

## The Use of Conciliation in Arbitration

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In China, the law and practice encourage the use of conciliation (mediation) in arbitration. According to the Chinese Arbitration Law and the Chinese Arbitration Rules, if both parties in the process of arbitration voluntarily seek conciliation or agree to conciliation when consulted by the arbitration tribunal, the arbitration tribunal shall conduct conciliation at any time before an arbitration award is rendered. This is what we call the Combination of Arbitration and Conciliation and what you call the use of conciliation in arbitration.

If conciliation is unsuccessful, an arbitration award will be made promptly. If conciliation leads to a settlement between the parties, the arbitration tribunal will make a Conciliation Statement or an arbitration award in accordance with the contents of the settlement. A Conciliation Statement and an arbitration award have equal legal validity and effect. The Conciliation Statement should specify the arbitration claim and the results of the settlement reached upon between the parties. It should be signed by the arbitrator(s) sitting in the arbitration tribunal and sealed (stamped) by the arbitration institution. After the Conciliation Statement has been so signed and sealed (stamped), it will be served on the parties. The Conciliation Statement becomes legally effective immediately after the parties have signed for receipt of it. If the Conciliation Statement is repudiated by one party before he signs for receipt of it, the arbitration tribunal will promptly make an arbitration award.

The arbitration tribunal may conciliate cases in the manner it deems appropriate.

The arbitration tribunal may terminate conciliation and continue the arbitration proceedings when one of the parties requests a termination of conciliation or when it believes that further efforts to conciliate will be futile.

If the parties reach a settlement outside the arbitration tribunal in the course of conciliation conducted by the arbitration tribunal, such settlement will be regarded as one which has been reached through the arbitration tribunal's conciliation.

Should conciliation conducted by the arbitration tribunal fails, no statements, opinions, views or proposals which have been made, raised, put forward, acknowledged, accepted or rejected by either party or by the arbitration tribunal in the process of conciliation can be evoked as grounds for any claim, defence and/or counter-claim in the arbitration proceedings.

Normally, there are three stages in the process of arbitration in China:

1. the stage of finding and establishing facts;
2. the stage of applying the law, the terms of the contract, the trade usage and the principle of fairness and reasonableness (equity) on the basis of the facts found at the first stage to distinguish the liabilities between the parties; and
3. the stage of discussing and deciding the case by the arbitration tribunal.

Very often, at the end of the first stage or in the middle of the second stage, the parties become aware of "where they are" and voluntarily ask the arbitration tribunal to conciliate the case. Or, the arbitration tribunal finds a possibility of resolving the case by conciliation and takes the initiative to ask the parties whether they are willing to settle their dispute through conciliation to be conducted by the arbitration tribunal. If the responses from the parties are positive, the arbitration tribunal will commence the conciliation proceedings during the arbitration proceedings.

The arbitration tribunal may conduct the conciliation proceedings in three ways:

1. the arbitration tribunal consults with both of the parties together;
2. the arbitration tribunal consults with each of the parties separately; and
3. the parties consult each other themselves.

These three ways can be used alternatively.

In the course of conciliation, the arbitration tribunal must carefully and patiently listen to the statements and arguments of the parties and rigidly examine their evidence. The arbitration tribunal must very patiently explain the case to the parties from the legal point of view as well as from the business (relationship) point of view so as to bring about mutual understanding and mutual concession between both parties. One very important point is that the parties should never be put on adversary positions but on friendly and cooperative positions; otherwise, the arbitration tribunal as a conciliator will get nowhere and the conciliation efforts will be futile.

Sometimes some lawyers who are not quite familiar with conciliation may constitute obstacles on the way to reaching a settlement. Therefore, it is always helpful for the arbitration tribunal to find a way to get round those lawyers who may become obstacles and talk to the managers (executives) of the parties directly, particularly at the crucial and decisive moment. Absence of legal arguments are not good for conciliation but too many legal arguments are equally not good and even bad for conciliation. Reasonably sufficient legal arguments are good enough. The arbitration tribunal should never let things go to the extreme when conciliating a dispute.

When conducting conciliation, the arbitration tribunal in China is required to:

1. respect the free will of the parties;
2. find out the facts of the case, distinguish right from wrong between the parties and determine the liabilities of the parties while abide by law, adhere to the terms of the contract, follow international practice and observe the principle of fairness and reasonableness (equitable principle); and
3. examine the evidence submitted by the parties.

The arbitrator-turned-conciliators sitting on the arbitration tribunal must be absolutely objective and impartial and prove themselves really objective and impartial in all respects in their conduct of conciliation proceedings; otherwise, they will lose their "authority" and forfeit the parties' confidence in them. They must also prove themselves to be professionally knowledgeable, technically skillful and even psychologically strong in conducting conciliation; otherwise, they can not convince the parties and lawyers in particular. They must be strict in applying law, sympathetic in feeling and flexible in tactics. Impatience is prohibited.

Combining arbitration and conciliation has, among others, the following advantages:

1. saving one procedure (separate conciliation procedure) in reality;
2. less expensive, saving money, time, human energy, etc.;
3. higher successful rate of conciliation; and
4. enforceable outcome.

However, some people, particularly in the West, hold different views about the combination of arbitration and conciliation. The prominent international arbitration expert Professor Neil Kaplan writes:

"There is a long history of conciliation in Asia particularly in the People's Republic of China, where arbitration and conciliation are considered part of the same organic process. The Chinese see the

conciliator, aware of the needs and motivations of the parties, as the ideal arbitrator when the parties are unable to resolve their dispute voluntarily. In their view there is no need--in fact, a lost advantage--to have different people serve as conciliator and arbitrator.

In the West, however, conciliation and arbitration are viewed as two very different procedures. It is unthinkable that an arbitrator, in the course of his or her arbitration, would switch hats to act as a conciliator and, should the attempt at conciliation fail, continue with the arbitration. Parties would be reluctant to put all their cards on the table before a conciliator knowing that the same person may, in the end, arbitrate their dispute."

Professor Kaplan endorses the combination of the two procedures but adds the following conditions to ensure natural justice:

1. the combination is subject to the agreement of the parties;
2. conciliation proceedings cease once the parties withdraw their consent (agreement); and
3. should the efforts at conciliation fail, all material facts discovered in the proceeding must be disclosed.

Actually, there are two important issues to be considered and discussed. They are:

*1. Is the combination of arbitration and conciliation advantageous?*

In my view, it is advantageous. The advantages are already mentioned in the above paragraphs. In reality, there is no disadvantage so far as I can see. Conciliation is not arbitration. You do not need all the cards of the parties put on the table. When about 80% or even less than 80% of the cards of the parties have been put on the table, you would be able to have a good conduct of conciliation. Your job is to bring about an amicable settlement and not to make an award.

In CIETAC arbitration in China, conciliation has been conducted by the CIETAC arbitrators during arbitration proceedings in almost 50% of the cases under their cognizance. The successful rate is 40-50%. No complaint and dissatisfaction can be traced from the parties and their lawyers who have participated in the combination process.

*2. Is it good to have the same person who has known everything of the case to arbitrate the case?*

Some people say it is not good to have the same person to arbitrate the case because he has known everything of the case. I would say it is best to have him to arbitrate the case just because he has known everything of the case. The key point is that he must be impartial. The more he knows the case, the more impartial he can be if he is a person who really cherishes impartiality.

As I have said on many occasions, "in this regard, some people have their reasons to support their argument and I have my reasons to back my argument; we have to wait for the final arbitration award from the international business community in a few years to come."

However, pending for a final arbitration award, I would propose an amicable settlement - Professor Kaplan's "Formula."

In fact, combination of arbitration and conciliation or the use of conciliation (mediation) in arbitration has been endorsed not only in the East but also in many parts of the West.

### Chinese Endorsement

(See above)

### Hong Kong Endorsement

The Hong Kong Arbitration Ordinance gives the parties the option of letting the arbitrators interrupt the arbitration and attempt to conciliate the dispute. The procedure requires the agreement of both parties and, once started, can be terminated upon the request of either party. The arbitrator-turned-conciliator is permitted to have confidential discussions with each party. Should the effort at conciliation prove unsuccessful, the conciliator will resume the role of arbitrator and all material information given in confidence have to be disclosed. The Ordinance erects a framework that allows an arbitrator to conciliate a dispute without fear of committing misconduct by breaching the rules of natural justice.

### Indian Endorsement

The Indian Arbitration and Conciliation Ordinance 1996 endorses the combination of arbitration and conciliation by providing that it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other proceedings at any time during the arbitral proceedings to encourage settlement.

### Japanese Endorsement

The Rules of the Japan Commercial Arbitration Association stipulate that the arbitral tribunal may, when it deems it necessary and upon obtaining the consent of the parties, cause one or more of the arbitrators constituting the arbitral tribunal to ... or mediate a settlement.

The Rules of Maritime Arbitration of the Japan Shipping Exchange, Inc. also encourage the use of mediation in arbitration. Section 21 of the Rules stipulates:

1. the parties do not lose their respective rights to settle the dispute amicably even after the application for arbitration has been filed.
2. the Board may, at any stage of the arbitration proceedings, mediate between the parties for the whole or a part of the dispute.

In fact, the maritime arbitration in Japan, more cases which are referred to arbitration are settled by mediation in the process of arbitration than proceed to a final award.

### Korean Endorsement

The Korean Commercial Arbitration Board in Seoul endorses the combination of arbitration and conciliation in the following way:

1. After acceptance of the request for arbitration, the Secretariat shall, upon the conciliation request of both parties within 15 days in case of domestic arbitration and within 30 days in case of international arbitration from the Basic Date, attempt to settle the dispute by conciliation proceedings without recourse to taking the step of arbitration proceedings.
2. The conciliation proceedings shall be followed by one or more conciliators appointed by the Secretariat from among those on the Panel of Arbitrators in such manner as the conciliator(s) think(s) it appropriate.

3. If the conciliation succeeds in settling the dispute, the conciliator(s) shall be regarded as the arbitrator(s) appointed under the agreement of the parties; and the result of the conciliation shall be treated in the same manner as such award as to be given and rendered upon settlement by compromise under the provision of Article 53, and shall have the same effect as award.

4. When the conciliation fails to settle the dispute within 30 days after the appointment of conciliator(s), the conciliation procedure shall come to an end and the arbitration procedure under these Rules, inclusive of appointment of arbitrator(s), shall be immediately resumed.

#### German Endorsement

The German Rules oblige the arbitral tribunal to seek amicable settlement of the dispute or a part of the dispute at every stage of the arbitration proceedings.

#### Hungarian Endorsement

The Hungarian Rules provide that if an agreement (settlement) is reached between the parties, this shall be recorded in the minutes. The parties and the conciliator shall sign the minutes. Upon the request of all parties, the president of the Arbitration Court shall appoint the conciliator as sole arbitrator. In such case, at the request of the parties, the agreement (settlement) shall be included in an arbitration award.

#### Former CMEA Countries Endorsement

The former CMEA countries endorsed and endorse the use of conciliation (mediation) in various ways and manners.

#### Croatian Endorsement

The Rules of the Croatian Chamber of Commerce endorses the Arbitration-Conciliation Combination in the following way:

If a settlement has been concluded between the parties, it shall be noted in a record signed by the parties and the conciliator. At the request of the parties, and if the parties submit the valid arbitration agreement, the President shall appoint the conciliator as an arbitrator, who shall make the award by consent.

#### Austrian Endorsement

The Austrian Rules endorsement is as follows:

If agreement (settlement) is reached, that shall be the subject of a record signed by the parties and the conciliator. If a valid arbitration agreement exists, the Board shall appoint the conciliator as sole arbitrator, provided that all parties so request. The sole arbitrator must authenticate the agreement (settlement) in the form of a settlement or, if the parties so wish, make an award on the basis of the agreement (settlement).

### Australian Endorsement

The Australian Arbitration Act expressly endorses the use of conciliation/mediation in arbitration. It stipulates that:

(1) Unless otherwise agreed in writing by the parties to an arbitration agreement, the arbitrator or umpire shall have power to order the parties to a dispute which has arisen and to which that agreement applies to take such steps as the arbitrator or umpire thinks fit to achieve a settlement of the dispute (including attendance at a conference to be conducted by the arbitrator or umpire) without proceeding to arbitration or (as the case requires) continuing with the arbitration.

(2) Where

(a) an arbitrator or umpire conducts a conference pursuant to sub-section (1); and

(b) the conference fails to produce a settlement of the dispute acceptable to the parties to the dispute

No objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously conducted a conference in relation to the dispute.

### Canadian Endorsement

The Canadian Arbitration Bill supports the combination of arbitration and conciliation and stipulates:

(1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with Section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute.

### WIPO Endorsement

WIPO expressly supports and endorses the use of conciliation (mediation) in arbitration. As to details, please refer to WIPO Mediation Rules and WIPO Arbitration Rules.

Furthermore, so many existing international arbitration laws and rules permit that an arbitration award can be made in accordance with a settlement reached upon by the parties through conciliation. I regard this as a part of combination of arbitration and conciliation or the use of conciliation (mediation) in arbitration.

The following rules and laws endorse the above-said permission:

UNCITRAL Model Law, French law, Belgian law and rules, the Netherlands law and rules, United States rules, ICC rules, LCIA rules, Swiss rules, Italian rules, Swedish rules, German rules, Russian rules, Austrian rules, WIPO rules, Croatian rules, the Eastern European countries' rules, Canadian rules, Australian rules, Latin American rules, Hong Kong rules, Singapore rules, Japanese rules, Korean rules, Indian law, Chinese rules, etc. and etc.

I invoke the above facts to prove that the use of conciliation (mediation) in arbitration or the combination thereof is getting more and more popular in the world, at least in the business world.

The prospects for the development of conciliation/mediation and the use of it in arbitration are very bright.

WIPO Arbitration Center is doing a good job in promoting the development. I wish it great success!