Is there an expanding culture that favors combining arbitration with conciliation or other ADR procedures?

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I.

Yes, there is an expanding culture that favors combining arbitration with conciliation (mediation) in the world. This culture has been existing in the East for a long time and is now expanding to the West and other parts of the world in one way or another. In recent years, this culture has developed to favor combining arbitration with other ADR procedures as well. Actually, this culture is existing not only in the Common Law System countries but also in the Civil Code System countries.

The following facts are the evidence.

1. Combining Arbitration with Conciliation

In China

The Chinese law and practice firmly encourage combining arbitration with conciliation. Article 51 of the Chinese Arbitration Law stipulates: "The arbitration tribunal may carry out conciliation prior to giving an arbitration award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If conciliation is not successful, an arbitration award shall be made promptly. If conciliation leads to a settlement agreement, the arbitration tribunal shall make a written Conciliation Statement or make an arbitration award in accordance with the result of the settlement agreement. A written Conciliation Statement and a written arbitration award shall have equal legal validity and effect."

Articles 45 – 50 of the CIETAC Arbitration Rules provide: "If both parties have a desire for conciliation or one party so desires and the other party agrees to it when consulted by the arbitration tribunal, the arbitration tribunal may conciliate the case under its cognizance in the process of arbitration. The arbitration tribunal may conciliate cases in the manner it deems appropriate. The arbitration tribunal shall terminate the conciliation and continue the arbitration proceedings when one of the parties requests a termination of the conciliation or when the arbitration tribunal believe that further efforts to conciliate will be futile. If the parties have reached a settlement outside the arbitration tribunal in the course of conciliation conducted by

the arbitration tribunal, such settlement shall be deemed as on which has been reached through the arbitration tribunal' s conciliation. The parties shall sign a settlement agreement in writing when a settlement is reached through conciliation conducted by the arbitration tribunal, and the arbitration tribunal shall end the case by making an arbitration award in accordance with the contents of the settlement agreement unless otherwise agreed by the parties. Should the conciliation fail, any statement, opinion, view or proposal which has been made, raised, put forward, acknowledged, accepted or rejected by either party or by the arbitration tribunal in the process of conciliation shall not be invoked as grounds for any claim, defense and/or counterclaim in the subsequent arbitration proceedings, judicial proceedings or any other proceedings. "

In practice, in CIETAC arbitration, 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%. So far, no complaint and dissatisfaction can be traced from the parties and their lawyers who have participated in the arbitration-conciliation combining process.

In Hong Kong SAR

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 of the parties. Should the efforts at conciliation prove successful, the conciliator will resume the role of the arbitrator and all material information given in confidence has 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.

In India

The 1996 Indian Arbitration and Conciliation Ordinance endorses the combination of arbitration with 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 aribtral proceedings to encourage settlement.

In Japan

The Rules of 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 the Maritime Arbitration Commission of the Japan Shipping Exchange, Inc. also encourage combining arbitration with conciliation. 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, mediated between the parties for the whole or a part of the dispute.

In fact, in maritime arbitration in Japan, most of the cases referred to arbitration are settled by conciliation conducted in the arbitration proceedings before arbitral awards are granted.

By the way, the litigation/conciliation combination is a striking phenomenon. In 1992, of around 330,000 court cases over 100,000 were referred to conciliators.

In Korea

The Korea Commercial Arbitration Board in Seoul endorses arbitration/conciliation combination 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 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.

In Sri Lanka

The Arbitration Act (1995) of Sri Lanka promotes the combination of arbitration with conciliation by setting forth the following provisions:

Settlement 14

(1) It shall not be incompatible with arbitration proceedings for an arbitral tribunal to encourage settlement arbitral tribunal may use mediation, conciliation of any other procedure at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings the parties settle the dispute, the arbitral tribunal shall, if requested by the parties, record the settlement in the form of an arbitral award on agreed terms.

In Singapore

The Singapore' s 1994 International Arbitration Act includes the following Section to encourage combining arbitration with conciliation:

17 (1) If all parties to any arbitral proceedings consent in writing and for so long as no party has withdrawn his consent in writing, an arbitrator or umpire may act as a conciliator;

(2) An arbitrator or umpire acting as conciliator-

(a) may communicate with the parties to the arbitral proceedings collectively or separately; and

(b) shall treat information obtained by him from a party to the arbitral proceedings as confidential, unless that party otherwise agrees or unless Subsection (3) applies;

(3) Where confidential information is obtained by an arbitrator or umpire from a party to the arbitral proceedings during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall, before resuming the arbitral proceedings, disclose to all other parties to the arbitral proceedings as much of that information as he considers material to the arbitral proceedings;

(4) No objection shall be taken to the conduct of arbitral proceedings by a person solely on the ground that that person had acted previously as a conciliator in accordance with this Section.

In Saudi Arabia

In the National Report of Arbitration in Saudi Arabia published in the ICCA International Hand Book on Commercial Arbitration, Professor Albert Jan van den Berg writes: " the concept of a settlement of a dispute between the parties is very important in Saudi Arabia, as is the case in the Arab world in general. Courts and arbitrators attempt to bring about a settlement at all stages. If the arbitrators are authorized to reach a compromise solution, the arbitrators act as conciliators who give a binding decision with the concurrence of the parties. This can be seen as an equivalent of a settlement in the form of an award. "

In Germany

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. In practice, the German arbitrators strive to conciliate between the parties in the arbitration proceedings. Although the new German Arbitration Act does not have provisions for arbitrators to act as conciliators in the arbitration proceedings, it includes no stipulations to disallow arbitrators to do that, and it permits the arbitration tribunal to record the settlement reached between the parties during arbitration proceedings in the form of an arbitration award. This is actually another way of combining arbitration with conciliation.

In Slovenia

The Rules there stipulate that " if the parties agree upon the settlement, its content shall be noted in a record signed by the parties and the conciliator. At the request of the parties the court will appoint the conciliator as an aribtrator who will make an award on agreed terms, provided that the parties submit a valid arbitration agreement" .

In Hungary

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.

In Former CMEA Countries

The former CMEA countries endorsed and still endorse the combination of arbitration with conciliation in various ways and manners.

In Croatia

The Rules of the Croatian Chamber of Commerce endorse 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 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.

In Austria

The Austrian Rules also endorse arbitration-conciliation combination in the following way:

If an agreement (settlement) is reached, that shall be the subject of a record signed by the parties and 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).

In Australia

Combination of arbitration with conciliation is firmly and directly supported by legislation.

Section 27 of the Australian Commercial Arbitration Act states:

27 (1) Parties to an arbitration agreement:

(a) may seek settlement of a dispute between them by mediation, conciliation or similar means; or

(b) may authorize an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them··· Whether before or after proceeding to arbitration, and whether or not continuing with arbitration.

(2) Where:

(a) an arbitrator or umpire acts as a mediator, conciliator or intermediary···and

(b) that action fails to produce a settlement of the dispute acceptable to parties to 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 taken that action in relation to the dispute.

(3) Unless the parties otherwise agree in writing, an arbitrator is bound by the rules of natural justice when seeking a settlement under Subsection (1).

In Canada

The Canadian Arbitration Bill supports combination of arbitration with conciliation and stipulates that

(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.

In the Netherlands

Professor Pieter Sanders, Honorary Chairman of ICCA and Honorary Chairman of the Netherlands Arbitration Institute, told us in his 1996 Alexander lecture that "… Also in arbitration, like in court proceedings, arbitrators may at any stage of the proceedings order the parties to appear in person for the purpose of providing information or for attempts to arrive at a settlement. This is expressi verbis stated in the Dutch arbitration law."

In Sweden

In 1999, a Mediation Institute was set up within the Stockholm Chamber of Commerce. Its Mediation Rules set forth in Article 12 that upon reaching a settlement agreement, the parties may, subject to the approval of the Mediator, agree to appoint the Mediator as an Arbitrator and request him to confirm the settlement agreement in an arbitral award.

In Switzerland

The Arbitration Rules of Geneva Chamber of Commerce and Industry support combination of arbitration with conciliation. Article 21 of the Rules reads: Conciliation – the arbitral tribunal may at any time seek to conciliate the parties. Any settlement may be embodied in an arbitral award rendered by consent of the parties. The Rules of the Arbitration Court of the Zurich Chamber of Commerce also support the combination.

In France

The French ICC Committee has set up a committee to investigate the possibilities of having more institutionalized ADR in France. The possibilities of

combining arbitration with conciliation will be investigated too. The investigation is still going on.

In the USA

In New York, arbitration and conciliation are treated as separate processes. However, in the West coast of the USA, there is great zeal for combining arbitration with conciliation in practice although legislation support is lacking at the moment.

In his article " New York Arbitration under the Rules of the Society of Maritime Arbitrators" published in volume 65 Number 3 of the Journal of the CIA " Arbitration" , Mr. L. C. Bulow, the President of the Society of Maritime Arbitrators, New York, informs us that recently, parties have been requesting arbitrators to mediate their disputes and in several cases this has happened.

In Latin America

Like in the Far East, the philosophy of conciliation and the idea of combining arbitration with conciliation is popular in Latin America in spite of the fact that arbitration is not yet well developed there in practice.

In WIPO

The WIPO Arbitration Centre expressly supports and advocates the combination of arbitration with conciliation (mediation). The WIPO rules stipulate:

"(a) The mediator shall promote the settlement of the issues in dispute between the parties in any manner that the mediator believes to be appropriate, but shall have no authority to impose a settlement on the parties;

(b) Where the mediator believes that any issues in dispute between the parties are not susceptible to resolution through mediation, the mediator may propose, for the consideration of the parties, procedures or means for resolving those issues which the mediator considers are most likely, having regard to the circumstances of the dispute and any business relationship between the parties, to lead to the most efficient, least costly and most productive settlement of those issues. In particular, the mediator may so propose:

(I) an expert determination of one or more particular issues;

(II) arbitration;

(III) the submission of last offers of settlement by each party and, in the absence of a settlement through mediation, arbitration conducted on the basis of those last efforts pursuant to an arbitral procedure in which the mission of the arbitral tribunal is confined to determining which of the last offers shall prevails; or

(IV) arbitration in which the mediator will, with the express consent of the parties, act as sole arbitrator, it being understood that the mediator may, in the arbitral proceedings, take into account information received during the mediation."

In UNCITRAL

According to the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules and Conciliation Rules, the combination of arbitration with conciliation seems not possible. However, now UNCITRAL is considering its " Possible future work in the area of international commercial arbitration" (UNCITRAL document LYCN. 9/460) and the one of priority topics is conciliation. In this topic, the possibility of combining arbitration with conciliation will be considered and discussed.

Furthermore, many existing international and national arbitration rules and laws permit that a settlement reached by the parties through conciliation which has been or not been conducted by arbitrators can be recorded in the form of an arbitration award (known as award on agreed terms or consent award). Actually, this is another way of combining arbitration with conciliation.

The following rules and laws permit the making of awards on agreed terms or consent awards:

UNCITRAl Model Law, UNCITRAL Rules, French rules, Belgian law and rules, Spanish rules, Bermuda' s law and rules, Nigerian law and rules, the Netherlands law and rules, US rules, ICC rules, LCIA rules, Swiss rules, Italian rules, Swedish rules, German law and rules, the Eastern European countries' rules, Canadian law and rules, some Latin American rules, Hong Kong law and rules, Singapore law and rules, Japanese rules, Korean rules, Sri Lanka law and rules, Indian law and rules, Chinese law and rules, Egyptian rules, Malaysian law and rules, New Zealand rules, Mauritius rules, Vietnamese rules, Slovenian rules, etc.

2. Combining Arbitration with other ADR Procedures

The idea of combining arbitration with other ADR procedures is existing and expanding. But to realize the idea, there is a rather long way to go. ADR has so many forms, such as mediation (conciliation), minitrial, med/arb, arb/med, co-med/arb, final offer (baseball) arbitration/medaloa, court-annexed evaluation, early neutral evaluation, summery jury trials, etc., and more forms of ADR procedures. However, since many courts of law in the world have linked court proceedings with ADR procedures in one way or another, why should arbitration proceedings not be linked with ADR procedures in one form or another?

To enlighten our thinking, it may be useful to quote what Professor Pieter

Sanders, Honorary Chairman of ICCA, said in his 1996 Alexander lecture. He said:

" The general provision of Clause 33 of the English Bill provides that the tribunal shall adopt proceedings suitable to the circumstances of the particular case. This might include a meeting with the parties to discuss possibilities of settling the dispute. In case arbitrators take the initiative to order such a meeting to discuss possibilities of a settlement, it seems to me that it is not excluded that arbitrators would invite the parties to use one of the available means of ADR to settle their dispute. Such an invitation is not outside the mission of the arbitrators··· Arbitration is a service industry in the interest of the parties, why should the arbitrators not suggest, in appropriate cases, to use one of the available means of ADR?··· As far as I know this idea is a novum and not yet practiced in arbitration. For a court, this link of court proceedings with ADR may not be new. I refer to the questionnaire sent by the English commercial court in which under No. 11 the question is raised whether the possibility of attempting to resolve this dispute (or particular issues) by ADR has been discussed. By this question the parties' attention is drawn to the possibility of resorting to ADR. The same, in my opinion, could be done in arbitration during a meeting of arbitrators with the parties. It therefore seems interesting to know which means of ADR are available. This is not limited to a reference to a set of conciliation rules or to one of the institutes specialized in conciliation/mediation, as in England the Centre of Dispute Resolution (CEDR). Minitrial could also be referred to. This form of ADR which stems from the USA, where it is largely practiced, has been introduced in Europe by the Zurich Chamber of Commerce and has also recently been introduced in the Netherlands by the Netherlands Arbitration Institute. Minitrial is another form of organized conciliation. Under its rules a panel of three persons is constituted: two Chief Executive Officer (CEOs) from each side and a third person, the conciliator/mediator, who will act as chairman. Before this panel each party briefly presents its best case. Thereafter the panel retires and the possibilities of a settlement are discussed. In this discussions the CEOs are guided and assisted by the chairman who, as the case may be, may express his own neutral views and proposals. In many cases – in the USA percentages of 80% are mentioned – the CEOs reach a settlement···In arbitration it could also be suggested to resort to this speedy and less costly procedure, when available. If a settlement were to be reached··· the settlement could then be incorporated in an award on agreed terms."

Professor Sanders has told us clearly that the possibility of combining arbitration with ADR procedures is there. With the consent of the parties, the arbitrator or arbitrators may suggest or propose that the parties may use one of the available ADR procedures to resolve their dispute, if successful, then come back to the arbitrator or arbitrators for an arbitral award on agreed terms.

I fully agree to what Professor Sanders said, and would like to add that there are already some international arbitration law supporting the arbitrators to use ADR procedures for resolving disputes in arbitration process. For instance, the Canadian Act stipulates: " The members of an arbitral tribunal may, if the parties consent, use

mediation, conciliation or similar techniques during the arbitration to encourage settlement of the matters in dispute." The Australian Act provides: " (1) Parties to an arbitration agreement: (a) may seek settlement of a dispute between them by mediation, conciliation or similar means; or (b) may authorize an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them··· whether before or after proceedings to arbitration, and whether or not continuing with the arbitration." The Indian Ordinance sets forth: " 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."

The said " similar techniques" , " other non-arbitral intermediary" and " other proceedings" clearly include ADR procedures.

It is interesting to note that ADR is being popularized in the USA. However, the enforcement of ADR results in the USA is still lacking legislation support. If arbitration proceedings and ADR procedures were combined, in other words, if the successful outcome of ADR procedures could be recorded in the form of an arbitral award, the enforcement problem would be overcome. I am sure that arbitration proceedings and ADR procedures will be eventually combined in one way or another in the USA, following the rapid development of the ADR movement.

To sum up, I would repeat that there is an expanding culture that favors combining arbitration with conciliation (mediation) and with other ADR procedures in the world, not only in the East but also in some parts of the West and in some other parts of the world, not only in the Common Law System countries but also in the Civil Code System countries.

II.

There are two major concerns about the combination of arbitration with conciliation.

1. Natural Justice concern;
2. Same person acting as mediator (conciliator) and arbitrator concern.

Natural Justice Concern

Here the key issue is the private " caucusing" or "shuttle diplomacy" conducted by the arbitrator-turned-conciliator in the conciliation process. Mr. David C. Elliott objectively tackled this issue in his fine article "Med/arb: Fraught with Danger or Ripe with Opportunity?" which was published in the Journal of the Chartered Institute "Arbitration" Vol. 62, No. 3, August 1996. He observed:

"What causes lawyers most concern is a mediator privately caucusing with each side. Fundamental to our notion of Justice is the right to know and be able to

answer an opponent' s case. How can this be done if one side or the other has no way of knowing what the other party is saying? It is unsettling to think of what the other side might have said, and what influence that might have on the mediator-turned-arbitrator.

While private caucus meeting are problematic for lawyers, they can also pose a dilemma for the mediator-turned-arbitrator. How much reliance, if any, can be placed on what is said in caucus meetings (when some very frank comments might be made and when the other side may have no opportunity to rebut what is said, or to shed other light on them, or put them in a different context)?

A Meb/arb process may raise questions of bias, real or perceived, in the minds of the parties. This issue is most likely to arise if the mediator is particularly assertive, or provides an advisory opinion in the course of the mediation (an " advisory opinion" is a non-binding expression of the mediator' s opinion of the most likely outcome if the case goes to arbitration, based on what the mediator has heard in mediation). Equally, as a result of private caucus sessions, the mediator may fell biased to one side or the other on the basis of what he or she hears in confidence.

Natural Justice concerns are most often raised in jurisdiction with a mediation process that relies heavily on private caucusing and looks to the mediator providing formal or informal advice or opinions on the relative positions of the parties. The more progressive approach to mediation relies far less on private caucusing and far more on skills designed to keep the parties at the table and looking at different approaches to tackling the dispute. This is not to say that private caucusing does not or should not occur (with its attendant Natural Justice concerns) but it is less prevalent than it once was.

Natural Justice concerns can be dealt with satisfactorily in a Med/arb process, but only if they are canvassed, considered and dealt with by the parties on a fully informed basis."

I agree to Mr. Elliott' s observation. But I would make a comment that private "caucusing" or "shuttle diplomacy" is important and prevalent as it was.

With a view to avoiding possible breach of "Natural Justice" or "Due Process" , significant suggestions have been put forward for discussion. Some of the suggestions are:

1. don' t do private "caucusing" or "shuttle diplomacy" ;
2. have a contractual provision to override the requirement of "Natural Justice" and "Due Process" ; and
3. do private "caucusing" and "shuttle diplomacy" on a fully informed basis.

Personally, I prefer the third suggestion. According to that suggestion, all the information obtained by the arbitrator-turned-conciliator from one party shall be fully disclosed to the other party, so that the other party may respond in the process of conciliation, or if any information can not be disclosed to the other party during conciliation proceedings, it shall be disclosed when the conciliation proceedings are

terminated with an unsuccessful result, so the other party may respond in the resumed arbitration proceedings. By so doing, "Natural Justice" and "Due Process" will be ensured, and lawyers would not concern any more that private "caucusing" or "shuttle diplomacy" may be in breach of "Natural Justice" or "Due Process".

In China, in CIETAC's arbitration-conciliation combination process, there is no such problem as being in breach of "Natural Justice" or "Due Process", because the CIETAC arbitrators-turned-conciliators always keep one party or the other fully informed of what the other party said in private "caucusing" or "shuttle diplomacy" meetings. Furthermore, when conciliation is ended without a success and arbitration proceedings are resumed, the CIETAC conciliators-turned-arbitrators always let the parties say again what they had said in the conciliation proceedings, particularly what they had said in the private "caucusing" or "shuttle diplomacy" meetings, and let them argue with each other to ensure "Natural Justice" and "Due Process" in procedure. In fact, the CIETAC conciliators-turned-arbitrators have never made awards on the basis of what they have heard from the parties in the process of conciliation but made awards on the basis of what they have heard from the parties in the arbitration proceedings.

Same person acting as mediator (conciliator) and arbitrator concern

Professor Neil Kaplan, Chairman of the Hong Kong International Arbitration Centre, 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 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."

Indeed, many people say it is not good to have the same person to arbitrate the case because he has known everything of the case. But 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.

Actually, this problem of having the same person to act as conciliator and arbitrator has been settled or almost settled. Quite a few national laws and rules have allowed the same person to act as mediator (conciliator) and arbitrator, provided that

the parties consent. Arbitration and conciliation are service industries. They are private business. The parties' freedom to have the same person to conciliate and arbitrate their disputes should be respected.

As to the point said by Professor Kaplan that 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, I would say that conciliation is not arbitration; you don't 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; as a conciliator, your job is to bring about an amicable settlement and not to make an award.

In fact, Professor Kaplan endorses the Combination 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 proceedings must be disclosed.

I have told that in the other hemisphere of the globe in arbitration like in litigation, the parties are put on adversarial positions and the arbitration procedure made and conducted almost like a court procedure. Perhaps, this is where the "Natural Justice" ("Due Process") concerns and the "Same person acting as mediator (conciliator) and arbitrator" concerns come from. In this hemisphere of the globe, particularly in China, parties to arbitration are not put on adversarial positions but on friendly and cooperative positions. So the philosophy and practice of combining arbitration with conciliation are easily accepted in this part of the world.

Finally, I must say, conciliation like arbitration is private business. Its basis is the agreement of the parties and its essence is the parties' autonomy (the free will and voluntariness of the parties). If the parties want conciliation to be conducted by arbitrators in the arbitration proceedings, if the parties agree to have "caucus" without disclosing from one party to the other party all the information received by the arbitration tribunal (the arbitrators-turned-conciliators) in the course of caucusing, if the parties wish to have the same person to act as an arbitrator and at the same time as a conciliator or first act as a conciliator and later as an arbitrator and vice versa, how could a third person (a lawyer, a law-maker, a judge, a law professor, et.) say this is not appropriate and unfair to the parties and this is running counter to "Natural Justice" ?

The third person may not worry about this because this is just what the parties want and this is not contrary to "public policy" or "public order" or " public interests" .

III.

The combination of arbitration with conciliation has many advantages over the separation of arbitration from conciliation. Some of the advantages are:

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

In China, 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 with Conciliation.

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 the same 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 fail, 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 invoked as grounds for any claim, defense 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 established at the first stage to distinguish the liability 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 the 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 is required to:

1. respect the free will of the parties;
2. find out the facts of the case, distinguishing 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. carefully examine the evidence submitted by the parties.

The arbitrators-turned-conciliators sitting in 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 the lawyers in particular. They must be strict in applying law, sympathetic in feeling and flexible in tactics. Impatience is prohibited.

IV.

My friend Mr. Michael E. Schneider sent me a Questionnaire asking for some information about the practice of combining arbitration with conciliation (mediation) in China. My answers to his questions may be interesting to the participants in this Congress.

Question 1

Is it admissible in China for a judge or arbitrator, in the course of proceedings before him or she, to take the role of conciliator or mediator, and in particular,

(a) to take the initiative of suggesting an attempt at conciliation,

(b) to express provisional views about the case and the strength and weakness of the parties' respective positions,

(c) to make suggestions as to a possible amicable solution?

Answer 1

Yes, the Chinese Law and practice permit the judge and the arbitrator to do so.

Question 2

If it is admissible in China for a judge or arbitrator to take the role of a conciliator, is such action common; is it recommended?

Answer 2

Yes, such action is very common and recommended.

Question 3

Is it admissible in China for a conciliator to act as arbitrator after his efforts at conciliation in the same case have failed?

Answer 3

Yes, it is admissible.

Question 4

If the arbitrator acts as conciliator, what rules must he or she observe?

(a) May he or she meet one of the parties in the absence of the other, and if yes, what precautions should he or she take?

(b) May he or she meet one of the parties in the absence of the other, and if yes, may he or she paint a particular bleak picture of the case of the party with which he or she meets? Does the meeting of the arbitrator with one party require prior consent of

both parties?

(c) In case of an arbitral tribunal, should the conciliation be conducted by the Chairman of the arbitral tribunal, by the full tribunal or by the party appointed arbitrators (each with "his " or "her" party or with the "opposite" party)?

Are you aware of other solution in this respect, e.g. successive stages of the conciliation in differing combinations?

(d) Can the attempt at conciliation be made at any time in the procedure or should the "conciliation phase(s)" be clearly distinguished from the "arbitration phase(s)" ?

(e) If the parties request him or her to do so, may the arbitrators make a proposal for the settlement of the dispute?

(f) Are there any other rules which must be observed?

Answer 4

If the arbitrator acts as a conciliator,

(a) he or she may not express views about the possible outcome of the case in arbitration;

(b) he or she may meet one party in the absence of the other but may not paint a particular bleak picture of the case of the party with which he or she meets, and the meeting of the arbitrator with one party requires prior consent of both parties;

(c) in case of an arbitral tribunal, the conciliation should be conducted by the full tribunal, not by the Chairman of the arbitral tribunal alone and never by the party appointed arbitrator (each with "his" or "her" party or with the "opposite" party) , unless otherwise agreed by the parties. I am not aware of other solutions in this respect (successive stages of the conciliation in differing combinations, etc.);

(d) the attempt at conciliation can be made at any time in the procedure before an arbitral award is rendered, and the "conciliation phase(s)" should not be clearly distinguished from the "arbitration phase(s)" ;

(e) the arbitrator-turned-conciliator may make a proposal for the settlement of the dispute at the request of the parties or at his or her initiative;

(f) Article 46 of the CIETAC Rules stipulates that "the arbitration tribunal may conciliate cases in the manner it deems appropriate." So, if there are any other rules which must be observed, that is the rule of impartiality.

Question 5

(omitted)

Question 6

(omitted)

Question7

Investigations concerning the practice of combining conciliation and judicial or

arbitral proceedings indicate that the settlement solutions promoted by the judge or arbitrator generally resemble the outcome of the proceedings, if it were continued until a final judgment or award. It does not appear to be normal practice for the judge or arbitrator to seek innovative solutions unrelated to the probable outcome of the proceedings. This observation calls for the following question:

(a) Is the observation correct and does it correspond to your own experience?

(b) Is it desirable that the arbitrator, in his or her efforts at conciliation, remains within the limits of the possible outcome of the proceedings or should he or she try innovative solutions which take account of the interests of the parties in a wider sense? Have you experienced arbitrators act in this fashion?

Answer 7

I am not sure I really and fully understand the question. However, I would make the following points:

1. According to my own experience, the settlement solutions promoted by the arbitrator-turned-conciliator do not generally resemble the outcome of the proceedings if it were continued until a final arbitral award. If the promoted settlement solutions generally resemble the outcome of the arbitration proceedings, conciliation would be unnecessary.

2. What do "innovative solutions" and "in a wider sense" mean? Conciliation is not arbitration. In conciliation, everything is up to the parties' consent and agreement.

Question 8

Cultural differences:

(a) Have you experienced cultural differences in this respect, e.g. in an arbitration where counsel or arbitrators came from cultural backgrounds with differing positions as to the admissibility and practice concerning the combination of arbitration and conciliation?

(b) If yes, how was this cultural difference dealt with?

(c) Can you give any advice in this respect?

Answer 8

I have worked in many arbitral tribunals with very distinguished international arbitrators from UK, Sweden, USA, Germany, Russia, Spain, Italy, Singapore, Hong Kong, etc. We do not have the problem of cultural difference in practice of arbitration, conciliation (mediation) and combination of arbitration with conciliation (mediation). Much has been talked about cultural difference in theory but not much has been really felt in practice. It seems that cultural difference have been emphasized too much in international arbitration. This emphasis would not be beneficial to the development of international arbitration.

Question 9

Can you foresee any difficulties which could arise due to a combination of arbitration with conciliation (mediation) when it comes to enforcing an award, e.g. in case the conciliation (mediation) fails and the arbitration has to continue until an award is made or the settlement is recorded in a consent award? Are you aware of any concrete cases?

Answer 9

Yes, I can foresee some difficulties which may arise in some countries. In the British Insurance Law Association London Colloquium 1993, Mr. David Wagoner, US attorney-at-law and international arbitrator, said during general discussion what a US court had overturned an arbitrator' s award because he had acted within the reference as a conciliator. Besides, I have heard that the judicial circles of Japan may have negative views on consent awards or awards on agreed terms.

V.

As an example, a case of combining arbitration with conciliation is given below:

A foreign party and a Chinese party signed a contract for setting up an equity joint-venture enterprise in China. The contract stipulates that the foreign party should pay in his capital before a given date and that the Chinese party should provide the foreign party with a guarantee for the latter to borrow money from foreign banks as his capital to pay in. After the contract was signed, the foreign party brought some people from a foreign bank to negotiate with the Chinese party in Shanghai on the matter of bank-loan-guarantee. As a result, a Chinese financing organization, at the Chinese party' s request, issued a Letter of Intent to the foreign party, which showed the willingness of the Chinese financing organization to provide a guarantee for the foreign party to get a loan from the foreign bank. Specific conditions for the issuance of the guarantee were discussed but not agreed or confirmed by the parties concerned. Owing to some reasons, the total investment amount needed to be increased but no money had been secured. The foreign party was unable to borrow his needed money from the foreign bank and failed to pay in his capital before the given date. Disputes arose between the foreign party and the Chinese party. No solution was found through negotiation between them. Then, the Chinese party applied to the China International Economic and Trade Arbitration Commission (CIETAC) for arbitration.

The Chinese party claimed US$1,000,000 from the foreign party as indemnity for his loss due to the foreign party' s failure to pay in his capital before the given date. The foreign party argued that his failure to pay in the capital was in reality due to the fact that the Chinese party did not provide him with the loan-guarantee as contracted, and therefore, it was not him but the Chinese party that should be responsible for the failure. The Chinese party replied that he had given the foreign party a Letter of Intent issued by the Chinese financing organization to obtain a loan

from the foreign bank, and it was the poor creditability and inability of the foreign party that had prevented the foreign bank from lending money to the foreign party, and consequently, the foreign party should be liable for it.

At the hearing, the arbitration tribunal carried out conciliation with the consent of both parties. After private caucusing and consulting the parties together, the arbitration tribunal pointed out to the two parties:

1. Both parties did not carry out careful feasibility study on the joint-venture project;

2. Both parties were to blame because they were still in the process of negotiating an agreement on the specific conditions for the issuance of a bank-loan-guarantee when the time-limit for the foreign party to pay in his part of capital had expired;

3. The originally fixed total amount of investment needed to increase while no money had been secured for the increase, as a result, the foreign bank refrained from lending money to the foreign party; and

4. The Chinese party could not prove with sufficient evidence his allegation that he had lost US$1,000,000 and, in fact, the Chinese party had already avoided his loss by taking reasonable measures.

Based on the above facts and reasons, the arbitration tribunal persuaded both parties to sincerely consult each other for a compromise on the basis of mutual understanding and mutual concession. In the end, the two parties reached a settlement agreement, by which the foreign party paid the Chinese party a reasonable small sum of money to resolve the dispute. The arbitration tribunal made a consent award to put the case to an end.