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THE CHARACTERISTICS OF BUSINESS MEDIATION SYSTEM IN CHINA

-from the perspective of an international mediation case
Personally involved-

by

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Abstract:

Mediation is not only the core component of ADR but also a very important method in China to settle the social disputes and conflicts which is commenced and developed gradually in its long historical process. It originates from an effective method that the citizens depend on themselves to solve the social disputes. This article is trying to analyze and see the common and different characteristics of the mediation in ADR in western countries and the mediation in Chinese traditional style and whether the gaps between them could be reconciled.

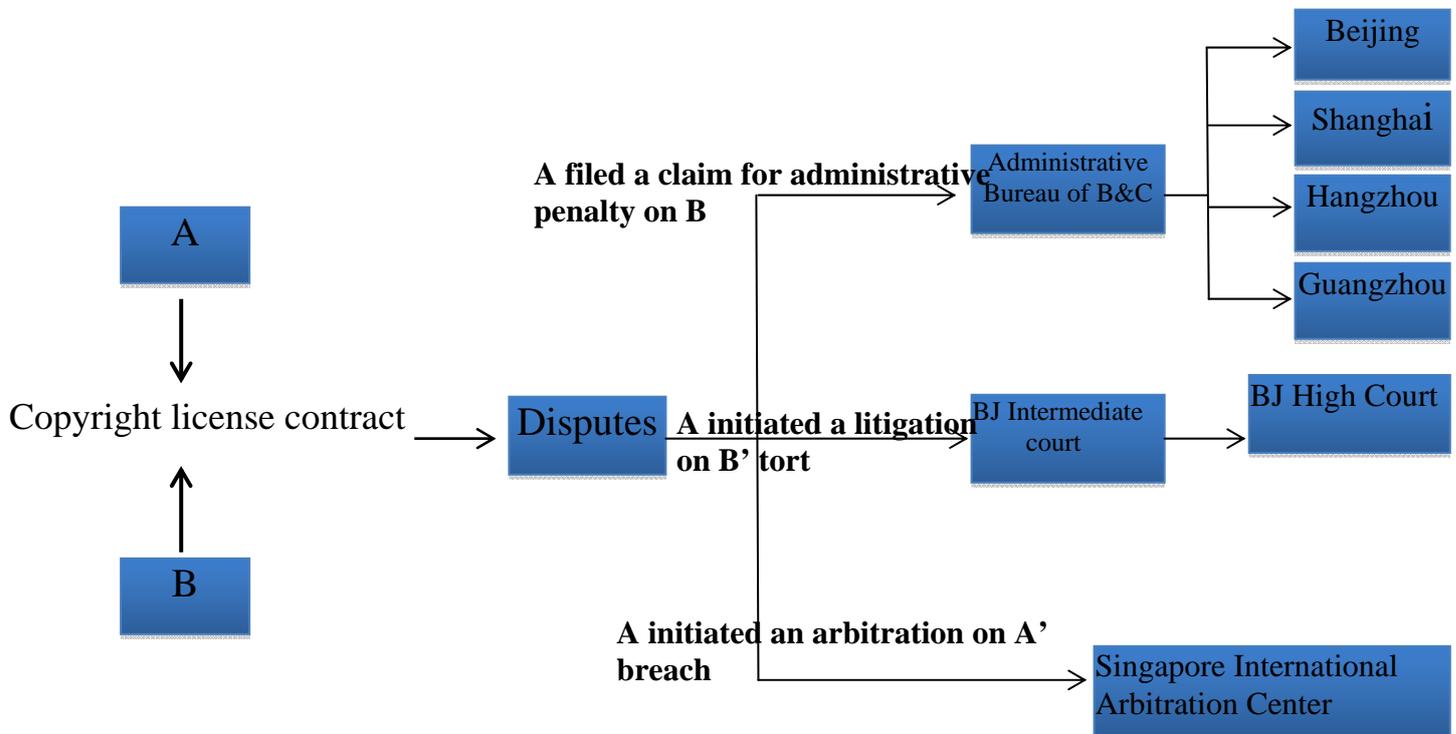
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Part I: Basic facts

An American company (Hereinafter referred to as Company A) and an equity joint venture in a city of China (Hereinafter referred to as Company B) signed an exclusive license agreement on A’s patented products and related music CDs .Under the agreement, company A had the copyright on the patented products and licensed B to use in the television station in a number of years. In the course of the execution of the agreement, Company A accused Company B of piracy and torts which resulted in serious infringement of copyright, therefore initiated an litigation in the Beijing Intermediate Court. What’s more, Company A complained the torts of Company B in Administrative Bureau for Industry & Commerce as well, in the cities of Beijing, Guangzhou, Wuhan, and Hangzhou. In return, company B accused company A of a violation of the exclusive license agreement and breach of the contract, which resulted in the early termination of the agreement in fact.Under the agreement, Company B initiated an arbitration in the Singapore International Arbitration Center .The following chart briefly summarized the main disputes of intellectual property rights arising out of the contract.



After Singapore International Arbitration Center accepted the case, company A selected Ms. Sally Harpole ,who is a senior international arbitration from UAS, as its arbitrator and company B selected Prof. Shen Sibao as its arbitrator in accordance with its arbitration rules.Considering the

complexity of the case raised by IP infringement and breach of contract, and the high costs for both parties, Ms. Sally Harpole proposed that if it is possible for both parties to settle their disputes through mediation before the formation of the arbitral tribunal and submit the package of disputes to the Mediation Committee Organization affiliated by Beijing Arbitration Commission Professor Shen fully supported her proposal and persuaded company B to make positive responses. Soon, A and B agreed the proposal one by one and reached agreement on the following described:

First, the mediation tribunal was composed by Ms. Harpole and Professor Shen Sibao

Second, during the mediation, both parties shall suspend all ongoing administrative claim for penalty in four cities and appeal activities in Beijing Higher People's Court and arbitration procedures in Singapore International Arbitration center as well.

Third, the mediation commission sent a full-time secretary to mediation tribunal for support.

Finally, the costs of the mediation for two days transferred not to the account of mediation commission but directly into the accounts of the mediators respectively.

In this way, from August 2009 onwards, both parties began the mediation under the mediation commission affiliated by the Beijing arbitration commission. After hard negotiation, both parties come into face to face mediation on December 1, 2009 and reached a preliminary intent of settlement agreement on December 2. In late December 2009 through April 2010, under the continuing work of the secretary, both parties entered into the mediation agreement finally, and the good news is the mediation agreement implemented eventually and the mediation came into a satisfactory end. As such, all the proceedings of arbitration, litigation and administrative claim for penalty had been terminated totally, which saved a lot of time and costs, what's more, both parties could hold hands cheerfully.

Part two: Process of mediation

1. Identifying the key issues

In the process of mediation, after studying the case materials and inquiring the parties separately and jointly, two mediators reached consensus on the key issues of the case and found the direction for final resolution jointly. Through two mediators' consultations, both reached the following agreements: company A breached the license agreement and caused economic losses to company B.

However, in practice, company B infringed the copyright of company A, if not stop, it was very likely to spread around and would definitely cause significant losses to company A

2. Analyzing the core interests of both parties

The common interests for both company A and B were the reputation in the market of China, however, as a foreign company on the process of opening Chinese market, company A cared more on its reputation in China. A's breach caused the real loss of company B and was a big blow for a limited- sized company like B. The most urgent request of Company A was the stop of infringement immediately by company B and company B promise no similar cases would be happen again. (B's infringement would cause losses to company A in the future in the event that it could not be prohibited.)

After the above analysis, two mediators and the secretary made the consensus that, in order to reach the conciliation, we should not focus on which party is wrong and which party is right, nor should we emphasize too much or even mention A' breach and B's tort. on the contrary, we should try to persuade company A to terminate the contract and make a certain amount of compensation for company B, meanwhile, try to persuade company B to accept company A's resolution for the dispute of infringement and the methods of preventing infringement in the future. After a half day's repeatedly leading and persuading by the two mediators, both disputants agree to negotiate the disputes on the above basis and draft the settlement agreement.

3. The characteristics of the mediation agreement

Therefore, at the very beginning, the purpose of mediation was highly focused. After a half-day's mediation, the case finally focused on the amount of compensation of company A to company B and how to draft agreement of settlement.

At this moment, two mediators contacted frequently with their party. During this process, the conciliation of mediators played a significant role , and after another day's mediation, both sides reached a conciliation agreement in principle finally through hard bargain. The most satisfactory clauses of agreement, or the clauses which reflect the mutual interests of both parties is the disclaimer as follows:

“on the basis that neither party is at fault nor recognize its fault, for the purpose of conciliation, both parties reach the following agreement. The agreement and any other negotiations, documents and discussions in connection with the agreement, shall not be interpreted as or deemed to be the recognition of any party to any liabilities or wrongdoings. On the basis, the mediation agreement

further stressed that, “both parties give up in any countries or regions the application, operation, participation or in any other ways, to initiate or execute, or assert any defense, offset or cross-claim or through any litigation or judicial activities (including but not limited to apply for arbitration under the " Arbitration Rules of International Chamber of Commerce ") to claim or defense or seek relief.”

Both parties make further commitments: neither party shall discredit the reputation of the other party in its own name or the name of a third party. Nor shall any party on its name or on the name of a third party, make any comments or use any word to defame or discredit the reputation of the company B or its subsidiaries, affiliates (and their associated subsidiary), managers, owners, members, directors, employees or any products or services of company B in any forms of negotiation with a third party. The mutual commitment concerning the reputation by both parties formed the essential content of the mediation agreement and had become a good foundation for future cooperation. On this basis, in the issue of compensation, company A nearly satisfied all the requirement of company B and made a certain amount of compensation to Company B. Meanwhile, company B accepted several measures proposed by company A to eliminate the infringement.

Finally, both parties withdrew the claims for administrative penalty in four cities and the litigation in Beijing court and the arbitration in Singapore International Arbitration Center.

The mediation ended in one and half days with the help of two mediators, while large number of rest work, including the final performance of mediation agreement was conducted by the secretary from Beijing Mediation Commission affiliated by Beijing Arbitration Commission.

Part three: the Features of mediation for commercial disputes in China

From this successful case, we could find the main characteristic of commercial mediation in China as follows:

1. the mediation in China is mainly of Institutional Mediation

Institutional mediation committee is divided into people's mediation committee and mediation committee for commercial disputes in China now.

The law in China does not prohibit folk or non-government mediation like Ad hoc in arbitration. All mediation activities of this case were conducted under the Beijing Mediation Commission set up

by the Beijing Arbitration Commission. The procedure was conducted on the basis of its rules, including the procedure of filing, appointment of mediator, hearing and charging.

According to statistics, there are 205 arbitration committees in mainland China totally, of which more than 50% has established mediation commissions especially for the settlement of commercial disputes. The advantage of this design is for a better combination of mediation and arbitration. On many circumstances, the mediation agreement both parties reached could be transformed into a formal arbitral award upon both disputants agree. The other advantage of institutional arbitration is that the institution could help to supervise and help the enforcement of the mediation agreement. Usually, the institution has the panel of arbitrators, which would help mediation institutions choose an arbitrator with prior successful corporation experience to mediate the case.

Besides, the mediation commission would provide a professional, responsible and upright secretary for the mediator or mediation tribunal. The secretaries are full-time, well-educated and impartial. They could conduct their work in full accordance with mediation procedure, which is indispensable to mediators.

2. The approach of commercial mediation in China is generally on joint mediation.

The commercial mediation especially the international commercial mediation is generally conducted in the mode of joint mediation in China. The joint mediation is usually defined as a mode, of which both parties to a dispute would select a mediator respectively on the voluntary basis, and the mediators selected by both parties form a joint mediation group to settle the disputes collectively.

The joint mediation mode in China is commonly a mode by two mediators, which is connected with the Chinese historical tradition that the strength of a group or a team is generally stronger than that of an individual.

The practice tells us, if the mediators have common understandings on the issue of a dispute, then generally, it would have the effect of 1 Plus 1 are greater than two. Nevertheless, if there is no common understandings on the issue of a dispute or if one or two mediators are partial, then the effect would be 1 plus 1 are less than two.

In this case, two mediators could mutually understand well on most of issues of this case because they have had a long and successful cooperation experience in mediation and arbitration in Beijing

Arbitration Commission and CIETAC, besides, they have common social experience, social responsibility and mentally mature as well.

Another reason to settle this case smoothly is that, both of them are very familiar of the culture traditions, values and the requirements of interest of its party who appointed them, all of which are the basic conditions for a quick, effective and complete successful mediation.

As we know, the mediation is a continuation and facilitation of negotiation, in which a third party (mediator) joins as an organizer.

So it is very essential that the mediator should be impartial, capable to keep balance and could be well understood by both parties during the mediation process. They are able to find the key issues of the disputes and the joint and respective interests of both parties (bottom line) meanwhile put forward brainstorming ways of to settle the disputes but still leave room to comprise for both parties . Select the best options and try to persuade each party respectively to accept them.

The future of mediation in China would be far-reaching and it has been popularizing in large scale. The philosophy principles as “ harmony is most precious” and “harmony could bring fortune” are always used as the guideline in mediation for the purpose of “dropping suit”.

3. A major characteristic of mediation system in China is the combination of arbitration and mediation.

Practically, the ways for the combination of arbitration and mediation are principally as follows:

- I. When the application for arbitration has been submitted by the claimant, under the persuasion by its arbitrator or legal counsels , a party to the dispute may firstly accept the advice for mediation; In this case, the claimant has applied for arbitration in SIAC but the arbitral procedure has not yet started, the arbitrators selected by both parties propose for mediation and was accepted by both parties.
- II. During the arbitral proceedings including at the stage of hearing, the tribunal could also suggest for mediation if both parties agree.
- III. At the stage when the hearing is basically finished, tribunal could also recommend for mediation and persuade the parties to the dispute to accept the proposal.

IV. Even in the process of enforcement after the arbitral award was issued, with the help and coordination of the original arbitral tribunal or the legal counsel of both parties, negotiation for mediation is also possible to make.

Special explanation for the above four ways of arb-mediation combination is as follows:

- a. The role and significance of mediation in all of the above four ways of combination is always highlighted from beginning through end on the voluntary basis of both parties.
- b. In the above four ways from one to three, if the mediation agreement could be reached, then the agreement is generally transformed into a binding award by tribunal. Of course, it shall also on the voluntary basis of both parties as well.
- c. Once both parties agree to mediate, the arbitral proceeding would be suspended automatically and immediately.

Each party to the dispute has the chance or we could say is entitled for both parties to select its mediator respectively. They could appoint the original arbitrator or other mediators as its mediator. While in practice, the mediation is generally conducted under the original tribunal.

Finally, within the approaches for the resolutions of commercial dispute in China, mediation and arbitration are mutually cohabitant rather than mutually exclusive, they could be transformed into each other following the will of the parties and combined together to play a better role.

Mediation in china is non-profitable at this stage

Currently, mediation institutions in China are not commercial organs for profits. Due to the historical reasons and for the development of mediation, the payment of mediators is comparatively low, the purpose of which is to reduce the mediation costs and enlarge and promote the influence of ADR in China. Take this case for an example, the administrative fees charged by Beijing Mediation Commission and its secretariat was 1000 US dollars totally, while the total fees of the two mediators for the work of reading materials, hearing and mediation is only 3000 US dollars respectively. That is to say, the total cost of the case is less than USD 10,000, which is even lower than the filing fee in ICC. Compared to the fees would be charged in the four administrative claims for penalty and two litigations in court plus one international arbitration; it was simply on drop in the ocean. In this sense, the two mediators who has already selected as arbitrators by both parties, would rather give up the opportunity of arbitration but try to facilitate mediation could be said to taking a kind of

social responsibility. The number of mediators who would like to take such social responsibility is quite large in China, only those who are already on the panel of mediators in each mediation commission are nearly tens of thousands of people. Because even without any payment, we could still see their great efforts in the mediation. They know the mediation job they are undertaking is for the stability and harmony of the society, thus the mediators in China are well respected and generally enjoy good reputation. China is a country with thousands years of ancient civilizations and cultural traditions, the unique mode for social management was formed in its long history of development. Currently, in order to achieve the goal of building a harmonious society, fully display the role of mediation, has a special significance at this moment. If we could say ADR is introduced from foreign countries as a "Exotic goods", then the core part of the ADR, negotiation and mediation, has already developed gradually and matured in China in its long history of development. Among them, the most representative and well-known old sayings are "Harmony is most precious", "Harmony brings wealth" □ "dropping suit" and "more friends, more opportunities; more enemies, more fields of fighting". They disclosed the historical continuity of dispute settlement through mediation in China from the perspective of objectives, methods and standards of mediation. Besides, they fully demonstrated the wisdom of the Chinese people! Of course, if the ancient tradition and modern experience in China and the ADR in the Western modernization could be influenced □ promoted and learned mutually, we believe it would have a more positive impact on the harmony development and common prosperity for China and the world.

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