in recent BITs by committing to reduce non-conforming measures. In the Protocol to the 2003 China-Germany BIT, for example, China declares that it will take appropriate steps to “progressively remove” the non-conforming measures<sup>155</sup> to address the non-application of national treatment to existing non-conforming measures.<sup>156</sup>

Shen, a researcher of EU-China BIT negotiations, argues that China is offering different degrees of national treatment protections to developed and developing countries so as to attract foreign direct investment from developed countries without reducing its discretion over national treatment protection of foreign direct investment from investors of developing countries.<sup>157</sup> National treatment protection is provided to developing countries if existing non-conforming measures can continue to operate.<sup>158</sup> The China-Germany BIT, for example, offers such arrangements. The Canada-China BIT signed in 2013, however, does not extend national treatment protections to existing non-conforming measures without a soft clause that declares the parties will strive to remove non-conforming measures.<sup>159</sup> This soft form national treatment protection is not offered to developing countries.

A possible explanation for the lack of investor-state arbitration initiated by Chinese investors is that the majority of Chinese investors economically and politically capable of investing in infrastructural projects abroad are either Central Government-owned enterprises or other forms of state-owned enterprises (“SOE”). Indeed, the BRI is led by Chinese SOE investments.<sup>160</sup> It remains to be seen, however, whether SCIA’s, CIETAC’s

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China-Malta BIT], <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3368/download>.

<sup>155</sup> Agreement between the Federal Republic of Germany and the People’s Republic of China Concerning the Encouragement and Reciprocal Protection of Investment Addendum s. 3, Ger.-China, Dec. 1, 2003, 2362 U.N.T.S. 253 [hereinafter Germany-China BIT].

<sup>156</sup> *Id.* art. 3(1).

<sup>157</sup> Shen, *supra* note 149, at 810.

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

<sup>159</sup> Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments art. 8, Can.-China, Sept. 9 2012 [hereinafter Canada-China BIT], <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3476/download>.

<sup>160</sup> Lauge N. Skovgaard Poulsen, *States as Foreign Investors: Diplomatic Disputes and Legal Fictions*, 31 ICSID REV. 12, 17 (2016).

and BAC's investment arbitration rules will become popular among Chinese investors, and whether foreign host states will be more receptive to Chinese investment arbitration rules than the delocalized ICSID arbitration or ad-hoc investment arbitration administered under the UNCITRAL Rules. For these reasons, the effectiveness of arb-med has not been tested in the area of investor-state arbitration in China.

In contrast, while weak due process safeguards in arb-med are a pervasive problem, the popularity of Chinese arbitration institutions among Chinese arbitration parties is not suffering. International users embrace more outward-facing institutions, and many non-mainland Chinese practitioners and scholars are involved in the administration of these institutions. The reasons are two-fold.

First, due process protection is mostly dependent on standards and not safeguards. Larger institutions such as CIETAC, SCIA and BAC are motivated to conduct impartial arbitration not by laws and regulations but by market pressures, both internal and external. As long as market pressures continue to propel leading institutions to align the Chinese sense of mediation with international standards, due process should not pose an issue for Chinese arbitration. It remains to be seen whether foreign enterprises and investors would prefer a seat of arbitration with greater due process safeguards in the region (such as Hong Kong and Singapore) given the increased competition in dispute resolution brought about by China's BRI development.

Second, whether Chinese institutions can attract foreign parties depends on whether China can shape dispute resolution norms within the BRI. Unlike China's attempts to amend its laws so that local standards meet international standards, norm shaping under the BRI entails the shaping of international arbitration expectations to meet Chinese expectations—so that potential parties are more receptive to the concept of Chinese arb-med. Indeed, these two approaches are not mutually exclusive. When making assessments on what China should do to promote arb-med under the BRI context, however, regard should be had for China's economic and cultural role in the region, as well as its motivations for supporting the BRI.

In conclusion, for investment arbitration, Chinese and foreign investors are still reluctant to use formal investor-state arbitration in China to assert their interests. As such, to the author's knowledge, there is no published doctrinal or empirical study of arb-med in the investor-state

arbitration field. Informal channels of dispute resolution through diplomacy and negotiation may continue to yield better results in China-related investment disputes.

### *B. Recent Judicial Policy*

The Chinese government has always encouraged arb-med, whether in domestic or cross-border arbitration. Requiring arbitration institutions to provide a mediation procedure in the Chinese Arbitration Law shows legislative support for this position. But what about the present judicial attitude toward the hybrid procedure?

For domestic arbitration, since 2018, the SPC has made it more difficult for lower courts to set aside arbitral awards. The “pre-reporting system,” which used to be exclusively applied to “foreign-related cases,”<sup>161</sup> is now applied to arbitration conducted within China without foreign elements.<sup>162</sup> According to the new provisions, when first instance courts have provisionally decided to declare a domestic arbitration agreement invalid, by refusing to enforce or by vacating a domestic award, it must first report such a decision to its superior provincial-level High People’s Court (“HPC”). Only when the HPC agrees with the lower court’s finding can the lower court render its decision. Special rules apply when decisions invalidating arbitral awards are made on public policy grounds. In these circumstances, the HPC must in turn report the case to the SPC. Only when both the SPC and the HPC agree with the lower court’s findings can the lower court render its decision to set aside the domestic arbitral award.<sup>163</sup>

This new judicial policy prevents lower courts from being overzealous or becoming subject to local protectionism and corruption against domestic awards obtained from outside the Chinese region. It also allows the SPC and HPC to harmonize standards for setting aside awards nationally, as well as to remove the unequal judicial treatment between domestic awards and awards with a foreign element. For arb-med, due to procedural irregularities of the

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<sup>161</sup> WEIXIA GU, ARBITRATION IN CHINA, *supra* note 39, at 14, 31.

<sup>162</sup> Zui gao ren min fa yuan guan yu zhong cai si fa shen cha an jian bao he wen ti de you guan gui ding (fa shi [2017] 21 hao) (最高人民法院关于仲裁司法审查案件报核问题的有关规定) (法释 [2017] 21号) [Relevant Provisions of the Supreme People’s Court on Issues Concerning Applications for Verification of Arbitration Cases under Judicial Review] (Interpretation No. 21 of 2017) art. 2(2) (issued by the Sup. People’s Ct., Dec. 26, 2017, effective Jan. 1, 2018), CLI.3.307538 (EN) (Lawinfochina).

<sup>163</sup> *Id.* art. 3(2).

Chinese-style arb-med procedures, the pre-reporting system will cause Chinese courts to more reluctantly set aside actually defective awards.

## VI. GLOBAL EXPERIENCES IN REGULATING ARB-MED

### A. *East-West Perception Divide on Arb-Med*

This section examines the East-West divide in how the state, practitioners, and parties approach arb-med. Such differences are shaped by the design of dispute resolution institutions, which are in turn the result of how arb-med is perceived by these actors.

Caution is always needed when attempting to divide legal practices into classifications such as the East-West dichotomy. The issue is simply the one discussed above: excessively relying on stereotypes and tropes risks not accounting for nuanced differences within each group and commonalities across groups. The East is usually characterized by the communitarian approach to dispute resolution or by the avoidance of social conflict.<sup>164</sup> Accordingly, parties from the East prefer non-contentious dispute resolution systems like mediation over litigation and arbitration. By contrast, Western parties prefer legal certainty and believe that mediation does not necessarily result in a fair and just outcome. They therefore prefer litigation and arbitration over mediation.

These characterizations might hold some truth in domestic arbitration, but they are increasingly irrelevant and untenable in the context of cross-border arbitration. In China, the drive to standardize arbitration norms between “foreign-related arbitration” and “domestic arbitration” has made the East-West divide less relevant, even for domestic arbitration. Such attempts to standardize norms by the SPC include the abolition (in effect) of the bifurcation between local arbitration commissions and foreign-related arbitration commissions on arbitral jurisdiction and the most recent extension of the “pre-reporting” system to domestic arbitrations.<sup>165</sup> With respect to the “pre-reporting” system, as discussed above, it was applied exclusively to foreign-related arbitrations conducted in China or entirely foreign arbitrations conducted outside China to mitigate Chinese local

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<sup>164</sup> Tai-Heng Cheng, *Reflections on Culture in Med-Arb*, *supra* note 9, at 424–25.

<sup>165</sup> Relevant Provisions of the Supreme People’s Court on Issues Concerning Applications for Verification of Arbitration Cases under Judicial Review, *supra* note 162, art. 2 (prescribing the pre-reporting system also be applied to judicial review over purely domestic arbitrations).

protectionism concerns but have now been extended to pure domestic arbitrations.<sup>166</sup> Chinese parties who might engage in cross-border arbitration do not necessarily use Chinese lawyers or Chinese arbitrators. Hence, how multinational companies choose their desired dispute resolution system may be attributed to multiple legal traditions.

Further, legal practitioners and judges in the West are not as hostile to arb-med as the stereotype suggests. In 2006, questionnaires were sent to a sample of California judges who served in both trial-judge and settlement-judge capacities. The judges responded that, before trial, they would seek the consent of the parties to set up a settlement conference in an attempt to mediate the dispute without litigation. The effect of this procedure is akin to arb-med, since if settlement fails, litigation would commence. 80% of the respondent judges did not find pre-litigation settlement conferences problematic, so long as the parties have consented to the hybrid procedure.<sup>167</sup> But attempts at setting up regular settlement conferences are not common.<sup>168</sup> On the specific issue of the judge expressing the merits of the parties' respective cases during the settlement stage in a failed settlement, the respondent judges were divided on whether that should be a cause for concern.<sup>169</sup> In these respects, the Western view is not consistent nor unequivocal.

*B. Addressing Arb-Med Procedural Defects in the East and the West*

*1. Asia*

*a. Common Law Asia*

Certain Asian jurisdictions rely on arbitration legislation to protect against procedural irregularities. Arbitration laws in Hong Kong and Singapore, the most preferred arbitral seats in Asia,<sup>170</sup> require arb-med to have proper procedural safeguards through provisions exclusively addressing procedural irregularity. This is not so in China, where rules of

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<sup>166</sup> *Id.* See also WEIXIA GU, ARBITRATION IN CHINA, *supra* note 39, at 163-164 and 169.

<sup>167</sup> Stipanowich et al., *supra* note 30, at 402.

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

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

<sup>170</sup> SCH. OF INT'L ARB. AT QUEEN MARY UNIV. OF LONDON & WHITE & CASE LLP, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 9 (2018), <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>.

individual arbitration institutions are the main instruments regulating arb-med procedures.

Arbitration legislation in Hong Kong and Singapore pays attention to the conflict inherently faced by an arbitrator who later becomes the mediator. Both Hong Kong's Arbitration Ordinance<sup>171</sup> and Singapore's International Arbitration Act ("IAA")<sup>172</sup> allow an arbitrator to act as a mediator if all parties consent in writing and no party has withdrawn its consent in writing.<sup>173</sup> Caucusing is also addressed by the statutes, which reflects the concern in common law traditions over the confidentiality of information provided to the neutral. Then-deputy president of the Chartered Institute of Arbitrators Jeffery Elkinson, commenting on the Keeneye case, argues that allowing the arbitrator to meet parties separately to try to reach a settlement violates due process.<sup>174</sup> When the mediation stage of arb-med fails, the Hong Kong Arbitration Ordinance forces the neutral to disclose, before arbitration resumes, any confidential information that is material to the case given to her by a party during mediation.<sup>175</sup> Singapore's IAA requires the same, in nearly identical language.<sup>176</sup>

*b. Civil Law Asia*

Legislation on arb-med procedure is also found in civil law jurisdictions in Asia. Like China, Japan is well known to be litigation-adverse and Japanese prefer more amicable means of resolving disputes. Japanese international commercial arbitration has not led to a vibrant market of arbitration institutions as seen in China,<sup>177</sup> but where arbitration is used, arb-med plays a significant role. The Japan Commercial Arbitration Association ("JCAA") studied its arbitration cases from 1999 to 2008 and found that in 40% of the cases the tribunal had attempted arb-med,<sup>178</sup> out of

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<sup>171</sup> Arbitration Ordinance, (2019) Cap. 609 § 33(1) (H.K.).

<sup>172</sup> Sing. Int'l Arbitration Act (Cap 143A, 2002 Rev Ed) s 17(1).

<sup>173</sup> Arbitration Ordinance, (2019) Cap. 609, 4-22-4-24, § 33(1) (H.K.); Sing. Int'l Arbitration Act (Cap 143A, 2002 Rev Ed) s 17(1).

<sup>174</sup> Mark Goodrich, *Arb-Med: Ideal Solution or Dangerous Heresy*, 15 INT'L. ARB. L. REV. 12, 14 (2012).

<sup>175</sup> Arbitration Ordinance, (2019) Cap. 609, 4-22-4-24, § 33(4) (H.K.)

<sup>176</sup> Sing. Int'l Arbitration Act (Cap 143A, 2002 Rev Ed) s 17(3).

<sup>177</sup> THOMAS E. CARBONNEAU & WILLIAM E. BUTLER, INTERNATIONAL LITIGATION AND ARBITRATION: CASES AND MATERIALS 592 (2d ed. 2013).

<sup>178</sup> Tatsuya Nakamura, *Brief Empirical Study on Arb-Med in the JCAA Arbitration*, JCAA NEWSL. (Japan Commercial Arbitration Ass'n, Tokyo, Japan), Jun. 2009, at 10, <http://www.jcaa.or.jp/e/arbitration/docs/news22.pdf>.

which 52% of those cases were concluded by settlement, i.e., the successful rate of arb-med attempts or those leading to consent awards could be as high as 20.8%. Moreover, no party challenged the neutral on grounds of partiality after arbitration had resumed in cases where mediation attempts failed.<sup>179</sup>

Japan's Arbitration Law requires arbitrators to obtain consent from the parties for mediation to take place.<sup>180</sup> On top of that, the parties must consent separately in writing in order for the arbitrator to attempt to mediate the dispute.<sup>181</sup> This regulatory approach might be described as a "double-consent" mechanism for arb-med to take place by the same person in Japan. Such consent can be withdrawn at any stage of the arbitration. Unlike statutes in Hong Kong and Singapore, Japan's Arbitration Law does not have much to say on the conduct of the arb-med neutral. Instead, institutional rules have taken the initiative to set out the due process standards for arb-med. Japan's Arbitration Law does not, for example, govern the confidentiality of information given to the neutral during mediation. Provisions governing this are found in the JCAA arbitration rules, which forbid the neutral from caucusing without written consent from the parties and impose a duty on the neutral to disclose at each instance that an *ex parte* communication has occurred.<sup>182</sup>

As mentioned above, the Chinese Arbitration Law has remained largely stagnant since its enactment in 1994.<sup>183</sup> Due process safeguards, such as a requirement of separate consent allowing the same neutral to arbitrate and mediate a dispute, are absent from China's statute. Several leading Chinese arbitration institutions are picking up these safeguard procedures, albeit any indication whether such procedures will be adopted into law or followed by other Chinese arbitration institutions remains absent.

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<sup>179</sup> *Id.* at 10.

<sup>180</sup> Chūsaihō [Arbitration Law], Law No. 138 of 2003, art. 38(1) (Japan), translated at <https://japan.kantei.go.jp/policy/sihou/arbitrationlaw.pdf>.

<sup>181</sup> *Id.*, art. 38(4).

<sup>182</sup> Japan Commercial Arbitration Ass'n (JCAA) Commercial Arbitration Rules 59(2) [hereinafter 2019 JCAA Rules], [http://www.jcaa.or.jp/e/arbitration/docs/Commercial\\_Arbitration\\_Rules.pdf](http://www.jcaa.or.jp/e/arbitration/docs/Commercial_Arbitration_Rules.pdf).

<sup>183</sup> The Chinese Arbitration Law was amended in 2017 on just one point: to impose the additional requirement of "passing the national unified law exam" on those staff members who have been working in Chinese arbitration institutions for eight or more years.

c. *Singapore's Unique Experience: The AMA Protocol*

As previously discussed, even though the 2015 CIETAC Rules and the 2017 CIETAC Investment Arbitration Rules allow parties to choose persons other than the arbitrator to be their mediator for arb-med, this option appears under-utilized by participating parties.

In this respect, the Singapore International Arbitration Centre (“SIAC”) instead implements separation of arbitration and mediation by regulatory and institutional design. In 2014, the SIAC and Singapore International Mediation Centre (“SIMC”) launched an Arb-Med-Arb Protocol (the “AMA Protocol”), where parties who enter into an arbitration agreement can settle through the combination of arbitration and mediation. Under the AMA Protocol, arbitration commences and is stayed normally for a maximum of eight weeks while SIMC mediation is undertaken. If mediation succeeds, the mediation settlement agreement is considered a SIAC consent award and is enforceable under the New York Convention.<sup>184</sup> If mediation fails, the parties resume arbitration at SIAC.<sup>185</sup> Under the AMA Protocol, arbitration and mediation are conducted independently by two institutions, the SIAC and the SIMC, respectively, using arbitrators and mediators appointed by the two institutions, also respectively.

The institutional partitioning provides parties a chance at amicable settlement without the risk of being subject to the same neutral assuming the conflicting roles of mediator and arbitrator. The drawback of institutional partitioning is the additional expenditure of time, money, and resources. When arb-med is performed under one roof, the time, costs, and resources required to appoint mediators (or rather, turn arbitrators into mediators and back) are less demanding.

Since the AMA Protocol was promulgated in 2014, the SIMC has seen fourteen cases applying the scheme.<sup>186</sup> Among the fourteen cases, two cases are still pending, two cases settled before mediation began, seven settled

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<sup>184</sup> *Arb-Med-Arb*, SING. INT’L MEDIATION CTR., <http://simc.com.sg/dispute-resolution/arb-med-arb/> (last visited Oct. 24, 2019).

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

<sup>186</sup> Statistics quoted by Eunice Chua (Assistant Professor of Law at Singapore Management University and formerly first Deputy Chief Executive Officer of the SIMC), who obtained the numbers in a meeting with SIMC CEO Aloysius Goh in April 2019 (on file with the author).



during mediation, and two progressed to arbitration.<sup>187</sup> As of October 2018, about one-fifth of SIMC's caseload utilized the AMA Protocol, and as of 2017, the settlement rate was 85%.<sup>188</sup>

Singapore's AMA approach is quite unique but appropriate in rejecting the integrated approach to arb-med, which, as demonstrated by how arb-med is conducted in China, has serious defects and due process concerns. But the question remains whether Chinese parties, who account for most of the caseloads of Chinese arbitration institutions, are receptive to such an institutional arrangement akin to Singapore's. Another question is whether Chinese parties are aware of the due process standards required internationally and the due process concerns involved when seeking overseas enforcement of consent awards. The *Keeneye* case may have given Chinese arbitrators and parties a false sense of security.<sup>189</sup>

## 2. *Continental Europe*

Regulation of arb-med at the national level is scant in Continental Europe, despite the popularity of arb-med in France, Switzerland, and Germany.<sup>190</sup> Civil procedure legislation tends to address mediation during litigation, but not arb-med. The arbitration provisions of the French Code of Civil Procedure<sup>191</sup> do not mention mediation in combination with arbitration but do arrange for mediation during litigation.<sup>192</sup> Likewise, the Swiss Federal Civil Procedure Code only regulates mediation during litigation, but not arb-med.<sup>193</sup>

Germany's Code of Civil Procedure, however, does mention arb-med. Under Germany's code, if parties settle a dispute via a mediation process during arbitration, the arbitration proceedings end. If the parties so request,

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<sup>187</sup> *Id.*

<sup>188</sup> Aziah Hussin, Claudia Kuck, & Nadja Alexander, *SIAC-SIMC's Arb-Med-Arb Protocol*, 11 N.Y. DISP. RESOL. LAW. 85 (2018), available at SSRN: <https://ssrn.com/abstract=3329785>.

<sup>189</sup> Weixia Gu, *The Delicate Art of Med-Arb and Its Future Institutionalisation in China*, *UCLA Pacific Basin Law Journal* (2014), at 109.

<sup>190</sup> Renate Dendorfer, *Mediation in Germany: Structure, Status Quo and Special Issues*, presented at Civil Mediation Council Fifth National Conference (Civil Mediation Council Manchester).

<sup>191</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 1442-1507 (Fr.).

<sup>192</sup> See CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 131-1–131-15 (Fr.) (regulating the use of mediation in litigation).

<sup>193</sup> SCHWEIZERISCHE ZIVILPROZESSORDNUNG [ZPO] [SWISS CIVIL PROCEDURE CODE] Dec. 19, 2008, SR 272, art. 214 (Switz.).

the arbitral tribunal “shall record the settlement in the form of an arbitral award.”<sup>194</sup> An empirical study by Bühring-Uhle, a German scholar of hybrid dispute resolution used in international business, shows that German practitioners support using the same neutral to conduct both stages of mediation and arbitration.<sup>195</sup> The empirical study found that 86% of respondents thought that facilitating a consensual solution is one of the functions of the arbitral process.<sup>196</sup> Most arb-med cases involving German practitioners see members of the arbitral tribunal (often the chairperson) playing the dual role of mediator.<sup>197</sup> Such practice is consistent with German court procedures, where judges may also act as mediators.<sup>198</sup> As such, this practice stemming from a combination of litigation and mediation has made German practitioners comfortable with the neutral being both the arbitrator and the mediator.<sup>199</sup>

The German experience shows that judicial practices can affect the willingness of practitioners to accept arb-med. The German judiciary’s mediatory role is part of the court’s duty to settle disputes.<sup>200</sup> It is therefore not uncommon for an adjudicative neutral to subsequently “switch hats” and take on a more conciliatory role. Further in line with common practices in German courts, Bühring-Uhle’s survey participants were quite familiar with this type of process and had very few objections to the involvement of the arbitrator as mediator (and only 25% of German respondents thought this was not appropriate). This stands in stark contrast to common-law-jurisdiction-based respondents who rarely encounter this practice (28 out of 31 have “practically never” seen it) and by a two-thirds majority regard it as inappropriate.<sup>201</sup>

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<sup>194</sup> ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], as amended, § 1053, *translation at* [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html) (Ger.).

<sup>195</sup> CHRISTIAN BÜHRING-UHLE ET AL., *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 110 (2d ed. 2006).

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

<sup>197</sup> *Id.* at 161.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *See* Kaufmann-Kohler, *supra* note 76, at 190 (German courts will hold a pre-hearing settlement session when possible with the parties during which they make inquiries and assess the merits of the case. Such settlement sessions can be held after the proceedings have commenced and even at the appellate stage. The court may also refer the parties to another judge to conciliate or to out-of-court alternative dispute resolution).

<sup>201</sup> BÜHRING-UHLE ET AL., *supra* note 195, at 122.

On the contrary, arbitrators in France rarely become mediators in the same dispute, even though the French Code of Civil Procedure does not expressly bar such practice.<sup>202</sup> Although French courts are empowered to conduct mediation,<sup>203</sup> judges rarely mediate a case themselves.<sup>204</sup>

Applying the case study in Germany to China reveals that the prevalence of judicial mediation could also be a factor contributing toward the wide acceptance of arb-med in China. Judges regularly perform judicial mediation as part of their duties. Arb-med would be considered even less problematic compared to Germany due to China's evaluative style of mediation, which narrows the gap between the role the neutral plays in arbitration and mediation.

### 3. *Common Law Jurisdictions in the "West"*

Turning to common law jurisdictions, in the United States legislation has not been keeping up with the rise in popularity of arb-med.<sup>205</sup> U.S. case law is dismissive of an option to conduct hybrid arbitration and mediation. In *Advanced Bodycare Solutions v. Thione International*, the Court of Appeals for the 11th Circuit held that a dispute resolution provision in a commercial contract allowing parties the option to either mediate or arbitrate was not "an agreement to settle by arbitration a controversy."<sup>206</sup> The clause, therefore, was not enforceable under the Federal Arbitration Act.<sup>207</sup>

In a similar vein, arb-med is not addressed in the English Arbitration Act of 1996, which regulates arbitration in England and Wales and Northern Ireland.<sup>208</sup> But English courts have considered issues of procedural irregularity that might arise from having the same neutral assume arbitral and mediatory roles in a dispute. In *Glencot Development & Design v. Ben Barrett & Son*,<sup>209</sup> the court held that the test to apply when assessing whether the neutral had been biased was whether the "circumstances would lead a

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<sup>202</sup> *Id.*

<sup>203</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1460 (Fr.).

<sup>204</sup> Kaufmann-Kohler, *supra* note 76, at 190.

<sup>205</sup> BÜHRING-UHLE ET AL., *supra* note 196, at 122.

<sup>206</sup> *Advanced Bodycare Solutions v. Thione Int'l*, 524 F.3d 1235, 1238 (11th Cir. 2008).

<sup>207</sup> *Id.* at 1240 (The Federal Arbitration Act postulates that arbitration will produce a resolution "independent of the parties' acquiescence[.]" which differs from the voluntary agreement mediation aims to achieve).

<sup>208</sup> See Arbitration Act 1996, c. 23, § 2(1) (U.K.).

<sup>209</sup> [2001] All ER (D) 384 (UK).

fair-minded and informed observer to conclude that there was a real possibility, or a real danger . . . that the tribunal was biased.”<sup>210</sup> The decision in *Glencot* was ultimately held to be unenforceable, as the mere act of caucusing in the mediation phase had compromised the neutral’s impartiality and tainted his decision with apparent bias.

Among Western common law jurisdictions, Australia has considered potential procedural pitfalls in its piecemeal reform of arbitration legislation beginning as early as 2010. On the domestic arbitration front, Australian states and territories have one by one adopted the Commercial Arbitration Act (“CAA”) Model Bill of Australia.<sup>211</sup> The CAA Model Bill sets out that arbitrators can only be a mediator if the governing arbitration agreement allows for this arrangement or if every party has consented to the neutral switching hats.<sup>212</sup> Moreover, party consent is also required for caucusing. In addition, the neutral must treat as confidential any information obtained from a party during caucusing, and, unless otherwise allowed by the governing arbitration agreement, receive the disclosing party’s consent before releasing information to the other party.

Perhaps most important is that the CAA Model Bill does not allow an arbitrator-turned-mediator to act as an arbitrator again after a failed mediation without first obtaining both parties’ written consent.<sup>213</sup> This arrangement is unique to the CAA Model Bill and not found in other UNCITRAL Model Law jurisdictions like Hong Kong and Singapore. This arb-med provision of the Australian Model Bill was tested in *Ku-ring-gai Council v. Ichor Constructions Pty Ltd* most recently before the New South Wales Supreme Court,<sup>214</sup> where implied consent from both parties was ruled to be insufficient to meet the statute’s requirement that the neutral must seek written consent before resuming arbitration after a failed mediation or where mediation efforts are futile.<sup>215</sup>

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<sup>210</sup> *Id.* para. 86.

<sup>211</sup> See, e.g., *Commercial Arbitration (National Uniform Law) Act 2011* (NT) (Austl.); *Commercial Arbitration Act 2010* (NSW) (Austl.); *Commercial Arbitration Act 2011* (SA) (Austl.); *Commercial Arbitration Act 2011* (Vic) (Austl.); *Commercial Arbitration Act 2011* (Tas) (Austl.); *Commercial Arbitration Act 2012* (WA) (Austl.); *Commercial Arbitration Act 2013* (Qld) (Austl.); *Commercial Arbitration Act 2017* (ACT) (Austl.).

<sup>212</sup> *Commercial Arbitration Bill 2010* (Cth) pt V div 27(D) sub-div 1 (Austl.).

<sup>213</sup> *Commercial Arbitration Bill 2010* (Cth) pt V div 27(D) sub-div 4 (Austl.).

<sup>214</sup> *Ku-ring-gai Council v Ichor Constructions Pty Ltd* (2018) NSWLR 610 (Austl.).

<sup>215</sup> *Id.*

Such an arb-med regulation regime is, however, not included in the international arbitration regime in Australia. The Australian International Arbitration Act (“IAA”)<sup>216</sup> governs international commercial arbitration in Australia. The 2010 amendments to the IAA, whose main objective was to incorporate the 2006 amendments to the UNCITRAL Model Law into the Australian law, did not include an arb-med regime because there were concerns that foreign courts would be reluctant to enforce an Australian award concluded by arb-med.<sup>217</sup> However, as we have seen in the experiences of China and other jurisdictions, arb-med awards are being enforced by foreign courts. Furthermore, it is precisely for the reason that a comprehensive statutory regime guiding international commercial arb-med requires impartiality that awards may be enforced overseas.

## VII. PROMOTING ARB-MED UNDER THE BELT AND ROAD INITIATIVE

### A. *The Popularity and Credibility of Cross-Border Arb-Med*

Before asking how China can promote arb-med under the BRI context, we need to consider what the most valuable and least desirable features of cross-border arb-med are to arbitration users. Then the question is: what China could do to mitigate the shortcomings of arb-med and, in the meantime, amplify its advantages as perceived by potential parties, not only Chinese, but also those foreign parties alongside the BRI roadmap?

A recent survey conducted by Queen Mary University of London, surveying mainly European private practitioners, in-house counsels, and arbitrators, participants chose the costs involved as the least valuable characteristic of cross-border arbitration.<sup>218</sup> Only 3% of 922 respondents regarded it as one of the “three most valuable characteristics of international arbitration” while 67% regarded it as one of the “three worst characteristics of international arbitration.”<sup>219</sup> “Confidentiality and privacy” (36%) and “neutrality” (25%) stood in the middle, while the “enforceability of awards”

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<sup>216</sup> *International Arbitration Act 1974* (Cth) pt I div 2D (Austl.).

<sup>217</sup> Richard Garnett, *Australia’s International and Domestic Arbitration Framework*, in *ARBITRATION AND DISPUTE RESOLUTION IN THE RESOURCES SECTOR: AN AUSTRALIAN PERSPECTIVE* 21 (Gabriël A. Moens & Philip Evans eds., 2015).

<sup>218</sup> SCH. OF INT’L ARB., *supra* note 170, at 7.

<sup>219</sup> *Id.* at 7–8.

(64%) and “avoiding specific legal systems/national courts” (60%) were chosen as the most valued characteristics.<sup>220</sup>

The survey also asked respondents about the factors they contemplate when choosing a seat of arbitration. The “general reputation and recognition of the seat” is considered the most important factor, followed by “neutrality and impartiality of the local legal system,” “national arbitration law[,]” and “track record of enforcing agreements to arbitrate and arbitral awards.”<sup>221</sup> Despite being considered one of the worst qualities of cross-border arbitration, cost was only regarded by about 5% of the respondents as one of top four factors in choosing a seat.<sup>222</sup>

Compared to other leading arbitral seats and arbitration institutions in the Asian region (i.e., the Hong Kong International Arbitration Centre (“HKIAC”) in Hong Kong and SIAC in Singapore), leading Chinese arbitration institutions such as CIETAC, BAC and SCIA are likely less attractive to foreign parties than HKIAC and SIAC. As the results of the Queen Mary survey reveal, Chinese arbitration institutions should improve the neutrality and impartiality of their arb-med procedures and the enforceability of their arb-med-produced consent awards. Although the outcome of the *Keeneye* case may be an isolated one, a similar fact pattern has not been tested in courts outside of Hong Kong. BRI jurisdictions may not pay as much deference to a Chinese supervisory court opinion as did the Hong Kong courts.

One suggestion is that Chinese courts may consider adopting stricter standards over the exercise of their supervisory powers for arb-med awards manifesting due process issues. Stricter standards would make arb-med more popular and credible to potential arb-med users and practitioners as a dispute resolution method. While actively supporting deficient arb-med practices and making it more difficult for domestic arb-med awards to be set aside through unanimous application of the “pre-reporting system” benefits China’s overall arbitration enforcement record, Chinese courts are not injecting confidence into foreign parties by alleviating Chinese-styled arb-med due process concerns. Arbitration users are still not seeing Chinese courts as competent reviewers of arbitrator partiality when the arbitrator is

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<sup>220</sup> *Id.* at 7.

<sup>221</sup> *Id.* at 11.

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

also the mediator. Perception is important, as the Queen Mary survey shows that “general reputation and recognition[,]” “neutrality and impartiality of the local legal system[,]” and “national arbitration laws” are the most important factors considered when parties select an arbitration seat, regionally and internationally.<sup>223</sup> Arbitration users prefer a seat where the formal arbitration legal structure is perceived to be impartial.<sup>224</sup>

### B. *The CICC and the “One-Stop” Hybrid Dispute Resolution Platform*

Most recently, China’s Central Government, the State Council, released in late June 2018 the “Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions” (the “Mechanism and Institutions Opinion”).<sup>225</sup> The Mechanism and Institutions Opinion stresses the need to build dispute resolution mechanisms and institutions that can account for the inconsistencies of law and legal culture across the BRI jurisdictions. The solution suggested is a “diversified” dispute resolution system to satisfy the range of disputes that the BRI will produce. “Diversification” here is taken to mean the use of mediation, arbitration, and litigation to resolve disputes.<sup>226</sup> But studies below show that the diversified dispute resolution mechanism may not necessarily be conducted by the same institution (and same personnel) as in Chinese-styled arb-med practices.

#### 1. *The Establishment of the CICC*

The SPC established the CICC days after the Mechanism and Institutions Opinion was published. The CICC is governed by the

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<sup>223</sup> *Id.* at 10.

<sup>224</sup> *Id.*

<sup>225</sup> Zhong gong zhong yang ban gong ting, guo wu yuan ban gong ting yin fa guan yu jian li “yi dai yi lu” guo ji shang shi zheng duan jie jue ji zhi he ji gou de yi jian (中共中央办公厅、国务院办公厅印发《关于建立“一带一路”国际商事争端解决机制和机构的意见》) [Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions] (issued by the General Office of the Communist Party Central Committee and the General Office of the State Council, June 2018), CLI.5.316324 (EN) (Lawinfochina).

<sup>226</sup> Wen Xin Qiao (乔文心), *Chuang xin ji zhi ji gou gong zheng gao xiao bian li jie jue guo ji shangshi jiu fen — ren min fa yuan fu wu bao zhang “yi dai yi lu” jian she gong zuo zong shu* (创新机制机构 公正高效便利解决国际商事纠纷——人民法院服务保障“一带一路”建设工作综述) [*Innovative Mechanism Institutions Are Fair, Efficient and Convenient to Resolve International Commercial Disputes—A Summary of the Construction of the “Belt and Road” for the Service Guarantee of the People’s Court*], CHINA COURT NETWORK (Mar. 5, 2019), <https://www.chinacourt.org/article/detail/2019/03/id/3746817.shtml> (China).

“Provisions of the Supreme People’s Court on Several Issues Regarding the Establishment of the International Commercial Court” (the “CICC Provisions”). The CICC consists of two courts: the First CICC in Shenzhen, Guangdong Province, for handling BRI-related international commercial disputes arising out of the sea-based Maritime Silk Road (*haishang sichouzhilu* 海上丝绸之路); and the Second CICC in Xi’an, Shaanxi Province, for handling BRI-related international commercial disputes arising out of the land-based Silk Road Economic Belt (*sichouzhilu jingjingdai* 丝绸之路经济带). Shenzhen was chosen for its traditional role as a test bed of new legal and economic policies and for its strategic geo-economic location on the Maritime Silk Road, as well as for being closer to the Guangdong-Hong Kong-Macau Great Bay Area.<sup>227</sup> Xi’an was chosen for its historical position as the starting point of the ancient Silk Road.<sup>228</sup>

Inspired by the SICC’s affiliation with the Singapore’s Court of Appeal, the two new courts are permanent bodies within the SPC in Beijing.<sup>229</sup> Its judges are selected from senior judges familiar with international laws and norms and proficient in English and Chinese.<sup>230</sup> As of May 2019, all fourteen judges appointed to the CICC are mainland Chinese and hold postgraduate degrees in law—with eight of the judges having either visited or studied at a university outside mainland China.<sup>231</sup>

According to Article 2 of the CICC Provisions, the CICC has jurisdiction over:

- (1) international commercial cases with the subject matter worth more than RMB 300 million, where the parties have agreed in writing to choose the International Commercial Court

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<sup>227</sup> Xiao Yu (于晓), *Wei shen me zai shen zhen, xi’an she guo ji shang shi fa ting? Zui gao fa hui ying* (为什么在深圳、西安设国际商事法庭? 最高法回应) [Why Establish the China International Commercial Court (CICC) in Shenzhen and Xi’an? Response from the Supreme People’s Court], CHINA NEWS NETWORK (June 28, 2018), <http://www.chinanews.com/gn/2018/06-28/8549700.shtml> (China).

<sup>228</sup> *Id.*

<sup>229</sup> *Zui gao ren min fa yuan guan yu she li guo ji shang shi fa ting ruo gan wen ti de gui ding* (fa shi [2018] 11 hao) (最高人民法院关于设立国际商事法庭若干问题的规定) (法释 [2018] 11号) [Provisions of the Supreme People’s Court on Several Issues Regarding the Establishment of the International Commercial Court] (promulgated by the Sup. People’s Ct., June 25, 2018, effective July 1, 2018), art. 1, available at <http://cicc.court.gov.cn/html/1/219/208/210/817.html> (China).

<sup>230</sup> *Id.* art. 4.

<sup>231</sup> *See Judges, CHINA INT’L COMMERCIAL COURT*, <http://cicc.court.gov.cn/html/1/219/193/196/index.html> (last visited Nov. 2, 2019).



for adjudication in accordance with Article 34 of the Chinese Civil Procedure Law (2017);

(2) first instance international commercial cases under the jurisdiction of the Provincial High People's Courts (HPC) that the HPC deems it should be adjudicated by the SPC, and the SPC has so permitted;

(3) first instance international commercial cases of national significance;

(4) applications for arbitration preservation measures under Article 14 of the CICC Provisions and applications to revoke or enforce an award from an international commercial arbitration; and

(5) any other international commercial cases the SPC deems the CICC should have jurisdiction over.<sup>232</sup>

Article 3 then prescribes the scope of “international commercial cases” where:

(1) at least one party has a non-Chinese nationality, has no nationality, is a foreign enterprise or organization;

(2) at least one party habitually reside outside of the People's Republic of China;

(3) the subject matter is outside of the People's Republic of China; or

(4) the legal fact of creation, amendment or extinguishment of the commercial relationship occurred outside the People's Republic of China.<sup>233</sup>

In short, the CICC handles complex international commercial cases but does not extend its jurisdiction to investor-state investment disputes. This is because of an early SPC interpretation of China's reservation in its accession to the New York Convention in 1986.<sup>234</sup> However, according to

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<sup>232</sup> Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court, *supra* note 229, art. 2.

<sup>233</sup> *Id.* art. 3.

<sup>234</sup> Zui gao ren min fa yuan guan yu zhi xing wo guo jia ru de “cheng ren ji zhi xing wai guo zhong cai cai jue gong yue” de tong zhi (fa (jing) fa [1987] 5 hao)

CICC Justice Gao Xiaoli, China's reservation may be reconsidered in the future.<sup>235</sup>

## 2. *The CICC's "One-Stop" Hybrid Dispute Resolution Platform*

For arb-med, the most important CICC provisions are Articles 11 and 14. Article 11 formulates the establishment of a new "one-stop" international commercial dispute resolution mechanism as follows:

The Supreme People's Court will set up an International Commercial Expert Committee (ICEC) and select qualified international commercial mediation institutions and international commercial arbitration institutions to build up together with the CICC a "one-stop" international commercial dispute resolution platform on which mediation, arbitration, and litigation are efficiently linked.

The International Commercial Court supports parties to settle their international commercial disputes by choosing the approach they consider appropriate through the dispute resolution platform on which mediation, arbitration and litigation are efficiently linked.

Article 14 then links the CICC with international commercial arbitration institutions:

Where parties agree to submit their disputes to arbitration by an international commercial arbitration institution under Article 11 paragraph 1 of the CICC Provisions, they may apply to the CICC for a ruling on the preservation of property, evidence or conduct before or after the arbitration proceeding commences.

Where a party makes an application to the CICC for setting aside or enforcement of an arbitral award rendered by an international commercial arbitration institution under Article 11 paragraph 1 of the CICC Provisions, the CICC shall review the

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(最高人民法院关于执行我国加入的《承认及执行外国仲裁裁决公约》的通知) (法(经)发 [1987] 5号) [Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China] (issued by the Sup. People's Ct., Apr. 10, 1987, effective Apr. 10, 1987), art. 2, CLI.3.3255 (EN) (Lawinfochina).

<sup>235</sup> He & Yan, *Creating the International Commercial Court*, *supra* note 49.

application in accordance with provisions of the Chinese Civil Procedure Law and other related legal provisions.<sup>236</sup>

Pursuant to Article 11, CICC now allows international commercial disputes to be mediated and arbitrated through a single, combined set of procedures. The single platform does not imply that mediation and arbitration is to be conducted by the same personnel or institution, as in traditional Chinese-styled arb-med. Rather, by pointing international arbitration and mediation conducted under the CICC to different arbitration institutions and mediation institutions,<sup>237</sup> Article 11 seems to suggest that mediation and arbitration in arb-med procedures are to be conducted by separate mediation and arbitration institutions. This creation of an integrated mediation and arbitration platform using separate institutions is an important feature of the CICC, and exhibits China's innovation of providing a "one-stop" hybrid dispute resolution platform that aims to alleviate due process concerns in cross-border arb-med in the BRI dispute resolution context.

While detailed implementation rules are still under preparation, as recent as December 2018, the CICC designated five Chinese arbitration institutions and two mediation institutions to be part of its "one-stop" integrated mediation and arbitration platform.<sup>238</sup>

The five arbitration institutions designated by the CICC are all leading Chinese arbitral institutions: CIETAC, SCIA, BAC, Shanghai International Arbitration Center ("SHIAC"),<sup>239</sup> and China Maritime Arbitration Commission ("CMAC").<sup>240</sup> These institutions are considered the most experienced, capable, and credible Chinese arbitration institutions handling

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<sup>236</sup> Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court, *supra* note 229, art. 14.

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

<sup>238</sup> The CICC issues its working rules, rules regarding expert committee and designation of Mainland arbitration and mediation institutions at an official press release, <http://cicc.court.gov.cn/html/1/218/149/156/1128.html>.

<sup>239</sup> SHIAC is accessible at [http://www.shiac.org/SHIAC/arbitrate\\_items\\_E.aspx](http://www.shiac.org/SHIAC/arbitrate_items_E.aspx).

<sup>240</sup> CMAC is accessible at <http://www.cmac.org.cn/?lang=en>; Zui gao ren min fa yuan ban gong ting guan yu que ding shou pi na ru "yi zhan shi" guo ji shang shi jiu fen duo yuan hua jie jue ji zhi de guo ji shang shi zhong cai ji tiao jie ji gou de tong zhi (fa ban [2018] 212 hao) (最高人民法院办公厅关于确定首批纳入“一站式”国际商事纠纷多元化解决机制的国际商事仲裁及调解机构的通知) (法办 [2018] 212 号) [Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the "One-Stop" Diversified International Commercial Dispute Resolution Mechanism], ¶ 2 (issued by the Sup. People's Ct., Nov. 13, 2018, effective Dec. 5, 2018), <http://cicc.court.gov.cn/html/1/219/208/210/1144.html>.

cross-border arbitration cases,<sup>241</sup> and are expected to be the forefront venues in BRI-related arbitration. Parties to arbitration cases at one of the above designated institutions may apply for recognition and enforcement of arbitral awards directly to the CICC, which is expected to significantly enhance the quality of judicial review of awards from these five arbitral institutions.<sup>242</sup> As the two CICC's are permanent bodies of the SPC, the scheme can be understood as the SPC providing direct support and supervision over BRI-related arbitration.

Likewise, the CICC has designated two of the most experienced institutional mediation providers in China<sup>243</sup> to work with its “one-stop” hybrid dispute resolution platform.<sup>244</sup> The two mediation institutions are the China Council for the Promotion of International Trade (“CCPIT”) Mediation Center<sup>245</sup> and the Shanghai Commercial Mediation Center (“SCMC”).<sup>246</sup> If all the Chinese legislative requirements on mediation are satisfied, mediation settlement agreements reached at the two designated Chinese mediation centers can be converted into CICC judicial settlement agreements, or even judgments issued by the CICC.<sup>247</sup>

### 3. *Implications*

The creation of all these new schemes signals a strong attempt by the CICC to move away from conducting arbitration (or litigation) and mediation under one roof and by the same neutral—the practice of which foreign parties are skeptical due to procedural irregularities. The CICC's new efforts bear some resemblance to Singapore's AMA Protocol. This is particularly interesting given the BRI development, because alternative approaches to cross-border disputes, such as mediation combined with arbitration, are expected to rise exponentially where China is expected to

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<sup>241</sup> The arbitration institutions listed by CICC exclude those of Hong Kong, Macau and Taiwan.

<sup>242</sup> Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the “One-Stop” Diversified International Commercial Dispute Resolution Mechanism, *supra* note 240, at ¶ 4.

<sup>243</sup> Again, the mediation institutions listed by CICC exclude those of Hong Kong, Macau and Taiwan.

<sup>244</sup> Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the “One-Stop” Diversified International Commercial Dispute Resolution Mechanism, *supra* note 240, at ¶ 2.

<sup>245</sup> CCPIT Mediation Center is accessible at <http://adr.ccpit.org/EN/Index/index.html>.

<sup>246</sup> SCMC is accessible at <http://www.scmc.org.cn/>.

<sup>247</sup> Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the “One-Stop” Diversified International Commercial Dispute Resolution Mechanism, *supra* note 240, at ¶ 3.

take the lead in streamlining BRI-related cross-border dispute resolution processes.

Under the BRI context, China faces competition with two of the most popular seats of arbitration in both the Asia-Pacific and the world: Hong Kong and Singapore.<sup>248</sup> As both the initiator of and the largest economy in the BRI, China is in the unique position to shape future BRI arbitration norms. There are early indications of China's intention to assume a larger role in BRI arbitration. The 18th Central Committee of the Communist Party of China ("CCCPC") passed a key decision in 2014 during its Fourth Plenum on "comprehensively advancing ruling the country in accordance with law,"<sup>249</sup> in line with Xi Jinping's then-new mantra of socialist rule of law with Chinese characteristics. The decision includes a section on "foreign-related legal work," which among other things states that China should "actively participate in the creation of international rules"<sup>250</sup> and should "strengthen [its] voice and influence in international legal affairs, so as to protect [its] sovereignty, security and developmental interests by legal means."<sup>251</sup>

Therefore, besides the need to attract foreign parties to compete with regional institutions, China also needs to establish regional arbitration norms with respect to the BRI. These needs are the leading factors pushing China to look beyond legal-political factors.

As evidenced by the CICC's most recent efforts, the shift to separate mediation and arbitration into different institutions rather than prescribing arb-med under one roof using the same neutral(s) may indicate that, where disputes are not exclusively Chinese (i.e., cross-border commercial disputes), China is willing to explore due-process-valued hybrid resolution processes. While mediation is an essential part of the Chinese cultural legacy, arb-med may not necessary be at the expense of justice and impartiality. What the CICC's "One-Stop" Platform sacrifices in comparison

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<sup>248</sup> SCH. OF INT'L ARB., *supra* note 170, at 10.

<sup>249</sup> Zhong gong zhong yang guan yu quan mian tui jin yi fa zhi guo ruo gan zhong da wen ti de jue ding (中共中央关于全面推进依法治国若干重大问题的决定) [Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law] (promulgated by Cent. Comm. of the Communist Party of China, Oct. 23, 2014, effective Oct. 23, 2014), CLI.5.237344 (EN) (Lawinfochina).

<sup>250</sup> *Id.* art. 7(7).

<sup>251</sup> *Id.*

to traditional Chinese-styled arb-med, though, is the efficiency and lower costs afforded by using a dual-role neutral. However, foreign parties seem relatively less concerned with the cost of arbitration than Chinese domestic parties. As argued, the need to attract foreign parties in addition to merely Chinese ones and the pressure to compete in the BRI arbitration market might be the primary factors in reducing a Chinese characteristic divide in arb-med practices.

Indeed, the development of arbitration norms in China is bidirectional—it involves both localized globalism and globalized localism.<sup>252</sup> The former direction is well known, for it is frequently highlighted in government documents as taking reference of foreign experiences during arbitral reforms. The latter, where local norms are transformed into international norms, is less known but increasing in regard, especially in the context of BRI dispute resolution that is going to be increasingly shaped by China.

## VIII. CONCLUSION

While mediation is more culture-laden and jurisdiction-specific, arbitration is more international due to the successful harmonization efforts of the international legal instruments in the field. Arb-med traverses the spheres of local and international norms and practices. With mediation as a local product that may potentially go abroad when combined with arbitration, arb-med encompasses significant international implications. China should regulate arb-med in a way to reconcile local practices (mediation) with international expectations (arbitration) under the BRI dispute resolution context. In doing so, China should reform its arb-med practices; mediation and arbitration procedures should be separated so as to comply with international due process standards.

China's proposed economic bloc, the BRI development, has the potential to promote dispute resolution means with Chinese characteristics such as arb-med. Parties to Chinese-style arb-med, based on cultural harmony, procedural looseness, and outcome-orientation, might find their

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<sup>252</sup> See generally, Kun Fan, "Glocalization" of International Arbitration—Rethinking Tradition: Modernity and East-West Binaries through Examples of China and Japan, 11 U. OF PA. ASIAN L. REV. 243, (2017).

arb-med-produced awards will not be recognized nor enforced due to Chinese arb-med's failure to comply with internationally recognized due process standards, like those of New York Convention. As such, in the end, the promotion of a Chinese-styled hybrid commercial dispute resolution system in which arb-med is essential comes down to the following question: how crucial is it to address the due process defects of Chinese-styled arb-med in the eyes of Chinese legislators and regulators, arbitration institutions, and potential parties, both Chinese and foreign?

Interestingly, the development of arb-med in China over the past decade does not seem to indicate that due process issues are so pressing that party familiarity and dispute resolution efficiency are to be subverted for higher standards of impartiality, especially for Chinese domestic parties. It is still too early to make conclusions on whether Chinese-styled arb-med with its due process concerns will impede cross-border dispute resolution processes under the BRI. However, as discussed, judging from the most recent efforts of leading Chinese arbitration institution such as CIETAC, BAC, and SCIA, it is evident that regulation of arb-med detaching the two processes has become the trend when faced with international clients and the need to compete with international arbitration institutions in the BRI dispute resolution market.

Global comparative study of leading arbitration jurisdictions in the East and the West shows a heightened awareness of arb-med due process concerns. Among the jurisdictions surveyed, this article argues that Singapore in Asia, Germany in the European Continent, and Australia in the Pacific have already impacted reforms of arb-med systems by some of the most influential Chinese arbitration institutions. Singapore's AMA Protocol, in particular, has already influenced the CICC's recent "One-Stop" Multi-tier Dispute Resolution Platform.

Both the establishment of the CICC and its publication of the "One-Stop" Platform show an awareness of the procedural justice issues in the hybrid dispute resolution trending globally, as well as a proper shift in the quality of Chinese judicial mentality; both of which signal the acceptance of further arb-med practice in the BRI dispute resolution context that China is expected to spearhead. The CICC's most recent actions show that leading international arbitration norms and attracting foreign parties, in addition to BRI-dispute-resolution-market pressures, are the main factors driving Chinese regulators to look beyond sociopolitical imperatives and cultural

boundaries. Moreover, as China is anticipated to spearhead the BRI arbitration and dispute resolution system, Chinese arb-med will remain a fluid area of localized globalism vis-à-vis globalized localism in China-led BRI development.

Apart from separating mediation and arbitration procedures in arb-med, Chinese courts should also change what they consider to be a “pro-arbitration” judicial attitude. For many years, the Chinese courts have taken a “pro-arbitration” judicial approach emphasizing the number of arbitral awards enforced in China and overseas. The extension of the “pre-reporting” system to China’s domestic arbitration regime has become a natural outcome and would make numerous defective arb-med awards impossible to be set aside. Equally, if not more, important is the quality of China’s arbitration processes. The quality of judicial review over the arbitration process, i.e., the real role that court systems play in supervising the arbitration process, should be emphasized in reforms as an essential component of the “pro-arbitration” judicial attitude.



