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International Commercial Arbitration/Mediation at CIETAC (China International Economic and Trade Arbitration Commission)

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PART I: INTRODUCTION

Within any given culture, appropriate mechanisms of conflict resolution, including arbitration and mediation, are cultivated to meet the society's particular normative practices and legal traditions.' When arbitration becomes transnational, the resulting fusion of different legal cultures, methodologies and social needs give rise to a multiplicity of perceptions affecting each component of the arbitration proceedings.²

The appropriateness of blending the process and personnel of mediation and arbitration is among the most controversial issues in arbitration.³ Views on the acceptability of blending differ between distinct legal cultures. The China International Economic and Trade Arbitration Commission (CIETAC) offers an option for consenting parties to "blend" mediation and arbitration in a unique manner not employed by other international arbitration tribunals, and therefore is subject to the above controversy. Academic analysis of dispute resolution in which the mediator can also act as arbitrator has conveniently categorized methodologies in the abstract, which have perpetuated metaphoric analysis without regard for how the process manifests itself in reality.⁴ While CIETAC's blending of arbitration and mediation raises a number of important issues, commentary on CIETAC's preference to blend arbitration and mediation has been quintessentially theoretical and disregards the practical reality of the process.

1 See B. Crenades, "Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration", 14, *Arbitration International*. 164. (1998).

2 See *Id.*

3 See *Id.*

4 Analysis and evaluation of CIETAC arbitration is difficult for those who have no personal experience of its process, especially when systematic data is not readily available because of the confidential and flexible nature of CIETAC arbitration. Academic models often exist in isolation of real life.

This article will assert that a number of criticisms directed at blending are of negligible force when examined in light of CIETAC's dispute resolution process in practice. It will be established that in practice it is not the blending *per se* that impairs the dispute resolution proceeding, but rather other components of CIETAC's overall processes and personnel that may benefit from development and reform. This analysis will establish that the basic principles involved in blending have the potential to accommodate the Western preference for arbitration and the Chinese societal preference for the appearance of agreed solutions.

Part II will comment on the Chinese predisposition to mediate disputes as cultural and social factors enforce the importance of mediation in the minds of the Chinese. Mediation is both part of the legal system and part of the general practice of dispute resolution in China, whereas arbitration is perceived as a regrettable option following a failed attempt to mediate.⁵ How this relates to the foreign investor in

China will be considered. In addition, the assertion that the West has a legal culture based solely on litigation will be examined, as in practice there is a preference to settle commercial disputes out of court, or before an adjudicator is appointed.

Part III will chronicle the rapid growth of CIETAC as an international arbitration body and comment on the complexity of the international business disputes that come before the commission.

See Ramond Yu., "Dispute Resolution in the PRC." (1996) .<http://fwww.ozenmail.com.au/~ravmondy/pub/dispute.htm>. His article claims that friendly negotiation is the best possible method to approach commercial disputes in China. Also see, A. Famia, "Talking Disputes Into Harmony: China Approach to International Commercial Arbitration." 4 American University J. Int'l Law and Policy, 137, 142, Winter (1989).

Part IV will evaluate the strengths and weaknesses of blending mediation and arbitration. This article will assert that previous academic explanations of blending are inadequate and inaccurate as they portray blending at CIETAC's as an interchangeable mix of conciliation and arbitration, or a process of conciliation and arbitration that can shift back and forth with no clear line of demarcation.⁶ In addition, blending has been described as a process that is conducted not separately but simultaneously.⁷ In practice, blending creates a transitional link between two dispute resolution methods. In the event mediation is unsuccessful, the personnel involved may proceed with arbitration. This article will address blending at CIETAC in a manner that separates the dispute resolution process from the personnel.⁸

The analysis of "blending" will focus on three main aspects: 1) the accuracy/inaccuracy of the process 2) the effectiveness/ineffectiveness of the process and 3) issues of fairness/unfairness. Within this threefold evaluation it will become apparent that different conclusions could ultimately be drawn, depending upon which legal culture is used to frame the analysis. This article will assert that in practice the option to blend conciliation and arbitration at CIETAC does not pose major problems in regards to the accuracy, effectiveness and fairness of the process. In addition, if specific institutional and personnel factors within CIETAC were reformed CIETAC may be relieved of much of its criticism, consequently leading to greater acceptance of blending mediation and arbitration.

⁶See Steven Burton, "Combining Conciliation with Arbitration of International Commercial Disputes" ,18 Hastings Int'l & Comp. L. Rev. 653 (1995).

See James Zimmerman, "Dispute Resolution in the People's Republic of China", 2, (1998).
<http://www.ita.doc.gov/legal/zimlhtml>.

PART II: THE EFFECT OF CULTURAL FACTORS ON INTERNATIONAL COMMERCIAL AND LEGAL RELATIONSHIPS.

Human beings draw close to one another by their common nature, but habits and customs keep them apart. -- Confucius

China's deep-rooted cultural traditions promote resolving disputes by friendly negotiation and mediation, which differ from the West's tradition of litigation. However, cultural generalizations may overstate the effects of traditional cultural/philosophical notions on issues pertaining to how cross-cultural interaction manifests itself in modern-day circumstances, and what expectations culture creates for legal relationships.⁹ Globalization of the world's economy and an increase in international interaction has unquestionably had an impact on the extent to which culture can be used to generalize interaction;

"gone are the days when foreigners did not dare attempt to arbitrate or litigate such disagreements for fear of threatening future business relations with China".¹⁰ 11

The role that each Chinese and Western culture plays in the process of dispute resolution may need to be re-evaluated. It appears that Chinese culture continues to dictate its preferred *method* of dispute resolution (mediation), though its effect on the notion of a clash of legal cultures in arbitration may be overstated.¹² Experienced and reputable mediators and arbitrators from the East and West claim that if parties to a commercial dispute willingly come to the table with the intention of being in control of the outcome, cultural differences play a secondary role, as their "human interaction" and dialogue shape the proceedings.¹³

⁹"Few sociological studies have been undertaken on the different legal professions and their relationship with societies' expectations and in particular the citizens who demand and use these services. It is difficult to state what is understood by legal culture and even more arbitration culture." (See B. Crenades, *supra* note!, at 160).

¹⁰See M. Bersani, "Enforcement of Arbitration Awards in China", *China Business Review* 6 (May-June, 1992).

See Michael Moser, "Arbitration in China", *China Business Law Review* 42, 43 (Sept-Oct 1990). Moser states: "Some foreign companies worry that bringing a Chinese party to arbitration may tarnish their reputation in China and endanger future business prospects. Unless a company's entire China business depends on good relations with a single supplier, this fear seems unfounded, especially as more and more Chinese companies find themselves in competition with each other".

¹² Members of the International Council for Commercial Arbitration met in Seoul in 1996, with the intention to discuss the true cultural essence, which underlies the practice of international commercial arbitration. Before the conference they were convinced that in daily practice of international commercial arbitration a "true clash of legal cultures existed." However, during the preparation for the conference and at the conference itself they had to re-evaluate their initial position, as they became more convinced "that the clash had led to a harmonization of arbitration procedures and a greater professionalism in those who participated in the arbitral process." (See B. Crenades, *supra* note 1, at 160).

¹³ Telephone conversation with Peter Grove, Executive Director of the British Columbia International Commercial Arbitration Center in Vancouver, British Columbia, Canada. Dec. 21, 1998. The same view was expressed by Bai Yanchun, a Beijing lawyer who has handled over 75 cases at CIETAC (Interview with Bai Yanchun, Nov. 18, 1989, Cleveland, Ohio.)

Although the above might indicate a recession in the clash of legal cultures, maxims such as "it is better to die of starvation than to become a thief, it is better to be vexed to death than bring a lawsuit"¹⁴ demonstrate China's societal and philosophical preference for agreed solutions. Regardless of whether the Chinese follow true Confucian values or principles, ¹⁵ in order to understand alternative dispute resolution mechanisms in modern China, a brief summary of the fundamental sources of Chinese dispute resolution is required.¹⁶

¹⁴See Cohen, "Chinese Mediation on the Eve of Modernization", *54*, *Calif. Law Review*. 1201 (1966).

¹⁵See S. Faison "Hot-Selling Book Lights a Fire Under the Chinese" *The New York Times* (6 November

1998) A4.

16 It is important to note that a paper of this nature may employ a number of generalizations about cultures and nations. Generalization can form the basis of stereotyping, which can lead to the erroneous conclusion that all people from a certain nation, or culture possesses certain beliefs and attributes. To a degree, generalizations are inevitable when one compares distinct cultures or beliefs, however they become erroneous when cultural stereotypes become the basis for all individual interactions. Thus, one must be aware of the importance of culture in shaping beliefs and behavior, but also be aware of sweeping generalizations. Robert Utter, "Dispute Resolution in China," 62 Wash. Law Rev. 383 (1987).
18 China is a signatory to the New York Convention (signed on April 22, 1987) and the Washington Convention. In addition, one may assume that Chinese goals for economic development will continue to influence its acceptance of international trade practices, including those in the area of international commercial arbitration.

A. The roots of dispute resolution in China

The Chinese predisposition to seek dispute resolution through mediation as opposed to litigation is rooted in at least three sources: Confucian philosophy, the unavailability and inadequacy of the court system, and a social structure that emphasized small, stable units.¹⁷ These factors have influenced China in its evolving approach to current international commercial dispute resolution. China, as a signatory to international arbitration conventions, also appears to be open to internationally recognized approaches to dispute resolution 18

Regardless of any Western influence on dispute resolution, the Confucian philosophy continues to have a profound influence on the manner of conduct in China.

"The majority of Chinese business people prefer *arbitration* to *litigation*, perhaps due to the influence of the traditional teachings of Confucianism."¹⁹ Within the context of dispute resolution at CIETAC, such a preference would be manifested by *mediation preceding arbitration* with the consent of both parties. This statement is rooted in the Chinese preference for agreed solutions, which are deemed to be less shameful and less disruptive to the natural order of social life.

B. The influence of Confucian concepts

In China, the natural order of life was understood through the central concept of *yi*, which articulated specific patterns of behavior based on the recognition of one's responsibilities defined by his/her place in society. The specific categorization of one's individual responsibilities to the group created a fundamental etiquette that lead to the establishment of a social norm of behavior and classifications of proper conduct. A breach of *yi* leads to a disruption in the harmony found within life's natural order, and in a very collective society, leads to individual shame and dishonor. The Confucian ideal of harmony within society sought to maintain social stability and conceptually it was believed there was little need for laws and corresponding punishments. A disruption of harmony that led to litigation was so severe that it was seen as a personal failure; a proverb states: "In death avoid hell, in life avoid the law courts."

The concept of *li* was understood and internalized by the educated elite in China, and it was believed that those who refused to conform to *li* lacked "understanding"; subsequently the concept of *fa* (interpreted to mean "law") was established by the Legalists to deter the "common people" from acts that would disrupt social harmony.²⁰ The Legalists challenged the traditional Confucian philosophy that *yi* will sufficiently influence an individual from committing wrongful acts; they argued that "man is fundamentally untrustworthy and must be controlled by employing strict laws and hard punishments

uniformly applied."²¹ The Legalists maintained that *fa* was needed to assert control in society, which was paramount over notions of justice.

19Tma Yang, "Dispute Resolution -- Mediation, Arbitration and Litigation", (Address at The China Corporate Challenge, Nov. 18, 1998, Wyndham Cleveland Hotel, Cleveland, Ohio).

20The Legalist school of thought was dominant during the harsh Ch'in Dynasty of 221-206 B.C.

Chinese society ranked *li* above *fa*. Living a life influenced by *li* made one an inherently rational, dutiful individual who respected the common good; having to be deterred by *fa* made one appear to be untrustworthy and too uncivilized to live by Confucian ideals.

The separate concepts of *li* and *fa* eventually merged combining Confucian ideals and substantive law. The fusion continues today and subsequently influences the way the Chinese view dispute resolution.²² In Imperial China the formal legal system was viewed not as a paramount achievement, but instead as a regrettable necessity.²³ Today in China many still hold the view that "while such laws appear in the law books, the general assumption is that respectable people will be able to settle such matters out of court."²⁴

The Confucian ethic of *jiang* (meaning, "yielding") is another central concept that shaped dispute resolution. Yielding is associated with the act of compromise and has traditionally been understood to be more important than asserting "rights on a unilateral basis so as to aggrandize a position at the expense of another."²⁵ Even as China began to develop more substantive laws, the Chinese regarded rights-based claims as disruptive violations of fundamental values.²⁶

21 See Eric Glassman, "The Function of Mediation in China: Examining the Impact of Regulations Governing the People's Mediation Committees", 10 UCLA Pacific Basin Law J. (Spring 1992) Confucians did also have laws and applied them, but they did not reflect the Legalists notion of an expansive, harsh system of deterrence.

22 See Lee and Lai, "The Chinese Conception of Law: Confucian, Legalist and Buddhist", 29 Hastings L.J.

1307, 1308 (1978). The article notes that the Confucian concept of *li* continues to exert strong influence over Modern Chinese society and it is still far more persuasive than the government laws or decrees (*Th*). In Modern China *li* incorporates Party ideology, whereas *fa* embodies state regulations.

23 See Eric Glassman, *supra* note 21, at 462.

24 *Id.* at 465. See Justice Robert Utter, *supra* note 12, at 332.

C. The Unavailability of the Courts

Mediation was dominant in China also because of the inadequacies of the court system. Not only was there their moral discountenance with going to court, but there were also major financial burdens. The magistrate's assistants, who handled the cases, were known for charging arbitrary fees, thus "win your lawsuit and lose your money" became a maxim. Along with being expensive, litigation tended to be a humiliating experience that led to severed relationships. "Litigation constituted a public admission of some personal failing and required the revelation of private problems to unknown third parties."²⁷

Despite these inadequacies, governments did little to rectify the problem, for their attitude was that "lawsuits would tend to increase to a frightful amount if people were not afraid of tribunals, and if they felt confident of always finding in them ready and perfect justice."²⁸ The aversion to the court system led the Chinese to become unaccustomed to and concerned with leaving their problems to be adjudicated by a third party.

D. The social structure

Finally, mediation in China allowed individuals and groups to maintain *face* and position within the social order. Face (known as "mianzi") refers to one's social and professional position, reputation and self-image. In China, power and status were acquired from gaining face. To put this concept in a Western context, some have compared face to a credit rating: the more you have of it, the more you can "buy" with it.²⁹ (This analogy, however, is incomplete because face also shapes personal interaction and individual conduct.) Face also explains why the Chinese favor conciliation, as the third party can act as a protector of face. The more drastic the method of dispute resolution is, the more irreversible the damage may be to the parties themselves, and the future relationship of the parties to the dispute. The concept of face is still extremely prevalent in China today.

²⁶ *Id.* at 322.

²⁷ *Id.* at 333.

²⁸ *Id.* at 333.

Mediation is favored over arbitration because the social structure of China found order, peace and conformity through mediation.³⁰ Historically, litigation could not enforce social control, but the mediator in one's community emphasized the notions of individual sacrifice, class hierarchy and the values found in *li*.³¹ Today, arbitration is regarded as a last resort in China. "If a commercial dispute goes to arbitration in China, it is most likely that the underlying relationship between the parties has deteriorated beyond repair."³²

²⁹ Harry Irwin, "Communicating with Asia; Understanding People and Customs," Allen and Unwin, St. Leonards Australia, at 67 (1996).

³⁰ It should be noted that although mediators often sacrificed individual priorities for the common good, not all citizens were treated with equality in disputes to begin with. For example, the Confucian philosophy advocates a very rigid system of hierarchy of class. Individuals in a lower social rank often had little choice but to submit to the party with the high social ranking. This added to the notion of mediation as a mechanism for social control.

³¹ See Eric Glassman, *supra* note 21, at 465: "Mediation served most of society in a way that the disfavored institution of litigation could not: as a mechanism of social control. Meanwhile, social peace was kept by the authority of the mediator."

³² "Asia Update: Rule of Law in China", No. 13 Aug. 1997
<http://www.aar.com.aupublic/a97130lch.htm>.

PART III: INTERNATIONAL BUSINESS AND CULTURE

A. The rapid growth of CIETAC

The commencement of CIETAC dates back to 1956, at this time it was a small and relatively insignificant organization. After China received "Most Favored Nation Status" (MFN) from the United States in 1979 China experienced a radical growth in transnational commercial interaction, and consequently CIETAC has grown at a rapid pace. The increase in international activity inevitably led to an increase in commercial disputes. In 1979 the trade volume between China and the United States was \$2.45 billion; in 1996, it was \$42.84 billion.³³ It is speculated that China will have the world's largest economy by 2020. To meet the changing economic, legal and political realities of China, CIETAC has gone through a number of changes; the most recent amendments to its rules were made in May 1998.³⁴

See untitled, [http:// www.chinanews.orgJwhitepapers/TradeBalance-1 .html](http://www.chinanews.orgJwhitepapers/TradeBalance-1.html).

In May of 1998, CIETAC made four significant modifications to its rules. The first was with regards to CIETAC's extended jurisdiction found in Article 2. Compared to the 1995 rules, the new rule extends jurisdiction relating to foreign- invested enterprises ("FIEs"), and domestic legal persons under Chinese law, whereas before Article 2 left it unclear as to whether CIETAC had jurisdiction under a number of instances.

The second amendment deals with Article 7. The 1995 rules stated that parties submitting their dispute to CIETAC would be deemed to have agreed that their proceedings would be conducted under those same rules. However, CIETAC arbitrator, Jingzhou Tao, states that "in practice parties were sometimes permitted to substitute their own procedural rules if both agreed to the rules between themselves and they were approved by CIETAC." (See Jingzhou Tao, "Modifications to CIETAC's Arbitration Rules", <http://www.coudert.com.cietac.htm>.) Tao claims that the 1998 amendment confirm this highly useful and flexible practice by explicitly stating in Article 7 that where separate procedural rules have been agreed upon by the parties and affirmed by CIETAC, they may be substituted for CIETAC's own rules. This option allows parties to have more control in determining the process of the dispute resolution, and is particularly favorable to cases involving confidential information or issues. It also highlights the reality that activities occurring within the dispute resolution process may occur *in practice* even before they are formally confirmed under the rules; rules may not mirror what is manifested in the realities of each case. The third amendment was made to Article 23, and dealt with property and evidence preservation measures.

The last amendment is found in Article 56. The 1998 Arbitration Rules add that a dissenting arbitrator may attach his dissenting opinion to the statement of the award, so long as this "does not prejudice the legal force of the award". Jingzhou Tao, claims this amendment adds to the transparency of the process and "can only heighten confidence in the impartiality of CIETAC's judgements". He also notes that it will be interesting to see if dissenting arbitrators will in practice use this new option available to them, and how the condition of "not prejudicing the legal force of the award" shall be interpreted in practice. (See J. Tao, "Modifications to CIETAC's Arbitration Rules", <http://www.coudert.com/cietac.htm>.)³⁵ These locations are all founded on the same principles and rules; however, some of their operational standards may vary, along with the atmosphere. CIETAC Shenzhen was established in April 1984, and CIETAC Shanghai on March 15, 1990.

See Tina Yang, *supra* note 14.

CIETAC has three locations in China. Its headquarters are in Beijing, with sub-commissions in Shenzhen and Shanghai.³⁵ CIETAC takes cognizance of a case in accordance with a party's previous agreement to refer its dispute to CIETAC, or upon written application from the parties. CIETAC has 428

arbitrators/mediators on its panel. 281 are from Mainland China, 24 from Hong Kong and 123 from countries including the USA, Spain, Germany, Japan, Canada, and Nigeria.³⁶ This is a dramatic change, for until 1988 CIETAC had an exclusively Chinese panel.

An understanding of CIETAC and its process of arbitration and mediation are important for any entity (Chinese or non-) that is considering to contractually bind themselves to arbitration in China.³⁷ International lawyer Andrew Shields states: "Indeed CIETAC is in many ways more important than leading Western Arbitration Centers."³⁸ In 1985 CIETAC adjudicated 37 cases; in 1995 it adjudicated 1,000 cases, and now it currently handles more international arbitration cases than any other arbitration body in the world, having heard over 1,600 cases in 1996-1997.³⁹ The arbitrating parties were from approximately 40 countries and regions of the world. An explanation for this increase is that although Chinese entities theoretically have an option to arbitrate their disputes with any international arbitration body, they almost always insist on having it arbitrated in China by CIETAC. Standard contract forms used by Chinese entities often include arbitration clauses with reference to CIETAC within their framework.⁴⁰

³⁷ See Pritchard, "China's Economic Law in Contract", 14 Int'l Bus. Law 333, 333 (1986). In this article it is advised that Western investors gain an understanding of the cultural, political and social views before negotiating a contract with the Chinese.

See Andrew Shields, "China's Two- Pronged Approach to International Arbitration", 15(2) Journal of Int'l Arbitration. 67 (1998).

B. The Complexity of International Business Relationships

In China, the complexity of dispute resolution is exacerbated by the fact that China's rule of law and laws in general are continuously being born. For example, during QioShi's five years as leader 188 laws were passed to institutionalize market forces, provide checks and balances and codify explicit non-discretionary legal procedures and systems.⁴¹ The current changes in China are being called nothing short of radical and revolutionary.⁴² Foreign business executives say that the laws are changing so rapidly that even four years ago the legal and bureaucratic system was drastically different. ⁴³ Laws, procedures and regulations are truly being made in an ad hoc fashion. Therefore, in some instances where Chinese law is applicable, general international trade practices and customary international law will have a strong influence on the arbitrators.⁴⁴

See Sally Harpole, "Following Through on Arbitration", The China Business Review. <http://www.uschina.org/cbr/98091harpole.htm>.

⁴⁰ Chinese law does permit contracting parties to choose the forum for resolving disputes. Under its trade agreement with the USA China recognizes the rights of parties to choose a forum in a third country, as well as the USA and China. (See, Agreement on Trade Relations, July 7, 1979, United States- The Peoples Republic of China, Article 8, 31 U.S.T. 4651 T.I.A.S. No. 9630 Reprinted in 18 I.L.M. 1041, 1049(1979). The current practice however, is having the disputes resolved on the Mainland of China. In addition, the Agreement specifically endorses the arbitration rules of the UNCITRAL when acceptable to the parties and to the arbitration body. The UNCITRAL rules were designed to bridge the ideological differences between socialism and capitalism, and between economically developed and developing nations. Thus, a party's request for these rules should not be viewed as an effort to promote one side's national or personal interest.

41 *Qio Shi* is the retired chairman of the National Peoples Congress

42 See Nicholas V. Chen, "Doing Business in Greater China: An Update on Legal and Business Aspects in China." (Address to the Greater Cleveland International Lawyers Association, Nov. 17, 1998, Cleveland, Ohio).

Christopher Wadden, former General Manager of Nabisco Beijing, "Management Challenges In a Chinese Venture", (Address at The China Corporate Challenge, November 18, 1998, Wyndham Cleveland Hotel, Cleveland, Ohio).

In many instances the preservation of a cooperative business relationship is facilitated by social norms, however foreign and Chinese parties may have a more limited common set of social norms to act upon. In addition, young, active lawyers in China indicate that social norms and the general mood is changing; they acknowledge the new "practical utility of relatively free expression of views."⁴⁵ China is a large, diverse traditional nation and as it is undergoing dramatic change some uncertainty and disorganization of its laws, policies and social norms are to be expected.

The globalization of the world economy has had a drastic impact on international commercial dispute resolution, and a significant level of uncertainty affects the complexity of today's business relationships. Uncertainty may come from unstable financial and monetary situations, unstable or rapidly changing political and legal scenes, foreign bureaucracies and organizations, in addition to interpersonal factors such as language and cultural differences. These factors must be viewed in light of the changing nature of international business transactions, from simple exchanges to complex long-term relationships. Conflict is inherent in both cooperation and competition and the potential for transnational business disputes inevitably rises as more interaction takes place.

44 See Cao Xin-guang. Unpublished Masters of Law Thesis, Queens University, Kingston, Ontario, Canada. December 1992. See Nicholas V. Chen, *supra* note 42.

PART IV: THE BLENDING OF MEDIATION AND ARBITRATION

1. A. Defining methods of dispute resolution

In the People's Republic of China international commercial disputes can be resolved in four ways: a) negotiation/friendly consultation b) mediation/conciliation c) arbitration d) litigation.⁴⁶

Negotiation can be defined as an endeavor to settle the problem with no external party in a friendly manner potentially through letters and discussions.⁴⁷

Mediation is often used interchangeably with conciliation; and this will be done throughout this article. There is no universally accepted definition of mediation.⁴⁸ Mediation and conciliation are difficult to define because they include many different styles and methodologies; in addition, no consensus of terminology exists within academic articles written on the subject.⁴⁹ In mediation/conciliation the parties may attempt to solve their dispute through a neutral third party in a proceeding that is more informal than arbitration. The conciliator lacks any authority to impose a solution or procedure on the parties; it can be defined as a method in which the conciliator does not negotiate with the parties, but rather helps them negotiate. The success of conciliation largely rests on the level of cooperation and dedication to the process by the parties involved.⁵⁰

46 See Ramond Yu, *supra* note 3, at 1.

48 See Christian Buhning-Uhie, "Arbitration and Mediation in International Business". Kluwer Law International (1996) at 273. Also see, Gunning, "Diversity Issues in Mediation: Controlling Negative Cultural Myths", 10 Journal of Dispute Resolution, 55 (1995). Gunning states that the approach to mediate a dispute depends on the nature of the conflict. For example, she states that the setting, the experience and resources of the disputants and the background and are "so numerous that it is more helpful to view the possible approaches to mediation as a matter of style dependant on a number of intersecting continuums, each model with many shadings, rather than attempting to define specific categories of mediation." It appears that "conciliation" is used more frequently than "mediation" in the context of international commercial dispute resolution. In academic articles it is almost impossible to articulate a consensus on the terminology. Some authors claim that there is little significant difference between the two terms. Also, See Alan Scott Rau & Edward F. Sherman, "Tradition and Innovation in International Arbitration Procedure", 30 Tex. Int'l L J.89, 105 (1995). Also, M. Scott Donahey, "The Asian Concept of Conciliator! Arbitrator: Is it Translatable to the Western World?" Dispute Resolution J., (April- June 1995). He states that the terms differ in relation to "the degree of involvement" of the third party; while a mediator attempts to "bring the parties together to arrive at their own settlement of the dispute", a

Negotiation is so common in international business that it is often not categorized as an Alternative Dispute Resolution Technique (ADR). However, to further illuminate the difficulties in defining ADR terminology it should be noted that different cultures perceive negotiation differently. American's tend to view it as a competitive process of offers and counteroffers, while some Asian nations, including China, see it as an opportunity for information sharing without the element of disagreement and confrontation that may be associated with the Western style of negotiation.

In arbitration parties agree to submit their disputes to a third party who will settle them by making a final, binding and enforceable award. Arbitration is a private process with public legal effects and has a number of advantages over transnational litigation.⁵¹

CIETAC may benefit from reforming its procedure to remove an arbitrator if a conflict does arise in the blended procedure. CIETAC rules do not explicitly state the procedure to be followed during a challenge. No provisions exist regarding the notification of the challenge to the members of the Arbitration tribunal or the opposite party. UNCITRAL and ICC rules provide that the other party and members of the tribunal (including the individual being challenged) must be notified.¹⁰¹

CIETAC rules do not indicate whether the proceedings would be continued or suspended when an individual who has assumed both roles would be challenged and a decision on the challenge is pending. It has observed that the commission has so far wisely exercised discretion in this regard, although clearer guidelines are needed.¹⁰²

C. Blending offers flexibility

By offering flexibility that within its arbitration process, CIETAC's aims is to create a more efficient system of dispute resolution, but, the efficiency of the resolution is largely determined by the will of the plaintiff and the defendant. The West, with its strong tradition in litigation, does not generally believe that flexibility is a desired characteristic in the arbitration process and therefore may not correlate the concepts of flexibility and effectiveness.

100 See Bia Yanchun, *supra* note 56.

101 See *supra* note 7.

102 See Michael Moser, "Arbitration in China", 17, *The China Business Review* 42 (1990).

Western lawyers may be fearful of "flexibility."¹⁰³ Some British lawyers have been known to behave as *if* they were in a court of law as opposed to an arbitration tribunal; they will insist on cross-examining witnesses and calling expert witnesses. Some American lawyers apparently "still behave as if a jury was there."¹⁰⁴ A CIETAC arbitrator states: "A lot of American and British lawyers bring their Western style of litigation to CIETAC. I have seen that style a lot - it is really awful."¹⁰⁵ There has to be a balance between documents and efficiency."¹⁰⁶ This problem does not necessarily indicate that Western lawyers advocate for arbitration rules that mirror judicial rules. However, if the West is unfamiliar with CIETAC's flexibility it may be concluded that it is not the blending procedure that is ineffective, but that the ideas of how the dispute resolution process "should be", inhibits the most practical, efficient solution.

Full advantage of the flexibility may not be available by means of a CIETAC reform, but rather by legal counsel adapting their methods to facilitate effective international commercial arbitration and conciliation.

D. Are arbitrators good conciliators?

The effectiveness or ineffectiveness of the blending procedure is to a great extent determined by the personnel; that is the arbitrator/conciliator. The former Secretary General of the ICC's International Court of Arbitration rightly stated: "Arbitration only worth as much as the quality of the arbitrators."¹⁰⁷ A potential problem may arise within the blended model because some good conciliators may not make good arbitrators, and some good arbitrators may not make good conciliators.

103 See Christian Buhring-Uhle, *supra* note 49, at 335.

104 See Allan Scott, "Tradition and Innovation in International Arbitration", 30 *Tex. Int'l L.J.* 89, (1995).

105 See Bia Yanchun, *supra* note 58.

106 See B. Cremades, *supra* note 4 at 158.

107 See *Id.*

CIETAC supplies the parties to a dispute a list of "arbitrators". It is unknown if these individuals will be effective "conciliators". Even strong supporters of the blending procedure acknowledge that this is a relevant and important issue regarding the success of the dispute resolution process.¹⁰⁸

A good conciliator can dismantle barriers that stand in the way of resolving a dispute. These barriers can include, but are not limited to, strategic barriers, cultural barriers and organizational barriers. Strategic barriers may be limited if the conciliator/arbitrator is trusted by both sides, allowing the parties to feel comfortable in revealing information about their underlying interests, needs and priorities. A skilled conciliator can quell the temptation of a party to engage in hardball tactics that waste resources and breed ill will. An effective conciliator can overcome the cultural and psychological barriers that exist between two parties, in addition to serving as an educator and relationship builder.

Therefore, emphasis should not be placed on discounting the blending procedure, but rather on supplying arbitrators whose characteristics can relate to both arbitration and conciliation.

E. Has technology made arbitration less effective?

At the 1996 International Council for Commercial Arbitration in Seoul, Korea, Professor Whitmore Gray stated that high technology and the success of commercial arbitration has in some ways made arbitration a victim of itself.¹⁰⁹ High-tech computer programs now do endless amounts of photocopying and simplified drafting. It is "not infrequent to find arbitral tribunals confused at the end of the arbitration proceedings before so much argument and excessive documentation."¹¹⁰ Volumes of information due to technology have necessitated a clarification of issues by the parties to arbitration, while ensuring that the right of the parties to be heard in an adversarial procedure is maintained.

CIETAC may require the parties to formally provide a more definitive statement of issues to facilitate an effective dispute resolution process. The blending at CIETAC could potentially reduce the dependency of the tribunal to review large amounts of documentation, which may lead to a more effective and efficient method of dispute resolution.

F. The Pacific Rim

It has been theorized that Western centers on the Pacific Rim have been influenced by the Asian preference for conciliation and have come to realize the effectiveness of blending." Professor Scott Donahey writes that in Canada, the British Columbia International Arbitration Act expressly provides that with consent an arbitrator can act as a conciliator at any stage in the proceedings. He claims, "clearly the draftspersons of the B.C. statute were influenced by the experience of their Asian trading partners and their citizens of Asian backgrounds." Though, conversely, the rules of the British Columbia International Commercial Arbitration Center (BCICAC) do not allow the blending of personnel or process. The executive director of the BCICAC states that the notion of blending (or med-arb) is more accepted on the Pacific Rim is a "nice theory," but in practice the West Coast has quite a "cowboy mentality" and generally does not pursue dispute resolution in a mixed mediation-arbitration form."² Therefore, there appears to be no cross-cultural consensus regarding the *method* of dispute resolution even in centers that are influenced by both Eastern and Western cultures."³ However, whether mediation and arbitration are offered separately or in a blended option, there appears to be a consensus by Eastern and Western arbitrators that conciliation does work and is effective within international commercial disputes. The BCICAC claims that 80% mediated cases are successful; CIETAC's apparently has approximately the same percentage of success."⁴ Western and Eastern mediators and arbitrators both claim that once the parties are at the table and there is a genuine desire to mediate, the success rate is very high.

108 See *Id.*

109 See *Id.*

110 See *Id.*

111 See Scott Donahey, *supra* note 50, at 121. He states: "It surprising that the concept of the arbitrator/conciliator has been accepted the most completely by Western dispute resolution centers of the Pacific Rim." Some law firms seem to acknowledge the influence of the mixing of Asian and Western cultures in commercial dispute resolution. For example, The Pan Pacific Commercial Law Offices have

a Chinese name of "Jya He"; a name that means "excellent peace". The firm states that they encourage amicable resolutions of disputes whenever possible, and adapts to the different philosophy of dispute resolution in China and other Asian nations. See: <http://www.panpacificlaw.com/dispute.html>

112 See Peter Grove, *supra* note 13.

113 See Christian Buhning-Uhle, *supra* note 49: It is suggested that it may be easier to get commercial parties to cooperate in a mediation- arbitration setting if the procedure is not formally labeled.

114 Telephone interview with Song Hung, (attorney at Baker and McKenzie in Beijing). He stated that about eighty percent of cases that employ conciliation are successful, and twenty percent go onto the arbitration process. Also See James Zimmerman, *supra* note 6, at 2. He states that in domestic arbitration matter in China, almost ninety-percent of the cases are resolved through conciliation/mediation. He further states that and over half the cases at CIETAC attempt to be resolved through conciliation/ mediation. See Also Joan Kelly, "Mediation Delegation to the People's Republic of China" <http://www.ambassadors.com/ptpap/journal/mediationjrn1.htm>. This article claims that the success rate for conciliation within the arbitration is 50 percent.

4. FAIRNESS/UNFAIRNESS OF THE BLENDING PROCEDURE

One of the primary reasons international arbitration is so widely used is that it is seen as a way to avoid "home-town justice," with courts of an opposing party's nation. International contracts with arbitration clauses attempt to provide for a dispute resolution mechanism that strives for equality between the parties. For example, a number of international arbitration clauses stipulate that the tribunal should be in a mutually accessible country, chaired by someone of a different nationality, and follow language and procedural principles that offer no distinct advantage to one group.

The issues raised below do not precisely relate to the strengths and weaknesses in the blending of conciliation and arbitration, *per Se*. However, they are necessary to address in order to gain an understanding of the general practices of CIETAC and how they relate to perceptions regarding the accuracy, efficiency and fairness of the dispute resolution.

A. The list system

Currently, CIETAC is the only major international arbitration body that employs a "list system;" meaning that all appointments must be made from a panel established by CIETAC. The recent addition of international arbitrators to the panel was of great necessity as a number of international lawyers representing their clients at CIETAC expressed grave concern over the fairness of the tribunal if only Chinese national were available. The fact that CIETAC has a list system at all is still an issue of actual or illusionary fairness; to be truly an international arbitration body the list system should be eliminated or only exist as a recommendation.

Western lawyers may advise that a party involved in a dispute to specifically request detailed information on the arbitrators and review it carefully, especially those appointed by the opposing party or the commission. One U.S. lawyer claimed, "CIETAC has appointed arbitrators that were not on its approved list or where their impartiality was in question."⁵ Therefore the fairness of a result under the blending option may not be a result of the blending process itself, but of the list system, an aspect of CIETAC that may need reform.

B. Fairness in Awards

CIETAC's awards are based on objectivity, the facts of the case in accordance with the applicable laws and regulations, and the parties contract. CIETAC awards are also required to take into consideration international "practices;" customs and practices frequently relied upon to fill in where Chinese law is non-existent or ambiguous. **16**

The arbitration tribunal is also required (See Article 53) to observe the "principles of fairness and reasonableness" in rendering its award."⁷ This article appears to grant the tribunal the powers of equity. Thus, it is questionable whether in practice, a valid, bargained for contract that may be unfair or unreasonable, but not invalid under the law would be deemed to be enforceable. Could this lead the tribunal to "to disregard the applicable law and the parties' express written contract?"¹¹⁸ Although it has been claimed that CIETAC arbitrators may be prone to assume the role of "peacemaker" rather than "decision-maker", the author can find no conclusive evidence to warrant a claim that CIETAC disregards relevant fact and law. CIETAC brought up this issue in a "notice" outlining regulations and ethical standards for arbitrators. The notice's first regulation was: "The arbitrator should fairly and impartially try cases on their facts and in accordance with the laws and by reference to international practices".¹²⁰

¹¹⁵ See James Zimmerman, *supra* note 6 at 11.

¹¹⁶ See Cao Xin-guang, *supra* note 44.

¹¹⁷ See *supra* note 58. Article 53 states: " The arbitration tribunal shall independently and impartially make its arbitral award on the basis of the facts, in accordance with the law and the terms of the contract, with reference to international practices and in compliance with the principles *offairness and reasonableness*."

Concern has also been raised that some while some CIETAC arbitrator's on the list have considerable trade expertise, some do not have formal legal training, especially in the laws of foreign legal systems.¹²¹ Nor is there any accessible information identifying the process of selection of CIETAC arbitrators.¹²²

To satisfy its' clientele and ensure that a fair and legally just awards are rendered, CIETAC should give priority to new arbitrators who have reasonable knowledge and expertise in both Chinese and foreign law, international trade practices and international commercial arbitration. Given the increasing complexity of disputes, CIETAC should also offer continuing education programs for its arbitrators. Training should be provided in technology, and other fields. A reason for this general standard may be that cases at CIETAC are too numerous and various to lay down specific rules with respect to the specific qualifications of arbitrators.

¹¹⁸ See James Zimmerman, *supra* note 6 at 15. The article claims that absent fraud or duress, most international tribunals would hold a party to its contractual obligations, but at CIETAC the requirement that the tribunal observe principles of "fairness and reasonableness" creates "uncertainty in the CIETAC process".

¹¹⁹ See *supra* note 32. CIETAC is deemed to be (increasingly) competent and consistent.

¹²⁰ See Huang Yanming, "The Ethics of Arbitrators on CIETAC Arbitration's. 18, *Journal of International Arbitration*, (1995) at 15.

¹²¹ See *Cao Xin-guang, supra* note 44, at 25.

122 See *supra* note 58. Article 10 states: "The Arbitration Commission maintains a panel of arbitrators. The arbitrators are appointed by the Arbitration Commission from among Chinese and foreign personages with special knowledge and practical experience in the fields of law, economics and trade, science and in order to increase the arbitrator's understanding and knowledge of laws and expectations, that go beyond one's area of individual expertise.

C. Ethical Issues

The very elements that make mediation so appealing, in comparison to the more adversarial approaches, also pose potential dangers and raise professional and ethical issues. The process is not bound by precedent or substantive laws and lacks the precise checks and balances that are in place in an adversarial system. The private nature of most mediation processes also precludes public access to the process and evaluation of the result. However, it could be argued that concerns over fairness, although serious, skirt the overriding feature and redeeming value of conciliation/mediation - it is a consensual process that seeks self-determining resolutions.

Legitimate concerns about conciliation and arbitration must be voiced while recognizing no faultless system exists. "The voice concerned about the fairness aspect of mediation agreements tends to compare mediation with a romanticized notion of formal justice. In considering whether mediated settlements will be fair and just, we must ask "compared to what?"¹²³ The adversarial approach to dispute resolution does not impose a mediator when private bargaining occurs. These unmediated bargains may be a result of unequal bargaining power or different propensities for the avoidance of risk. To reason that a system which allows conciliation under the cognizance of arbitration is less fair than an out of court settlements is inconclusive.

Conciliation/arbitration is growing in the international commercial context, and it is becoming increasingly important to develop and establish standards relating to ethical and behavioral limits. A distinction between standards and ethics can be drawn. The professional group governing the organization generally articulates an ethical code, whereas professional standards may exist outside an ethical code and at a minimum are the expectations of the parties to the process.¹²⁴ As arbitrators are drawn from a variety of backgrounds, individuals may have more than one ethical code to follow. It has not yet been determined what parts, if any, of these separate code apply to the practice of mediation, which differs to some extent from the traditional practices of each profession.

Questions regarding ethical fairness have also been raised by the fact that although CIETAC is a self-regulating organization it operates under the auspice of the China Council for the Promotion of International Trade (CCPIT).¹²⁵ The CCPIT technically has independent status in China, however, it continues to be supervised by the Ministry of Foreign Trade. Despite CIETAC's independent status, scholars have argued that it is influenced by Chinese government policies.¹²⁶ These concerns appear to have been more predominant in the 1980's and early 1990's. In addition, they tend to reflect a more general uneasiness about China's social system and structures, than particular institutional relationships that influences individual arbitrators.¹²⁷ However, in circumstances where issues are of a sensitive political or economic nature the existence of this concern is understandable.

¹²³ See Folberg, Jay, Taylor, Alison. "Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation." Jossey- Bass Publishers. (1984) at 246.

¹²⁴ See *id.* at 250.

¹²⁵ The CCPIT adopted "China Chamber of International Commerce (CCOIC) as its official name on

June 28, 1988, however, CCPIT continues to be used. It is a nation-wide organization composed of representatives of business enterprises and other economic organization in China. Although CIETAC is associated with the CCOIC, this arrangement is not dissimilar to that of other international arbitration bodies.

126 See Cao Xin-guang, *supra* note 44, at 31.

127 See *Id.* at 33, 37. It is claimed that to the authors knowledge there have been no allegations either by foreign parties or by CIETAC's foreign arbitrators of a lack of independence on the basis of the institutional relationship between CIETAC and CCPIT.

The CCPIT is also responsible for determining the list of individuals who can arbitrate at CIETAC. In order for CIETAC to continue to be respected in the international arbitration community, CIETAC must guard against influences of policy or national economics that may lead to real or illusionary questions of its impartiality. In China's long term national interest it seems unlikely that she would jeopardize the independent status of CIETAC, for it would then risk the countries growth of foreign trade and investment.

CONCLUSION

CIETAC has played and will continue to play a very important role in the settlement of international commercial disputes in China. It has borrowed and adopted rules and procedures from other dominant international dispute resolution bodies, but it continues to offer a unique alternative to dispute resolution. CIETAC's promotion of blending conciliation and arbitration sparks new interest in international arbitration innovation, especially for legal cultures that have more rigid methods. The statistics prove that the initial dogmatic rejection of the combination of conciliation and arbitration is not correct, especially when this is what the parties mutually consent to.

CIETAC has given parties to a dispute an option to choose to blend conciliation and arbitration. The fact that this option is frequently chosen and results in satisfactory resolutions indicates that there are merits to the process. However, the international business community will undoubtedly place expectations on CIETAC to ensure that the process and personnel conduct the dispute resolution process in an accurate, effective and fair manner, whether they consent to a blended process, or only to arbitration. Reforms such as: establishing clear guidelines for the challenge and potential removal of an arbitrator, setting guidelines for the dissemination of evidence, and establishing checks on confidential information that may need to be disclosed are areas in which CIETAC can mature and grow. CIETAC may receive pressure from the international business community to abolish its list system, or to have it exist as a recommendation only. CIEATC may also want to create opportunities for its arbitrators to be further educated and informed on new laws and dispute resolution techniques.

In the last decade, CIETAC has been extremely successful in adapting to new methods, while retaining it's cultural preferences for dispute resolution. The process in which CIETAC gains legitimacy must be viewed in the context of the pre-existing norms within which CIETAC competes for legitimacy. In addition to reforms, CIETAC may benefit from enhanced communication and exchanging ideas with other international commercial arbitration tribunals, international lawyers and arbitrators. Ongoing dialogue and deeper understanding of various methods of dispute resolution should lead to a more sophisticated and enhanced method of resolving transnational commercial disputes.

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