

TOPIC: When Local Meets International: Mediation Combined with Arbitration in China and Its Prospective Reform in a Comparative Context

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Published in Journal of Comparative Law

1. Research Question & Concept

- **Question:** Whether the Chinese practice of med-arb is compatible with the rule of law?
- **Concept:** Due process in med-arb proceedings

2. Research Purpose and Significance

- **Purpose:** A series of due process concerns for allowing the mediator and arbitrator to be assumed by the same person in the same case, such as *Keeneye case*; **Proposes a reform of the Chinese arbitration system**
- **Significance:** Scant comparative literature analysing; Rising use of the med-arb; Further academic enquiry into the comparative study in the dispute resolution field of med-arb

3. Type of Scholarship & Research Methods

● **Type of Scholarships**

Descriptive:

- **the Arbitration Law**-Basic procedural rules on med-arb, but failed to provide specific guidance on the process.

Doctrinal:

- **The Legislations and Practices** of med-arb process in China, Asia, Continental Europe, and Common Law jurisdictions;
- **Arbitration Commission Rules**-General provision conferring power upon the arbitral tribunal to mediate the case, but very little attention given to the process of med-arb: conducted in **an informal manner**.

Instrumental:

- **An ideal med-arb** should consist of regulatory rules and mandatory requirements which represent the minimum standard to ensure the conduct of med-arb is consistent with due process.

● **Research Methods**

Doctrinal:

- Identify the legal issue over the procedural safeguards of med-arb in China by reviewing a typical case where a med-arb was challenged in enforcement proceedings;
- Analysis of the legislation and default position to infer the current procedural safeguards are insufficient to ensure due process.

Comparative legal research:

- In the context of China's harmonious dispute resolution traditions and "results-oriented" dispute resolution system, this article compares Med-arb practices and relevant procedural safeguards in various jurisdictions in an attempt to provide

comparative experience for future institutionalization of med-arb in China.

4. Main argument & Argumentation

- **Main Argument:**

This article argues that the China style med-arb **lacks due process recognition** and the **reform of med-arb** bears particular relevance for China in its **rule of law process**.

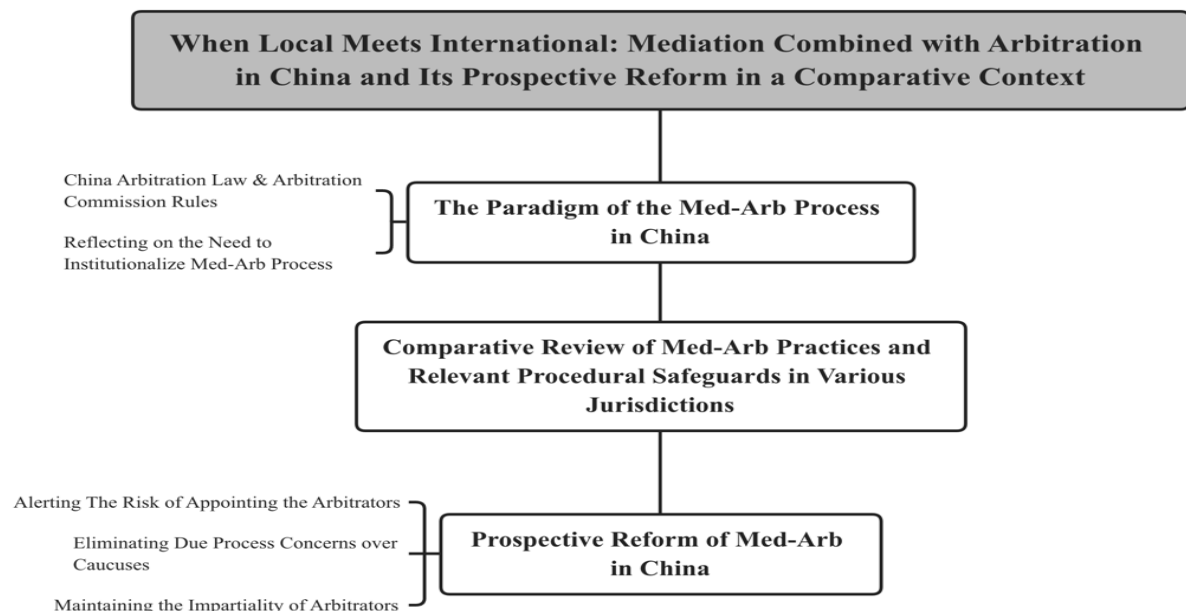
- **Argumentation:**

Firstly, this article explores the regulatory landscape of med-arb in China and evaluates the current procedural safeguards against actual or apparent bias in med-arb process. From the *Keeneye* case and regulations, it has established that the legislative framework for med-arb in China is still flawed by analysing three quire specific procedural concerns (the mediation process is often conducted by the tribunal, the arbitrators' impartiality, no requirement of confidentiality).

Next, the present study then reviews the med-arb practice of various jurisdictions in the East and West, and more importantly the legislative efforts in these jurisdictions to prevent actual or apparent bias in an attempt to explore how the current med-arb process in China might be improved.

Finally, drawing on international experience, the article then studies how to improve the med-arb process in China. It suggests that legislators should employ procedural safeguards, which aim at alerting parties as to the potential risks of appointing the arbitrator as mediator, eliminating due process concerns over caucuses and maintaining the impartiality of arbitrators.

5. Structure & Information



- **Information**

- **Legislation:** Arbitration Law of China; The New York Convention (1985); Hong Kong Arbitration Ordinance (Cap 609); Japanese Arbitration Law; French Code of Civil Procedure; New York Civil Practice Law & Rules; CAA Model Bill, etc.
- **Arbitration Rules:** CIETAC Rules (amended 2014); BAC Rules (amended 2015);

- IBA Rules of Ethics for International Arbitrators (1987), etc.
- **Cases:** *Gao Haiyan v Keeneyc Holdings Ltd*, etc.
 - **Press release:** Gu, W and Zhang, X 'The Keeneye Case: Rethinking the Content of Public Policy in Cross-Border Arbitration Between Hong Kong and Mainland China', etc.
 - Statistics of CIETAC

6. Implication, Conclusion & Original Contribution

● Implication

Arbitration institutions may consider adopting a similar mechanism to supervise the holding of caucus.

The key to preventing bias is to ensure that an arbitrator in rendering the award does not take into account information obtained in the mediation process which is not available in the arbitration process.

● Conclusion

In view of the dominance of the med-arb process in commercial dispute resolution in China, the author concludes that the reform of med-arb bears particular relevance for China in her rule of law process, as it is a much relied-on mechanism in a jurisdiction without established due process traditions, yet, with a booming economy and burgeoning commercial disputes.

● The Original Contribution

Article Published in 2015.

the Arbitration Law of the People's Republic of China (Revision) (Exposure Draft) in 2021- Article 52& 69: the regulations on disclosure system and arbitrator avoidance are improved.