The Revival of ADR in China: The Path to Rule of Law or the Turn Against Law?

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Abstract This Chapter outlines the mediation under the current legal system in PR China. The Chinese term of mediation refers to a process in which the parties voluntarily come to an arrangement about contested rights or obligations under the guidance of a third party. In some perspectives the Chinese term differs from the corresponding term in the western jurisdictions. There are various kinds of mediations available in China. They are governed by several different legal regulations, and thus the applicable legal areas, the requirements for mediation agreements, the specific mediation procedures, the enforceability of the settlement agreements of each type of mediation varies. Generally speaking, the mediation in China follows also the worldwide acknowledged principles such as the principle of confidentiality and voluntariness. Distinguished Principles stipulated in the statutes are the principle of lawful mediation and the principle of distinguishing right and wrong based on the facts. As to the enforceability and legal effect, the settlement agreements are treated as conventional contracts. In the court-annexed mediation, the mediation awards issued by courts based on the content of mediation settlements have the effect of *res judicata*. Settlement agreements reached in most of the other mediation procedures can obtain their enforceability by a judicial ratification. Certain foreign settlement agreements may also be recognized in China.

1 The Concept of Mediation

1.1 The Notion of Mediation

The term mediation (调解) is not defined in a statute in China; thus, it is not easy to provide a precise and generally accepted definition thereof. Moreover, English translations of Chinese laws sometimes translate the Chinese term of mediation as 'conciliation', which results in even more confusion. In a broader sense, it can be said that the Chinese term of mediation stands for a process in which the parties

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voluntarily come to an arrangement about contested rights or obligations under the guidance of a third party.[1] On the one hand, the element of voluntariness as well as the element of the process not being institutionalised are typical for mediation. On the other hand, in certain areas such as foreign trade or people's mediation, one can observe a high degree of legislative regulation and tightly controlled institutions, which are more typical of arbitration or conciliation. This leads some authors to assume that in China, there is no distinction between 'mediation' and 'conciliation'.[2] Whatever the solution for the linguistic side of the distinction may be, it has to be kept in mind that the Chinese term 'mediation' does not totally correspond to mediation as known in most western jurisdictions.

1.2 Types of Other ADR Instruments

In the Chinese legal setting, ADR is a concept borrowed from foreign law, particularly from US law. The most popular ADR instrument other than mediation is arbitration.

It should be noted that ADR instruments may be divided based on their nature or carrier into subtypes such as non-governmental ADR, specialised ADR, industrial ADR and administrative ADR.[3] Non-governmental ADR refers to ADR conducted by grassroots organisations or other non-governmental institutions such as community autonomy organisations. Specialised ADR describes mediation specialised for a certain type of dispute, such as mediation and arbitration of labour, medical or consumer disputes, traffic accidents as well as disputes over intellectual property. Administrative ADR is just another name for administrative mediation, which is used to handle damages resulting from personal or property damage by the competent administrative authority (*infra* at 1.3.4). To a certain degree, one ADR instrument can fall into more than one category. For instance, labour arbitration is at the same time both a specialised arbitration as well as an administrative arbitration.

1.2.1 Arbitration

The Chinese arbitration system began to evolve in the early 1900s with the opening of the Business Arbitration Office in 1912.[4] It was the first arbitration institution in China and was responsible for the settlement of business disputes. However,

[1] B. Pißler, 'Mediation in China' in Hopt and Steffek (eds.), *Mediation*, Mohr Siebeck, Tübingen 2007, p. 607.

[2] L. Cao, 'Combining Conciliation and Arbitration in China: Overview and Latest Developments' (2006) 9 *International Arbitration Law Review* 85.

[3] Y. Fan, 'Development of ADR in Contemporary China' (2002) *ZZP Int*, 548–549.

[4] J. Tao, *Arbitration Law and Practice in China*, London/New York 2004, p. 1.

settlement agreements were weak as they relied on the consent of both parties to be legally binding.[5] After the founding of the PRC in 1949, China began establishing both domestic and foreign-related systems of arbitration that included labour arbitration, contract arbitration and real estate arbitration.[6] In the 1950 and 1960s, the Chinese government began actively promoting arbitration as the preferred means of economic conflict resolution. It was in these years that the systems of domestic and foreign-related arbitration began drifting apart, mainly because of China developing a mandatory domestic administrative arbitration system for the resolution of economic contract disputes. Starting in the 1980s, under the regime of the Economic Contract Law and further regulations, China began developing specific economic contract arbitration commissions at various levels. These arbitration commissions were each specialised in the arbitration of disputes arising in a specific field, such as contracts, labour or intellectual property. These commissions were strictly hierarchical under the State Administration for Industry and Commerce, and jurisdiction was adopted by way of territorial jurisdiction so that parties could not chose arbitration commissions themselves. Arbitral awards did not have a binding effect on the parties.

All changed with the enactment of the Arbitration Law on 1 September 1995. The Arbitration Law introduced party autonomy, the independence of the arbitration commissions and was overall characterised by the effort of bringing domestic arbitration in line with international practice. Moreover, it stipulated that arbitral awards were now legally binding, with courts not being allowed to accept cases that had already been handled by arbitration commissions. From that point on, the evolution of the Chinese arbitration system was harmonised towards the internationally recognised principles of arbitration.

Following China's accession to the New York Convention in 1987, China's foreign-related system of arbitration received an impetus towards conformity with international standards, which was implemented into national law in provisions of the Civil Procedure Law (1991), the Arbitration Law (1995) and the Rules of China International Economic and Trade Arbitration Commission (CIETAC Rules) (1994, 1995).[7] By then, arbitral awards rendered by international arbitral tribunals could be enforced in China, which encouraged the international business community to submit disputes for arbitration between these institutions.[8] The first enforcement of a Chinese arbitral award in a foreign country following the New York Convention was executed in 1989; and the first application of the New York Convention in China occurred in 1990.[9] In particular, the Supreme People's Court has by way of issuing several judicial interpretations ensured that the development of foreign-related and

[5]L. Kniprath, *Die Schiedsgerichtsbarkeit der CIETAC*, Köln/Berlin, 2004, p. 20.

[6]J. Tao, *supra* n. 4, p. 1.

[7]L. Kniprath, *supra* n. 5, pp. 25 ff.

[8]J. Tao, *supra* n. 4, p. 12.

[9]L. Kniprath, *supra* n. 5, p. 24.

international arbitration in China follows international standards.[10] It can thus be inferred that as regards foreign-related arbitration, Chinese judges see arbitration as a valuable supplement to their own work. Furthermore, as far as domestic arbitration is concerned, courts provide necessary assistance to arbitration, for example deciding on the jurisdiction of an arbitral tribunal if this is disputed (Article 20 Arbitration Law) or preservation of evidence.[11] The most important function of the courts with respect to arbitration, however, is the scrutinising of awards to determine the recognisability and enforceability. In spite of protectionism of some local Chinese courts concerning the enforcement of Chinese arbitral awards, studies have shown that in practice the rejection of arbitral awards by Chinese courts is a rare phenomenon.[12]

As the traditional ADR mechanism in China,[13] mediation is often connected with arbitration and treated as the first step preceding arbitration proceedings, as illustrated by the Law on Labor Dispute Mediation and the Law on Mediation and Arbitration of Rural Land Contract Disputes. In the past, CIETAC combined mediation and arbitration in its practice despite the lack of explicit mediation rules.[14] The combination of mediation and arbitration has now been incorporated into the current CIETAC arbitration rules. The law on arbitration also contains several provisions which allow for mediation in arbitration proceedings. If the parties thereafter reach a consensus via negotiation, the arbitral tribunal can render a so-called conciliation statement which has the same legal effect as a binding arbitral award. Due to this special feature, some authors see mediation in arbitration proceedings as a distinct subcategory of mediation.

1.2.2 Petition

Petition[15] also plays a significant role in addressing grievance,[16] but is not regarded as an ADR instrument in this chapter, because petition offices are only empowered to forward the petitions to the responsible government agencies after they have examined and confirmed the merits of petitioners' submissions, instead of adjudicating or mediating the disputes themselves.

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[10] J. Tao, *supra* n. 4, p. 13.

[11] J. Tao, *supra* n. 4, p. 32.

[12] L. Kniprath, *supra* n. 5, p. 179.

[13] Y. Fan, *supra* n. 3, pp. 533–534.

[14] W. Wang, 'Distinct Features of Arbitration in China – A Historical Perspective' (2006) 23 *Journal of International Arbitration* 74.

[15] Petitioning (also known as letters and calls, correspondence and reception, xinfang or shangfang) is the administrative system for hearing complaints and grievances from individuals in the PRC. Definition in Wikipedia.

[16] For a detailed description of the working mechanism of the petition system in China see: C. Minzer 'Xinfang: An Alternative to Formal Chinese Legal Institutions' (2006) 42 *Stanford Journal of International Law* 103.

1.3 Types of Mediation

Mediation can be divided into court-related mediation and extra-judicial mediation in China. The former refers to court-annexed mediation and preliminary mediation. And the later includes people's mediation, administrative mediation, institutional mediation and industry-based mediation.[17]

1.3.1 Court-Annexed Mediation

Court-annexed mediation refers to mediation by the courts in ongoing litigation. As a part of civil proceedings, it is governed by Articles 93–99 of the Civil Procedure Law. Court-annexed mediation can be initiated in almost all phases during the trial proceedings. The 2012 Amendment of Civil Procedure Law has even advanced mediation prior to the beginning of the trial proceeding (Article 133.2). Court-annexed mediation is the form of mediation that is most similar to mediation in western jurisdictions.

Mediation has long been used by the courts as a preferred form of dispute resolution, as it existed even prior to the founding of the PRC in the areas ruled by the Communist Party.[18] However, in today's China – unlike in western countries generally– mediation is not always considered as an esteemed tradition, but is sometimes characterised by a negative image, in particular in the last 20 years of the twentieth century. In everyday language, mediation settlements are compromises, in which right and wrong are blurred and the innocent party must sacrifice a portion of its right to restore peace with the more demanding party. The concept of 'judgment instead of mediation' characterised the 20-year judicial reform in China, which started in the early 1980s.

In the first PRC Civil Procedure Law, enacted in 1982 as a provisionally implemented statute, the 'priority of mediation over trial' (Article 6) was a principle. This was replaced by the principle of 'voluntariness and lawfulness of mediation' (Article 9) in the 1991 Civil Procedure Law. Moreover, it was established that trial must be commenced or resumed, if the mediation attempt fails. Thus, the practice of continuing futile mediation attempts is supposed to be put to an end. This shift in attitude towards court-annexed mediation in civil proceedings occurred at a time when China experienced a kind of 'access to justice' movement. In the 1990s, new judge positions were created, imposing court houses were built and the jurisdiction of the courts was expanded. The motto of this era was 'every village should build a branch office of the Court'. This was accompanied by the departure of mediating

[17] Cf. W. Wang, 'The Role of Conciliation in Resolving Disputes: A P.R.C. Perspective' (2005) 20 *Ohio State Journal on Dispute Resolution* 421; some authors see mediation in arbitration proceedings as a subcategory of mediation.

[18] J. Liang, 'The Enforcement of Mediation Settlement Agreements in China' (2008) 19 *American Review of International Arbitration* 499.

activities of judges for the sake of the supremacy of law. However, the mediation has experienced a strong revival since the turn of the millennium. There are many reasons for this change, and the crucial one was the new Party line of a 'harmonious society'.[19]

1.3.2 Preliminary Mediation

The 2012-revision of the Civil Procedure Law has adopted the concept of preliminary mediation prescribed in Article 122, which states "Wherever appropriate, conciliation shall be adopted for civil disputes before they are brought to the people's court, unless the parties thereto refuse conciliation". Based on the wording of this provision, no unambiguous conclusion can be drawn whether it requires mediation to be conducted prior to the court's acceptance of a case[20] and/or thereafter.[21] In the past, preliminary mediation used to refer to mediation conducted after a case has been accepted by the court and prior to the first court hearing.[22] From a systematical point of view, it is more persuasive to construe Article 122 to cover only the mediation carried out prior to the acceptance of a case filing, as the mediation thereafter has already been addressed by Article 133. However to avoid impediments to the right to sue, the court must carry out mediation on a consensual basis and register the case within seven days if the parties reject the mediation.

Preliminary mediation is regarded as court-related mediation but not court-annexed mediation for two reasons. Firstly, preliminary mediation may be conducted by judges or other judicial personnel, but it can also be carried out by other mediation organizations which are entrusted by courts. Secondly, even though preliminary mediation may take place in court, the court has not yet accepted the case filing.

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[19]To understand 'harmonious Society' see Kleining, 'In search of harmony', <http://www.kas.de/db_files/dokumente/laenderberichte/7_dokument_dok_pdf_12235_1.pdf> accessed 24.04.2012.

[20]J. Pan, 'Reflection on the Institution of Connecting Litigation and Mediation in the Background of the Civil Procedure Law's Amendment'(2013) 3 *Contemporary Law Review* p. 106; Z. Zhang and J. Xiong, 'On the Construction of Preliminary Mediation in China' (2014) 3 *People's Judicature* p. 62.

[21]G. Tan, 'Comment on the Amendment of Civil Procedure Law' (2012) 11 *Justice of China* 48; J. Xiao, 'Turning from Legislative Perspective to Interpretive Perspective: Pragmatic Response to the Amendment of Civil Procedure Law' (2012) 11 *Journal of Law Application* 43; H. Li, 'Research on the Institution of Preliminary Mediation' (2013) 3 *Jianghai Academic Journal* 139; X. Xi, *Understanding and Application of the Revised Clauses in Civil Procedure Law*, Court Press, Beijing 2012, p. 271; Civil Law Office of the Commission of Legislative Affairs of the NPC Standing Committee, *Understanding the Civil Procedure Law of PRC*, China Legal Publishing House, Beijing 2012, p. 334.

[22]J. Xiao, *supra* n. 21, p. 43.

According to an empirical research led by a local municipal court, preliminary mediation is being operated quite differently.[23] It is not uncommon that the judges in the case-filing chambers[24] or even trial judges[25] conduct the mediation. This practice is subject to the challenge of how to justify the involvement of the judges, when the courts have not yet gained the jurisdiction over the case prior to its registration.[26] In order to deal with this issue, courts have invented the pre-registration institution, according to which courts may register the lawsuits in advance without officially accepting them and then allocate the cases to judges for mediation.[27] However this institution has no solid foundation in statutes.

Courts may also assign the cases to other organizations such as people's mediation office set up in the court, administrative authorities as well as industry and commercial mediation centers.[28] This is usually defined as court-entrusted mediation.[29] A question relating to the nature of court-entrusted mediation arises, namely whether the court-entrusted mediation is to be attributed to mediation performed by the court or it's merely a mixture of non-judicial mediations? While in some situations such other organizations can be seen as agents of the courts who mediate the disputes on behalf of the courts, in other situations the reference to mediation by other organizations is only a nonbinding suggestion of the courts. Thus, it's subject to the parties whether they initiate the mediation or not.[30] This differentiation is essential, since the nature of the mediation will decide the effect of the settlement agreement. Settlement agreement reached in courts is able to be turned into mediation awards with binding effect, while settlement agreement reached in non-judicial proceedings can obtain its enforceability only through ratification procedure. According to the commentators, only in the court-entrusted mediation under Article 95 of Civil Procedure Law, which allows courts to solicit relevant organizations and persons to assist in mediation, such organizations act as agents of the courts.[31] The nature of other court-entrusted mediations always depends on the degree of the courts' intervention in the mediation procedure.[32]

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[23] Research Group of the Yangzhou Municipal Court, 'Status quo of Preliminary Mediation and its Revelation for the Implication of the Preliminary Mediation' (2013) 19 *People's Judicature* pp. 56–57.

[24] H. Li, *supra* n. 21, p. 143.

[25] Research Group of the Yangzhou Municipal Court, *supra* n. 23, p. 57.

[26] H. Li, *supra* n. 21, p. 144.

[27] Research Group of the Yangzhou Municipal Court, *supra* n. 23, p. 57;H. Li, *supra* n. 21, p. 144.

[28] Article 14 and 15 of Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation.

[29] Y. Fan, 'Comparative Research on Court-entrusted Mediation'(2013) 3 *Tsinghua Law Journal* 57.

[30] Y. Fan, *supra* n. 29, pp. 57–58.

[31] Y. Fan, *supra* n. 29, p. 58.

[32] Y. Fan, *supra* n. 29, p. 68.

Preliminary mediation has been introduced in the hope to solve conflicts more promptly at an early stage and to reduce the caseload of the courts; however, besides the theoretical issues discussed above, it results in the practice also in several deficits, such as forced mediation[33] and delay of trial process.[34]

1.3.3 People's Mediation

A unique form of mediation is the so-called people's mediation – the only form of mediation to have found entry into the Chinese constitution in 1982.[35] It evolved from its heritage in Chinese traditional conciliation and was first set up in the 1940s in the areas ruled by the Communist Party. In the period from the foundation of the PRC in 1949 until the beginning of the Cultural Revolution in 1966, people's mediation played an important role in dispute settlement both in rural and urban areas. Although restored in 1978, people's mediation began to decline after reaching its peak between 1986 and 1990.[36] In spite of attempts by government and legislature to revive people's mediation by enacting an impressively great number of guiding policy documents since 2002[37] and ultimately the People's Mediation Law in 2010, people's mediation has not recovered from the trend of marginalisation.[38] In particular, being perceived rather as a political tool and not a professional dispute resolution instrument, people's mediation does not appeal to the younger, affluent and educated generation.[39] The fact that the revival of people's mediation depends to a large extent on state power and not primarily on party preference suggests the declining acceptance of this dispute resolution mechanism in society.[40]

Some commentators have noticed that the tension between the institutionalisation and the flexibility of people's mediation actually curtails its development in

[33] Y. Cai, 'Rethink of the Policy of 'Giving Priority to Mediation' in Civil Case: From the Analysis of 'Mediation First' in Civil Procedure Law' (2013) 5 *Modern Law Science* 134.

[34] Research Report of Pinggu District Court, <http://bjgy.chinacourt.org/article/detail/2014/02/id/1220064.shtml> accessed 24.07.2014.

[35] For a detailed summary of the evolution of people's mediation in China in Chinese see S. Jiang, *Mediation, Rule by Law and Modernization: A Survey on Chinese Mediation Systems*, Chinese Legal Publishing House, Beijing 2001; S. Lubman, *Bird in a Cage: Legal Reform After Mao*, Standford University Press, Palo Alto 1999, pp. 40–71.

[36] For a detailed description of the historical development of people's mediation in China see Y. Fan, *supra* n.3, pp. 537–538.

[37] Y. Fan, *supra* n.3, p. 534.

[38] W. Zhou, 'People's Mediation in Transformation: Three Contradictions – Review On the People's Mediation Law' (2011) 10 *Journal of Social Science* 100–101.

[39] A. Halegua, 'Reforming the People's Mediation in Urban China' (2005) 35 *Hong Kong Law Journal* 715.

[40] W. Zhou, *supra* n. 38, p. 103.

contemporary Chinese society.[41] One advantage of people's mediation is believed to be its flexibility, meaning the mediator may suggest a settlement that better suits the needs of the parties, but is not completely in line with the legal position of the parties according to the law. In this sense, people's mediation is not a right-based mediation, as in Germany, but rather an interest-based mediation. In the past, however, people's mediators were required to mediate according to the law,[42] which significantly confined mediators' room for operation and thereby diminished the attractiveness of people's mediation.[43] This tension has not yet been solved by the People's Mediation Law, which takes an ambiguous attitude by freeing mediators from the strict abidance of the law (Article 22) and at the same time, imposing the duty to stick to principles and to clarify the legal positions of the parties (Articles 3 and 21).

The people's mediation committees are structured to be mass organisations (Article 7). Villagers' committees and residents' committees are required to establish people's mediation committees. Enterprises and public institutions may also choose to establish such mediation committees (Article 8). However, people's mediation committees are subject to the guidance produced by the Ministry of Justice, which results to a certain degree in the much criticised bureaucratisation of people's mediation. Until 2008, a nationwide network existed of more than 800,000 people's mediation organisations employing in total about 4 million people's mediators.[44] People's mediation is generally available to all kinds of civil disputes, with the majority being family, community and non-commercial cases between natural persons, in certain regions also covering disputes between natural persons, legal persons or other social organisations.

The lack of a clear delineation of the scope of application is alleged to be a deficit of the People's Mediation Law. This problem had been recognised in the course of deliberation on the People's Mediation Law, but was ultimately left out in the final legal text for fear of delaying the enactment of this law, which could have caused controversy among the delegates.[45] Currently, it remains to be seen whether some established forms of mediation such as administrative mediation will be merged into people's mediation.[46]

[41] W. Zhou, *supra* n. 38, pp. 103–105.

[42] Article 1 of the Several Provisions on People's Mediation of 2002 and Article 1 of the Ordinance on the Organization of People's Mediation Committees.

[43] W. Zhou, *supra* n. 38, p. 105.

[44] Explanations on the Draft People's Mediation Law dated 1.7.2010, <http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2010-07/01/content_1580323.htm>accessed 17.08.2014.

[45] Y. Fan, 'An Analysis of the People's Mediation Law of the PRC' (2011) 2 *Jurist* 3.

[46] Y. Fan, *supra* n. 45, p. 3.

1.3.4 Administrative Mediation

In the common understanding, administrative mediation does not primarily refer to mediation in public law, but mainly to mediation in certain areas of civil or commercial law conducted by specific government agencies, whereby the administrative authority acts as mediator, witness and enforcement authority at the same time.[47] The legitimacy for government agencies to intervene in civil and commercial disputes is said to be that the civil/commercial disputes subject to administrative mediation frequently involve administrative law at the same time. For example, a defective product does not only give rise to civil quality disputes but may also trigger administrative fines. Due to their special technical expertise, such agencies may allegedly settle these disputes more rapidly and accurately.

Similar to people's mediation, administrative mediation also emerged prior to the foundation of the PRC in the so-called revolution bases of the Communist Party.[48] Administrative mediation usually precedes some form of litigation with the goal of avoiding lawsuits. The result of such administrative mediation is in essence an agreement between the parties. Due to the lack of enforceability of settlement agreements, administrative mediation is often perceived as a waste of time and resources. In this setting, neither parties nor the mediators are genuinely motivated to go through the mediation procedure. The responsible government agencies used to express strong reluctance to continue offering this service. However, the current policy of the central government is unambiguous: administrative mediation is a component of the rule of law and has to be strengthened correspondingly.[49] A national regulation dedicated to this form of mediation has already been put under deliberation by the State Council.

Until the national regulation comes into force, administrative mediation is mainly regulated by local regulations and widely scattered single provisions in national statutes and administrative regulations such as the Marriage Law, the Road Traffic Safety Law, the Law on Public Security Administration and Sanction, the Law on Prevention of Air Pollution, the Regulations on Handling Medical Accidents, and the Implementation Regulations of the Road Traffic Safety Law. The subject matter jurisdiction of administrative mediation covers primarily civil disputes and to a limited extent administrative disputes (*infra* at *2.2.5*). The former includes (a) verification of certain rights such as the right to use ocean territory, rights of ownership and use of forests; (b) ascertainment of women's rights to use land of maritime disputes or liability for compensation; (c) mediation regarding the amount of compensation in medical or traffic accidents or environmental pollution cases or infringement of intellectual property or consumer disputes. In local regulations, the subject matter jurisdiction is extended to almost all civil disputes and administrative

[47] Y. Fan, *supra* n. 3, p. 549.

[48] Y. Fan, *Study on ADR Mechanism*, Renmin University Publishing House, Beijing 2000, p. 76.

[49] Opinions of the State Council on Strengthening the Construction of Rule of Law Governments issued in October 2010.

disputes arising from administrative activities.[50] Currently, administrative mediation has still many deficits to overcome: the existing rules on administrative mediation are too simplistic and vary significantly from city to city,[51] and the professional qualification of the mediators is often not guaranteed.

1.3.5 Institutional Mediation

Institutional mediation refers to mediation conducted by professional mediation centers and is often also called commercial mediation. An example is the Conciliation Center of CCPIT (China Council for the Promotion of International Trade)/CCOIC (China Chamber of Commerce). Several arbitration commissions such as CIETAC and the local arbitration commissions have established specialised mediation centers to handle mediation cases. The mediation center of CIETAC also allows mediation during the process of arbitration, and can convert a mediation settlement into a binding arbitral award. (*supra.* 1.2.1)[52] Most of the disputes solved using this mechanism deal with commercial law.[53]

1.3.6 Industry-Based Mediation

Industry-based mediation refers to mediation conducted by autonomous industrial organisations for industrial professionals in or related to a specific industry such as accountancy, insurance, banking, logistics, medical services, transportation, real estate or the tourism industry. The legal basis for industry-based mediation is the regulation 'Some Provisions Concerning the Work of People's Mediation' issued by the Ministry of Justice in China in September 2002. Some of the industry-based mediation committees have been set up by the relevant industry associations, and others are established by or under the supervision of the relevant government bureaus.

The status of industry-based mediation committees has also been recognised in Article 34 of the People's Mediation Law, according to which 'if it is necessary, social groups or other organisations may establish people's mediation committees to mediate disputes among the people.' The Ministry of Justice issued the 'Opinions of the Ministry of Justice on Strengthening the Building of Industry-based and Profession-based People's Mediation Committees' in May 2011 in an effort to further promote industry-based mediation. The general advantage of industry-based

[50] Z. Zhang and Q. Gu, 'A Study on "Administrative Mediation in Chinese Legal Documents"' (2011) 5 *Jiang Huai Forum* 126–127.

[51] Z. Zhang and Q. Gu, *supra* n. 50, pp. 128–129.

[52] Mediation during Arbitration, <http://cn.cietac.org/Mediation/index.asp> accessed 24.07.2014.

[53] See more details: J. Liang, *supra* n. 18, pp. 502–505.

mediation is that the mediator normally has sufficient professional know-how and experience. On the other hand, as mediators are selected by the industry association, their neutrality is sometimes questionable.

1.4 Grand Mediation

With the adoption of the People's Mediation Law, people's mediation has been given a fresh lease of life. Thus, the new catchword 'grand mediation' was coined with the support of the Supreme People's Court in 2008. 'Grand mediation' (大调解) brings together people's mediation, mediation by administrative bodies and judicial mediation. This is done under the auspices of the Party, the government and the leadership of the Committee of the Party for Politics and Law with the cooperation of the courts, prosecutors, police, petition authorities, real estate supervisory authorities and labour authorities, etc. In concrete terms, people's mediation bodies have been established in courts, petition offices, the traffic police and the labour mediation authorities. One-third of the disputes in Shanghai in 2009 reportedly could be resolved by 'grand mediation' and filtered out of the litigation channel. Despite such potential for success, the superiority of 'grand mediation' has apparently failed to convince all judges and litigants.[54] The advantages and disadvantages of mediation and judgment are often compared and weighed. However, there has been an excessive emphasis on mediation. This is disturbing given that it was introduced on the basis of proposals of some authors as a necessary correction of the supremacy of the law (唯法治论) and the supremacy of legal protection (司法救济至上).[55] If one views the legitimacy of the courts solving disputes by mediation as based on principles of self-determination of the parties,[56] one will be disappointed to realise that forced court settlements are common. Even with respect to judges, a free choice between mediation and judgment is not guaranteed, because the mediation rate is a factor in the evaluation of their working performance.[57]

A problematic special feature of 'grand mediation' is that the mediator lacks neutrality. In some cases, such as expropriation cases, the party liable to pay damages, namely the government, is also the mediator.[58] The court merely plays the

[54]C. Zhang, 'Zivilprozess und Durchsetzung privater Ansprüche', in Y. Bu (ed.), *Recht und Rechtswirklichkeit in Deutschland und China, Mohr Siebeck*, Tübingen 2011. pp. 13–14.

[55]Y. Fan takes that view in *Theory and Practice of Conflict Settlement*, Tsinghua University Publishing House, Beijing 2007, pp. 293–298.

[56]R. Stürner, 'Richterliche Vergleichsverhandlung und richterlicher Vergleich aus juristischer Sicht' in I. Meier, *Recht und Rechtsdurchsetzung: Festschrift für Hans Ulrich Walder zum 65. Geburtstag*, Zürich 1994, p. 280.

[57]For a detailed description compare C. Minzner, 'China's Turn Against the Law' (2011) 59 *American Journal of Comparative Law* 956 ff.

[58]J. Ai, '"Big Mediation" Under the Logic of Social Stabilization and Its Problems' (2011) 1 *Studies in Law and Business* 24.

role of a legally qualified adviser, who fosters a pragmatic solution, both compatible with the legal framework as well as taking social stability into account.[59]

In the overhaul of the Chinese Civil Procedure Law in 2012, a shift of attitude is not in sight. Rather, the coordination between mediation and adjudication shall be optimised and the enforceability of settlement agreements shall be secured.

1.5 Statistic Information and the Existing Trend

Available statistics show that the employment of mediation has kept increasing since 2002, to a certain degree because it was in 2002 that the binding effect of people's mediation settlement was recognized by the Supreme People's Court.[60] Court-annexed mediation has been experiencing also its flourish since then, and civil disputes that were settled at first instance courts by means of mediation have steadily increased.[61] Back to 2003 there were 1,322,200 cases settled by mediation, and it accounted for 29.9 % of all civil cases solved at first instance courts.[62] In 2012 that number of cases has almost tripled with a number of 3,004,979 and its percentage reached 41.7 %.[63]

Some reasons such as traditional legal culture, the influence imposed by foreign law, the court mechanism in China lead to the rapid development of mediation in China. The incumbent political leaders attach great importance to the maintenance of social stability and see the revival of mediation as an effective tool helping to reach this goal. Since in this regard there is no radical change in sight, it can be assumed that the popularity of mediation could last long.

2 Exiting Legal Basis

2.1 Legal Framework

The legal framework governing mediation in China consists of a large number of national statutes, administrative regulations, judicial interpretations and local provisions. Below are the most important ones:

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[59] J. Ai, *supra* n. 58, p. 21.

[60] C. Shi, 'From Judgment to Settlement: the Impact of ADR on Judicial Functions' (2014) 2 *Science of Law (Journal of Northwest University of Political Science and Law)* 5.

[61] C. Shi, *supra* n. 60, p. 6.

[62] C. Shi, *supra* n. 60, p. 6.

[63] Editorial Office, *Law Year Book of China* 2013, Law Year Book of China Press, Beijing 2013, p.1211.

National Statutes

- People's Mediation Law (人民调解法), promulgated on 28 August 2010 and effective on 1 January 2011;
- Law on Mediation and Arbitration of Rural Land Contract Disputes (农村土地承包经营纠纷调解仲裁法), promulgated on 27 June 2009 and effective on 1 January 2010;
- Law on Labor Dispute Mediation and Arbitration (劳动争议调解仲裁法), promulgated on 29 December 2007, effective on 1 May 2008.

Administrative Regulations

- Rules on the Mediation and Arbitration of Rural Land Contract Disputes (农村土地承包经营纠纷调解仲裁工作规范), promulgated by the Ministry of Agriculture on 15 January 2013 and effective on 15 January 2013;
- Provisions on the Negotiation and Mediation of Enterprise Labour Disputes (企业劳动争议协商调解规定), promulgated by the Ministry of Human Resources and Social Security on 30 November 2011 and effective on 1 January 2012;
- Provisions on the Mediation of Electricity Disputes (电力争议纠纷调解规定), promulgated by the State Power Regulatory Commission on 30 September 2011 and effective on 1 January 2012;
- Some Provisions Concerning the Work of People's Mediation (人民调解工作若干规定), promulgated by the Ministry of Justice on 26 September 2002 and effective on 1 November 2002;
- Procedures of Mediation of Disputes about the Rights of Sea Area Use (海域使用权争议调解处理办法), promulgated by the State Oceanic Administration on 28 April 2002 and effective on 28 April 2002;
- Measures on Mediation of Disputes about the Quality of Vehicle Repairs (汽车维修质量纠纷调解办法), promulgated by the Ministry of Communications (dissolved) on 12 June 1998 and effective on 1 September 1998;
- Measures on Administrative Mediation of Contracts Disputes (合同争议行政调解办法), promulgated by the State Administration for Industry and Commerce on 3 November 1997 and effective on 3 November 1997.

Judicial Interpretations

- Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases Involving Mediation and Arbitration of Rural Land Contract Disputes (最高人民法院关于审理涉及农村土地承包经营纠纷调解仲裁案件适用法律若干问题的解释), promulgated by the Supreme People's Court on 9 January 2014 and effective on 24 January 2014;
- Several Provisions of the Supreme People's Court on the Judicial Ratification Procedure for the People's Mediation Agreements (最高人民法院关于人民调解协议司法确认程序的若干规定) promulgated by the Supreme People's Court on 23 March 2011 and effective on 30 March 2011;
- Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court (最高人民法院关于人民法院民事

调解工作若干问题的规定) promulgated by the Supreme People's Court on 16 September 2004 and effective on 1 November 2004;
- Some Provisions of the Supreme People's Court on Trying Civil Cases Involving the People's Conciliation Agreements (最高人民法院关于审理涉及人民调解协议的民事案件的若干规定) promulgated by the Supreme People's Court on 16 September 2002 and effective on 1 November 2002.

2.2 Areas of Laws Covered by Mediation

2.2.1 Civil Law

In the area of family law, mediation is a mandatory proceeding mostly envisaged for divorce cases. According to Article 32 of the Marriage Law 2001, courts are obliged to perform mediation prior to trying the case in a divorce suit. Furthermore, mediation is regulated as the primary legal avenue in cases of domestic violence and abandonment of family members.

Article 15 of the Inheritance Law stipulates that successors shall negotiate a settlement in the spirit of compromise as well as peaceful harmony. If these negotiations fail, the successors can call upon the people's mediation committee for mediation or file a lawsuit with the competent court.

In the area of contract and tort law, mediation may be conducted with respect to certain types of contract disputes such as electricity disputes and disputes about the quality of vehicle repairs or tort liability for medical malpractice or traffic accidents. In this regard, the Ministry of Justice has issued an opinion on 12 May 2011 on Strengthening the Building of Industry-based and Profession-based People's Mediation Committees (*supra 1.3.6*).

2.2.2 Commercial Law

Parties of Chinese-foreign joint ventures are often recommended to hold a number of 'amicable negotiations' before performing an arbitration proceeding or filing a lawsuit. In the field of foreign trade, mediation also plays a key role.

2.2.3 Labour Law

Numerous regulations exist regulating mediation proceedings in labour disputes. Chinese labour law envisages a system with multiple steps – voluntary negotiation, mandatory mediation, arbitration and trial. After voluntary negotiation has failed, mediation is a mandatory proceeding preceding labour arbitration, which in turn must precede a trial before court.

2.2.4 Intellectual Property Law

According to Chap. 3 of the Measures for Administrative Enforcement concerning Patent Issues the patent administration authorities are entitled to mediate the disputes involving patent infringement.

2.2.5 Public Law

In the field of administrative law, mediation is prohibited except for cases concerning government liability. An exception is possible when minor disputes between citizens at the same time constitute administrative offences. In that case, police departments can mediate the dispute between citizens, and in the case of a successful mediation the penalty imposed by administrative law will be dropped. Likewise, mediation is permitted in the area of criminal law in private actions.

2.2.6 Areas of Law Excluding Mediation

The employment of court-annexed mediation is subject to the limitation of Article 2 of the Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work. It specifies the situations in which disputes are excluded from mediation. In those exceptional cases, usually a special court procedure is designated.

3 Mediation Agreement/Agreement to Submit the Disputes to Mediation

3.1 Agreement und Legal Requirements

Mutual consent is the basic requirement for commencing a mediation proceeding. In the most types of mediations except the institutional mediation, written form of mediation agreement is not required. As to the question whether the consent has to be given expressly or impliedly, the requirement varies depending on the type of mediation. For court-annexed mediation the explanation of the Commission of Legislative Affairs of the NPC Standing Committee suggests that agreement must be expressly declared and an implied consent is insufficient.[64] However in the cases

[64]Civil Law Office of the Commission of Legislative Affairs of the NPC Standing Committee, *supra* n. 21, p. 240.

of preliminary mediation the implied consent is allowed.[65] People's mediation can be initiated by application of one party or be ordered *ex officio* by the people's mediation commission, as long as no party is explicitly against the mediation,[66] which indicates that the implied consent may suffice. In administrative mediation the requirements on the form of the agreement vary from area to area, the application in written form may be required in some circumstances.

On the contrary, institutional mediation follows stricter rules. Usually a mediation agreement in written form is required. According to one commentator, a mediation agreement can be entered into in the following three ways.[67] Firstly, the parties can express their intention to mediate in their contract. When later on disputes arise out of this contract, the mediation clause can serve as a mediation agreement. Secondly, the parties may also reach an agreement to submit the disputes to mediation after the conflict occurs. Lastly one party can submit an application to the mediation center in written form with certain contents, and when the other party agrees, the mediation could be started. Usually the application should include contents such as personal information, basic description of the disputes and the claims.

3.2 Effects of the Agreement

3.2.1 Binding Effects on the Parties

Mediation agreement is deemed as a civil contract, which obligates the both parties to perform their duties arising out of it. However, this contract is not enforceable due to its voluntary nature. One party's absence at the mediation will only lead to failure of the mediation.

3.2.2 Effects on Future Plead

In contrary to arbitration agreement, which constitutes a statutory bar for courts on accepting the case filing, the mediation agreement doesn't prevent the parties from filing a lawsuit before courts. Once a party files an application with a people's

[65] Civil Law Office of the Commission of Legislative Affairs of the NPC Standing Committee, *supra*n. 21, p. 334.

[66] Article 17 of the People's Mediation Law.

[67] H. Gao, 'Mediation with regard to Trade Disputes: Three Ways to Enter into Mediation Agreement' *Cross-Strait Relationship* (2000) 10, p. 46.

mediation commission or other authorities to claim civil rights, the prescription period will be interrupted upon the time the application is made.[68]

3.2.3 Effects on Pending Claims Before Courts

When the parties reach a mediation agreement, it may bring about different results depending on the type of mediation:

In the court-annexed mediation, if the parties agree to start the mediation proceeding, the trial proceeding will be suspended. However, the period of time used for mediation will still be included in the mandatory time limit for trial. Only in certain circumstances, when the mediation has not yet been finished within the permitted time of period but the parties agree on the continuation of mediation, the extended period is allowed to be excluded from the prescribed time limit of trial.[69]

No specific rules govern the effect of a mediation agreement on pending claims in the case of people's mediation or institutional mediation. Since both types of mediation are unable to produce directly binding settlement, it does not matter whether a conflicting result with the court ruling exists. In respect thereof, it can be concluded that both types of mediation will not affect the pending claims. However, if the parties reached a settlement before the court's judgment has been made, and they intend to get the settlement ratified by the court, it may be necessary to withdraw their action, due to the fact that a ratified people's mediation agreement may bring about the equal effect of *res judicata*. (*infra* at 7.3)

In the situation of administrative mediation and industry-based mediation the parties are free to choose either mediation or litigation. Once they have chosen litigation, it may be impossible for them to go back to mediation. For example, in traffic accident disputes the application for mediation from a party who has already brought the case before the court will be rejected. Even when the mediation has begun, the legal action in court will automatically bring the mediation process to a halt.[70] The application for mediation with the Securities Association of China will also be rejected, if the parties have brought the lawsuit before a court.[71] In this regard, litigation excludes the employment of mediation and thus it won't be possible for mediation to have an impact on the pending claims.

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[68] Article 14 of the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Statute of Limitations during the Trial of Civil Cases.

[69] Article 6 of the Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court.

[70] Article 96 of the Regulation on the Implementation of the Road Traffic Safety Law of the People's Republic of China.

[71] Notice of Security Association of China about Application for Mediation, <http://www.sac.net.cn/hyfw/zqjftj/zxsq/> accessed 17.08.2014.

4 The Mediator

4.1 Suitable Persons as Mediators and Their Appointments

The qualification of mediators varies depending on the type of mediation. In court-annexed mediation it is the trial judges who are in charge of the lawsuit conduct the mediation in the same matter. Upon consensus of the parties, the assistant judges may also conduct the mediation.[72] In preliminary mediation judges of the case filing chamber may also serve as mediators. The judges are allocated by the court. The same as court-annexed mediation, the parties are not allowed to appoint their mediators in administrative mediation, since the responsible staff of the administrative organ lead the mediation.

According to the People's Mediation Law, the members of the people's mediation committee, who are elected and recommended by the villagers' meeting or villagers representatives' meeting (villagers' committee), residents meeting (residents' committee) and employees' assembly or labor union (enterprises' committee) and also the persons that are appointed by the above committees can serve as mediator.[73] In order to be a mediator, they are required to know policy and law and to have basic education. Morally they must be impartial and dedicated to the mediation work.[74] In concrete cases, not only can the parties choose mediators, but also are mediation committees able to appoint mediators.[75] If the parties agree, relatives, neighbors, colleagues, persons with special knowledge or experience as well persons of certain related social organizations can be invited by mediation committees to participate in the mediation procedures.[76]

In institutional and industry-based mediation the mediators are usually experts in the related area, and they may be lawyers, scholars, retired governmental officials and judges or practitioners. Eligible persons are usually registered in the lists of the mediation centers for selection by the parties. However, the parties' choices are usually not restricted by the list.

4.2 Duities and Responsbilities of the Mediators

The main duties of mediators are the clarification of the procedures and the facilitation of the settlement. Before the mediation starts, they are obligated to

[72] Article 11 of Several Opinions of the Supreme People's Court on Further Displaying the Positive Roles of Litigation Mediation in the Building of a Socialist Harmonious Society.

[73] Article 9 and 13 of the People's Mediation Law.

[74] Article 14 of the People's Mediation Law.

[75] Article 19 of the People's Mediation Law.

[76] Article 20 para. 1 of the People's Mediation Law.

inform the parties of the basic procedure, the function of the mediators and any related issues with regard to the expense and remuneration of mediators. During the mediation, mediators are held to respect the party autonomy, bring the parties together and fulfill their wishes and requests. A distinctive feature of court-annexed mediation is that the mediators are not only entitled to support the parties in reaching settlement on their own, but can also propose settlement to the parties.[77] In this respect the court-annexed mediation resembles to a certain degree the conciliation.

Duty of disclosure is another important duty of the mediator, which is stressed in the mediation rules of mediation centers. According to those rules mediators are obligated to disclose any information which may incur reasonable doubt about their fairness and independence. Information such as previous discussion with the parties in relation to the cases before the appointment as mediator, personal interests in the disputing cases, employment relationship or any other personal relationships with the parties belongs to the content of such disclosure. When mediators fail to perform their duties, they will be excluded from the mediator list and be barred from serving as mediators in future cases, depending on the seriousness of the breach of duty.

4.3 Code of Conduct

No unified code of conduct for mediators has so far been released in China. Certain rules regulating the behaviors of mediators scatter in legal regulations or internal rules of the mediation centers. Some of the mediation centers play a leading role in enacting codes of conduct. Those codes of conduct usually obligate mediators to be impartial and fair, to keep all the information obtained during the mediation confidential. Mediators are also banned from obtaining any illegal interests by conducting the mediation.

5 The Procedure of Mediation

5.1 Basic Principles

Voluntariness, equality and neutrality of the mediators and other worldwide accepted principles count also to the existing principles of mediation in China, which are mentioned in the statutes or mediation rules of mediation centers. While those principles are applicable to almost all kinds of mediation, there are still some principles which are only applied to a special kind of mediation. In the following part, it will focus on the distinct mediation principles in China.

[77] Article 8 of the Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court.

5.1.1 Principle of Confidentiality

In China the principle of confidentiality features two aspects. First of all, the mediators and other persons involved in the mediation such as witnesses or experts are bound to strictly abide by the duty of confidentiality, which forbids them from divulging personal privacies, commercial secrets and any other information in relation to the mediation to other irrelevant persons or to the oppositing party. Secondly, the mediation procedure is not public and no record should be kept. Since there are several kinds of mediation in China, it's difficult to say whether and to which degree the principle of confidentiality is followed. No doubt that institutional mediation has taken the pioneer position in putting this principle into practice, since mediation procedure rules of the mediation centers have usually specified confidentiality in both above mentioned aspects.[78]

While the principle of confidentiality belongs to the primary principles of mediation worldwide, it has not been declared as a statutory principle of court-annexed mediation in China under the Civil Procedure Law. Only the Supreme People's Court has dealt with this issue. Article 7 para. 1 of the Provisions of the Supreme People's Court about Several Issues concerning the Civil Mediation Work of the Peoples' Court in 2004 states that when the parties apply for mediation in a non-public proceeding, the court shall grant its permit. Based on this clause it can be assumed that in court-annexed mediation the non-public mediation is not regarded as a binding principle. Not until 2007 the Supreme People's Court has turned the exceptional confidentiality requirement into a general principle in its Several Opinions on Further Displaying the Positive Roles of Litigation Mediation in the Building of a Socialist Harmonious Society. It stipulated that the judges and other participants must keep all information in relation to the mediation confidential. Article 19 of the in 2009 enacted Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation forbids mediators from testifying and the parties from using of the record of mediation proceeding, concession and commitment of the parties and opinions of the mediators as evidence in the subsequent trial. In this way, this clause intends to further guarantee the confidentiality of the mediation information.[79]

Regarding the mediation record, in contrary to most of the institutional mediation where no record has to be kept, in people' mediation[80] and court-annexed mediation the record of the mediation process and the mediation settlement are required.

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[78] For example, Article 18 the Mediation Rules from Mediation Centre of Beijing Arbitration Commission, <http://www.bjac.org.cn/mediation/shuoming.htm>

[79] J. Xiao and Y. Tang, 'On Confidentiality in Court-annexed Mediation' (2011) 4 *Science of Law (Journal of Northwest University of Political Science and Law)* 139.

[80] Article 20 of the People's Mediation Law.

5.1.2 Principle of Voluntariness

The principle of voluntariness is stipulated in Article 9 of the Civil Procedure Law. In court-annexed mediation it is stressed that voluntariness constitutes the foundation for the mediation.[81] On the one hand, voluntariness means that the mediation procedure must be started and terminated according to the parties' wishes; on the other hand, this principle intends to prevent the courts from compelling the parties to reach certain agreement, therefore the content of mediation settlement should be consistent with the true wish of the parties.[82]

In all other types of mediation voluntariness is also a primary principle. This can be extracted from the wording of the requirement that the mediation can be initiated only when both parties consent, no matter if it is done explicitly or implicitly.

5.1.3 Principle of Lawful Mediation

Article 9 of the Civil Procedure Law and Article 3.2 of the People's Mediation Law articulate the principle of lawful mediation in court-annexed and people's mediation. Lawful mediation requires not only that the mediation procedure should follow the procedural regulations but also that the content of the mediation settlement must be lawful. As to the requirements of lawfulness of the content, it is still controversial. In a strict sense, lawfullness means that the content of mediation settlement must conform to the substantive legal rules and the outcome of mediation has to be in line with the legal position of the parties according to law.[83] In contrast, according to a more accepted interpretation, lawfullness requires only that the content of the mediation settlement does not violate the mandatory legal provisions, infringe the national and public interests as well interests of others. A compliance with the substantive law to the full extent is not necessary.[84] In people's mediation the latter interpretation has been followed.[85] It is almost undisputable that people's mediation is an interest-based mediation, but not a right-based mediation. (*Supra* at 1.3.3) In court-annexed mediation, the commentators also intend to adopt the latter interpretation. Considering that mediation aims at resolving the dispute by mutual consent, rather than defining rights and obligations strictly according to law, it may be meaningful to allow the parties' deviation from substantive law to a certain extent.

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[81] B. Jiang, *Civil Procedure law of the People' Republic of China: A Practical Guide to Understanding and its Application*, Law Press, Beijing 2012, p. 360.

[82] Civil Law Office of the Commission of Legislative Affairs of the NPC Standing Committee, *supra* n.21, p. 240.

[83] S. Qi (eds), *Civil Procedure Law*, Xiamen University Press, Fujian 2007, p.71.

[84] B. Jiang, *supra* n.81, p. 361; X.Xi, *supra* n. 21, p. 246.

[85] H. Li, 'Restatement of the Principle of Ascertaining the Facts and Distinguishing Right and Wrong' (2011) 4 *Chinese Journal of Law* 121.

5.1.4 Principle of Distinguishing Right and Wrong Based on the Facts

According to Article 93 of the Civil Procedure Law, in court-annexed mediation the principle of distinguishing right and wrong based on the facts is to be applied. This principal has its origin in the first civil procedure law of 1982. The judges were required to conduct mediation on the condition that they have ascertained the facts and distinguished right from wrong. The emphasis of this principle was closely associated with the prevalent opinion about the nature of mediation. Since the legislator then considered mediation as another method used by courts in addition to trial to perform its adjudicatory power,[86] judges were also obligated to find out relevant facts during the mediation just as in a trial proceeding.

In the revision of the Civil Procedure Law the text of this principle was slightly changed to the current version, which has ceased to emphasize the court shall ascertain the facts, but only states that the mediation shall be conducted on the basis of clear facts. While scholar construes the wording as abandonment of the obligation to ascertain the facts,[87] most commentators believe there is no substantial change to the content of this principle.[88] Since the wording of Article 93 gives no clear explanation to the issue, both interpretations exist in the practice.

5.2 Duration of Mediation and Time Limits

In court-related mediation, mediation is to be promptly conducted in order to prevent prolonging the parties' litigation process. However, no mandatory time limit of mediation exists in the legal text. The only clause regarding time limit that can be found regulates only the mediation proceeding conducted by the court in the period prior to the expiration of the deadline for submitting defense. In this case, the mediation proceeding is limited to 7 days if the summary procedure is applied or 15 days if the ordinary procedure is applied.[89] This time limit can be extended by the parties.

In people's mediation there is no provision on the duration of mediation either. In administrative mediation the allowed duration varies depending on the individual administrative regulations. In institutional and industry-based mediation, the parties are usually free to determine the duration of mediation. Upon agreement of the both parties, the mediators are also entitled to determine the time limit. If there is no time limit, the mediation shall be finished usually in no more than 30 days, but it may be extended upon the consent of the parties.

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[86] C. Zhou, 'Restatement of the Relationship between Trial and Mediation' (2014) *1 Journal of Comparative Law* 47.

[87] B. Jiang, *supra* n.81, p. 362.

[88] H. Li, *supra* n. 85, p. 123.

[89] Article 6 of the Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court.

5.3 Relationship Between Mediation and Notary

5.3.1 The Role of Notaries During the Mediation Procedures

Notaries are entitled to conduct mediation in disputes relating to notarized matters.[90] When the parties bring lawsuit concerning a notarized matter before the court, notaries may be entrusted or invited to participate in the mediation. Since during the notary proceedings the notaries have already gathered information and evidence about the disputes, they are in a good position to mediate.

5.3.2 Notarization of Settlement Agreements

According to Article 37 of the Notary Law notarized credit document that deals with payment and records the obligator's acceptance of enforcement is enforceable. Therefore, a settlement agreement which fulfills the above requirements can also obtain its enforceability by notarization. The Supreme People's Court specified that the creditor of a notarised settlement agreement can directly apply to courts for enforcement.[91] Practitioners have suggested that the involvement of notarization in mediation proceeding shall be promoted in order to facilitate the enforceability of settlement agreement.[92]

6 Failure of the Mediation

6.1 Meaning

There is no definition of failure of the mediation. Normally if the mediation procedure is terminated without reaching a mediation settlement, the mediation can be deemed to have failed. Circumstances which lead to a termination include: a party refuses to attend the mediation, the mediator terminates the procedure by written announcement based on his conviction that there is no hope for a settlement, one or both parties declare to abandon the mediation or the time limit is exceeded and the parties object to an extension.

[90] Article 56 of the Rules of Notary Procedure.

[91] Article 10 of the Some Provisions of the Supreme People's Court on Trying Civil Cases Involving the People's Mediation Agreements and article 12 of Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation.

[92] M. Ma and J. Hao, 'Research on the Involvement of Notary in Mediation relating to Traffic Accidents Disputes' (2014) 4 *Legal System and Society* 121; M. Zhang, 'Incorporate Notarization into People's Mediation in Order to solve Disputes effectively', <http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=76424> accessed 20.08.2014.

6.2 Consequences

The failure of mediation does not affect the substantial rights of the parties. They may further resort to arbitration, litigation, administrative measures and other available methods to claim their rights. Regarding the consequence for mediators, mediation rules of some mediation centers prohibit them from acting as arbitrators or agents of the parties in arbitration or trial proceedings relating the same matter.

7 Success of the Mediation Procedure

7.1 Meaning of Successful Mediation and Requirements for Mediation Settlement

There are no legal rules specifying under which circumstances the mediation procedure may be deemed successful. Normally successful mediation is achieved when the parties reach a mediation settlement. Rules governing the wide range of mediations lay down different requirements for the effectiveness of the settlement agreement.

In court-annexed mediation the parties have to sign the written settlement agreement. Courts have to review the settlement agreement and then attach it to the case files. In order to be legally binding, the settlement agreement should also bear the signatures or seal of the judges and court clerks.[93] After being reviewed by the courts, mediation settlements can be converted into mediation awards, which are enforceable. (*infra* at 7.3.1)

The settlement agreement in people's mediation can be reached either in oral or written form.[94] Upon oral settlement the mediators are bound to document the content of the settlement. The agreement in oral form becomes effective as of the day on which it's reached.[95] In the written settlement the mediators may record the basic information of the parties, principle facts and main issues of the dispute, liabilities of each party, and further the contents of the settlement, manner and term for performing the agreement. The parties and the mediators ought to attach their signatures and the people's mediation committee has to seal on the agreement in order to make it effective.[96]

[93] Article 13 of the Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court.

[94] Article 28 of the People's Mediation Law.

[95] Article 30 of the People's Mediation Law.

[96] Article 29 para 1 of the People's Mediation Law.

Settlement in administrative mediation is usually recorded in an agreement produced by the administrative authorities. For its effectiveness are also the signatures or seals of the parties and seal of the administrative authorities necessary.[97]

Settlement agreements in institutional and industry-based mediations are also usually kept in written form. A distinctive feature of the settlement agreement reached in the mediation centers attached to arbitration commissions is that, after the agreement is reached, the parties may jointly apply for arbitration, and then the arbitration commission is able to issue a mediation award or an arbitration award based on the content of the settlement agreement.[98]

7.2 Conditions for Enforceability

In principle, settlement agreements made by the parties do not qualify as directly enforceable titles, but as conventional contracts.[99] To give a settlement agreement the effect of direct enforceability, the parties may initiate judicial ratification proceedings before a competent court or have the settlement agreement notarised by a public notary, if it deals with a simple debt. The Parties may also apply for payment order in court.[100]

7.2.1 Enforcement of Settlement Agreements Reached in Court-Annexed Mediation Proceedings

The rapid and voluntary compliance with settlement agreements is praised as an advantage of mediation. The efforts of the Supreme People's Court to make rescission from judicially drafted settlement awards difficult, actually argues against this assumption. According to Article 97 para. 1 of the Civil Procedure Law a mediation award will be made in which the submissions, the facts and the mediation results are documented where both parties reach a settlement agreement. A mediation award becomes final and enforceable upon being served on the parties. Article 99 of the Civil Procedure Law allows each party to with draw from the settlement award made by the court without any objective reason prior to its

[97] For example Article 24 of the Measures for Patent Administrative Law Enforcement, and Article 95 of the Regulation on the Implementation of the Road Traffic Safety Law.

[98] Article 23 para. 1 of the Mediation Rules of the mediation centre attached to Beijing Arbitration Commission. <http://www.bjac.org.cn/mediation/shuoming.htm>accessed 17.08.2014

[99] Articles 8, 9 10 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 and Article 1 of the Some Provisions of the Supreme People's Court on Trying Civil Cases Involving the People's Mediation Agreements.

[100] Article 13 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.

service. Often one party feels ripped off by the other and refuses to accept the delivery of the settlement award once the peaceful atmosphere generated by the mediation discussion fades and the party gives further thought to the law and facts. This is considered a waste of judicial resources. As a countermeasure, the Supreme People's Court stipulates that the refusal of service does not contradict the enforceability of the settlement award for certain cases, in which a mediation award is not necessary and the parties agree that the settlement agreement should come into effect upon signing by the parties.[101] In those cases the settlement agreement becomes legally effective, as soon as the parties agreed to a settlement, the court confirmed its content and the parties and judges have signed the corresponding court record.[102] That means, once the settlement agreement has been signed, the parties are bound to the declaration. In all other cases, the mediation award can only be binding as from its service.[103]

7.2.2 The Enforcement of Settlement Agreements Reached in People's Mediation Proceedings

The enforcement of settlement agreements has been controversial since the people's mediation system was restored. The Ministry of Justice issued the Measures for Handling Peoples Disputes in 1990 and sought to give compulsory effect to settlement agreements and decisions reached under local governments.[104] However, in 1993 the Supreme People's Court made it clear in the Notice on How to Deal with Civilian Disputes Handled by Township People's Governments that courts may invariably hear disputes covered by people's mediation agreements and are not bound by the mediation results while adjudicating the cases.[105] The legally binding nature of the people's mediation settlements was reaffirmed by the Supreme People's Court in 2002. Again, the 'binding nature' of the settlement agreement only refers to it being 'binding' like any other civil contract, but does not say anything as regards enforceability.

Generally speaking, a distinction is to be made between the enforcement of a settlement agreement itself and a judicially ratified agreement. A plain settlement agreement without judicial ratification is nothing more than a normal contract, which does not qualify as an enforcement order. Therefore, if one party refuses to perform a settlement agreement, the other party has to obtain an executory title either by suing the non-performing party for breach of contract or by filing

[101] Article 151 of the Interpretation of the Supreme People's Court Concerning the Application of the Civil Procedure Law.

[102] Article 13 of the Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court.

[103] Article 149 of the Interpretation of the Supreme People's Court Concerning the Application of the Civil Procedure Law.

[104] Y. Fan, *supra* n. 3, p. 538.

[105] Y. Fan, *supra* n. 3, p. 539.

a suit with the court for the underlying dispute settled by the settlement agreement. Numerous commentators have tried to confer a plain settlement agreement the effect of direct enforceability, which was rejected by the judiciary due to lack of support in the black letter law and legal theory. The wording of the pertinent provision in the People's Mediation Law actually does not suggest the direct enforceability of people's mediation settlement agreements.[106] In effect, settlement agreements are not enforceable until judicial ratification by the courts has taken place.

Judicial ratification of people's mediation agreements has been officially established by the People's Mediation Law. Previously, several judicial interpretations already introduced and implemented this legal concept. Judicial ratification proceedings are regarded as a declaratory action and deal with non-contentious matters; they are therefore to be classified as special proceedings.[107] In the case of a successful judicial ratification, the ratification certificate, accompanied by the original settlement agreement, constitutes the enforcement title.[108] It is however still subject to discussion whether a judicially ratified settlement agreement is able to bring about the effect of *res judicata*.[109]

In pursuance of Article 33 of the People's Mediation Law, the two parties may jointly apply to the court for ratification within thirty days of the settlement agreement taking effect if they deem it necessary. The lately enacted Interpretation of the Supreme People's Court Concerning the Application of the Civil Procedure Law makes it clear, under which circumstances application for judicial ratification will not be accepted by courts: (1) if the cases do not belong to courts' accepted scope of civil actions; (2) the court which receives the application has no jurisdiction over the case; (3) the party applies for confirmation of the invalidity, validation or termination of the marriage, parenthood, adoption relationship; (4) other special procedures, procedure for public summons, procedure for bankrupt should be applied in the proceedings; or (5) the settlement agreement deals with the confirmation of property rights or intellectual property rights.[110] After the court confirms the validity of the settlement agreement in accordance with the law, the other party may apply to the people's court for enforcement, if one party refuses to perform or fails to properly perform. Where the court determines that the settlement agreement is invalid, the parties may alter the original settlement agreement or reach a new settlement agreement or may also file a lawsuit to the people's court.

Another highly controversial issue is the standard of examination to be applied by courts to judicial review of people's mediation agreements. The Supreme People's

[106] Y. Fan, *supra* n. 45, p. 10. The wording is 'The mediation agreement reached through the mediation of the civil mediation committee shall be legally binding and the parties shall perform in light of the stipulations'.

[107] G. Xiang, 'The Improvement and Development of the Judicial Ratification Proceeding of Mediation Agreement' (2011) 7 *Journal of Law Application* 14.

[108] G. Xiang, *supra* n. 105, p. 15.

[109] G. Xiang, *supra* n. 105, p. 16.

[110] Article 357 of the Interpretation of the Supreme People's Court Concerning the Application of the Civil Procedure Law.

Court has addressed this issue in several judicial interpretations, but each time the approach has been slightly amended.

For example, according to Article 7 of 'Certain Provisions on Procedures for Judicial Ratification of People's Mediation Agreements' issued by the Supreme People's Court on 23 March 2011, the settlement agreement is subject to a substantive review in the judicial ratification proceedings. That means the consulted court is allowed to examine the settlement agreement with a view to its compliance with mandatory statutory provisions, compliance with the interests of the state, the public and third party rights, compliance with public policy and social order as well as the clarity of the contents. This provision deviates from a guideline set out in 'Several Opinions on Establishing and Improving Resolution System in the Disputes in the Link of Litigation and Non-litigation Cases' in that the latter allows the court to even examine whether the mediation is conducted voluntarily and there is no violation of professional ethic rules by the mediator and the mediation organisation. In addition, in contrast to 'Certain Provisions on Procedures for Judicial Ratification of People's Mediation Agreements', the 'Several Opinions on Establishing and Improving Resolution System in the Disputes in the Link of Litigation and Non-litigation Cases' still follow the principle that party autonomy prevails, meaning the court is to ratify the validity of the settlement agreement if the parties are fully aware of the agreement's non-compliance with the above mentioned validity requirements and forfeit the right to challenge the validity. It is safe to assume that this principle has been abandoned since the later issued 'Certain Provisions on Procedures for Judicial Ratification of People's Mediation Agreements' does not contain a comparable provision. The provision in the 'Certain Provisions on Procedures for Judicial Ratification of People's Mediation Agreements' corresponds more to the common understanding of this issue in the judiciary.[111] Being the latest pertaining rule, the Interpretation of the Supreme People's Court concerning the Application of the Civil Procedure Law adds a new item, namely the violation of the voluntariness principle to the review standards set forth in Certain Provisions on Procedures for Judicial Ratification of People's Mediation Agreements.[112] Any violation against those review standards will lead to the rejection of application for judicial ratification.

7.2.3 The Enforcement of Agreements Reached in Administrative Mediation Proceedings

There is no explicit regulation on the enforceability of administrative settlement agreements. Thus, settlement agreements resulting from administrative mediation are not enforceable per se, but rather resemble a civil contract as is the case with

[111] G. Xiang, *supra* n. 105, p. 15.

[112] Article of 360 the Interpretation of the Supreme People's Court concerning the Application of the Civil Procedure Law.

people's mediation. If a party repudiates the settlement agreement, the other party has to seek an enforceable title either by applying for arbitration (as long as there is an arbitration clause) or directly filing a lawsuit.[113] The non-enforceability of administrative mediation has a significant negative impact on the parties and the mediation bodies (*supra*at 1.3.4).

In the 'Several Opinions on Establishing and Improving Resolution System in the Disputes in the Link of Litigation and Non-litigation Cases', the Supreme People's Court opened the possibility of judicial ratification to other forms of mediation such as administrative mediation. However, this document does not qualify as a judicial interpretation and has therefore limited authority.

7.2.4 The Enforcement of Agreements Reached in Institutional and Industry-Based Mediation proceedings

The same as agreements reached in administrative mediation proceedings, agreements from industry-based mediation can also be judicially ratified.[114]

In the institutional mediation there is a distinction between mediation conducted by the mediation centers attached to the arbitration commissions and mediation during the arbitration proceedings by the arbitration commissions. Settlement agreement in the former case is considered as a conventional contract,[115] and thus it can obtain its enforceability by judicial ratification. In contrary, according to Article 51 para. 1 of the Arbitration Law the arbitration commission may issue mediation award or arbitration award based on the content of the settlement agreement reached in arbitration proceedings. Furthermore the mediation award enjoys the same legal effects as arbitration award. In other words, the mediation award made during the arbitration proceedings is also enforceable in China.

7.3 Effects of the Settlement

Depending on the type of mediation and the form of settlement agreement, an effective settlement may bring about different effects.

In court-annexed mediation, courts are empowered to issue mediation award based on the content of the parties' settlement agreement. Pursuant to Article 97 of Civil Procedure Law, effective mediation award is legally binding, which not only means that the mediation award is enforceable, but also can be construed as

[113] J. Liang, *supra* n. 18, pp. 4 ff.

[114] 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.

[115] Article 9 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.

having the effect of *res judicata.*[116] To be specific, the parties are not allowed to bring the lawsuits concerning the same dispute before courts in the future, and there is no possibility of appeal, the only possible way to change the award is to apply for retrial (再审). (Article 124.5)

Regarding the settlement agreement which has been judicially ratified, it's controversial whether it has the effect of *res judicata. Res judicata* refers to two aspects in China. The first one is a negative effect, which prevents parties of an effective judgment from suing once again out of the same dispute; the other one is positive effect, which obligates the judges in other related disputes to stick to the existing judgment.[117] While most of the scholars have denied the both effects of judicial ratified settlement agreement to the full extent,[118] some others acknowledge the negative effect.[119] From a practical and economical perspective, it may be meaningful to accept the negative effect to avoid the waste of judicial resources.

As to the plain settlement agreement, it is only considered as a conventional contract. According to a scholarly opinion the rights and obligations arising from the original legal relationship between the parties can be modified by the settlement agreement.[120] Therefore, as long as a party claims the rights based on the settlement, the court has only to review the validity of the settlement agreement but not the original disputes; only by mutual consent, the both parties can abolish the agreement and bring lawsuit due to the same dispute once again before the court.

8 Costs and Legal Aid

In court-related mediation there is no extra charge besides the case acceptance fee. According to Article 15 of the Measures on Payment for Litigation Costs, if the dispute is resolved by mediation settlement, only half of the provided case acceptance fee will be charged. The proportion to be borne by each party is up to their own negotiation; however the court may make the decision if the consensus is absent.[121] Since the courts may also authorize or assign other social organizations or professional mediation centers to mediate, it makes the costs problem complicated.

[116]C. Zhou, *supra* n. 86, p. 49; D. Hong, 'On Judicial Review of the Validity of Reconciliation Agreement' (2012) 2 *Jurist* 114.

[117]Y. Wang, 'Connection of Mediation and Litigation and the Judicial Ratification of Mediation Settlements' (2010) 6 *Journal of Law Application* 35.

[118]Y. Wang, *supra* n. 113, 35; S. Zhang, 'The Attribution of Judicatory Affirmation of People's Mediation Agreement' (2012) 3 *Science of Law (Journal of Northwest University of Political Science and Law)* 143; D. Hong, *supra* n. 112, p. 115.

[119]H. Shao, 'On the Ratification of People's Mediation Agreement: Effect, Value and Procedure' (2011) 10 *Political Science and Law*, 111; Z. Hao, 'The Effectiveness of Judicial Confirmation on the People's Mediation Agreement' (2013) 2 *Science of Law (Journal of Northwest University of Political Science and Law)* 176.

[120]J. Pan, *supra* n.20, p. 108.

[121]Article 31 of the Measures on Payment for Litigation Costs.

Especially in the situation of institutional mediation, the parties may have to pay both the case acceptance fee to the court and mediation costs to the mediation center.[122]

People's mediation[123] and administrative mediation are free of charge, and industry-based mediation is also usually offered for free.

The costs for institutional mediation vary from mediation center to mediation center, but are usually calculated based on the dispute amount. The costs included the compensation for mediators and management expenses of the mediation centers.

9 Cross-Border Mediation

In the Chinese legal setting the term cross-border mediation does not exist. In the area of family law some courts try to conduct mediation in divorce matter, where one party has his/her domicile in countries other than China. Besides, several people's mediation committees were set up in the border cities adjacent to foreign country in order to mediate trade disputes between residents of both countries.[124] Pursuant to the recently promulgated judicial interpretation of Civil Procedure Law,[125] in the foreign-related mediation, the court is entitled to issue a judgment based on the content of the mediation settlement upon the request of the both parties.

10 Recognition and Enforcement of Foreign Mediation Settlements

10.1 Foreign Mediation Settlements Reached in Court-Annexed Mediation Proceedings

Article 282 of Civil Procedure Law governs the recognition and enforcement of foreign judgments and rulings. If a foreign settlement award reached in court-annexed mediation proceedings can be considered as having the same effect as a judgment, it may be possible to get recognized and enforced in China. For example, a Reply of the Supreme People's Court About the Question Whether Courts Shall Accept the Application for Ratification Proceedings From the Party, Who Hold A Mediation Award Issued by Taiwan Court or Mediation Agreement Issued by Other

[122] Civil Law Office of the Commission of Legislative Affairs of the NPC Standing Committee*n Legislation Background and Point on Civil Procedure Law*, Law Press, Beijing 2012, p. 281.

[123] Article 4 of the People's Mediation Law.

[124] News about the Establishment of Cross-border Mediation Committee,<http://www.gl.chinanews.com/1005_0819/67404.html> accessed 17.08.2014.

[125] Article 530 of Interpretation of the Supreme People's Court concerning the Application of the Civil Procedure Law.

Organizations suggests that the mediation award issued by courts in Taiwan has the same effect as a judgment and can thus be recognized and enforced.[126] Besides, treaties on judicial assistance between China and several countries were signed and ratified. In some of the treaties it is clearly stated that the clauses with regard to recognition and enforcement of judgments in this treaty are also applicable to mediation awards issued by courts.

Disregarding the detail rules in treaties, Articles 281 and 282 of Civil Procedure Law set forth the general procedures and conditions for application. When the prerequisites are fulfilled, which include the award shall not contradict basic principles of Chinese law and the sovereignty, security or public interest of China, the court may grant its permission.

10.2 Foreign Mediation Settlements Reached in out of Court Mediation Proceedings

There are no specific rules regarding the effect of foreign settlement agreement reached in out of court mediation proceedings. Since domestic settlement agreement are only considered as plain contract and it cannot be directly enforced, it is certain that foreign settlement agreement deserve no privilege. No explicit legal rules have mentioned whether those settlement agreements can get recognized in China. However the above Reply of the Supreme People's Court Concerning Settlement Agreement in Taiwan denied the possibility of recognition for Taiwanese settlement agreement reached in out of court mediation proceedings. Based on this reply, it can be assumed that foreign settlement agreement reached in out of court mediation proceedings will not get recognized and thus enforced in China.

11 (e) Justice

(e)Justice devices are also utilized in China. For example during the mediation proceeding with regard to divorce matters, when one party is unable to attend court hearings, video conference is permitted. An online mediate system has even been established in China. It allows the parties to submit mediation applications online, which will be forwarded to the mediation center that participates in the online mediation program and is chosen by the parties.[127]

[126]Reply of the Supreme People's Court about the Question whether Courts shall accept the Application for Ratification Proceedings from the party, who hold a Mediation Award issued by Taiwan Court or Mediation Agreement issued by other Organizations.

[127]Online application procedure, see Website of the online mediation platform <http://www.adr101.com/TjService/tjfw_sl.aspx>accessed 17.08.2014.