

# Mediation in China – Past, Present and Future

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**Abstract:** Mediation, as an alternative dispute resolution method, is becoming increasingly popular across many jurisdictions. Asia is no exception. After its signing of the Singapore Convention, mediation in China has taken another step forward. This article will start from the concept of mediation in China, going through the proceedings and enforcement mechanism. It will also investigate the current development as well as the aspects that need to be further improved. Additionally, this article will spend a few lines on the prevalence of international mediation, the foreseeable developments in mediation in future China when introducing China's level of receptivity to the Singapore Convention and the existing hurdles to its ratification.

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## Introduction

Mediation, as an alternative dispute resolution method, is becoming increasingly popular across many jurisdictions.<sup>1</sup> Asia is no exception. In June 2018, the 51<sup>st</sup> session of the United Nations Commission on International Trade

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<sup>1</sup> On multiparty mediation in Brazil see: FERREIRA; SEVERO, 2021. See also: FARIAS, 2020. See: AWAD, 2020. On mediation in Palestine see: SHAAT, 2020.

Law (UNCITRAL) witnessed the adoption of the “Convention on International Settlement Agreements Resulting from Mediation” (also known as the “Singapore Convention”). The Singapore Convention<sup>2</sup> marks a new chapter for the resolution of international commercial disputes and will exert significant and far-reaching historical significance on the settlement of international commercial disputes.

China signed the Singapore Convention on 7 August 2019. The signing of the Convention provides a valuable opportunity for commercial mediation to thrive and to become an important path among the diversified dispute resolution routes in China. China is also taking this opportunity to accelerate the process of independent legislation on commercial mediation to promote the coordinated development of China’s commercial mediation system with the international community.

## I Chinese Mediation in Context

### A The Fundamentals: Concept and Law

In Ancient China, mediation, as a dispute resolution method, was praised as “eastern experience” and was regarded as a reflection of traditional wisdom. In its long history, mediation has been used to resolve conflicts in various scenarios. It has been exceptionally handy when the conflict is about family matters<sup>3</sup> or neighbourhood disputes.

Mediation in China has taken on new shape in a modernised society. There are currently four categories of mediation that are frequently invoked in China - judicial mediation, arbitration institution mediation, people’s mediation and commercial mediation. For judicial, arbitration institution and people’s mediation, the legal basis and related rules are respectively scattered in laws and normative documents such as the *Civil Procedure Law*, the *Arbitration Law*, and the *People’s Mediation Law*. For commercial mediation, China has yet to establish specialized legislative instruments. This may explain why the current mediation system on the face mainly involves people’s mediation and mediation conducted as an ancillary process during litigation and arbitration, laying less emphasis on commercial mediation as an independent procedure. Nevertheless, with the Singapore Convention coming into play, commercial mediation is gaining greater social energy and form an indispensable part of the Chinese mediation practice.

Judicial mediation, also known as court mediation, refers to the activity of resolving civil disputes through voluntary negotiation between the two parties under the guidance of the judges of the court. The filing of a lawsuit is a prerequisite

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<sup>2</sup> See COMETTI; MOSCHEN, 2022, p. 37-57. See also: MASON, 2021.

<sup>3</sup> On mediation in family Law in Brazil see: BRAGANÇA, 2020.

for judicial mediation because it is an ancillary procedure during the litigation process. Judicial mediation is mainly governed by relevant provisions in the *Civil Procedure Law*. Article 100 of the *Civil Procedure Law* stipulates that “when a settlement agreement is reached by mediation, the people’s court shall prepare a consent judgment. A consent judgment shall state the claims, facts of the case and results of mediation. The judges and court clerk shall affix their signatures and the people’s court shall affix its seal to a consent judgment, which shall be served on both sides. Once a consent judgment is signed by both sides, it shall become legally binding.”

Arbitration institution mediation refers to mediation conducted by the arbitration tribunal during the arbitration process based on the parties’ autonomy. The commencement of arbitration is a prerequisite for arbitration institution mediation because it is an ancillary procedure attached to the arbitration process. Arbitration institution mediation is mainly governed by relevant provisions in the *Arbitration Law*. Article 51 of the *Arbitration Law* stipulates that “the arbitration tribunal may carry out mediation prior to giving an arbitration award. The arbitration tribunal shall conduct mediation if both parties voluntarily seek mediation. If mediation is unsuccessful, an arbitration award shall be made promptly. If mediation leads to a settlement agreement, the arbitration tribunal shall make a written mediation statement or make an arbitration award in accordance with the result of the settlement agreement. A written mediation statement and an arbitration award shall have equal legal effect.”

Another type of mediation with unique Chinese characteristics is people’s mediation. People’s mediation refers to the activities of the people’s mediation commission, which uses persuasion and guidance to encourage the parties to reach a voluntary settlement agreement. It is mainly provided in the *People’s Mediation Law*. Considering that the parties are not charged any fees by conducting people’s mediation,<sup>4</sup> and the mediators are usually staffed by administrative organs, people’s mediation has a public interest and administrative character.

As for commercial mediation, there is no authoritative definition in the Chinese legal context. According to the *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* formulated by UNCITRAL, Article 1 stipulates that commercial mediation means a process whereby parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship.

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<sup>4</sup> Article 4 of *The People’s Mediation Law* stipulates that “people’s mediation commissions may not charge fees for the mediation of disputes among the people”.

It is evident that commercial mediation is significantly different from the three types of mediation mentioned above. *First*, judicial mediation and arbitration institution mediation both require the commencement of litigation or arbitration proceedings, but commercial mediation is an independent mediation process, and the mediator is not a judge or arbitrator. *Secondly*, commercial mediation is market-oriented and operates on commercial logic, while people's mediation is social-oriented and is endowed with the responsibility to contribute to public interest and to maintain social stability.

After China signed the Singapore Convention, the number of commercial mediation institutions has risen. More institutions and enterprises have attached importance to the role of commercial mediation in the settlement of commercial disputes. In order to further promote the sound development of the commercial mediation industry and to study the interface between the Singapore Convention and the Chinese legal system, the China Council for the Promotion of International Trade (CCPIT) has commissioned the Institute of International Law of the Chinese Academy of Social Sciences to conduct a "Research on Commercial Mediation Legislation" project. Research reports have been consistently produced on Chinese commercial mediation legislation. These projects will definitely contribute to the development of the Chinese commercial mediation system and forthcoming legislation.

## **B The Procedure: How Mediation is Conducted in China**

In Chinese practice, judicial mediation and arbitration institution mediation are conducted by judges and arbitrators, who would usually be the same judge and arbitrator hearing the matter and rendering a final judgment or arbitral award if the mediation does not result in a settlement. When conducting people's mediation, the mediators propose solutions during and after parties' negotiations on the same footing and assist them to reach a settlement agreement on their own.

As for commercial mediation, in absence of existing legislation, the mediation procedure is prescribed by each commercial mediation centre. In accordance with the mediation rules, the common model is that the parties submit a mediation application and other materials to the mediation centre and pay the corresponding mediation fee. The parties may then choose a mediator from the mediation centre's roster of mediators (or from outside the roster), who may mediate the dispute in any manner they deem appropriate to facilitate a settlement between the parties. The mediation proceeding is conducted at the physical venue of the mediation

centre. If the parties agree otherwise, or if the mediator deems it necessary, the mediation may take place at another location.<sup>5</sup>

### C The Enforcement Mechanism

In the current Chinese legal system, a domestic settlement agreement resulting from mediation must be transformed into an enforceable judgment through judicial procedures in order to be enforced. Article 201 of the *Civil Procedure Law* stipulates that “to apply for the judicial confirmation of a mediation agreement reached under the mediation of a legally established mediation organization in accordance with the law, both parties to the mediation agreement shall, within 30 days from the date when the mediation agreement takes effect, jointly file an application with the following people’s court...”

Therefore, before getting transformed into an enforceable judgment through judicial procedures, domestic settlement agreements only have contractual binding force and cannot be directly enforced by the court. The Supreme People’s Court clarified its “civil contract” nature of settlement agreements in Article 20 of the *Several Opinions of the Supreme People’s Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation*, which stipulates that “for an agreement of a nature of a civil contract reached through mediation by an administrative organ, a people’s mediation organization, a commercial mediation organization, an industrial mediation organization or any other organization with the mediation function, the parties may apply to the people’s court having jurisdiction for confirming the validity of such an agreement after the mediation organization and mediators affixing their signatures or seals to it.” Therefore, in China, domestic settlement agreements only have the contractual binding force and can only obtain enforceability by being converted into court settlement agreements, arbitration settlement agreements or arbitration awards, or by applying for judicial confirmation from the court. Article 358 of the *Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China* stipulates that “Where a settlement agreement is found to have the following characteristics after examination, the people’s court shall make a ruling rejecting the application: (1) violation of mandatory legal provisions; (2) damaging to national interests, public interests or legal rights and interests of others; (3) violation of public order and good customs; (4) violation of

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<sup>5</sup> See: China Council for the Promotion of International Trade/China International Chamber of Commerce Mediation Center Mediation Rules (2012 Edition); Mediation Rules of International Commercial Mediation Center for the Belt & Road (2021 Edition); Beijing Arbitration Commission Mediation Center Mediation Rules (2011 Edition).

the principle of voluntariness; (5) unclear in content; (6) other factors that make it not possible for it to be judicially confirmed.” Therefore, the judicial confirmation process for settlement agreements is led and promoted by a presiding judge, who bears the obligation to conduct a full-fledged review.

## II The Development of Mediation in China

### A The Mediator

The demand for trained and experienced mediators in China is growing. However, the qualifications of mediators and the accreditation system can vary in different regions. There is currently no unified standard for mediator training and accreditation. Qualified mediators are also unevenly dispersed nationwide.

For commercial mediation institutions, there are both full-time and part-time mediators working in the institutions. They are mainly appointed by mediation organizations, invited as special guests, or qualified through training and examination organized by these institutions. In the absence of a unified law for commercial mediation, each institution has developed its own qualifications for mediators.

For example, the CCPIT Mediation Centre requires its mediators to have a university degree or above, a certain level of legal and specialized knowledge, be under 70 years old and in good health, and the requirements can be relaxed for those with rich experience. Additionally, the centre has different professional background requirements for mediators in different industries and professional fields. The Shanghai Commercial Mediation Centre (SCMC) has similar basic requirements for mediator education and age as the CCPIT Mediation Centre but requires its mediators to be proficient in one or more foreign languages and to possess higher professional background requirements. The CCPIT Mediation Centre also cooperates with the Effective Dispute Resolution Centre of UK to train and foster specialized commercial mediators for international commercial dispute resolution. The Belt and Road International Commercial Mediation Centre has also trained and fostered specialized mediators who are familiar with the commercial culture and environment of countries along the Belt and Road, have an adversarial mindset, and possess international commercial negotiation skills to handle relevant disputes. In Beijing Zhongguancun Entrepreneur Commercial Mediation Centre, well-known entrepreneurs serve as mediators to leverage their industry strengths.

Some institutions require more than 5 years of work experience for retired judges, lawyers, or other legal professionals, while others require more than 10 years. Some institutions have also formulated detailed rules for behaviour

assessment, such as conflicts of interest, inability to ensure sufficient time and energy to handle cases, and unfamiliarity with the fields involved in the case. If the above situations exist, mediators should proactively decline the parties' selection or the mediation centre's appointment. It is arguable whether uniformity is desirable, taking into account the existing situation in China. As a matter of fact, with the scale of China's population in mind, a simplified and unified standard for all mediators dealing with disputes from all walks of life may be an underestimation of the complexity in Chinese legal reality. It may be worth exploring further the current mode of having institutions implementing different standards to meet the need of various industries.

Meanwhile, many institutions do not have clear rules for follow-up training or total training time. This is an area that warrants improvement in China. The training topics are incomprehensive as well. Even if there are regulations on mediator education and training, they mainly focus on mediation rules and procedures, and are vastly different from the knowledge and abilities possessed by international commercial mediators, such as economic and technical knowledge, commercial sense and cross-border communication and coordination skills. To conclude, the current situation of commercial mediators in China can be summarized as follows: the number of professionally trained mediators are relatively limited, and the qualifications of commercial mediators vary.

Upon deeper analysis, one of the reasons for the current state of affairs is that existing legislation does not distinguish between the qualifications required for a commercial mediator and a people's mediator. The qualifications required for a people's mediator under the current *People's Mediation Law* are very general and subjective. Article 14 of the *People's Mediation Law* stipulates that "people's mediators must be adult citizens who are impartial, decent and dedicated to the people's mediation work, and have a certain level of education, policy understanding and legal knowledge. The administrative departments of justice of the county people's governments shall provide vocational trainings for the people's mediators on a regular basis".

Article 15 of the *People's Mediation Law* goes on to stipulate that "where a people's mediator commits any of a list of acts in the course of mediation, the people's mediation commission which he belongs to shall criticize and educate him and order him to correct himself. If the circumstances are serious, the entity which recommended or appointed him shall dismiss him from the position or employment. The list includes (i) showing favoritism to a party concerned; (ii) insulting a party concerned; (iii) asking for or accepting money or goods or seeking for other illicit benefits; or (iv) divulging the individual privacy or trade secret of a party concerned". Article 9 of the *People's Mediation Law* stipulates that "the members

of the people's mediation commission of a villagers' committee or neighbourhood committee shall be selected at the villagers' meeting, the villagers' representative meeting or the residents' meeting. The people's mediation commission of an enterprise or a public institution shall be selected by the employees' assembly, the employees' representative meeting or the labour union".

*Opinions of the Commission for Political and Legal Affairs of the CPC Central Committee, the Supreme People's Court, the Ministry of Justice, and Other Departments on Strengthening the Building of the People's Mediator Team* further stipulates that: "People's mediators shall be adult citizens who are impartial and honest, upright, self-disciplined, enthusiastic about people's mediation work and possess a certain knowledge of culture, policies, and law. The mediators of township (sub-district) people's mediation commissions shall generally possess high school educational qualifications or above, and mediators of industry and professional people's mediation commissions shall generally have a junior college educational qualification or above, the knowledge of the relevant industries, expertise, or work experience."

This reveals a significant discrepancy between the training and qualifications of people's mediators and the requirements for commercial mediators. For instance, the academic requirement for professional people's mediators is only a university degree or above. However, commercial mediation needs to use commercial knowledge and experience to mediate disputes between parties. The highly subjective standards for people's mediators are clearly too low and do not match the nature and needs of commercial mediation. Based on the current situation in China, while ensuring adequate theoretical knowledge, commercial experience, mediation skills, completion of mediation training, and sufficient time to engage in mediation work, the commercial mediator team in China will still mainly consist of renowned scholars, retired judges, entrepreneurs, industry experts, and lawyers for a period of time.

## **B Mediation Institutions**

There are currently several commercial mediation institutions or centres in China, including state-run or government-sponsored mediation institutions, non-enterprise community mediation centres or civil social groups registered with the Civil Affairs Bureau, and private profit-making enterprises such as partnership enterprises, sole proprietorship enterprises, and companies that are piloting commercial mediation centres in different regions. These centres provide a physical infrastructure conducive to the conduct of mediation, with dedicated rooms and facilities for mediation sessions.



For example, there are the CCPIT Mediation Centre, The Shanghai Commercial Mediation Centre (SCMC) and The Belt and Road International Commercial Mediation Centre. In Beijing's Zhongguancun Entrepreneur Commercial Mediation Centre, well-known entrepreneurs serve as mediators to leverage their industry knowledge. In coastal areas where the shipping industry has developed, there are also maritime mediation centres, such as the Shanghai Maritime Mediation Centre and the Jiangsu Maritime Mediation Centre. In 2012, the CCPIT also established the country's first e-commerce mediation centre. Although these organizations are all engaged in commercial mediation, the overall development of commercial mediation organizations has been slow, lacking institutionalization and standardization.

Apart from domestic institutions, China values input by international organisations as well. The Singapore International Mediation Centre (SIMC) is no doubt the pioneer among these institutions. SIMC is working very closely with its counterparts in China to promote mediation. In June 2018, a Specialist Mediators' workshop was jointly organized by SIMC and CCPIT in Shanghai. It was the first of many joint training programmes focused on equipping mediators in Singapore and China with the skills to manage disputes in relation to the Belt and Road Initiative (BRI). Recently, in late 2022, SIMC joined the CCPIT Hangzhou's China (Hangzhou) Intellectual Property and International Commercial Mediation Cloud Platform as the first foreign international mediation organisation to be offered to the Hangzhou platform's users. What's more, the SIMC-SCIA Med-Arb Protocol (signed 25 November 2022) applies to all disputes submitted to SIMC for mediation, whether directly by parties, or via the Shenzhen Court of International Arbitration (SCIA) through commencement of arbitration proceedings. Resulting mediated settlement agreements can be registered as a consent arbitral award by SCIA and enforceable in China and potentially under the New York Convention in 170 jurisdictions. It represents an unprecedented level of formalised cooperation between SIMC and a foreign arbitral institution to offer a "mixed mode" mechanism, in line with global trends where mediation and arbitration are not mutually exclusive, but instead used in complementary ways to achieve a satisfactory outcome.

## **C** Prevalence of Mediation in China

### **(1)** Mediation as a Mandatory Prelude to Legal Proceedings

As a matter of principle, mediation is neither a court mandated process nor a mandatory prelude to legal proceedings in China. According to the *Civil Procedure Law*, in civil cases, the court may suggest that the parties attempt mediation

before proceeding to trial. If both parties agree, the court will refer the case to a mediation centre.

However, according to the latest legislative trend, in some regions in China, for certain types of disputes, such as labour disputes and traffic disputes, mediation would become a mandatory prelude to legal proceedings. In these cases, the parties are required to attempt mediation before they can file a lawsuit. For example, in 2022, Shanghai High People's Court and Shanghai Judicial Bureau have issued *Several Opinions on Deepening the Exploration of Implementing Mediation Procedures as Prelude to Legal Proceedings*, which clearly state that from July 1, 2022, mediation procedures will be implemented before the litigation process for disputes involving family, neighbouring relations, small debts, labour disputes, consumer rights, and traffic accidents. Pre-litigation mediation will be explored and implemented throughout the city. For disputes that meet the conditions for pre-litigation mediation, the court may itself arrange pre-litigation mediation on its own.

These opinions point out that the scope of application of pre-litigation mediation procedure should be accurately limited to the types of cases that are applicable. For the types of cases applicable for pre-litigation mediation procedure, the parties should be promptly informed. Besides, the mandatory mediation prelude to legal proceedings does not restrict the parties' rights to apply for interim measures to the court. Before the interim measures (e.g., interim measures for *status quo*) are in place, the judge should be reminded to carefully decide whether to conduct pre-litigation mediation. Further, if pre-litigation mediation is successful, in order to ensure the effectiveness and enforcement of the settlement agreement, both parties can jointly apply to the people's court for judicial confirmation. If one party refuses to perform or does not fully perform the settlement agreement, the other party can apply to the people's court for enforcement. Fourthly, during the mediation stage, some actions of the parties can be effective till the litigation stage. If the parties fail to reach a settlement agreement when the mediation proceeding is concluded, the mediator, with the consent of all parties, can record in writing the undisputed facts during the mediation process and have the parties sign and confirm it. In the litigation proceeding, the parties generally do not need to provide evidence for undisputed facts confirmed during the mediation process. It is believed that such confirmation in mediation procedure can effectively advance the progress of the litigation procedure.

## (2) Mediation in China as a Means of Dispute Resolution

Although mediation as a mandatory process is limited within a narrow scope, mediation as an alternative dispute resolution method has seen a rapid growth in the past several years and has become more prevalent.

People's mediation in China is mediation on a large scale. According to the 2021 annual report of the Supreme People's Court, by the end of 2021, there were 63,000 mediation organizations and 260,000 mediators registered on the online platform of the people's court. The number of disputes mediated online by courts nationwide exceeded 10 million in 2021, and the number of successful cases mediated through social forces before litigation reached 6.107 million.

Compared to people's mediation, the number of commercial mediation organizations is limited, but their development is steadily increasing. Commercial mediation organizations in China can generally be divided into three categories.

The first category is mediation organizations under chambers of commerce and industry associations. An example will be mediation centres established in the China International Chamber of Commerce – CCPIT as well as the mediation centres established in the national industrial and commercial contacts system. As of the end of 2021, there were 59 branch mediation centres established by the China International Chamber of Commerce – CCPIT in various provinces, cities, autonomous regions, and some important cities across the country, handling more than 2,000 mediation cases on average per year. There are 3,001 commercial mediation organizations under the national industrial and commercial contacts system, which have mediated various types of disputes since 2018, handling an average of 32,500 cases per year.

The second type are mediation centres established by commercial arbitration institutions in various regions, as well as temporary mediation organizations appointed by the arbitration institutions themselves and the arbitration tribunals during the arbitration process. For example, the Beijing Arbitration Commission/Beijing International Arbitration Center (BAC) established the BAC Mediation Center on August 1, 2011, which handled 10 mediation cases involving investment finance, engineering construction and other fields in 2021, with a total dispute amount of up to 4.407 billion yuan. The Shenzhen Arbitration Commission/Shenzhen Court of International Arbitration (SCIA) established the SCIA Mediation Centre and the Shenzhen Securities and Futures Industry Dispute Mediation Centre, handling 1382 cases in the capital market and 1365 cases in exhibitions in 2021. The 270 arbitration institutions nationwide have vigorously carried out mediation work during the arbitration process, and have achieved a relatively high success rate through the mediations conducted by the arbitration tribunals during the arbitration process and the assistance of the arbitration institutions in mediation.

For example, in 2021, BAC concluded a total of 7,216 cases, of which 4,434 cases were concluded by award, accounting for 61.45%; 1,161 cases were concluded by mediation, accounting for 16.09% (a year-on-year increase of 41.41%) and 1,621 cases were concluded by withdrawal, accounting for 22.46%

(a year-on-year increase of 28.14%). In 2021, SCIA concluded a total of 7,438 cases, of which 5,512 cases were concluded by award, accounting for 74%; 562 cases were concluded by mediation, accounting for 7.6%; and 1,364 cases were concluded by withdrawal, accounting for 18.3%. The Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center) (referred to as SHIAC below) concluded a total of 1,473 cases in 2021, of which 1,095 cases were concluded by award, accounting for 74%, including 193 cases settled by a consent award, accounting for 18%; and 378 cases were concluded by withdrawal, accounting for 26%. As of the end of 2021, the Wuhan Arbitration Commission (WAC) had accepted a total of 221,005 arbitration cases, and the overall settlement rate of mediated cases in previous years was above 60%.

From the above statistical data, the withdrawal and mediation rates of the concluded arbitration cases by BAC, SCIA, SHIAC, and WAC have respectively reached 38.6%, 25%, 44%, and 60%. In addition to unsuccessful mediations, it is estimated that more than 50% of cases have gone through mediation. In 2021, the 270 arbitration institutions nationwide accepted a total of 415,889 arbitration cases, and the number of cases settled by mediation and settlement was 93,162, accounting for 35% of the total number of cases accepted.

The third type are mediation organizations established through cooperation of social forces, such as the International Commercial Dispute Prevention and Resolution Organization established in Beijing, the Belt and Road International Commercial Mediation Center, the Shanghai Economic and Trade Commercial Mediation Center, the China Commercial Mediation Development Cooperation Mechanism, the Guangdong-Hong Kong-Macao Arbitration and Mediation Alliance established in Shenzhen, etc. These mediation organizations are currently in the nascent stage of development.

On February 28, 2018, the people's court online mediation platform was officially launched, marking a further step in the implementation of diversified dispute resolution. Over the past three years, the number of mediation organizations, mediators, and the number of pre-litigation mediation cases have all increased significantly. The number of mediation organizations has increased nearly 25 times from 1,264 in 2018 to 32,937 in 2020. The number of mediators has increased nearly 11 times from 13,791 in 2018 to 165,333 in 2020. The number of civil cases successfully resolved through pre-litigation mediation has increased from 568,000 in 2018 to 4.24 million in 2020.

## **D The Integration of Mediation with Other Dispute Resolution Mechanism**

China is vigorously promoting the diversified dispute resolution mechanisms of Mediation-Litigation Coordination and Mediation-Arbitration Coordination. The aim is to establish a platform incorporating all kinds of dispute resolution mechanisms thereby enhancing accessibility, flexibility and convenience to alternative dispute resolution methods.

The model of Mediation-Litigation Coordination is to connect litigation with administrative mediation, people's mediation, commercial mediation, industry mediation and other non-litigation dispute resolution methods. First, for a case that falls within the scope of civil actions accepted by the people's court within its jurisdiction, the people's court may, after receiving the written or oral complaint and before formally docketing the case, according to its functions or upon application of a party, appoint an administrative organ, a people's mediation organization, a commercial mediation organization, an industrial mediation organization or any other organization with the mediation function to conduct mediation. Secondly, subject to the consent of both parties or when the people's court deems necessary, the people's court may, after docketing a case, authorize an administrative organ, a people's mediation organization, a commercial mediation organization, an industrial mediation organization or any other organization with the mediation function to assist in the mediation of the civil case.

At present, the courts are gradually carrying out the practice of Mediation-Litigation Coordination through the establishment of the Mediation-Litigation Coordination Centre, which plays a positive role in the overall promotion of the diversified settlement of conflicts and disputes.

The Mediation-Arbitration Coordination refers to the combination of mediation and arbitration to achieve a composite dispute resolution method that complements the advantages of the two. In practice, a few arbitration institutions have cooperated with mediation centers. For example, Beijing International Arbitration Centre and the China Securities Investor Services Centre have signed the Framework Agreement on Cooperation between arbitration and mediation. Another example is the cooperation agreement between China International Economic and Trade Arbitration Commission and Beijing Retio Legal and Commercial Service Centre for the Belt and Road Initiative.

Through the arrangement of Mediation-Arbitration Coordination, if the parties have reached mediation before applying for arbitration, they can apply to the arbitration commission for filing a case and forming an arbitration tribunal based on the arbitration agreement, and the arbitration tribunal shall make a written conciliation statement or make an arbitration award in accordance with the result

of the settlement agreement. This is to achieve a seamless coordination of arbitration and mediation and conferring the settlement agreement enforceability.

### III Signing the Singapore Convention: The Road Ahead

#### A The Singapore Convention: Opportunities and Obstacles

Signing the Singapore Convention is no doubt a great leap in the course of the development of mediation in China. In 2018, commissioned by the relevant departments of the Chinese government, researchers from the Institute of International Law of the Chinese Academy of Social Sciences conducted a relevant assessment of China's signing of the Singapore Convention and submitted an assessment report to the relevant departments. On the basis of the final report on the evaluation of the Singapore Convention, researchers from the Institute of International Law of the Chinese Academy of Social Sciences also completed the study on the ratification and implementation mechanism of the Singapore Convention, which systematically studied the Convention, its ratification and implementation mechanism in China, and put forward recommendations to promote the Singapore Convention in China from legislative, judicial and enforcement levels. It also put forward proposals to promote the implementation of the Singapore Convention in China in these aspects.

This section considers the current usage of international mediation in China, and the opportunities brought by the Singapore Convention. On the other side of the coin, there also exist hurdles in the current Chinese legal system to fully accommodate the Singapore Convention. As a last step, this section looks into potential future development in the field of mediation in China.

#### (1) International Mediations in China

As introduced above, there is no existing legal framework in China to enforce settlement agreements resulting from mediation by foreign institutions. Without such a mechanism in place, the incentive for domestic and international users to select mediation for international dispute resolution is substantially reduced.

After the introduction of the Singapore Convention, commercial mediation gradually gained publicity in China. Several waves of specialised mediation centres emerged within arbitration institutions and chambers of commerce. Still, the use of mediation at that time was still largely confined to domestic users. While recognizing the possibility of dispute resolution through international mediation, arbitration is still the mainstream of alternative dispute resolution. Mediation

is often a prelude to arbitration, but seldom a stand-alone mechanism to settle international disputes.

International mediation is still in its introductory phase in China. It is also expected that the use of international mediation will continue to grow after China's ratification of the Singapore Convention.

## (2) Enforceability of Settlement Agreements

Paragraph 3, Article 2 "Definition" of the Singapore Convention defines "mediation" as follows: "'Mediation' means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (the "mediator") lacking the authority to impose a solution upon the parties to the dispute." In the drafting process of the Convention, the Working Group also expressed the view that "mediation" should not be restricted to that carried out under the auspices of a mediation institution or be implying an "arranged or organized process". Accordingly, enforcement of settlement agreements resulting from both institutional and non-institutional mediation can be sought in accordance with the Singapore Convention.

However, as illustrated above, the legally-regulated mediation in China can be categorized as mediation affiliated with the courts, mediation affiliated with arbitration institutions, and mediation administered by commercial mediation institutions. Ad hoc mediation cannot fall into the scope, which renders uncertainty to its enforceability. Such mismatch may create extra difficulty if the parties are expecting certain enforceability that is beyond contractual binding force to be granted to the settlement agreement resulting from ad hoc mediation.

Further, according to Article 463 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China* and Article 18 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Judicial Enforcement of People's Courts (for Trial Implementation)*, an effective legal instrument requested by a party for enforcement by the people's court must have clear and definite stipulations on rights and obligations and the objects of claims as well. In the practice of separating trials and enforcement by China's courts, the enforcement division of the courts would quite often only enforce effective legal instruments which contain definite provisions on claims and debts. It is not uncommon for the courts to refuse to enforce conditional debts in effective legal instruments. The content of a commercial settlement agreement is arguably more flexible and elastic than a judgment or an award. Therefore, obligations subject to conditions, time limits and concurrent or advance performance by the other party are likely to be more prevalent in settlement agreements than

in judgments and awards. If a party relies on the Singapore Convention to seek direct enforcement of a settlement agreement, there are concerns that settlement agreements dealing with certain flexibility on its subject matters would not fully enjoy the current mandatory enforcement mechanism in China.

### **(3) Lack of Preservative Measures in the Course of Applying for Enforcement of Settlement Agreements**

In China's long-term judicial practice, interim measures can only be granted by courts for domestic litigation and arbitration. As there is no specific provision on the preservation of property during the proceeding of recognizing and enforcing foreign arbitral awards in the New York Convention or relevant laws of China, regional courts hold different views when deciding on this type of application for interim measures. It is argued, among others, that property preservation requested by the parties during the judicial review of recognition and enforcement of foreign arbitral awards by the courts falls into the scope of international judicial assistance, and therefore should be considered based on international treaties China has concluded or joined, or reciprocal treatments between China and the country where the arbitration institution is located, if any.

The Singapore Convention also does not address the issue of preservation measures. Therefore, a similar dilemma may arise for Chinese users when applying for interim measures before submitting their application to enforce a settlement agreement. A potential way out might be for the courts to refer to the provisions on interim measures for preservation in domestic litigation and arbitration when the parties apply to enforce a settlement agreement. The Supreme People's Court may issue a new guidance document on this matter. This is not only in line with the principle of direct enforcement stipulated in Article 3.1 of the Singapore Convention, under which settlement agreements are presumed to be valid and enforceable, but also manifests China's pro-mediation stance and the equal treatment of mediation, litigation and arbitration.

## **B Next Steps**

### **(1) Future Steps to Incorporate Singapore Convention into the Current Legal System**

To better connect the Chinese legal community and Chinese users to the international stage, it is imperative that China takes steps to better accommodate the Singapore Convention into its current legal system.



First, giving direct enforceability to international mediation agreements is not only the minimum requirement that China should meet when joining the Convention, but it is also compatible with the demand for efficient resolution of disputes in international commercial activities. Convenient enforcement of mediation agreements is an important requirement for international commercial activities. In order to achieve this goal, China should also conform to the requirements of the Convention after signing it and give direct enforceability to international mediation agreements.

Second, as far as domestic commercial mediation agreements are concerned, considering the relatively unregulated situation of commercial mediation in China, if domestic settlement agreements are directly given enforceability, it may be too heavy a burden to the current developing legal system in China. The court would not be able to conduct judicial review as an intermediate process to gradually grant the adjudicative power to mediators.

Therefore, the path for endowing mediation agreements with enforceability in China's commercial mediation law can be divided into two steps. First is granting enforceability to international settlement agreements to fulfil the obligations prescribed by the Convention. For this purpose, future legislation may recognize qualified international settlement agreements as "enforceable legal documents" within the framework of civil litigation law. *Secondly*, domestic settlement agreements still need to go through judicial review and confirmation by the courts. Only settlement agreements that have been recognized by the courts as effective are qualified to apply for court recognition and enforcement. When the commercial mediation market in China matures and the supporting mechanisms for commercial mediation become more established, consideration can then be given to granting direct enforceability to domestic mediation agreements.

## (2) Other Endeavours in the Field of Mediation

On 16 February 2023, the International Organization for Mediation (IOMed) Preparatory Office was established in Hong Kong, signalling the commencement of China's endeavour to establish a brand-new inter-governmental organisation for international mediation. Currently, there are nine Contracting Parties to the Joint Statement on Founding the International Organization for Mediation.

It remains to be seen what role this organisation will play in international dispute resolution. Looking at the backdrop, this organisation was founded in the context of inter-state disputes between Ethiopia, Egypt and Sudan. Therefore, it is anticipated that it will conduct State-to-State mediations. For commercial mediation between private parties or mediation for investor-State disputes, it is less clear whether the mandate of the IOMed will cover these other areas of disputes.

## IV Conclusion

This review of mediation in China explores how the use of mediation has taken shape in the Chinese legal context. Against this backdrop, the status of mediation in China is easier to understand – it sits in the middle of a loose and non-binding means of settlement and a mature system that deals with commercial undertakings. China's signing of the Singapore Convention is expected to give a boost to the development of commercial mediation and a wider embracement of international practice and standards of mediation in China.

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