

# A Comparative Perspective of the Greek and Chinese Mediation Models

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**Abstract:** On May 2011, given the fact that transaction relations between People's Republic of China and Greece are increasingly stronger, due to the dynamic opening of the PRC to the international markets and the geographically strategic place of Greece in Europe and the Mediterranean Sea, it was announced that the Hellenic Center of Mediation and Arbitration has signed an agreement of cooperation with the CCPIT and its branches. This information was the starting point to explore and further compare the relation between these two completely different mediation systems in depth and to find the golden line of communication between them. In Greece, there have been multiple comparative studies of the Greek Mediation Framework with almost every European Union's Mediation Framework but not with one from an Eastern country. On the other hand, China's Mediation Framework has mostly been compared with the United States of America's Mediation Framework and not with a European Union's one. The current study will try to explore how two completely different legal orders, an Asian and a European one, have implemented the mediation system, by observing the different way the mediation was introduced to their legal systems and then try to find possible lessons and reforms that they can introduce to each other.

**Keywords:** Greece, China, mediation, mediation rules, Arb-Med model, comparison.

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## 1. INTRODUCTION

In Chinese Law, Arbitration and Mediation can be merged (Wang ShenChang, 2001) into Arbitration proceeding, in a way that mediation becomes a method to settle dispute. The two systems combined, create the Arb-Med structure that is considered to be an outstanding characteristic of Chinese dispute settlement. According to the Arb-Med process, the parties first initiate arbitration and then the arbitrator conducts either mediation or conciliation. Through this unique system, mediation agreements can be considered as arbitration awards and submitted to the court for enforcement.

In Greek legal order, there are fundamental differences between arbitration and mediation. In arbitration,<sup>1</sup> the arbitral tribunal is an adjudicatory body but in mediation, the triangular scheme of the mediator and the parties cannot be consider as such. Furthermore, the role of arbitral tribunal is different from the role of the mediator in that the first is a body that issues an arbitral award equivalent to a court decision based on the laws and statutes of the country, whereas the second is an individual that signs a settlement agreement between the parties.

### 1.1 European Trend: Mandatory Mediation:

The will of the European legislator towards the promotion of private mediation has not been shared by the citizens of mainland Europe's legal systems, who still prefer the judicial way, even in the form of judicial mediation. Therefore, the European Parliament suggested, through a study conducted on January 2014 among the EU member states,<sup>2</sup> a new interpretation of the Directive for Mediation. According to this interpretation every year a specific number of cases in every member state need to be solved by the means of private mediation for a balanced relation to be created between the court procedures and mediation. The European Parliament would be the one to supervise if the member states reached the

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<sup>1</sup> Arbitration is an alternative dispute resolution mechanism that is stipulated in the 7th Book of the Greek CCP Arts.867-903).

<sup>2</sup> The European Parliament in January 2014, initiated a study entitled "'Rebooting' The Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediation in the Eu."

required, from the European Directive balance. The number of cases that need to be resolved by mediation will be defined on basis of the well-functioning of civil justice, mediation infrastructure and macroeconomic indicators in every member state. If the member states do not achieve the aforementioned number of cases, then this inability will be equal to violation of the Directive. Every member state may choose the most appropriate measures to achieve the goal of the Directive either, for example, by mandatory participation in informative sessions or by employing financial incentives or by regulating mandatory mediation.

Furthermore, the survey suggests for member states, such as Greece, where the problem of "slow" justice is continuous and increasing for many years, the introduction of mandatory mediation in certain type of cases, with the possibility to withdraw from the mediation process after a specified period of time has passed.<sup>3</sup> The most important goal in the study for the interested parties is to have the opportunity to meet the facilitator either before court proceedings start or during them.

Some member states have already taken the initiative towards the above direction. Italy, by legislative decree no. 25/2010, introduced the obligatory mediation as a preliminary condition to access to the court (Martin Svatos, 2013). Consequently, the number of mediation proceedings experienced an unprecedented increase. This obligatory state was abolished after two years with the 272/2012 decision of the Italian Constitutional Court. The Court held that the mandatory nature of mediation was unconstitutional due to excess of legislative power without further explaining the substantive grounds of unconstitutionality. Therefore, mediation became voluntary again and the number of mediation cases decreased by 80%<sup>4</sup>. In Bulgaria, if parties are successful in resolving a dispute in mediation, they are entitled to a refund of 50% of the state fee that they paid to file the case in court. Romania provides an even greater incentive to parties, who receive "full reimbursement of the court fee if they settle a pending legal dispute through mediation" (Nolan-Haley and Jacqueline M., 2011). Only future will show how Greece will embrace the European Parliament's initiative.

### **1.2 Strengthening Mediation at National Level - The Establishment of Hellenic Mediation Center:**

When the 3898/2010 Law was implemented, legal scholars and practitioners were supporting the idea that, among other problems, the lack of the efficiency of the mediation institution is based on the fact that Greece did not have the foundation to apply mediation and there were not sufficient institutions to train mediators. Since then, and for the following years, there have been a lot of adjustments for Greece to fit in the new needs of the newly adopt mediation mechanism.

The first step forward was the establishment of the Hellenic Mediation and Arbitration Centre. The Greek Centre for Mediation and Arbitration (the Center) was established in Athens, with the decision of the Annual General Meeting of the members of the Association of Sociétés Anonymes and Limited Liability Companies on March 30, 2006. At first, it was a 'pilot' effort for the introduction of the institution of mediation in civil and commercial litigation, with particular emphasis on business needs. With a series of campaigns and educational seminars for the mediators and for introducing the institution to lawyers, business executives, and individuals, the Center was founded at the forefront and contributed decisively to the familiarity of Greek enterprises, legal profession and the society with the possibilities of the institution of mediation. Although initially the activity of the Centre consciously was limited to mediation, now, in order to introduce the institution to the Greek public, the objectives of the Centre also include Arbitration and other forms of alternative dispute Resolution (ADR), because often in international practice, if the dispute is not resolved by mediation, then there are attempts to resolve the dispute through arbitration or other alternative method. Already in 2010, the Hellenic Centre for Mediation and Arbitration operates as a civil, non-profit organization offering mediation services to individuals and businesses, with the assistance of mediators who have been trained and certified by world renowned centers.

The Centre's aims are:

- a) To offer to third parties, natural and legal persons, superior service Mediation, Arbitration and other alternative methods of dispute resolution, in cooperation with trained mediators that cover all legal specialties. Main objective of the Centre is to conduct mediations in appropriate places, involving mediators who are certified and trained, in accordance with the specific techniques and methods used internationally,

<sup>3</sup> The possibility to withdraw from the mediation process after a specified period of time has passed is called opting-out.

<sup>4</sup> The European Court of Justice opined that none of the Directive's provisions limited the power of Member States to establish mandatory out of court procedures and there is no breach of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Joined Cases C-317/108 to C-320/08, *Alassini v. Telecom Italia SpA*, 2010 E.C.R. 134, P 68; see also Council Directive 2002/22, 2002 O.J. (L 108) 51 (EU).

- b) To offer to third parties, natural and legal persons, high quality scientific services (consulting, research, etc.) and educational services (through seminars, conferences, workshops, etc.), and
- c) To promote the institution of mediation and/or other alternative methods of dispute resolution and to continue to bring citizens, businesses and the Greek Judicial system closer to mediation and other institutions in order to understand, accept and adopt them as an alternative and productive way to resolve disputes.

The Greek Centre of Mediation and Arbitration, with the knowledge and experience of the partners and associates and adequate logistical infrastructure, ensures smooth implementation and 'monitors' the development of mediation, suggesting an impartial and independent person, familiar with the relevant techniques, as the mediator. In 'neutral' but proper place with the help of the mediator and the presence of their lawyers, interested parties have the ability to 'hear' and achieve an amicable settlement of their dispute with absolute confidentiality and privacy.

### 1.3 Chinese Mediation – the Arb-Med innovative model:

In China there a lot of different procedures regarding extra-judicial mediation in civil and commercial disputes. In civil disputes, People's Mediation Law and certain Supreme Court Several Opinions are applied by the People's Mediation Committees,<sup>5</sup> on the contrary, in commercial disputes, mediation rules, and not a unified Law, are applicable in the mediation centers or arbitration commissions' mediation centers.

The first kind of mediation institutions that exist in China are those that have been established independently, such as the China Council for the Promotion of International Trade (CCPIT)/China Chamber of International Commerce (CCOIC) Mediation Center. The CCPIT/CCOIC Mediation Center was founded in 1987 and is the first, largest and the most famous commercial mediation institution in China, with 42 sub-council mediation centers, in provinces, municipalities, autonomous regions, covering almost all the country, establishing a very effective conciliating network. The network has been expanded at an international level as well, the CCPIT/CCOIC Mediation Center has signed co-operation agreements with many countries and sub regions around the world, such as Hong Kong, England, Greece, Singapore and Japan and has also established co-operative mediation centers such as the Beijing-Hamburg Mediation Center, the Italy-China Business Mediation Center, the US-China Business Mediation Center, the CCBC –CCPIT joint Mediation Center, the China- South Korea Business Dispute Mediation Center and the CCOIC-WTCM Mediation Center. In numbers the CCPIT/CCOIC Mediation Center has already handled around 10,000 cases with a success rate of more than 70% among parties from more than 50 countries around the world, thus verifying its role of solving international disputes and promoting international cooperation. In 2012, the CCPIT/CCOIC Mediation Center adopted the 2012 Mediation Rules and in Article 2, mentions that "the civil and commercial disputes between Chinese and foreign natural persons, legal persons and other organizations or particular disputes agreed between other special parties may be referred to the CCPIT/CCOIC Mediation Center for mediation."

The second type of commercial mediation centers that exist in China is arbitration centers that provide independent mediation services. In general, Chinese arbitration system contains a unique characteristic of combing arbitration with mediation. The parties have an arbitration agreement that they want to conduct commercial arbitration and when the arbitration procedure starts, the arbitrator can either use mediation or conciliation to settle the dispute. The popularity of Arb-Med<sup>6</sup> system has been increased due to multiple advantages that the system can offer. First, in the Arb-Med system,

<sup>5</sup> 2011年3月21日最高人民法院审判委员会第1515次会议通过,自2011年3月30日起施行。The Several Provisions of the Supreme People's Court on Procedures for Judicial Confirmation of People's Mediation Agreements was adopted at the 15th Meeting of the Judicial Committee of the Supreme People's Court on March 21, 2011 and was effective on March 30, 2011. Also 最高人民法院《关于建立健全诉讼与非诉讼相衔接的矛盾纠纷解决机制的若干意见》(法发[2009]45号)。Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation, effective from 24 July, 2009. In addition, 2004年8月18日,最高人民法院审判委员会第1321次会议通过,自2004年11月1日起施行。The Provisions about Several Issues Concerning the Civil Mediation Work of the People's Court was adopted at the 1321th meeting of the Judicial Committee of the Supreme People's Court on August 18, 2004 and was effective since November 1, 2004. Also see 《关于建立健全诉讼与非诉讼相衔接的矛盾纠纷解决机制的若干意见》2009年8月4日由最高人民法院发布。The Several Opinions on Establishing and Improving the Resolution System for Disputes by Linking Litigation and Non-litigation Cases was issued by the Supreme People's Court on August 4, 2009

<sup>6</sup> The Chinese translation on the topic is called Arb-Med, however stand-alone mediation in the English translation is Med-Arb. The Med-Arb model is quite new to the legal professions and the other non-legal professions, organizations, and enterprises in China. Stipanowich, Thomas J., et al. "East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China." *Pepperdine Dispute Resolution Law Journal* 9.2 (2012): 5.

mediation can start at any stage of the proceedings only with the consent of both parties, and on the event that the parties cannot reach to an agreement; the arbitration tribunal will continue the case and issue an enforceable arbitration award (Li Changbin, 2006). In this way the system provides flexibility regarding the choice of the parties and in the same time a stability that the procedure is effective and will result in an enforceable decision. Second, even if arbitration is a procedure that is fully controlled by the arbitrator, in the Arb-Med system the parties have the autonomy to accept or not the mediation settlement, according to their own interests (Wang Cunxue, 1993). Third, Mediation through Arb-Med is a better way to resolve disputes and in the same time maintain good and long term business relations between the disputed parties because the basis of settling the dispute is communication and understanding. However, the disadvantages of Arb-Med are also to be considered. The first disadvantage has to do with the fact that mediation and arbitration are two completely different systems, the goal of an arbitrator is to issue a decision, on the other hand, the goal of a mediator is to help the parties communicate and reach to an agreement, which is why in Greece and all the western societies, arbitration and mediation have a parallel existence and never intersect. Furthermore, when conducting mediation in front of an arbitrator, there is always the fear of arbitrator's influence during the settlement because he has the power, in the end, to issue an arbitral award and therefore persuade the parties to a certain direction thus impacting the communication proceedings (Chen Zhidong, 1998) by limiting the autonomy of the parties to the procedure. Another negative aspect of the Arb-Med is that the parties, because of the dual role (Han Jian, 1993) of the mediator also as an arbitrator, are possibly reluctant to disclose all the information to the mediator<sup>7</sup>, because later on, as an arbitrator he/she might use the information he obtained as a mediator, against the revealing party, therefore issues of trust and confidentiality arise in making the parties exposed and does not secure a neutral procedure (Qiao Xing, 2000). Finally, according to the Greek Mediation Law, mediation provides flexibility and mediators can conduct mediation at any place, any time with every medium such as e-mails, telephone, skype, fax, in person or on line while, on the other hand, mediation in the Arb-Med system can provide limited flexibility, on the grounds that mediation has to be conducted in a certain place (tribunal) and at a certain time (predetermined time of hearing).

This confusion of whether the Arb-Med can offer a flexible advantage to the parties or make the settling of the dispute more complicated, along with the demands of the Chinese business community to adjust to the economic development and globalization, led some arbitration commissions to take new measures and adopt new standards to respond to the needs of the business community.

### ***1.3.1 Beijing Arbitration Commission (Mediation Rules):***

One of the Arbitration Commissions that took steps forward to improve the Arb-Med system is the Beijing Arbitration Commission (BAC), which has established its own stand-alone mediation procedure, in order to reach the standards of international mediation. The mediation rules allow the conduct of mediation separate from arbitration procedure and establish a systematic mediation model in-line with the international standards. According to the BAC Mediation Rules<sup>8</sup>, after the parties reach to a mediation settlement, an arbitration award is allowed to be issued. In addition, the rules provide a separate list for mediators including foreign mediators too, from where the parties can chose a mediator to settle their dispute, counter to the common practice that the majority of the Chinese Arbitration Committees choose to follow by using their list of arbitrators to appoint mediators. BAC has also shown a very dynamic profile toward the training of mediators by holding international courses for them<sup>9</sup> and by conducting seminars and programs where hot issues are discussed. Furthermore, BAC has accepted a dual system for the payment of mediation fee, either by paying directly the fee according to the total amount of the case or following the international standards by paying the mediator an hourly fee, where the rate of the fee is chosen by the parties or/and the mediator. Finally, in Article 56 of the Arbitration rules of the Beijing Arbitration Commission there is a provision about replacing the arbitrator after mediation in order not to affect the final judgment, which shows that even the arbitration is formed in a way to adjust to the needs of Arb-Med. Beijing's

<sup>7</sup> Interesting is the approach of Professor Tang Houzhi who states : “[M]ediation is not arbitration; you don't need all the cards of the parties put on the table; when about 80% or even less than 80% of the cards of the parties have been put on the table, you would be able to have a good conduct of mediation; as a mediator, your job is to bring about an amicable settlement and not to make an award.”Tang Houzhi, The Use of Conciliation in Arbitration, in WIPO Conference on Mediation 6 (1996).

<sup>8</sup> BEIJING ARBITRATION COMMISSION MEDIATION CENTER MEDIATION RULES. Adopted at the First Meeting of the First Session of the council of the Beijing Arbitration Commission Mediation Center on August 31, 2011. Effective as of September 28, 2011 <http://www.bjac.org.cn/en/Mediation/Rules.html> last visited 19/04/2014 (21:31pm)

<sup>9</sup> In March 2008, BAC cooperated with the Straus Institute for Dispute Resolution at Pepperdine University School of Law and held a mediation training courses for its mediators. The course was conducted by the Straus Institute for Dispute Resolution at Pepperdine University School of Law (Straus Institute), located in the USA. The program was a huge success.

Arbitration Commission, by taking the aforementioned initiatives, has improved the quality of mediators in China and has brought a certain level of prestige to this area.

### ***1.3.2 Wuhan Arbitration Commission (Mediation Center):***

Also another Arbitration Commission that has begun to take measures to improve mediation is the Wuhan's Arbitration Commission Mediation Center<sup>10</sup> that has formulated its own independent mediation rules. The provisions that are contained in Wuhan Arbitration Commission's mediation rules are considered to be very progressive and forward-looking. First, the provisions regulate how the mediation work will be divided in the mediation center. In practice the Arbitration Commission gave the permission to the mediation center to establish five separate mediation centers within the Wuhan's mediation center, with different responsibilities. One is responsible for the general accepting and hearing of various cases, the second one is dealing only with the consumer's complaints, the third with real estate, home maintenance, decoration and similar disputes, the fourth is dealing with all the facet of private enterprise disputes concerning distributing activities and operating transactions and the fifth one is devoted to any other dispute such as logistics, business, etc. Except this network of five mediation centers, that is quite helpful for the arbitration work as well, the provisions, in order to secure the enforceability of the mediation agreement, provide the option for the results of mediation to take the form of an arbitration award. In addition, the provisions respect the autonomy of the parties, meaning that the mediators in the centers will not, by any means, force the parties to reach a settlement. Wuhan's Commission Mediation Center has helped to improve the implementation of mediation in the arbitration legal system and build the reputation of mediation in resolving disputes in civil and commercial matters. Particularly, mediation in arbitration cases in the Wuhan's Mediation center is chosen more than 80%, where 90% of the cases end with an agreement and 60% of the cases reach to a result sooner than expected (GuXuan, 2008).

## **1.4 Suggestive Reforms:**

### ***1.4.1 Adopting the Arb-Med Model in the Greek mediation scheme:***

As mentioned above the PRC has introduced an innovative and successful model of combining Arbitration with Mediation. The Arb-Med contains multiple advantages for the parties and with the proper use it could be a very efficient structure to solve disputes. In Greece, Arbitration and Mediation are two completely different procedures that by no means can combine. However, after the establishment of the Hellenic Mediation and Arbitration Center, the Greek Legal order, demonstrated the willingness to adopt new models and adjust to the developments that international business community requests. The center can provide both mediation and arbitration services, in a way that if the first fails then the parties have the choice to proceed to the second.

The procedure that takes place in the Hellenic Mediation Center (HMC) is essentially an Arb-Med structure with an important difference; the mediation agreement cannot be enforceable by an arbitral award. This difference, and not the mandatory mediation that the EU suggests, is probably the necessary element that the Greek Mediation Procedure needs to promote an efficient, authoritative and facilitative image to the parties. The Greek Legislator can consider adding mediation standards in the existing Arbitration Rules and pursue the examples of BAC and Wuhan Arbitration Committee Mediation Center, in the Hellenic Mediation Center.

There are multiple advantages of adding mediation standards in the Greek Arbitration Law, first the mediation agreement can have enforceability as an arbitral award, therefore the fear of a weak mediation agreement disappears, second, there will be an increase in solving disputes through arbitration given the fact that parties will be more willing to involve themselves in a process that takes less time, it is more efficient and gives the option of having an evaluative procedure such as mediation side by side with a facilitative one such as arbitration, and third, cases intended for arbitration will have the probability of being unlimited to mediation.

### ***1.4.2 Adopting a Unified Mediation Law in the Chinese Mediation scheme:***

In China as mentioned above, there a lot of different procedures regarding extra-judicial mediation in civil and commercial disputes. In civil disputes, People's Mediation Law and certain Supreme Court Several Opinions are applied by the People's Mediation Committees, whereas, in commercial disputes, mediation rules, and not a unified Law, are applicable in the mediation centers or inside the mediation centers of the arbitration commissions'. Alternatively, in

<sup>10</sup><http://www.whac.org.cn> and <http://www.wh-ccic.com.cn/news/jzkw/192.html> last visited 19/04/2014 (22:07pm)

Greece, a unified Mediation Law exists covering all the facet of civil and commercial disputes. It is understandable that mediation is not a legal process; therefore there aren't a lot of laws covering it, however, the United Nations Commission on International Trade law has released international standards, the United States has promulgated uniform mediation acts, the European Union has issued ethical codes and draft directives for EU states to promote mediation and also International Institute for Conflict Prevention & Resolution has promulgated standards for practitioners (Miller, Paula M., 2005). If China wants to be a part of this international community, it has to adjust to the demands of the community by issuing a unified mediation law for both commercial and civil disputes.

Toward the goal of achieving the unified, separate, extra judicial law in civil and commercial disputes, China has two options; either to review the People's Mediation Law and add articles about the commercial mediation in commercial disputes in mediation centers or to promulgate a new law, as a complement to the existing People's Mediation Law, completely focused on commercial mediation that will cover domestic and foreign commercial disputes. Either way leads to the same result, which is the creation of a respectful body of Law that would be easily accessible and understandable by the majority of Chinese people and that would be applicable to the People's Mediation Committees or/and to all the domestic and the Sino-foreign mediation institutions.

China has already built a concrete domestic and international network of mediation centers and the Mediation rules of 2012, published by the CCPIT/CCOIC Mediation center, brought the 42 domestic mediation sub-centers a step closer to the international practice. Therefore, given the fact that mediation institutions facilities already exist, I believe that if certain adjustments in the already published mediation rules be done, toward the training of mediators, the code of conduct, the judicial confirmation of the mediation agreements, the confidentiality term and the limited periods, a final step to China's realization of a Chinese mediation system according to the standards of the international community would be the promulgation of a unified, separate, extra-judicial mediation law, that will bring necessary international and domestic respect.

## 2. CONCLUSION

Comparative study can offer multiple advantages, not only it can improve and construct one's own domestic law but also is an instrument for learning about the legal culture of other countries and a tool of harmonization in order to achieve a common base for the dialogue of different laws. When comparing systems, it is impossible to decide for a winner or a loser, it is acceptable though, through the comparison, to emphasize and highlight the potentials of each system. It is necessary to accept the fact that each country will find their way to adapt to the needs of a developing society in the international arena and make the necessary adjustments. Both systems offered valuable advice for the improvement of private mediation in the two legal orders. China needs to create a separate private mediation law or to improve the existing Chinese Mediation Law by including also commercial disputes. Greece at the other end has to realize that the transforming of mediation from a voluntary procedure to a mandatory one as EU suggests, will probably not solve the problem of the hesitation of the parties to choose mediation to resolve their disputes. Instead, the Greek Legislator could consider adding mediation standards in the existing Arbitration Rules and pursue the examples of BAC and Wuhan Arbitration Committee Mediation Center, in the Hellenic Mediation Center.

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