Mediate Week 2016
2016 年調解周

"Mediate First - Advance with the times"
「調解為先 與時並進」

7 - 13 May 2016 · 2016 年 5 月 7-13 日

Organised by 主辦機構 :

律政司
香港特別行政區政府
Department of Justice
The Government of the Hong Kong Special Administrative Region

HKTDC
香港貿發局

Edited by Mediation Team, Department of Justice HKSAR

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The Mediation Week 2016 was supported by:
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The Law Society of Hong Kong 香港律師會

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HKIAC 香港國際仲裁中心 Hong Kong International Arbitration Centre

香港和解中心 Hong Kong Mediation Centre

香港調解會 The Hong Kong Mediation Council (A Division of Hong Kong International Arbitration Centre)

香港調解學院 Hong Kong Institute of Mediation

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JMHO Joint Mediation Helpline Office 聯合調解專線辦事處

Mediation Conference 2016

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13 May 2016
2016年5月13日

Co-organisers:

律政司
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The Government of the Hong Kong Special Administrative Region

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CCPIT Mediation Center

CEDR Centre for Effective Dispute Resolution

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Mediation Conference 2016
(Conducted in English)

Foreword

Following the Policy Address by the Chief Executive in October 2007, Hong Kong held its first ever Mediation Conference on November 30 and December 1 that year to promote mediation. The Department of Justice believed and still believes that holding mediation conference is one of the effective ways to enhance understanding, exchange views, share experiences as well as to explore ideas on the promotion of mediation. I am very delighted to have witnessed and participated in the holding of the Mediation Conference which has since become a recurring event in Hong Kong. Indeed, since 2014, the Mediation Conference has become part of the biennial event known as "Mediation Week" consisting of mediation events lasting a whole week.

The theme of the Mediation Week 2016, with the Mediation Conference as the highlight event, is "Mediate First – Advance with the times". As suggested in the theme of the Mediation Week, our work on the promotion of mediation has evolved since 2007. During the past decade, we have moved forward and concentrated our efforts in enhancing our legal framework for mediation, ensuring professionalism and maintaining international standards in mediation training, and to encourage the wider use of mediation as a means of dispute resolution in various sectors.

The Department of Justice plays an important role in implementing the Government's policy on the promotion and development of mediation. Events and initiatives have been held and implemented with a view to arousing the awareness relating to the use of mediation as a means of resolving different types of disputes. In the course of doing so, we discern a growing interest in and understanding of mediation from the different groups of participants including students, community groups, professionals as well as business executives. To address their varying interests and the need for more up-to-date knowledge on mediation, the Mediation Week 2016 covered a wide range of topics. Key examples include peer mediation, mediation for medical disputes, mediation for social groups, sector-specific mediation schemes, cross-border commercial mediation, evaluative mediation for intellectual property disputes and the latest development of mediation in other jurisdictions.

The Mediation Week is a good opportunity to take stock of the mediation development in Hong Kong as well as a perfect occasion for the Government, the mediation community and those interested in mediation to engage in discussion as to how Hong Kong can learn from overseas experience to further the development of mediation which would be useful for the Government to formulate the future mediation policy.

I would like to take this opportunity to express my gratitude to the speakers, the organizing committee headed by Mr Chan Bing Woon, the co-organizers and supporting organizations, as well as all the participants for their support and contributions to the success of the Mediation Week 2016.

This publication is a collection of the papers presented by the distinguished international and local speakers at the Mediation Conference and during the Mediation Week 2016. I would like to thank all the speakers who have so generously shared their insights and experiences on mediation. I certainly hope this publication would enable readers to draw on the useful references and experiences of mediation development in other jurisdictions and provides stimulating insights into the recent developments of mediation in Hong Kong. I also hope the publication will provoke discussion amongst the readers which will serve as an impetus to stimulate further study and research in areas that will take the development of mediation forward.

The development and promotion of mediation will continue to be one of the key priorities of the Department of Justice in consolidating Hong Kong's status as the leading centre of international legal and dispute resolution services in the Asia Pacific region. We will maintain close contacts with the mediation communities (both local and overseas) and look forward to seeing you in our future mediation-related events including the Mediation Conference.

Rimsky Yuen, SC
Secretary for Justice
December 2017

Preface

I still vividly recall speaking at the first Mediation Conference in Hong Kong in 2007 held at the Hong Kong International Arbitration Centre. During that time, as one of the pioneer mediators in Hong Kong, speaking about mediation was almost like a foreign language to some. Mediation became more prominent in 2007 as it was the first time that the promotion and development of mediation was included in the policy of the Hong Kong Government. I am proud to say that with concerted efforts from the Judiciary, the Hong Kong Government, mediation organizations and stakeholders, the mediation culture in Hong Kong has not only taken root but also blossomed over the past 10 years. The Mediation Ordinance (Cap. 620); the establishment of the Hong Kong Mediation Accreditation Association Limited; and the various pilot mediation schemes that had proven successful, provided a solid foundation for Hong Kong to become a leading centre in dispute resolution within the Asia Pacific Region.

Although much good work has been done in the past decade, we must not take pleasure in this complacency. It is with this in mind that the theme of the Mediation Week "Mediate First – Advance with the times" was decided. Whilst maintaining our primary objective of encouraging parties to "mediate first", we also ought to be mindful of the latest global developments and to "advance with the times". The Mediation Week 2016, which is held for the second time, consisted of a series of sector specific seminars and a Mediation Conference as the finale programme. The Mediation Week provided a platform for mediators, lawyers, corporate executives, academics, professionals and participants interested in mediation to exchange views on the future development of mediation in Hong Kong.

The papers in this publication presented by our international and local distinguished speakers cover a wide range of topics from community mediation to commercial mediation. Some of these papers were produced by the speakers after the Mediation Week to provide a more in depth discussion of their respective topics and are not simply replicate of the conference papers.

On behalf of the Organizing Committee of the Mediation Week 2016, I would like to thank all our distinguished speakers for taking time to share their

invaluable insights and experiences with our audience. A big thank you to our co-organizers and supporting organizations for their unfailing support which has led to the success of the Mediation Week 2016. Heartfelt thanks to David Dai, April Lam, Francis Law, Jody Sin, Ludwig Tsoi and Amaranth Yip, for their passion in promoting mediation and assistance in organizing the Mediation Week seminars. Special thanks to the Mediation Team of the Department of Justice for their effective secretariat support, in particular, Venus Cheung for her unwavering dedication throughout the Mediation Week and for being a wonderful Master of Ceremony at the Mediation Conference.

Lastly, it is my vision for Hong Kong to continue developing and strengthening the mediation culture through more education; enhancing the regulatory regime for mediation professionals; and upholding the mediation legislative framework.

Mr Chan Bing Woon, SBS, MBE, JP
Chairperson of the Organizing Committee of the Mediation Week 2016
May 2017

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調解與處理家長訴求

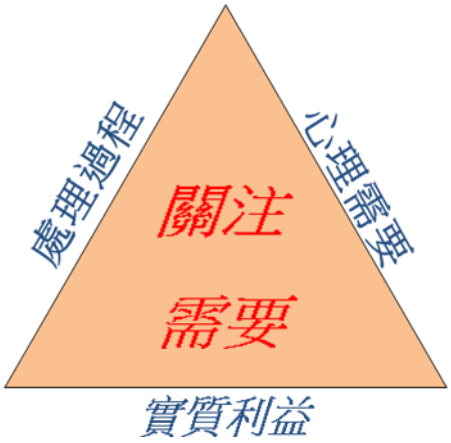
李慧芬女士[1]

隨著時代的變遷，現在孩子的需要與家長的要求不斷改變。出生率減低，每個家庭都只有一至二名子女，家長照顧他們的時間相應增加，期望學校、老師也能像家長一樣全面照顧他們，但因老師平日的教學及行政工作已十分繁重，實在很難提供此「貼身」的服務。因為期望的落差，自然家長的「投訴」亦比以前增加了。根據香港教育工作者聯會於 2014 年 3 月的調查（晴報，2014 年 3 月 26 日）發現近四成老師在過去半個學年曾因學校工作被家長「投訴」。「投訴」內容主要以教師的獎懲，子女被同學欺凌及學生功課量有關，對老師的工作挑戰真的不少。根據本會前線學校社工的經驗，如果在早期能好好處理家長的訴求，便可避免不必要的糾纏及「投訴」，使衝突降溫。事實上，我們處理家長訴求時往往會運用調解的理念和技巧，真的能帶出顯著的效果。

調解是一種以和平處理爭議的方法，透過調解的過程，促進彼此諒解和提高個人處理衝突的能力。我們建議使用促進式調解（facilitative mediation），因這模式著重處理關係，正配合家長和老師要在學校持續性的合作關係，能令事件和氣收場。

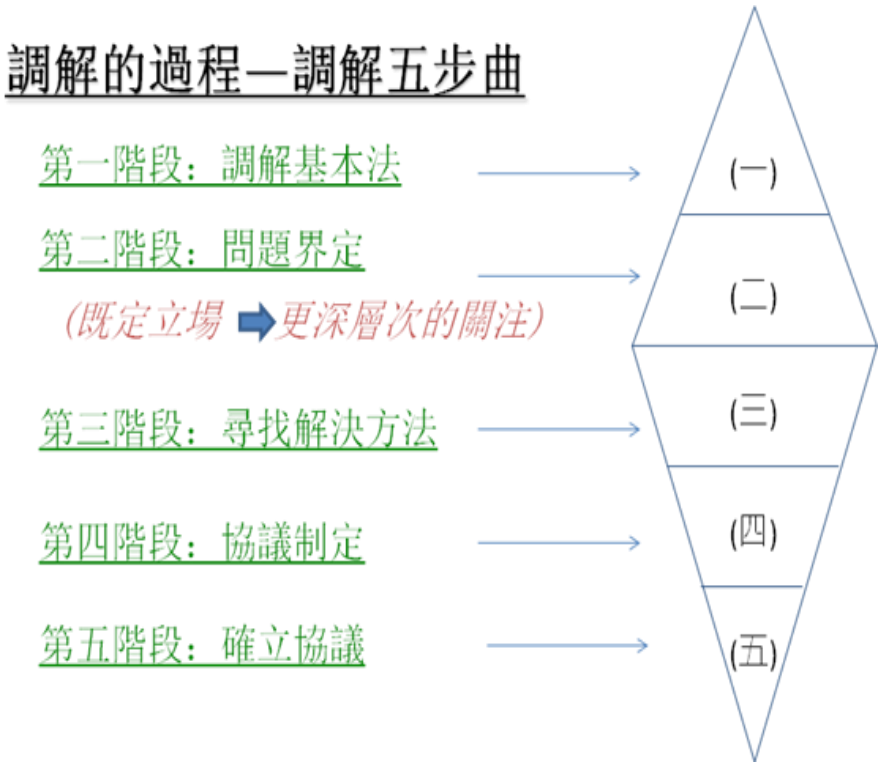
調解概念的「滿足需要三角形」（Satisfaction Triangle，圖一）提醒調解員要明白衝突雙方的關注需要。每一個訴求都有三方面要滿足：實質利益，如賞罰；心理需要，如被尊重及處理過程，如在過程中如何被對待，調解員如何公平地處理衝突。這三角形對老師在處理家長訴求時能給予一些提醒：有些時候礙於學校的制度，老師未能滿足家長要求的實質利益，但老師如能多注意如何滿足家長的心理需要，在處理過程中如何令家長覺得公平，家長的情緒便得以舒緩。老師如能掌握家長的深層的關注和需要，就可一起創造更多解決的方法，使問題更易解決。

[1] 香港家庭福利會認可家事調解員、資深學校社工



圖一：滿足需要三角形（Satisfaction Triangle）

為要了解家長的關注，使他們的需要獲得滿足，我們建議可參考調解的五個步驟。調解是一種著重程序及技巧的衝突處理方法（參考圖二）。調解的過程可分為上三角及下三角，上三角集中了解問題，擴闊雙方既定的立場，找出更深層的關注；而下三角則集中找出解決方法。



圖二：調解五步曲

於第一階段的「調解基本法」、老師可注意事先安排合適的房間，決定誰參與會面及安排會面，這樣可減少很多不必要的誤會和令過程更順暢，而

在這方面的建議亦可參考教育局的優化學校投訴管理計劃[2]。

於第二階段的「問題界定」，老師可透過問題了解事情的核心，安撫家長的情緒，從而了解家長的深層關注。從西方傳統的輔導學「薩堤爾模式」（Stair, Benman, Gerber & Gomori, 1991），以致近代華人發展的「知行易徑」（曾家達，游達裕，2011）都提出從表面行為找出深層需要的重要性，如果人的需要被滿足，就能各取所需，減少衝突。所以，我們不先以“投訴”的角度去看問題，而是用一個需要未被滿足的角度去看來尋求協助的家長。

在處理訴求時，我們特別著重於情感的回應上，協助家長舒緩情緒之餘，又可從中了解家長的深層關注。當我們找到深層關注之後，更多的可能性便會出現，問題自然會迎刃而解。當然，老師自己的需要也不容忽視，老師也先要預備一個平靜的心才可以接這些具挑戰性的任務。

如果能找出家長的深層需要，於第三階段的「尋找解決方法」中，老師與家長就可更有創意地解決問題，尋找其他的出路，達致雙贏。

除了這些即時的應對技巧外，學校層面也要預先建立透明的投訴機制及程序，推動政策的改變，優化學校的投訴紀錄，以便跟進。

至於老師方面，學校需要建立一個協作團隊，讓負責處投訴的老師有足夠的支援。同時，提供老師培訓的機會。讓老師學習處理家長訴求的技巧及態度。

當然最重要是加強與家長的溝通，特別是與家長教師會的聯繫和合作，嘗試在於學校提供調解教育的資訊給家長。這方面也是我們家福會的近年的發展方向。

最後，我們希望調解的訊息能滲透校園每一角落，使同學、老師及家長都能享受和諧的校園生活。所以，我們一直致力在學校不同層面推動調解，舉辦學生的朋輩調解員訓練、調解教育講座及工作坊、親子調解工作坊及講座、幼稚園及中小學老師的培訓。參加者的反應十分良好，均表示活動有助他們應用調解的概念及技巧去處理校園及生活的衝突中。期望這短短的分享能協助各老師在處理校園衝突中更得心應手。

參考資料：

[2] http://www.edb.gov.hk/tc/sch-admin/admin/pilot-scheme/index.html

Stair V., Banman, K. Gerber, J. & Gomori, M. (1991) . *The Stair Model: Family Therapy and Beyond.* Palo Alto, Calif: Science & Behavior Books.

曾家達，游達裕 (2011)。<知行易徑：基礎與應用>。
香港：策馬文創有限公司

〈家長投訴騎呢 老師怕怕〉，晴報，2014 年 3 月 26 日。

家校善用調解，共建和諧校園

鄭會圻先生[1]

和諧校園的組成

學校仿如社會的縮影，在人與人之間彼此相處時必定會有矛盾，處理不好時便會演變成衝突，在校園內經常被討論及受注重的矛盾衝突包括有同學之間、同學與老師之間、同學與家長之間、甚或是家長與老師之間。然而很多時我們忽略了教職員之間的衝突，他們彼此共事的時間，可以是幾年至幾十年，試想想倘若老師們之間，又或是教職員之間因為沒有妥善處理好相互間的矛盾與衝突，以致他們帶著負面的情緒到課室，不論當事人有多專業，也會影響教學質素或與同學家長們的關係。所以教職員間的和融相處是和諧校園不能缺少的重要一環。

在校園裡，職間和諧的重要

對學校機構的重要

假如員工在工作上獲得滿足感和歸屬感，既能提升他們的責任感，又能引發他們主動發揮個人所長，對於學校機構、教師員工也會有很多方面的好處，從而增強機構的競爭力及推動發展，而且亦會降低工作間、校園內意外事故發生的機會。

對個人的重要

與此同時，倘若當事人處理衝突時有所失當，可能會影響個人情緒健康、睡眠質素，或會令工作及服務表現有所閃失，負面形象難免影響前途；另外，若持續帶著困擾回到家中，可能引至家庭和諧受損；更甚者可能因而辭職，此舉不單是個人成本，亦令機構人手有所流失，間接造成機構無形的損失。

處理職間衝突的慣常現象與模式

處理矛盾分歧的傳統模式—逃避與對抗

當遇上衝突時各人會有不同的反應及行為，有些人會採取漠視問題、逃避處理的方式；亦有些人會以主動進攻的策略、威脅恐嚇的手法應對。這正

[1] 香港調解學院院長

是人類與生俱來處理衝突的慣常方法。

然而，以逃避方式面對問題，好處是無須操心，但問題仍然存在，未能夠得到解決，後果有如一個地雷埋在職間，可能永遠平安無事，直至有一天被觸動到才會引爆，到時才處理補救可能為時已晚。另一方面，若以權力對抗的方式，或會得到短暫的妥協和屈服，但被懾服一方當遇上機會時，便會作出報復，這種惡性循環週而復始，鬥爭便永不終止，後果多是兩敗俱傷，可見對抗或逃避均不是解決矛盾衝突的有效方法。

矛盾的升級及後果

員工在工作間出現的衝突，若是屬於小節糾紛，是無須第三者介入處理，因為一般他們可以透過“社會大學”的教導而自行化解。但作為管理層便要留意由小節糾紛升級為頂撞的衝突，因為如果雙方已經發生言語上的頂撞或口角，意味着他們的矛盾已經升級，假若任由發展下去便可能升級至更激烈的行為，並有可能引發至危機，所以管理層在留意到員工間有頂撞的訊號便有需要介入化解，以免由此釀成機構災難！

調解，是鼓勵雙方面對事件，不逃避、不對抗、以對話方式共同解決問題。

如何運用調解知識技巧處理職間分歧

傳統的上司對於處理同事之間的衝突，很多時都是採取勸導員工彼此包容，忍耐和忍讓，然而這種一刻的妥協只能得到暫時的平靜，若果他們不解決基本的分歧或處理分歧的態度方式，職間也難有和諧。假若他們不妥協，一般的上司便會運用權力，為他們的爭執衝突作出裁決，判斷誰對誰錯，並指示他們如何處理，若再違反，便辭退一方，甚至雙方。

在智識型的機構用這方式成本是非常昂貴的，當人材是機構的重要資產時，無論是職員間因不能處理他們之間的衝突或不服上司的裁決而離職，機構重新聘用一位人材費用高昂，而由第三者所作的裁決及處理的方法，往往並非當事人自願接受的，因而令一方、甚至雙方都不滿意。

調解並非裁決，而是以中立的第三方角色以關注式協商，透過對話與當事人共同商討各方可接受的解決方案。

職間衝突定義

職間的衝突可以是很複雜，內容錯綜複雜，不是一時三刻可以處理。而相關人士祇須經過一至二天的訓練課程後，便有能力調解部份的衝突，在這裡我們簡單界定可以調解的職間衝突是：

1. 雙方在工作關係上有關連或需互相倚靠；
2. 一方或雙方覺得對方犯錯而感覺不滿意和憤怒；
3. 有證據顯示他倆的爭拗已對機構或部門造成負面影響。

職間調解的基本條件

職間調解會議是採用面對面直接對話方式，為防範員工以逃避或對抗的方式進行會議，因此調解會議須設下一些基本條件：

1. 雙方要有充足的對話時間；
2. 彼此在面對面的環境下傾談，直至達成雙方認為可行的解決方法案為止；
3. 在保密情況，沒有其他騷擾，如接聽來電或有第三方打斷會議的進行；
4. 會議期間雙方除了需要相互尊重及有禮貌對話之外；
5. 還須遵守「不得無故離開」及「不作強權加諸對方的單方面方案」。

處理職間分歧的不同模式

自行調解

其特點是當事人除了是其中一位爭議者外，同時亦扮演調解員的角色，技巧是以調解員身份去邀請及游說另一方參與會議，一起商討解決方案。一般來說，對方通常不接納邀請，或以沒有爭拗等諸多原因推卻，自行調解的訓練便會著重如何訓練當事用不偏不倚的句子、客觀的表述、過程的編排，令對方願意以直接對話、以關注協商討論共同解決問題。

第三者主持調解

由第三者主持的調解會議，該第三者既可以是同級同事，亦可以是人事部同事，同時亦可以是由上級同事包括直屬上司，其重點是雙方當事人都相信該第三者會保密、過程中立、行為不偏不倚及在公平原則上進行。

由同級同事或人事部同事主持調解會議爭議不大，但由上司主持調解會議在角色上有一定程度的衝突。上司難以獨立，而下屬和諧對上司有一定好處，縱使如此，由上司主持調解會議亦存在一定的優勢。例如上司擁有權力協助他們有效地執行解決方案，並能跟進他們是否執行，上司地位受尊重令他們更能遵守規則進行會議、明白機構的文化、可動用資源及機構政策上的取向，上司要相信同事們有能力創造解決方案，切忌運用權力指令他們接受上司的方案並以正面樂觀的態度去主持會議便可以。

即使如此，由上司主持的調解會議始終會令員工心存憂慮，既不願意亦也可能沒有信心坦誠表達，而且有些衝突的源頭可能正是來自上司，包括工

作分配不公、偏私、或指示不清晰等原因所引致，因而令調解難以有效進行，衝突管理啓導法正能填補這方面的不足。

衝突管理啟導法

甚麼是衝突管理啓導法

衝突管理啓導法是由一名衝突管理教練以問題方式去啟導當事人解決問題，其特點是以「單對單形式」的個人會談方法與一方當事人對話，無須發生衝突的另一方出席會議，衝突管理教練甚至無須知道另一方的真實身分。整個過程是保密的，期間需要當事人自願參與。

衝突管理啓導法的理論基礎

衝突管理啓導法的模式是運用輔導學的反映法及自我反省法，啟發當事人重新檢視發生不安及衝突的因由來源，到底對方觸犯了當事人甚麼？價值觀？個人信念？現實需要？又或是身分角色被詆譭？教練更要著重調解學的中立、不給予意見、不定對錯，期間以當事人所訂立的目標為本，集中討論在事件中引致雙方因衝突而動怒的事項，提高當事人的警覺，從而啟導當事人對整件事件產生另一些角度的看法，與當事人評核可能達至目標的不同方法的利弊，從而試演最佳方法。

衝突管理啓導法的特點

衝突管理啓導法的目標是由當事人自行決定，教練根據有系統的程序在不給予任何意見下，透過一連串的有力問題，啟導當事人拆解爭執的由來，讓當事人明白不滿甚或爆發衝突的原委。同時教練會以同樣方式引導當事人從另一方的角度拆解當事人可能令爭執方觸怒不滿的因由，在完成這一階段的歷程後當事人往往對整個衝突事件有一些新的觀點或啓發，其後由當事人自行構思能達到其目標的可能方案，教練祇會協助當事人分析不同方案的優劣，並在當事人預演其方案後，反映對其預演的意見，整個過程都是在提升當事人處理衝突的能力。

可應用的範疇

衝突處理啟導法，在職間的應用範圍很廣泛，尤其是對一些不均衡勢力的情況，例如上司與下屬、不知如何面對難纏的第二方、或是當事人希望提升自己處理衝突問題的能力。亦可應用於管理一些不受管束的下屬、或遇上同期訓練和資歷相若的下屬、或工作表現評核時，要傳遞一些難免引起員工反彈的建議或消息。

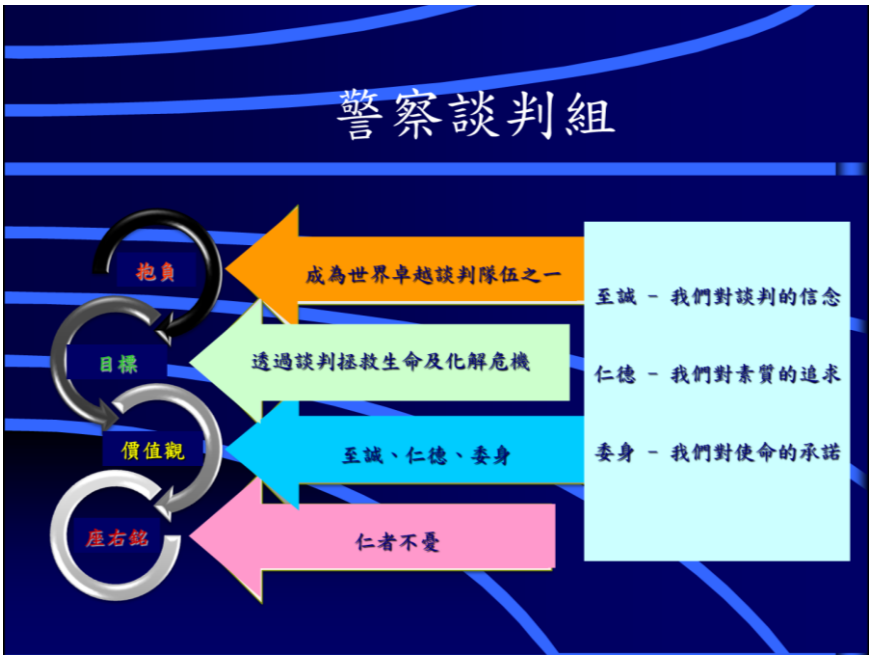
結語

一個和諧的城市是由和融的社區、校園、家庭、機構等所組成。我們在中學校園內會學習不同的學科，例如：數理化學；在大學求學時有會計、電腦、工程等科目，至今天只有少數著名大學提供衝突管理學課程；另一方面，很多人都體會到職間和諧的重要性，但仍然缺乏或沒有支援提升員工解決分歧衝突能力的課程。我們希望員工從職間開始提升解決衝突的能力，當機構體驗到因員工能妥善及有效解決衝突後為它所帶來的利益，自然會投入資源訓練員工。員工能力提升後，自然有能力化解家庭糾紛，繼而處理社區的紛爭，而學生能從家裡學習，在學校運用，和諧校園便指日可待，希望我們的下一代是以對話協商取代角力對抗來解決分歧衝突。

危機談判

黃廣興博士[1]

秉承著「至誠（Passion）－我們對談判的信念，仁德（Noble）－我們對素質的追求，及委身（Commitment）－我們對使命的承諾」這三個核心價值，香港警察談判組不斷為實現我們的目標「透過談判拯救生命及化解危機」而奮勇向前。警察談判組於一九七五年成立，現有約七十五位成員，所有成員都是現役警察，警銜由警員至總警司。這些談判專家們來自警隊不同單位，平時各有不同職務，我們都是自願兼任談判的工作。



警察談判組的座右銘「Who Cares Wins」（仁者不憂），充分體現了談判所包含的仁義博愛的精神-為拯救生命而無私奉獻，並借《論語》中的「仁者不憂」為中譯，強調在談判過程中必須秉承同理關愛的理念。我們相信在危機中必須時刻保持積極熱忱，以盡力關顧的態度對待各方，才能夠創造多方共贏的局面。

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[1] 高級警司、香港警察談判組主管

通常我們認為談判是雙方通過溝通，試圖影響對方而達成協議。然而對我而言，談判是 100%的藝術和 100%的科學，我認為它分為四個部份：

NE-GO-TI-ATION：

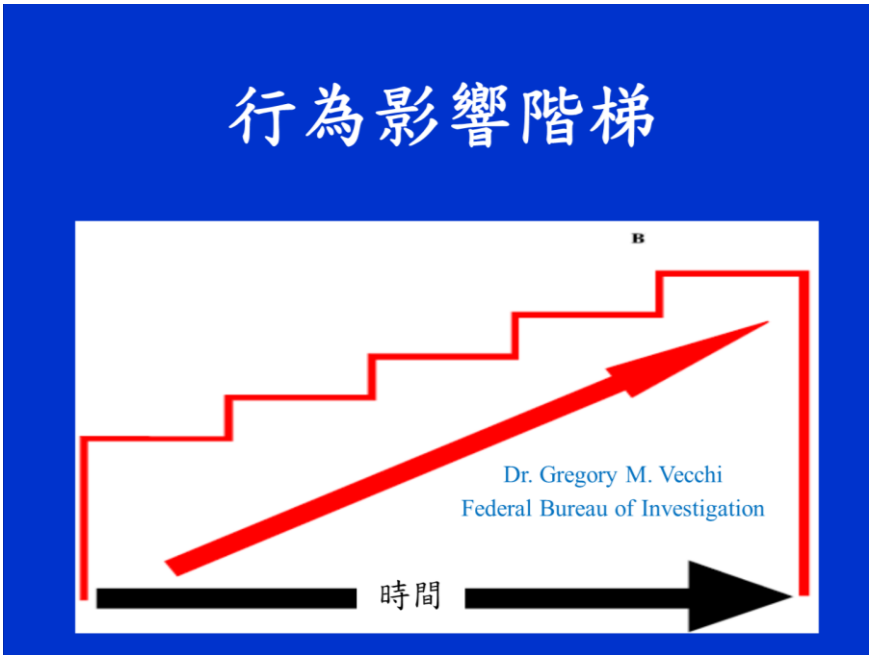
1. NE 是需求（NEED）－瞭解自己的需求，以及處於危機中其他人的需求。瞭解驅使你參與本次任務的原因，以及它對你的工作可能產生的影響。

2. GO 是目標（GOAL）－知道你的目標，並瞭解在危機中的其他人的目標。

3. TI 是時間（TIME）－談判需要時間，談判員也需要定時離開火線以便自我調整和壓力管理。

4. ATION 增加了一個 C，便成為行動（ACTION）－我們需要同步作出戰略和戰術的準備。

我們用的一套危機談判模式的是「行為影響階梯模式」〔Behavioural Influence Stairway Model（BISM）〕。這個模式主要分為四個階段：積極聆聽、同理共鳴、建立互信及產生影響，並由我的好朋友格雷維奇博士（Dr. Gregory Vecchi）提出的。它羅列了危機管理的各個重要步驟，並被學術界及多國執法單位廣泛應用。BISM 解釋了在危機情況下談判員與對方建立信任的過程。談判員由毫不相干發展為能夠影響對方，並最終令對方聽從自己的建議。



綜合多年的危機談判經驗，我建構了一個處理危機的 7Cs 策略如下：

1) **C**ordon 封鎖：管控受影響區域；

2) **C**ommand 指揮：設立現場指揮架構；

3) **C**ommunication 溝通：維持現場各持份者，包括與當事人、其家人、警察、消防單位及其他相關人士的有效溝通；

4) **C**ontrol of Emotion 情緒管理：爭取時間，以緩和當事人的情緒並強化其理性；

5) **C**oordination of Intelligence 情報協調：情報主導，針對當事人的心理狀況及其他關注事宜制定危機處理策略；

6) **C**ommitment 委身：致力拯救生命；

7) **C**are 關顧：除當事人外，同時關顧指揮員及其他談判組員的感受。

每一個身處危機的人都有一個屬於自己的故事，他們都希望有人傾聽他們的想法並渴望得到別人的理解。積極聆聽或同理聆聽讓我們能夠從對方的角度瞭解和照顧他們的想法和需求，只有通過這個首要步驟，才能和對方建立關係，最終達至改變對方並解決危機。

危機現場通常充滿緊張和混亂，我們未必能獲得太多關於當事人的背景資料或其他與事件有關的信息。我們會運用積極及同理聆聽技巧來爭取談判的時間，希望令對方穩定情緒並回復理性，然後才開始探討問題並找出解決方案，實現我們的目標「拯救生命及化解危機」。

在醫學界使用調解的可行性及裨益

陳肇始教授, JP[1]

今年 5 月，我很高興獲邀出席 2016 調解周，和與會人士一起討論推行醫療調解計劃的可行性。

香港的醫療系統以高質、高效見稱。我們在醫療服務方面取得卓越成就，有賴本港超過十萬名醫護人員的貢獻。他們勤奮盡責、表現出色，多年來贏得市民的信任和尊重。

醫護人員是市民健康的守護者。香港市民一直對醫護人員賦予高度的尊重和認同，同時對他們抱有很大的期望。一如許多其他地區，公眾對醫護人員的期望愈來愈高，病人投訴和醫療糾紛愈來愈普遍。

病人可因不同理由而作出投訴。除了涉及專業失當及醫療疏忽的投訴外，我們留意到最常見的病人投訴是涉及治療成效與病人期望不符，或病人與醫護人員溝通出現問題。其實，投訴或糾紛往往只由於醫護人員與病人之間的誤解或溝通不足所引致。

因應投訴的性質，現時有不同向醫護人員作出投訴的途徑。病人可向個別執業者、執業機構、專業人員及／或規管機關、有關當局及法庭提出申訴。然而，我們明白對病人而言，有關程序並不簡單，而且調查投訴和進行紀律聆訊可能需時甚久。此外，市民亦十分關注在處理投訴過程的透明度及公開性。最重要的是，有關過程複雜需時，使投訴人往往在等待投訴結果過程中，感到氣餒，因而對醫護人員及有關機構失去信心。

我相信大家都會認同，投訴對醫護人員及病人或其親友來說都是不愉快的經歷，而醫療糾紛和醫療疏忽申索就更令人煩擾。為協助醫護人員及投訴人溝通和促進雙方的了解，減輕事故對所涉各方造成的壓力及損失，我們可以研究以調解作為現有申訴途徑的另一選擇，用以處理不涉及專業行為失當的投訴。

調解是一種自願參與的程序，藉着受過專業訓練而身分中立的第三方，即調解員，協助爭議各方進行溝通和協商，最終在友好的氣氛下解決糾

[1] 食物及衞生局副局長

紛。調解員提供支援及實際方法，幫助爭議各方討論和辨識引起爭議的地方；探討各方的需要和利益；找出所有可行方案並從中挑選最適合的解決辦法；以及擬定詳細協議，詳列各方就每個問題所議定的解決方案，而不是判定誰是誰非。各方均有機會陳述本身的論點並聆聽對方的說法。調解過程着重妥協與和諧，任何一方都有權隨時終止程序。

我認為在醫療界使用調解處理醫療糾紛和醫療疏忽申索是一可行途徑。調解已愈來愈普遍，全球經驗顯示有關程序協助達成和解的比率很高，而且大多數人都對調解結果感到滿意。調解作為解決爭議的方法存在多方面的優點，包括讓各方能夠控制爭議結果，促進他們之間的溝通，創造有利及具建設性的環境，以及具成本效益和有效地使用時間。此外，調解可避免辯論式訴訟制度的壓力和衝突，而最終達成的和解條款可包括法庭及／或紀律機構所不能決定的事宜。

除了成本效益這顯著優點外，調解的主要特色包括下列各項。首先，調解程序協助各方尋找“可接受”的方法，以解決有關問題，而無須設法確定法律責任或過失。因此，調解在達成滿足各方需要的和解方面更有彈性，而且能夠超越目前的處理投訴途徑所能做到的範圍。其次，整個程序均屬自願及保密，可避免不必要的宣傳及媒體的關注；提供有利環境，讓各方開放和坦誠地交換意見；以及讓各方能夠自行作出決定，並達成他們較願意和樂於遵守的協議。第三點，是調解通常能讓各方維持關係，甚至可改善各方關係。當投訴獲得妥善處理和爭議獲得解決後，病人通常會樂於繼續使用有關服務，因為他們知道不滿已獲得注視。此外，我相信醫療調解所達致的和解或協議，在很多情況下不但回應調解各方的需要，而且也回應他們的家屬和照顧者的需要。鑑於這三贏的情況，調解應同時能提升各方的持續關係，以及社會對整體醫護專業人員的信任和尊重。

我們看到醫學界對採用調解處理醫療申訴愈來愈感興趣，而在這方面的培訓也愈來愈多。舉例來說，為醫療及醫護專業人員提供的調解培訓課程及計劃均有所增加，當中包括由醫院管理局、香港醫學會和本地大學舉辦的講座及研討會、工作坊，以及證書課程等。香港醫學會和香港牙醫學會均設有病人投訴調解委員會，並有成員從事醫療糾紛的調解工作。醫療人力規劃和專業發展的策略性檢討工作將於年內發表報告，我們預期有關建議會包括探討可否設立途徑，通過調解處理有關醫護專業人員不涉及專業失當的投訴。

有效地解決醫療糾紛對各方面都有好處。然而，在設立醫療調解計劃

方面，我們還需要就不同的調解模式的使用，以及調解這個工具的整體適用性和醫療調解計劃的框架設計作進一步探討。我感謝律政司調解小組和香港醫療調解學會共同舉辦研討會，為有關的各方人員和團體提供一個分享意見和知識的寶貴平台，對使用調解解決醫療糾紛進行研究。現今的醫療體系需要有其他選擇以解決糾紛。我們應該研究如何推展這項選擇。

使用調解解決醫療投訴的考慮因素

劉允怡教授[1]

香港醫務委員會（醫委會）

醫療專業有著很多的特色：

- 處理生與死
- 治療往往有利，但有時可對病人造成傷害
- 屬於一個自我規管的團體
- 屬於這個自我規管機構的成員需要接受業界的行為標準及處罰機制的監管。

在香港，這個自我規管機構就是香港醫務委員會（醫委會）。醫委會的權力來自香港法例第 161 章《醫生註冊條例》及其附屬法例，當中包括：

(a)《醫生(選舉規定)(程序)規例》；
(b)《醫生註冊(費用)規例》；
(c)《醫生註冊(雜項規定)規例》；及
(d)《醫生(註冊及紀律處分程序)規例》。

醫委會的功能：醫生註冊、維持醫療實務標準、及對醫生作紀律研訊。現時，醫委會只會在收到投訴通知時才採取行動。這些投訴可來自病人及親屬、醫生同事、政府及非政府組織、警方、法庭（當處理被判刑事罪成的醫生時）及其他來源，如報章。

法律上的疏忽

任何對醫治的不滿可來自於：治療效果並未達到病人的期望、治療的併發症、“高昂”的專業費用、醫生的“惡劣”態度，又或者醫患間的個人衝突。

但要強調一點，不滿並不等同醫療疏忽。

[1] 香港醫務委員會主席

疏忽在法律上需考量以下幾點：

(1) 任何醫生都有法律責任對其病人負上合理程度的關注；
(2) 違反此責任對原告人造成傷害；
(3) 有否違反此責任可按照業界一般能力的執業者的標準而衡量。

醫療專業的《希波克拉提斯宣言》指出醫生有責任將病人的利益置於個人利益之上，及醫療專業應在其能力範圍之內守護公眾避免傷害及錯誤。

醫療失誤

在醫學中，就算有最好的照料，治療病人時也會發生錯誤。醫生不可以在每次發生錯誤時都受到責備。醫生應在保護下無懼地向他們的病人提供良好的治療，否則沒有醫生願意醫治高風險的病人，而醫生只會施以“防禦性醫療”，這或對病人造成傷害。

在現實世界中，每個人都會犯錯，並且每個人都會犯無心之失。因此，並非所有錯誤都應被視作醫療失誤。

醫學仍是不精準的科學。現代醫學越趨複雜，隨之而來是對病人造成傷害的驚人風險。美國、英國、澳洲及以色列的研究顯示在１００名病人中就有高達6.7名病人出現嚴重或潛在的醫療失誤。不利的事件可在3.6％的入院病人中發生，當中超過一半是可避免及約１3.6％可導致死亡。

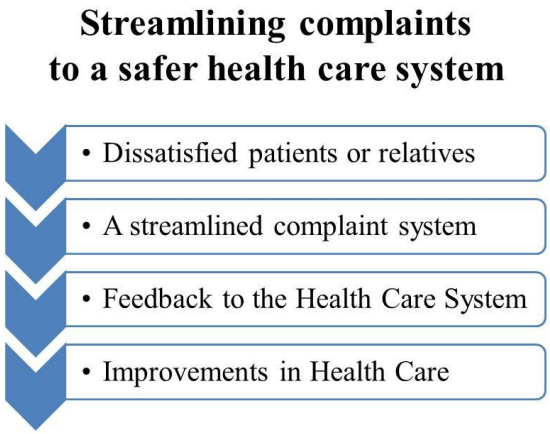
像這些數據，一旦刊登便會產生公眾情緒，部分導致嚴厲的監察及批評，然後要求懲處藉以企圖指責及懲罰某人。如此的方向並不可行。

來自航空業的教訓

我們應向航空業極好的安全程序學習。來自航空業的教訓是恐懼、報復、懲罰並不能產生安全，反而會產生防禦、保密及帶給人們極大的痛苦。

更安全的醫療系統

如果我們想要更安全的醫療及保健，我們應嘗試設計一個更安全的醫療系統，完善投訴就是達至一個更安全的醫療系統的其中一個方法（圖一）。



圖一. 完善投訴以達至更安全的醫療系統

航空業可在飛行風險高的時候取消所有航班。與航空業不同，在衡量相對可能性後認為治療對病人有利，儘管病人或為有高死亡風險，醫生仍然需要醫治或給病人進行手術。

醫委會投訴機制的現有問題

醫委會現有的投訴機制存在很多問題。緩慢的投訴機制對醫生及投訴人的日常生活造成長期的焦慮及干擾。由於經常有律師參與期中，因此費用昂貴。這是種含有勝負風險的對抗性方法。當中只有少數投訴會進行研訊（圖二）。民眾存在不滿的聲音，這不足為奇。

Number and Nature of Disciplinary Inquiries conducted by MCHK

Nature	2007	2008	2009	2010	2011	2012	2013	2014	2015
Disregard of professional responsibilities to patients	12 (incl. 2 part heard cases)	13 (incl. 1 part heard case)	8	15 (incl. 2 part heard cases)	10	14 (incl. 3 part heard cases)	12 (incl. 2 part heard cases)	17 (incl. 2 part heard cases)	12 (incl. 7 part heard cases)
Conviction	-	3	3	6	6	2	4	4	4
Labelling of drugs	-	2	2	-	-	-	-	-	-
Issuing misleading, false medical certificates	8	2	2	1	1	-	1	1	2
Advertising/ canvassing	-	3	4	10	4	-	5	1	3
Others	-	-	-	1	-	-	8	2	-
Total	**20**	**23**	**19**	**33**	**21**	**16**	**30**	**25**	**21**
No. of complaints received	**472**	**469**	**493**	**476**	**461**	**463**	**452**	**624**	**493**

圖二. 醫委會進行紀律研訊的宗數及性質

針對醫生的投訴系統可以改善嗎？

這裡有兩個可行方案：

I. 把醫療調解引進到香港

醫療調解是否可以幫助解決醫療投訴這個問題可由一些發達國家的經驗解答，當中顯示醫療調解程序可成功地解決一些醫療投訴，籍以減少會發展成正式紀律研訊的投訴個案。個人來說，我相信將醫療調解引進到香港前有很多因素需要非常小心地考量。當中有優點及擔憂。

優點有：

(1) 它減少投訴衍生至紀律研訊的數量；

(2) 它加快處理醫療投訴的過程，因此對雙方日常生活造成較少的焦慮及干擾；
(3) 它可減輕費用，因醫療調解的費用沒有紀律研訊般昂貴；
(4) 它可令雙方更滿意，因其並非對抗性的方法；
(5) 它可更好地解決處於專業失當邊緣的個案。

現時，案件被人為畫分成專業失當及非專業失當。這是一種“非黑即白”的方法，但當中卻存在著很多灰色地帶。現時，這條人為畫分線是基於案例。如果這條線過往定得太高，便會妨礙醫生為高風險病人提供治療。如果這條線定得太低，就會造成公眾不滿及指責醫委會“醫醫相衛”。

如把醫療調解引進香港，我建議可用醫療調解解決之前因輕微專業失當而令該醫生獲發警告信的案件。例如一些藥物標籤的無心之失，如處方剛過期藥物。

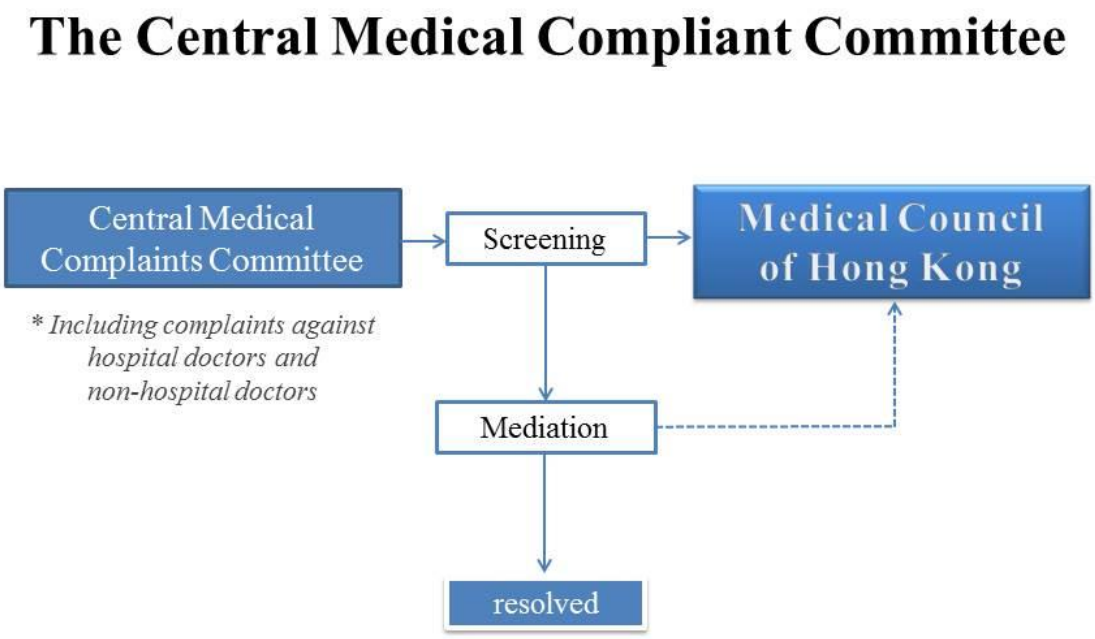
我對把醫療調解引進香港的主要擔憂是怎樣篩除不適合醫療調解的案件。例如一些爭議須要由法庭頒布屬宣布性質的濟助、刑事罪行、真實及嚴重的醫療疏忽案件、性相關罪行及最後，故意或重覆的犯罪行為如欺詐、不當／過度收取醫療費用。

我也有些輕微擔憂：－

(1) 醫療調解會否引致醫療投訴的數量上升？
(2) 是否有足夠的調解員處理醫療投訴？
(3) 醫療保障協會會否涵蓋醫療調解的費用？投訴人又是否需要支付有關費用？

如果我們決定把醫療調解引進香港，還有兩個因素需要考慮：－

(1) 是否需要訂立道歉法例－其他講者將會就這個議題發表演講；
(2) 我們應否設立一個中央醫療投訴系統？（圖三）



圖三. 中央醫療投訴委員會

中央醫療投訴委員會的主要功能是篩選及完善醫療投訴。它應由一名經驗豐富的醫生領導。當中應有非業界人士使投訴委員會更負責、更透明及更為公眾所接受。當中應有充足的秘書處及文書支援使投訴委員會可更快地回應投訴。設立中央醫療投訴委員會的好處及壞處有：

好處

- 投訴人知道可在哪裡作出關於醫生的投訴；
- 該系統更透明及有效率；
- 它可以快速地處理投訴，特別是輕微個案。

壞處

- 成立需要資源；
- 它或會導致投訴個案上升

II. 醫委會的改革

香港政府已經提出改革醫委會的建議，並且提出一項條例草案以修訂《醫生註冊條例》。建議包括：－

- 增加醫委會中業外人士的人數；
- 改善其投訴調查及紀律研訊機制；及
- 促進認可更多非本地培訓的醫生，特別是專科醫生在香港執業。

擬議中的醫委會改革的其中一個目的是為了加快處理投訴案件。這個改革須在法律上改變及投放額外資源到醫委會。這事項現已提交到立法會手上。

總結

公眾越來越高的期望令投訴的數量及複雜性提升。

現在該是醫委會及香港政府爲投訴系統作出改變的時候。

我相信應把醫療調解引進香港。

醫療事故調解計劃之法律框架

黃吳潔華律師[1]

世界各地不時發生醫療失誤，受害者及其家屬往往要進行漫長的法律訴訟來爭取公義及合理賠償。這對受害者、其家屬及醫護人員均構成沉重的心理及財政負擔。在香港，醫療失誤時有發生。當然，這並不是說香港的醫療制度或醫療服務質素欠佳。事實上，香港的醫療制度及醫療專業水平較很多國家優秀。可是，醫務人員也是普通人，不幸的醫療事故並不可能完全避免。因此，如何妥善有效處理醫療事故值得重視。

在現存制度下，醫療事故發生後，受害者或其家屬一般可以向有關人士或機構作出民事索償。如認為醫護人員有專業失當，亦可向相關專業團體，例如醫務委員會、護士管理局等作出投訴。然而，醫療事故發生後，受害者向有關的醫護人員採用對抗式的索償方法可能令醫患關係惡化。而間接亦令醫護人員因過度顧慮有關風險而只採取最保守的治療方式，情況不利香港的醫療服務的發展。調解可以為受害者及醫護人員提供新出路，其實，很多國家或地區也有採用調解處理醫療事故糾紛。

各方對醫療事故調解的疑慮

目前，很多市民及各個界別人士對利用調解以解決醫療事故有不同疑慮，以致醫療事故調解未被廣泛接納和採用。

首先，病人擔心醫療事故調解有損他們獲得公平審訊及賠償的權利。所有調解通訊及會議內容均是保密的，因此，各方在調解會議中的陳述均不能作為呈堂證供，例如涉事人員即使承認自己的過失，病人在追討賠償的訴訟中，都不能於庭上援引該陳述。病人亦擔心他們與院方或醫護人員的協議或許不獲有關保險機構承認，以致調解成果淪為空頭協議，未能獲得合適賠償。

其次，醫護人員擔心調解即是要求其承認事故的責任，因而可能導致他們

[1] 香港律師會調解委員會主席

失去專業責任保險的保障。醫護人員亦擔心受害者或其家屬要求他公開承認專業疏忽，進而被醫務委員會或護士管理局等展開專業失當聆訊。

第三，醫院或醫療機構亦擔心通過調解而未能讓法庭透過公平、公開的審訊還其清白，影響其專業聲譽。

第四，保險業界則擔心保險機構不能有效控制病人索償的過程。調解過程保密，亦有一定程度的不確定因素。調解雙方的協議亦未必能符合保險公司的內部政策或指引，以致三方陷於僵局，未能妥善處理病人的申索。

在世界上很多地方都有實例證明調解能更有效地解決紛爭。其實，香港的醫療調解正在準備開展新一頁，在釋除各方疑慮後，調解可以為病人、醫護人員、院方，及保險業界等帶來四贏局面。

民事司法制度改革

在討論醫療事故調解計劃法律框架之前，先要談一談香港於 2009 年推行的民事司法制度改革。民事司法制度改革推行之前，非正審申請的次數偏多，審訊前的法律程序很多時也欠缺焦點，以致程序延誤及訟費增加。民事司法制度改革旨在提高成本效益以及以利便較快解決爭議，與醫療調解的目的類似。

在現今的新制度下，法庭主動管理案件，以減少案件的拖延、鼓勵調停和調解、以減低訟費，以及幫助無律師代表的申請人。司法機構亦成立了民事司法制度改革監察委員會，由高等法院首席法官領導，監察並持續跟進民事司法制度改革的實施情況，確保整個改革有效執行。

於香港附屬法例第 4A 章《高等法院規則》第 1A 號命令第 1 條規則中，清楚列明民事司法制度改革目標是為提高法律程序的成本效益，確保案件在合理、切實、可行範圍內盡速、有效處理；提倡精簡法律程序的意識；確保訴訟各方可以公平，快捷地解決爭議，及確保法庭資源分配公平[2]。

第 1A 號命令的第 3 條指出法律程序的各方及其法律代表須協助法庭達成

[2] 第 4A 章 《高等法院規則》第 1A 號命令第 1 條規則。

第 1A 號命令的目標[3]，第 4 條亦指出法院須藉積極管理案件以達致基本目標[4]，包括鼓勵與訟各方在進行法律程序中互相合作；及早識別爭論點；從速決定哪些爭論點需要全面調查和審訊，並使用簡易程序處理其他爭論點；決定爭論點的解決次序；鼓勵各方採用另類排解程序（alternative dispute resolution）；幫助與訟各方全面或局部和解案件；編定處理案件程序的時間表；衡量採取某特定步驟所相當可能得到的利益；盡量在同一次聆訊中處理同一案件的最多爭議；於特定情況下處理案件而無需與訟各方出庭；利用科技及作出可使審訊快速有效地進行的指示[5]。由此可見，法例推動各方減少用於法律程序的時間和資源。

其中提及的另類排解程序，是跟此討論特別相關。在《高等法院規則》內並無直接提及法院推廣的另類排解程序是包括哪些程序。為此，司法機構於 2014 年 8 月 14 日發出《實務指示 31（調解）》（PD31），闡述各方須如何協助法院履行積極管理案件的責任。該實務指示並非法律，卻是訴訟各方必須遵守的案件程序規則。

根據 PD31，區域法院以及高等法院均有責任在其認爲合適的情況下，鼓勵各方採用另類排解程序，並為有關程序提供利便[6]。另類排解程序是一個解決爭議的過程，由各方協議委任的第三者協助他們達致和解或解決爭議。調解正是一種常見的另類排解程序。法庭對於案件頒佈訟費令時，能向不曾參與調解，又沒有合理解釋的訴訟人發出對其不利的訟費令。

此外，代表律師有責任向當事人解釋《區域法院規則》及《高等法院規則》的基本目標和法庭的職責。當事人須於調解證明書內表明是否願意尋求調解，不願意者則要提供合理原因解釋。此項規定有助法庭及與訟各方節省開支，同時考慮採用以訴訟以外的途徑解決爭議。值得留意的是，調解程序不單只適用於雙方有律師的案件，即使雙方沒有律師代表，法庭亦可主動行使其權力，在適當的時候考慮案件是否適宜進行調解。

除上述法律框架外，調解條例（第 620 章）已於 2013 年 1 月 1 日生效，

[3] 第 4A 章 《高等法院規則》第 1A 號命令第 3 條規則。
[4] 第 4A 章 《高等法院規則》第 1A 號命令第 4 條規則第(1)款。
[5] 第 4A 章 《高等法院規則》第 1A 號命令第 4 條規則第(2)款。
[6] 《實務指示 31》A 部第 1 段。

條例第 3 條列明其目的在於，包括提倡、鼓勵和促進以調解方式解決爭議；及使調解通訊得以保密[7]，以保障調解各方的利益及減少程序上的爭議。該條例對調解過程所涉及的與會人士及文件，例如：調解協議，調解員，調解通訊等作出定義，以便調解各方容易明瞭[8]。

調解條例第 8 條確立調解的保密原則。保密是調解程序的重要基石，調解的首要目的是保障當事人的利益，以及可讓各方能在保密的保障之下，沒有顧慮地談判，及商討各種解決爭議的方案。因此，若一方於調解會議中提供敏感資料以利達成協議，他方卻可以向與會人士及調解員以外的人士披露有關資料，或利用該項資料為訴訟作出部署，那是與調解達成雙贏的原意背道而馳。因此，除下列情況之外，任何人均不得披露調解通訊內容：

1. 有關的調解的每一方及調解員均同意作出披露；2. 該項調解通訊的內容，是公眾已可得到的資料；3. 該披露是因為有合理理由相信，為防止或盡量減少任何人受傷的風險，或任何未成年人的福祉受嚴重損害的風險；4. 該項披露是為研究、評估或教育的目的而作出的。在這種披露的情況下，該披露資料不能直接或間接洩露該項調解通訊相關人士的身分；5. 該項披露是當事人為了徵詢法律意見而作出的；6. 該項披露是按法律要求，或是在法院許可下作出；7. 執行或質疑調解達致的和解協議；或 8. 針對調解員的專業失當行為作出投訴[9]。

上述討論的現存的法律框架已經能充份保障調解各方的利益，因此，各持份者可積極考慮利用調解解決醫療事故。

現存關於道歉的憂慮

在一般的懷疑醫療失誤事故中，被投訴的醫護人員即使不認為自己有過失，也可能希望透過道歉表達自己對病人和其家屬的同情和遺憾。然而，在現存的制度下，受害者或其家屬可以把醫護人員的道歉作呈堂證供，作為醫護人員承認過失的證據，進而確立該醫護人員的法律責任。此外，礙於醫療事故會為醫護人員帶來民事甚至刑事責任的風險，間接上可能導致他們只採取保守的治療方法，以避免招致法律後果。因爲如有任何閃失，

[7] 第 620 章 《調解條例》第 3 條。
[8] 第 620 章 《調解條例》第 2 條。
[9] 第 620 章 《調解條例》第 8 條。

道歉也無助避免因意外而衍生的法律責任。有些保險條款禁止受保人承認過失，故此，一個簡單的道歉或致歉亦可能影響保險承保範圍的有效性。因此，目前在沒有道歉條例的保障之下，醫護人員會因為避免麻煩和可能失去保險保障的風險而拒絕道歉或對道歉有所顧忌。

然而，對於為數不少的病人和其家屬而言，涉事醫護人員的道歉非常重要。此舉不但能安撫有關的病人和家屬，更能提高調解的成功機會，並在長遠而言，鼓勵醫護人員嘗試採用較進取或先進的治療方法，減輕病人承受的痛苦。為解決現有制度的不足，調解督導委員會在 2015 年就道歉法進行了首輪諮詢，並在 2016 年進行第二次諮詢。委員會對道歉法例主要建議如下：—

（1）香港應制定道歉法例；
（2）道歉法例應可用於民事及其他非刑事的法律程序，其中包括紀律、管制聆訊及醫務委員會聆訊；
（3）醫護人員作出的道歉不應影響保險的承保範圍[10]。

不少國家已通過道歉法。在 2007 年，超過 30 個美國州份已經通過道歉法。此外，澳洲和加拿大也有道歉法，並得到重大成功。因此，香港也應該認真審視現有法律並研究通過道歉法的可能性。

道歉條例的立法目的

律政司調解工作小組在 2010 年提出多項建議，包括探討應否為增加和解機會而制定道歉法例，處理作出道歉的問題。為在香港進一步推動調解的發展，時任律政司司長在 2012 年成立調解督導委員會，其轄下規管架構小組委員會負責考慮是否有需要在香港制定道歉法例。督導委員會建議在香港制定道歉法例。擬議道歉法例的主要目的在於澄清道歉的法律後果，藉此提倡和鼓勵道歉，以促使各方的爭議可以友善地和解。

道歉法例能帶來多項好處。首先，道歉法例有助避免訴訟，從而令大眾採用成本既合理，效益又高的解決方法。此外，道歉法例能鼓勵雙方進行自然，公開和直接的對話。再者，道歉法例能鼓勵涉事醫護人員向病人及其

[10] 就是否立法包括「事實陳述」一點，委員會暫未達成一致意見。

家屬作出有意義的道歉。最後，醫護人員也能自由表達其對涉事病人和其家屬的遺憾和同情，這對減少訴訟案件有莫大幫助。

成功的調解試驗計畫

其實在民事司法制度改革和調解條例實行之前，香港已於不同範疇推行調解試驗計畫，並取得一定成果。

成功的調解試驗計畫（一）－香港機場核心計劃

香港機場核心計劃是香港一份規模龐大的基礎建設發展計劃，該計劃耗資五百億元，設計容納八百七十億乘客和九十億噸。於 1984 年，香港政府推行調解試驗計劃，以解決土木工程合約的建築爭議。五年後，所有重大公共工程合約，包括香港政府機場核心計劃項目，均加入了採用調解來解決爭議的條文。其中，機場核心計劃的合約訂明，在解決爭議的過程中，必須採用調解的方式。在機場核心計劃涉及的所有爭議中，藉調解或在調解階段通過磋商而解決的爭議佔百分之八十[11]。結果發現調解所需之時間與費用比訴訟較少。

成功的調解試驗計畫（二）－雷曼兄弟相關投資產品爭議

在 2008 年，美國第四大投資銀行雷曼兄弟（Lehman Brothers Holdings Inc）倒閉，影響本港約 48,000 名投資者，金額達 200 億港元。受影響的投資者紛紛上街遊行，表達不滿。隨之而來，便是有關雷曼兄弟發行或與其掛鈎的投資產品的投訴。當時，金管局、證監會和相關機構收到逾 27,000 宗有關投訴。大部分的投資者聲稱他們對有關投資產品的認識不足。為了解決這個問題，金管局委託香港國際仲裁中心作為雷曼兄弟相關投資產品爭議調解及仲裁計劃的服務提供者。據律政司 2010 年的調解工作報告所示，有關調解案件的和解比率為 88%，可見調解能解決金融方面的爭議。

其他方面的調解試驗計劃

家事調解

司法機構在 2000 年 5 月推行一個為期 3 年的「家事調解試驗計劃」，並於家事法庭大樓設立一個家事調解統籌主任辦事處。這個試驗計畫的目的是幫助正在離婚或分居的夫婦進行調解，就因分居或離婚而起的爭議達成各

[11] 香港特別行政區政府律政司，《調解工作小組報告》，2010 年 2 月，第 16 頁。

種協議。

司法機構於 2012 年 5 月 2 日制定《實務指示 15.10》，在婚姻或及家事法律程序中，不論呈請人有沒有律師代表，都會獲發宣傳家事調解服務的簡介單張，幫助離婚申請呈請人了解家事調解的重要[12]。離婚申請呈請人及答辯人若無合理理由，必須在法庭首次約見前參與調解。

人身傷亡個案調解

人身傷亡訴訟專責小組於 2008 年推行「新保險調解試行計劃」，也取得良好成果。另外，有關人身傷亡個案的《實務指示 18.1》（PD18.1）明確指示雙方必先調解。實務指示 18.1 指出，律師代表當事人向法庭提出申索前，必須向當事人解釋法庭會在適切時鼓勵他們透過調解解決爭議，與及他和被告人可嘗試透過調解達成全面或局部和解[13]。PD18.1 亦提到審訊應視為最後能解決爭議的一種方法，是協商或調解均告失敗之後不得已的選擇[14]。

建議：醫療事故調解試驗計劃

調解比訴訟快速、成本效益高，及較輕鬆，在醫療方面現屬嶄新排解程序。不過，市民大眾一般對此未有太深認識。故此，各方可參考上述先例，推行醫療事故調解實驗計畫，積極向社會各方，包括醫務委員會、醫生、醫院、保險公司、患者以及公眾推廣醫療調解以解決醫療爭議，減低對各方在時間、精神、金錢等方面的負擔。

結論

現存法律框架，包括上述《區域法院規則》、《高等法院規則》的有關命令、《實務指示 31》及《調解條例》均可應用於醫療事故調解。換而言之，推廣醫療事故調解並無法律障礙。道歉法雖尚未立法，但其並不是醫療調解必要的法律元素，只是在實行的程序上或推廣的層面上有待研究及討論。當然，道歉法例立法對醫療事故調解試驗計劃將會有正面幫助。畢竟，醫療事故牽動病人、家屬、以致醫護人員的情感，一個真誠的道歉能緩解病人和其家屬的傷痛和怒憤，也能讓醫護人員表達遺憾及關心，進而增加達致和解的機會，讓病人、醫護人員以及社會大眾都能夠受益。

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12 《實務指示 15.10》第二部份。
13 《實務指示 18.1》第 26 段。
14 《實務指示 18.1》第 5 段。

從病人角度看醫療調解

彭鴻昌先生[1]

與其他專業一樣，溝通是醫療專業上非常重要的一環。醫護人員本著專業的知識治療及照顧病人，然而，如果病人不明白醫護人員替他們所進行的程序，雙方缺乏溝通的話，病人並不會有良好的治療經驗。特別是治療效果不理想，甚或發生醫療事故時，溝通之門又未能打開的話，病人及家屬便會傾向以投訴及法律程序追尋公義。

根據學者研究指出，病人投訴可以分為三大領域共六大範疇，即：臨床（質素，安全）、管理（制度程序，時機及可達性）、及關係（交流，人性化照顧，病人權益）。[2] 表一列出各大領域範疇的指涉內容：

表一：病人投訴的分類

Domains	Categories	Sub-categories	
Clinical	Quality	Examinations:	*Inadequate patient examination by clinical staff*
		Patient Journey:	*Problems in the coordination of treatment in different services by clinical staff*
		Quality of care:	*Substandard clinical/nursing care*
		Treatment:	*Poor, or unsuccessful, clinical treatment*
	Safety	Errors in diagnosis:	*Erroneous, missed, or slow clinical diagnosis*
		Medication errors:	*Errors in prescribing or administering medications*
		Safety incidents:	*Events or complications that threatened the safety of patients*
		Skills and conduct:	*Deficiencies in the technical and non-technical skills of staff that compromise safety*
Management	Institutional issues	Bureaucracy:	*Problems with administrative policies and procedures*
		Environment:	*Poor accommodation, hygiene, or food*
		Finance and billing:	*Healthcare-associated costs, or the billing process*
		Service issues:	*Problems with hospital services for supporting patients*
		Staffing and resources:	*Inadequate hospital staffing and resource levels*
	Timing and access	Access and admission:	*Lack of access to services or staff*
		Delays:	*Delays in admissions or access to treatment*
		Discharge:	*Early, late, or unplanned discharge from the hospital*
		Referrals:	*Problems in being referred to a healthcare service*
Relationships	Communication	Communication breakdown:	*Inadequate, delayed, or absent communication with patients*
		Incorrect Information:	*Communication of wrong, inadequate, or conflicting information to patients*
		Patient-staff dialogue:	*Not listening to patients, lack of shared decision-making, and conflict*
	Humaneness/caring	Respect, dignity, and caring:	*Rude, disrespectful, or insensitive behaviours to patients*
		Staff attitudes:	*Poor attitudes towards patients or their families*
	Patient rights	Abuse:	*Physical, sexual, or emotional abuse of patients*
		Confidentiality:	*Breaches of patient confidentiality*
		Consent:	*Coercing or failing to obtain patient consent*
		Discrimination:	*Discrimination against patients*

要處理各種各樣的投訴，醫患雙方（即提出投訴的病人及家屬，及接受投訴的醫護人員及醫療機構），如能明白溝通的真諦，便會較容易處理爭議。溝通的真諦在於跳出自己的觀點，從對方的角度去了解對同一事件的意見。可惜發生醫療事故後，有時病人及家屬只緊握自己對醫護人員的

[1] 香港社區組織協會幹事

[2] Reader TW, et al. BMJ Qual Saf 2014;0:1–12. doi:10.1136/bmjqs-2013-002437

指責，未能從醫療專業角度去理解事故，及分析事故是天意屬不幸，抑或是人為屬疏忽。不過，醫護人員也很多時只從專業觀點分析事故，缺乏從事故者的角度理解事件，並嘗試明白事故者的感受，及協助了解事故情況。如此缺乏有效的溝通之下，病人及家屬就很可能循投訴及法律程序追討公義到底。

公義，對於病人及家屬而言有以下的意義：

1. 知事實——即知悉所有與事故相關的事實資料，如事故各項細節內容、事故的前因後果、事故的影響等；
2. 被理解——即獲得醫療機構及醫護人員明白他們申訴的理由，及事故對他們造成的影響；
3. 討公道——即獲得應有的對待，如得到適當的跟進治療、得到肇事者的道歉、及得到合理的賠償；
4. 助他人——即知道醫療機構及醫護人員會作甚麼改善，避免同類型事故再發生，危及他人的生命健康。

上述四方面的要求，最好能夠從速跟進處理，盡快安撫投訴者的不滿。不過現時各項投訴機制及民事索償程序需時甚長，例如：醫委會完成處理投訴的時間長達五年，民事索償亦可能要數年時間才可完成。當然，如果投訴涉及嚴重的失德及醫療疏忽，就有必要通過正式的程序，耗時長也無可奈何。然而，如果醫患雙方願意以調解方式跟進，以求盡快達致妥協和解的結果，應會獲雙方歡迎。

透過調解的過程，實在可以達致前文所述溝通的真諦。調解員可協助醫患雙方從黑白對立分明地看自己所持之道理，轉移至看到黑中有白白中有黑，並協助醫患雙方以各自所持的資訊雙向流動，讓雙方能明白對方的立場、觀點、及意見，藉此重建雙方的互信。調解的好處，實在不需再多言，可惜現實總是事與願違。

事實上，現時醫療機構或醫護人員若被投訴甚或接獲索償的要求，都傾向交由律師處理。病人及家屬此時所要面對的，就是盡力保護醫療機構或醫護人員法律權益的律師，也正因此，面對的就會是對立、冷漠的態度。為追討公道及維護自己的法律權益，病人及家屬也必須另聘律師，屆時無

論以金錢或時間來量度的成本也會增加。

要改變現況，政府必須帶領各持分者，包括：醫療機構及醫護人員、病人及家屬、法律專業人員、調解從業員、承保醫療專業保險的機構等，共同建立一個配合各方需要，及能處理各方憂慮的醫療調解制度。這種醫療調解制度，應可協助處理醫療機構內醫療服務的投訴、醫療專業規管機構有關專業水平不足但又未至於失德的投訴、及已確定疏忽的索償個案。

值得留意的是，現時常用的調解方法屬斡旋性質（facilitative mediation），即調解員作為中間人協助雙方溝通以達致妥協和解。為保雙方各自法律權益，病人及家屬需自行聘請律師或尋求法律專業意見，以評估透過調解所得的方案是否值得接受。也正因此，病人及家屬可能因經濟原因或缺乏知識，未能取得法律意見而接受了一項未符自己利益的和解方案。

所以較理想的調解方式應以評估式調解（evaluative mediation）進行，即由調解員或一名獨立的專家先對個案作出評估，然後再基於評估結果，協助調解雙方達致妥協和解。病人及家屬在這種調解方式下，就算沒有法律支援也不致於受到太不公平的對待。

最後，無論推行那一種的調解方式，都應該對作出投訴的病人及家屬提供包括文書、法律、情緒上的支援。面對醫療事故，身為弱者缺乏資源的病人及家屬，如果缺乏所需的協助，他們在尋求公義的路上，是難以獨自走下去的。

專業合作關愛弱勢社群

陳義飛先生[1]

甲、 引言

內地新來港及少數族裔人士是香港人口的重要組成部分，礙於語言、文化差異，在就學、就業、經濟、人際交往、適應與融入等不同層面上屢遇上困難與衝突。新家園協會作為服務新來港、少數族裔及弱勢社群的慈善機構，致力建構多層面的專業合作平台，支援弱勢社群在港的適應與發展。

按協會的服務經驗所得，不少內地新來港及少數族裔等弱勢社群，往往因為對社會資源、文化、制度不熟悉，容易陷入糾紛與矛盾。倘若處理不當，容易引發社會衝突。調解的原則及精神重於雙方協談，產生共識，以解決衝突，對於弱勢社群在解決問題有非常重要的作用。

乙、 內地新來港、少數族裔人士的概況、困難與需要

新來港及少數族裔人士是人口重要增長來源。自 1995 年 7 月，香港特區政府將單程證配額增至每天 150 個後，新來港人士的數字便持續高企。根據統計處數字，自本港回歸祖國後，共有近 88 萬名內地新來港人士透過單程證來港定居，即現時每七名港人，便有 1.2 名是內地新來港人士。同時，少數族裔人口亦持續上升，根據 2011 年的人口統計結果，少數族裔人士達 451,183 名，佔全香港人口總數 6.4%[2]。由於可見，內地新來港和少數族裔人士乃香港人口增長的重要部分，協助他們適應與融入社會，對社會發展有正面的推動力。

由於社會制度、生活文化、語言差異，不少內地新來港和少數族裔人士面對適應與融入的困難。根據民政事務總署在 2015 年進行的調查[3]發現，有過半新來港受訪者表示有適應困難，依次為房屋、就業、語言、經濟。

2016 年年中，新家園協會發表的《內地新來港定居人士社會參與狀況調查報告》[4]中亦發現，新來港定居人士家庭面臨結構性的貧窮問題，高達

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[1] 新家園協會服務總監(香港)

[2] 政府統計處：二零一一年人口統計 – 主題性報告 – 少數族裔人士

[3] 民政事務總署及入境事務處內地新來港定居人士的統計數字（二零一五年第四季）

[4] 新家園協會《內地新來港定居人士社會參與狀況調查報告》2015

65.9%的受訪者家庭月收入低於政府扶貧委員會公布的貧窮線；新來港人士面對就業困難，新來港人士的勞動市場參與率不足三分之一；同時，新來港人士的社交支援網絡狹窄，社交圈子一般都是從親友、同鄉建立起來的。

同樣地，新家園協會於去年曾對少數族裔進行有系統的調查[5]亦發現，超過九成少數族裔受訪者表示會以港為家，但他們在香港生活時，卻在語言、教育和就業方面遇到不少困難。而普遍少數族裔的族群性較高，社交圈子與新來港人士相近，傾向同族群人士之間的交往，導致社交支援網絡較單一，容易與主流社會因誤會而產生矛盾和衝突。

協助新來港和少數族裔等弱勢社群建立支援網絡，有助他們早日融入和適應香港生活。有不少新來港及少數族裔人士缺乏社會支援網絡，較少與本地社群接觸，在日常生活中易產生磨擦。若以非理性方式處理，演變成衝突，深化社會矛盾。故此，協助新來港和少數族裔人士認識社會資源，強化支援網絡，提升解決問題的能力，尤為重要。

丙、 構建不同的平台，協助弱勢社群融入社會

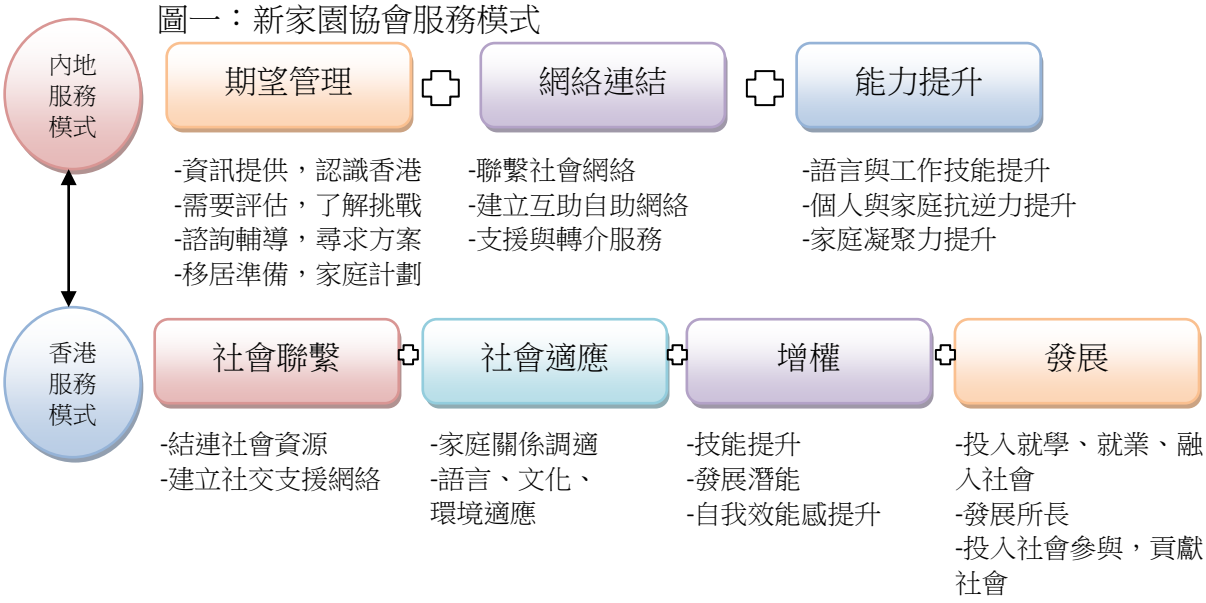
新家園協會成立於 2010 年 6 月，服務覆蓋香港與內地，是一間致力於服務新來港、少數族裔人士及其他弱勢社群的公共性慈善機構。本會提供優質、專業的多元社會服務，推動新來港、少數族裔人士及其他弱勢社群積極融入香港的生活，參與社區建設，促進社會和諧，創建平等關愛社會。

新來港及少數族裔面對多樣化和複雜的問題，必須建構多層面的專業服務支援網絡，才可協助服務對象的適應與發展。

本協會採用一條龍的社會服務模式，從內地服務開始，為準來港人士作好期望管理、建立社會資源網絡及提升能力，以使他們作好來港生活的準備，減少適應困難，早日融入社會；來港定居後，本會首先協助他們連結社會網絡，認識本地社會資源和建立社交支援網絡，及後，提供多元化的適應與培訓服務，包括語言、生活文化、家庭關係、社會適應等各層面，提升他們適應香港生活的能力，繼而，進入增權的過程，提供技能提升培訓服務，協助他們發展潛能，增強自我效能感，最後，促使他們在就學、就業與融入方面各展所長，促進社區參與，貢獻社會。

[5] 新家園協會《香港少數族裔的社會融合狀況調查報告》2015

圖一：新家園協會服務模式



新家園協會作為一間專門服務新來港、少數族裔及弱勢社群的社會服務機構，除採用傳統社會服務機構模式提供社會服務外，還發揮了四大社會功能：第一、促進功能，透過專業社會服務介入，在個人層面，提升個人能力，促進成長與發展；在家庭層面，增強家庭凝聚力；在社區層面，促進社會不同階層人士的合作，推動社區融和；第二、補救功能，針對新來港、少數族裔及弱勢社群的困難，提供介入與跟進，提升他們解決問題的能力；第三，發展功能，透過跨專業與界別的合作，增加弱勢社群對社會的認識與了解，協助他們發展所長，貢獻社會；第四，倡議功能，關注弱勢社群的發展，通過調查研究，向政府提出政策建議，改善弱勢社群的生活處境。故此，新家園協會以社福服務為基礎，通過與社會不同專業人士及持份者合作，促進弱勢社群的發展與融入。

為了達致上述四大功能，本協會已透過多方的專業合作，致力構建一多層面的合作平台，促進政府、地區、商界及專業團體的合作與交流，攜手支援弱勢社群融入社會，發展所長。

政府層面，新家園協會與不同政府部門保持良好合作關係，通過競標，承辦不同的適應與融入項目，支援弱勢社群融入社區，例如：民政事務總署資助地區融入計劃、新來港大使計劃、少數族裔青年大使計劃等，透過政府的資源，提供培訓與支援服務，協助弱勢社群提升能力，加強與社會不同群體的接觸，促進社會融入。

地區層面，透過全港五大區設立服務點及不同的服務合作點，長期及穩定接觸弱勢社群，提供服務。加上與地區組織，如：學校、地區團體、

社福機構等緊密合作，發揮協同效應，更好地支援弱勢社群融入社會。例如，本協會與九龍西區扶輪社合作，針對少數族裔青年發展所長，合辦「少數族裔青年職業發展計劃」，招募九龍西區扶輪社社友作導師，並提供不同培訓課程、行業探索及實習，擴闊少數族裔的視野和技能，為日後擇業作好準備。本協會又邀請不同族裔領袖加入協會少數族裔服務顧問委員會，提升服務質素。

商界是一個重要伙伴，提供資源，支援弱勢社群融入社區。新家園協會成立初時，以商界提供起動基金；亦獲商界贊助提供不同的支援項目，如：「世茂精英培養計劃」，為學生提供獎學金及發展培育活動，協助青年發展所長。

在專業團體合作的層面，新家園協會針對弱勢社群的多樣性需要，與不同專業人士或團體合作成立專項中心，以協助弱勢社群解決不同層面的問題。例如，新家園協會調解培訓及服務中心，與香港社區調解協會合作，目前有 12 位註冊調解員，提供調解諮詢服務、及社區教育推廣服務，如：員工培訓、電台分享、學校合作活動，協助弱勢社群用調解模式有效地解決紛爭。協會的法律諮詢服務中心，目前有 22 名義務律師，提供電話及面談諮詢服務、社區教育服務，包括員工培訓、法律講座、法律推廣資助計劃等，以協助弱勢社群解決問題，培養守法意識。協會的就業培訓及服務中心，與不同的僱主合作，提供就業配對及轉介服務，及與不同機構，包括僱員再培訓局，提供不同領域的就業培訓課程，並由社工提供就業輔導，全面協助弱勢社群投入香港勞動市場。還有，協會的社會政策研究中心，與大學及相關機構合作進行調查研究，關注弱勢社群的困難與需要，提供政策倡議。最後，協會的家園文化藝術協會，與不同專業團體合作，為弱勢社群提供文化藝術培訓，協助他們發展一技之長。由此可見，多方合作平台合力為弱勢社群提供全方位的支援服務，方可有效回應弱勢社群的多樣及複雜需要。

丁、 調解服務與社會服務相合作，支援弱勢社群

新來港、少數族裔等弱勢社群對社會制度及社會資源不熟悉，在日常生活中較易遇上不同的衝突，若單一依靠訴訟處理，往往花費大量金錢與時間，使弱勢社群陷入更無助的處境。例如，本年 5 月，在沙田火車站對開大堂，發生傷人案，一名持雙程證內地女子，疑因其活躍幼子與港童推撞問題，當眾打傷一對港人母女，警員到場將涉案內地女子拘捕，帶署扣查，及後，警方落案控告被捕內地女子襲擊導致他人身體受傷罪及傷人罪，在沙田裁判法院提堂。因語言或文化不同，演變成暴力衝突，導致訴訟，兩

敗俱傷。又或如處理不當，就可能演變成社會的悲劇。正如最近發生的香港西環觀龍樓發生四死縱火慘劇，一名獨居的六旬男子因噪音與一鄰居積怨，7 月 16 日凌晨爭執後突向對方住所擲燃燒彈縱火，鄰居一家三口慘遭滅門，其中持來港團聚僅 5 日的妻子及年僅 3 歲半女兒相擁葬身火海，男戶主全身著火墜樓死亡，疑兇其後折返單位再縱火自焚。可見，衝突未能妥善處理，引發更大的社會危機。而調解服務則為弱勢社群帶來另一有效解決問題的機遇。

調解服務應用於不同的層面，工作間及僱傭、知識產權、銀行及金融服務、醫療失當及醫護服務、保護兒童、環境、城市規劃、土地使用及重建。而調解的價值強調自願及保密、由爭議雙方做出決定、非判斷性，無對錯之分、雙方需求及利益、觀點及溝通，非證據和現在及未來，非過去，有助雙方以和平理性的方式處理衝突，有助弱勢社群更好處理問題。同時，調解技巧著重提問、聆聽、充權、創作方案，可建立一平台讓雙方理性思考、分析、共同處理問題，避免釀成更大的社會矛盾，減省時間和資源的成本。故此，對弱勢社群有效解決不同層面的問題尤為重要。

唯調解服務在社區仍未被廣泛接受及使用，暫時未能紮根社區。新家園協會調解服務及培訓中心於 2014 年 6 月 27 日成立，組織專業調解員團隊，為內地新來港及少數族裔人士提供專業及免費的調解服務，協助他們更好地處理糾紛，並由專業社工作支援及跟進，達致雙贏局面。同時，為社福機構員工提供調解培訓及推展社區教育活動，以共建和諧社會。中心採用專業調解和社工專業相結合，提供一站式個案管理服務，個案經由社工作評估，為有需要的個案安排由香港調解資歷評審協會認可調解員提供不多於 45 分鐘的電話調解諮詢服務，以解決問題，如有進一步跟進需要，可安排接受不多於 6 小時的免費調解服務。同時，負責個案之社工亦評估需要，並針對語言需要，提供廣東話、普通話及英語服務，亦可為有需要的少數族裔人士，提供翻譯協助，以確保服務對象的問題得以妥善跟進。同時，配合協會地區服務處的支援服務，全面地為內地新來港及少數族裔人士提供適切的支援，以提升案主解決問題之能力，妥善處理問題。中心亦提供不同的培訓及社區教育服務，以期在社區大力推廣調解精神，使調解服務能深入社區，播下種子，為社區居民處理衝突提供另一選擇，促使和平理性解決問題，建立共融和諧的社會。

戊、 結語

新來港與少數族裔等弱勢社群缺乏社會資源與網絡，面對不同層面的問題，唯有多層面的專業合作網絡，才能有效協助應對問題。而調解服務重

視和平理性的溝通與共同合作解決問題，更能實在地協助弱勢社群解決問題和衝突。調解服務只有紮根社區、依託社區，方能讓更多社會人士了解和使用。故此，社區調解服務極具發展空間，能促成和平理性處理問題，達致雙贏或多贏的局面。

社區調解與少數族裔及新來港人士

周世平先生[1]

1. 引言

香港自 2013年1月1日實施了《調解條例》之後，調解在香港的發展便非常迅速，但大多數個案是圍繞在法庭的民事案件上。雖然如此，調解仍然不太為社會大眾的認識和接受，就最近的一個調查發現有高達百分之七十的受訪者承認不太認識調解，更有高達百分之三十的受訪者表示不會以調解的方法去解決他們與別人的紛爭。

香港市民多年來已經很接受和熟悉法庭是解決紛爭的地方。但法律訴訟過程中當事人往往需要用上大量的時間和金錢，這就不是大多數人都能夠負擔的。社會大眾特別是基層市民，當中包括少數族裔和新來港人士，基於自身各種的困難，他們不會主動花多餘的金錢去嘗試一些他們不太接受和認識的解決問題新方法，所以在民事案件上應用的調解方式便不容易在社會上普及化，而且，既然當事人雙方都已經把他們的紛爭入稟成為法庭民事案件，在這情況下才開始去探討調解的可能性，對構建一個真正的和諧社會和建立一個調解文化都是幫助不大的。

2. 社區調解的含義和特質

“社區調解”在現今既定的調解文化中正處於萌芽階段。之前很多業界人士都用過這個名詞，但都是沒有一個實質的定義，所以筆者嘗試在這裡把“社區調解”的含義用文字較具體地表達出來。社區調解的含義是希望在紛爭發生的初步階段，在還沒有成為法庭的民事案件前，甚至在還未經由律師處理前，在紛爭還停留在社區的時候便為解決問題而進行的一種調解。在廣義上“社區調解”是推動和諧社會的一種必需品。和諧社會或社會共融不單純是一個理念和口號，社會上大眾的紛爭和分歧是需要有實質的方法去處理的，所以在社會上推廣調解文化便是實現“和諧社會”一個最重要的使命。

社區調解和傳統上處理法庭民事案件的調解有著很多不相同的地方，最明顯的分別是法庭鼓勵民事案件先進行調解，所以當事人或其代表律師都會主動地去認識和安排調解，在法庭民事案件中，現時關於調解的資訊

[1] 社區調解服務協會創會主席

和服務是足夠的。但是發生在社區的案件便沒有人會主動地鼓勵雙方去調解，大部份當事人在缺乏認識和支援的情況下都不會主動地去安排調解，更加不會在“官司”發生之前主動花金錢去解決問題。所以社區調解的服務提供者便不能依靠傳統的方法，被動地等待當事人或其代表提出相關服務的要求。社區調解需要一個專業團隊主動地去推廣調解，當有調解個案的時候，便需要主動地尋找資料和了解問題，掃除阻礙和解的障礙，安排調解服務，和跟進調解會議後的各種需要，在某程度而言，這是一種社會工作。在這個情況下，律師的角色和各方面的需要便產生了很大的變化，首先社區調解不需要一個律師作為法律代表，而事實上社區調解應該鼓勵當事人直接參與整個調解過程，因為只有當事人最清楚自己的問題和需要。當然，當事人還是可以尋找律師或者是其他專業人士作為其顧問以協助他們進行整個調解過程。

3. 少數族裔和新來港人士對接受調解的困難和需要

對香港的大部份市民來說真正認識調解是不容易的，尤其是對一些少數族裔和新來港人士來說便更加困難，他們有著自己的語言和文化以及成長背景，對香港的社會環境和法律制度可以說是不太了解，加上言語上的障礙和受到社會上一些人士的歧視和限制，使他們更加形成了他們本身的生活圈子，在問題發生的時候他們都傾向內部“自己人”解決，外人是不容易進入他們的生活圈子的。要了解他們的問題，便要爭取他們的信任，更加需要長時間的認識和關係的培養，所以要說服他們去選擇或接受一些他們不認識的調解員是具有相當難度的。

除此之外，少數族裔和新來港人士通常都要為新生活的各種問題而煩惱，經濟能力不高，生活壓力比較大，情緒容易波動。要理性的面對問題，解決問題，實在需要一些時間和援助，加上他們對社會上各方面的環境不熟悉，他們心中的解決問題方案有時候實在很有限，在這個情況下，他們都需要更多的引導去全面認識事情的各方面與及了解各種解決問題的方案，更加重要的是，去了解各種選擇和決定的後果。

4. 社區調解面對的挑戰

要在社會上發展社區調解現時實在面對不少的挑戰。首先，缺乏了具影響力人士的鼓勵和實際程序上的需要，要爭議雙方都同時願意接受以調解方式去解決問題，要他們去選擇或者同時願意去接受一個他們不認識的調解員更加是難上加難。通常是較為富裕的一方會找律師去處理他們的爭議，但較為缺乏經濟能力的市民，尤其是少數族裔及新來港人士便要“被

迫”接受去聘請律師去完成整個法律程序。就算他們願意先調解，尋找另一方當事人及其代表律師同意，在現時的社會環境下都是具有相當的難度的。

對香港大多數市民來說，尤其是少數族裔和新來港人士，要認識調解和調解員並不容易，要知道什麼是社區調解更加是難上加難，到現時來說很多人還以為一定要律師才可以當調解員，而事實上，坊間的調解團體或者是個別服務提供者，其質素不為市民熟悉，而由政府鼓勵的“調解資歷評審協會有限公司”所註冊的調解員，更加是不為市民熟識。在法庭民事案件上我們不能全部否認，律師與調解員的目標，存在某程度上的利益衝突，要社會大眾認識社區調解還是需要政府與各界大力的推動。

在現實中，認識社區調解的人不多，更加缺乏資源去推動，真正能夠提供給少數族裔及新來港人士的推廣和服務不多。社區調解需要持續性的推廣和支援，隨意性的單次推廣活動，效用不會太大和持久的，在缺乏資源和社會認識與支援的情況下，運作上存著很大的實質困難。

社區調解服務提供者與律師和獨立調解員的角色和運作都不同，他們大多數是義務性質，而且社區調解不同傳統的律師和調解員，可以建立個人財富和聲望，社區調解團隊需要策劃、行政和管理，專業調解範疇外也需具備其他知識和組織能力。在現時香港的環境下，有能力而又願意提供義務服務，願意付出時間默默地服務社會的專業人士不多，上述各種障礙都會限制社區調解的發展。

5. 調解的策略和技巧的應用

社區調解應用「當事人為本」的理念，它是以調解服務為重點，配合其他專業支援，尋求提供最佳的方案，以解決當事人的問題。所以社區調解不應該以個別調解員為主體的運作模式，代之，以當事人案件的性質和需要，尋找最適合的服務團隊，運用最適合的策略和技巧，以提高調解的成功率和解決問題的決心。團隊需要深入了解問題，提高當事人對事情的理解，協助他們處理阻礙調解的因素，因而提升調解的成功率。

要達成這些目標不單需要專業知識和技巧，調解員須具備相當高的語文和溝通能力，更需要對文化差異較高的敏感度去提供服務。無論在與當事人的溝通上或者在需要時草擬調解協議書時，都需要淺白得令當事人明白，而又能清楚準確地反映調解協議的成果。社區調解不像法庭民事案件的調解裡，調解協議不一定需要調解員去草擬，很多時都由雙方律師根據

他們自己的理解再草擬及協商，而且協議文件是法律文件，當事人不一定可以完全理解。筆者曾遇過一個調解案件，調解會議是用廣東話進行的，雖然有口頭協議，但其中一個沒有律師代表的當事人拒絕簽署對方律師用英文寫成的調解協議文件，因為他不懂英文，更加遑論由律師草擬的英文法律文件。這些看似簡單但卻對當事人非常重要的事情，社區調解都需要盡量以當事人為本的理念去處理，通常協議都希望由調解員草擬，在調解員見證下簽署，以避免雙方在草擬字眼上有分歧。筆者曾經處理過一宗由於雙方律師未能根據雙方當事人的口頭協議而成功草擬協議文件的案件，當事人的煩惱往往因為律師要處理法律文件而被嚴重忽略。

6. 總結

要調解能夠廣泛地進入社區，廣泛地被市民接受，尤其是少數族裔和新來港人士，社區調解便應該發展成為其中之一種社會服務，讓調解文化植根社會，調解在社會上才能夠真正的成功。

要社區調解發展成為其中之一種社會服務，社區調解服務提供者不應該與現存的其他服務提供者在爭取客源上有衝突，調解服務應該是其他社會服務提供者的『伙伴』而不是競爭者。他們服務的都是同一群當事人，社區調解是一種專業，在發展成為一種社會服務的過程裡，社區調解服務提供者需要和其他服務機構合作，以提供更全面和更有效率的服務。

社會的整體總資源有限，如何有效率地運用社會總資源，運用社會專業知識，更有效地為社會解決問題，成功地構建和諧社會，是社區調解的目標，也應該是社會發展的大方向。

謙遜－調解員動人的素質

林雪兒女士[1]

一般上過 40 小時「調解員培訓課程」的朋友，都會在課程中學習到不少有關調解的技巧及調解員應具備的特質，例如說話重塑、積極聆聽、同理心等等。相信很多調解員都認同，在調解過程中，調解員本身就是一個很重要的工具（tool）。調解員的素質，某程度會直接或間接影響調解過程及結果。

目前各持份者正積極推廣調解。在 2010 年，律政司的調解工作小組報告中已制定「香港調解守則」。在 2013 年，香港亦頒布了《調解條例》，使調解員這個行業更趨專業化。作為司法機構的調解主任，我有不少機會接觸案件的當事人，當中有不少人士也向我反映，他們委任的調解員相當專業。曾經有當事人告訴我，在調解過程中，調解員專業的形象反令他們不敢透露自己心中的建議，恐妨自己提出的方案是「小兒科」，不中用，於是就把自己的意見收藏起來，期望得到調解員的提示。可惜調解會過後，這些當事人又會感到最後的結果與自己心中所想的大有落差。這些分享令我有所頓悟及提醒。

市場上關於調解的書本或手冊有很多，當中常提及的調解員素質，就如誠意、樂觀、靈活變通等，但均沒有提及謙遜（Humility）這個特質。我認為這個素質是眾多調解員素質中，最難掌握的。也許有人認為謙遜的態度是示弱的表現。但從另一角度看，謙遜可以是十分有力的工具。謙和的調解員可以自然地軟化當事人敵意的態度，也不會令當事人感到被凌駕，沒有信心表達自己，而扼殺了思考解決方案的創意。此外，謙遜的態度亦能令調解員在調解過程或單獨會面中營造一個舒適的環境。事實上，一個人可以向另一個人坦白自己，雙方要在一個舒暢的情景，大家都有安全感，才能暢所欲言。謙和的調解員某程度已讓調解的環境成為安全及舒適的地帶。

[1] 司法機構高級調解事務主任

我認為人生其中一個很大的挑戰，就是克服面對意料之外的事情。當有些事情的發生並不在自己預期之內，便很容易使人產生憤怒的情緒，而怒氣往往驅使人以非建設性或不健康的方法回應事情，但謙和則是怒氣的中和劑。調解員謙和的態度對當事人來說不單是一種尊重；某程度上，謙和的調解員亦會樹立出一個很和諧的榜樣，讓當事人明白尊重對方才能夠促進雙方融洽。對調解員而言，尊重當事人的決定，比能否調解成功更為重要。謙和的調解員會明白到調解的結果很多時都不在自己掌握中這道理，而且他們調解的目的，不是要證明自己能夠做到甚麼，因此，他們不會因為調解成功或失敗而感到光榮或蒙羞，又或者在調解時不自覺地施加和解的壓力。

與謙遜很接近的一個素質就是親和力。我相信有謙和態度的調解員，他的親和力自會流露出來，不需要刻意營造。但願有志成為調解員的朋友，繼續培養謙遜的素質，協助當事人找到他們理想的目的地。

善用社區調解資源

關衛擎先生[1]

在律政司的大力推動及眾多調解機構協力支持下，2 年一度的「2016 調解周」於 2016 年 5 月 7 日至 13 日期間舉行，進一步推動香港調解服務的健康發展，以及推廣在教育、醫療、商業、社區和知識產權等不同界別多加使用調解服務。今年的調解周以「調解為先，與時並進」為主題，舉行了一連串活動包括研討會，特別為不同界別而設的調解講座及調解嘉年華。

首次舉行的調解嘉年華於 5 月 8 日在九龍樂富廣場舉行，透過調解講座、調解個案示範和調解展覽，加深市民對調解，包括多元化調解服務（例如家事調解及大廈管理調解）的了解，令調解文化更為普及，嘉年華並設有攤位遊戲及現場免費調解諮詢服務，即時解答市民對調解的疑難。

隨著市民對調解的認識，對專業調解服務的渴求明顯大幅增加，為使以調解為解決糾紛的首選方式得以貫徹推行到社區各階層人士，調解員的質素及調解費用會是大眾市民所關注的重點。除律政司推廣及支持外，不同的政府部門、社福機構、調解機構等均推出不同的既專業也免費的調解服務，供大眾市民選用，使調解的作用及優勢能深入民間，構建更和諧的社區。以下簡介為現時可供大眾市民選用的免費調解服務及資源：

<u>香港青年協會親子衝突調解中心[2]提供的「親子調解」服務</u>

香港青年協會的服務理念是因著青少年子女的成長是不少家長關注並感困擾的範疇，若然兩者之間缺乏溝通和了解，彼此的衝突很容易會愈變愈多，愈演愈烈，為個人、家庭以至社會帶來不同程度的壓力和危機。「愛與關懷」、「責任與尊重」、「溝通與和諧」是健康家庭的三大重要元素。家庭成員之間掌握溝通之道，而父母又能夠在關愛與管教兩者之間取得平衡，「家」便能茁壯成長，成為支援個人發展及凝聚社會和諧進步的支柱。

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[1] 香港和解中心 副會長

[2] 香港青年協會親子衝突調解中心總辦事處地址：九龍觀塘坪石邨翠石樓地下
單位主任：凌婉君姑娘，電話：2402 9230，電郵地址：pcmc@hkfyg.org.hk。

香港青年協會親子衝突調解中心的「親子調解」服務的服務目標是透過調解服務，協助親子學習「有商有量」的溝通模式，化解衝突，從而重建及改善親子關係。服務介入的最佳時段是親子衝突發生的初期或中期，服務對象針對 10 至 18 歲的青少年及其家長。透過調解服務處理的親子衝突一般可分為四大類別，包括(1)家庭方面：相處時間、溝通表達方法、個人私穩；(2)學業方面：讀書及學習上的期望、升學就業意願分歧、時間分配；(3) 社交/成長方面：擇友、拍拖、儀容打扮、金錢運用、時間管理、不良習慣； (4) 行為方面：夜歸、離家出走、逃學。

親子調解五步曲，以個別會談及親子聯席會議進行調解服務：
第一步：意識衝突　盡早意識及確定，親子的衝突事件
第二步：恰當表達　各自以冷靜態度表達對衝突事件的看法及感受
第三步：彼此聆聽　互相聆聽，站在彼此的角度感受其感受
第四步：商討辦法　齊齊商討解決問題的不同方法
第五步：訂定及執行協議　一起訂立及執行解決方案

此外，還在各區設有青年空間分別位於筲箕灣峻峰花園、紅磡家維邨、粉嶺祥華邨、天水圍天悅邨、荃灣祈德尊新邨等。

<u>聯合調解專線辦事處[3]小型糾紛調解先導計劃</u>

聯合調解專線辦事處(JMHO)在「司法機構調解工作小組」的構思及指導之下， 2010 年以非牟利擔保有限公司模式成立，在當時主要調解服務機構組成，創會成員包括：香港和解中心、香港大律師公會、香港律師會、香港仲裁司學會、英國特許仲裁學會(東亞分會)、香港調解會(香港國際仲裁中心轄下) 、香港建築師學會和香港測量師學會。聯合調解專線辦事處的主旨為推動調解及為市民提供調解轉介服務。

小型糾紛調解先導計劃(“先導計劃”) 由香港賽馬會慈善信託基金捐助，聯合調解專線辦事處(“調解專線”) 獨立管理。先導計劃主旨是鼓勵更多人士於訴訟前使用調解，亦透過協助當事人維繫關係，以促進社會和

[3] 如欲申請或有任何疑問，可聯絡聯合調解專線辦事處計劃主任，地址香港金鐘道 38 號高等法院大樓 LG102 室，查詢熱線電話：2901 1224，電子郵件：mdmps@jointmediation.org.hk

諧。符合申請先導計劃的爭議類別包括(1) 因社會或法律關係所產生的民事糾紛，可涉及或不涉及金錢；(2) 若涉及金錢，金額不可超過港幣$100,000。社會或法律關係是指鄰里、僱主僱員/同事、家庭成員、業主與租客、侵權行為人士、人身傷亡、涉及商品和/或服務合同的雙方/各方、代理和委託人、金融機構和客戶、電訊公司及其客戶、牽涉名譽或有關無形資產糾紛的當事人。

為能服務更多有真正需要的市民，先導計劃未能涵蓋所有類別的個案，不受理的個案包括(1) 純金錢性質：如一般債務，有關費用的政策，收費，徵費，或不涉及合同及侵權因素的投資損失；(2) 爭議涉及家庭暴力或涉嫌刑事罪行或行為；(3) 爭議是關於行使政府部門的權力/酌情權；(4) 爭議是關於一個機構的政策問題，並不涉及行政失當，重大事情不被披露或疏忽的指控；(5) 爭議已是消費者委員會，香港申訴專員公署，平等機會委員會，土地審裁處的建築物管理調解統籌主任辦事處，家事法庭的家事調解統籌主任辦事處，金融糾紛調解中心，或其他法定機構處理的案件。

為能有效地使用社區資源，先導計劃只能提供予合資格申請者，包括(1) 正領取下列其中一項香港特別行政區政府的津貼或補貼的人士；(2) 公共福利金計劃 (包括：普通傷殘津貼/ 高額傷殘津貼/ 高齡津貼/ 長者生活津貼) ；(3) 綜合社會保障援助計劃 (“綜援”) ；(4) 自力更生支援計劃及(5) 交通意外傷亡援助計劃;或個人每月入息不超過港幣$25,000 的人士。

先導計劃為免費服務，調解會議的時限為 4 小時，調解及場地費用*由賽馬會資助*。申請人只須支申請費費用每方港幣$200，如個案不受理會退回予申請人。如調解會議超過 4 小時，額外調解時間需調解各方同意並向辦事處作出報告，批核後可以繼續進行調解會議，調解員不得收取額外費用，調解專線豁免額外行政費，如涉及調解場地費用，則由各方當事人平均支付。

市區重建局的市建一站通社區調解場地先導計劃

聯合調解專線辦事處和市區重建局在香港律政司及民政事務總署協助下成立了「市建一站通社區調解場地先導計劃」，每間會議室收費為每小時港幣 48 元，義務調解員可獲豁免費用。場地提供收費影印及打印服務，

收費由「市建一站通」釐訂。

適用範圍：有關市區重建發展、樓宇維修及管理、物業估價、建築工程及在市區重建局的重建發展及 樓宇復修區域內的土地及物業個案。服務時間由星期一至六上午 9 時至下午 6 時 (公眾假期除外) 。預訂手續向聯合調解專線辦事處索取或在其網址下載「租用場地表格」、「問卷」及「場地使用條款及細則」，在使用場地作調解會議前至少 7 天以電郵、傳真或郵寄方式提交申請表格。聯合調解專線辦事處確認申請，在使用場地作調解會議前至少 2 個工作天或申請被確認後 4 天內 (以較早者為準) 以現金或支票繳交費用，請寫明支票的受款人為「聯合調解專線辦事處」或“ Joint Mediation Helpline Office”

<u>民政事務總署的大廈管理義務專業調解服務試驗計劃</u>
民政事務總署（民政署）於 2015 年 2 月 25 日與香港和解中心和香港調解會簽訂合作協議，推出「大廈管理義務專業調解服務試驗計劃」，由 2015 年 3 月至 2017 年 2 月，為期 24 個月。

「大廈管理義務專業調解服務試驗計劃」的服務範疇包括成立法團的安排及有關事宜、業主/法團會議程序及有關授權書事宜、大廈維修事宜及一般大廈管理糾紛。民政事務總署收到個案申請後，會透過香港和解中心或香港調解會安排包括 1 名主調解員及 2 名助理調解員的專業調解組與申請人進行初步會議，讓申請人瞭解調解基本原則、步驟並鼓勵申請人進行調解，最後評估個案是否適合行調解，總時數以 3 小時為限。完成初步會議後，調解員會與各申請人進行預備會議及正式調解會議 ，就各方的爭議事項進行調解會議，總時數以 12 小時為限。免費的調解會議場地包括灣仔軒尼詩道 130 號修頓中心 31 樓及大角咀福全街 6 號市建一站通。

申請人可透過各區民政事務署的聯絡主任，初步了解個案及評估後，會將個案轉介香港和解中心和香港調解會委派調解員及安排調解會議，調解服務由 3 名調解員組成的調解組提供。在處理個案申請時，各方須遞交申請表格及簽署表格內的聲明書；接著由調解組安排各方簽署調解協議和在達成各方都接受的解決方案後，簽署和解協議。最後，填寫意見調查表，以便評估服務成效。如申請一方為法團，於申請時交法團會議記錄，以確定

經管理委員會會議議決通過，授權管理委員會成員代表法團，授權代表參與調解會議、作出決定及簽署和解協議，使出席調解會議的法團代表能有足夠的授權，使調解會議能在有效及互動討論中進行，最後能達成各方都接受的解決方案。

香港和解中心[4]的免費社區調解服務計劃

香港和解中心的免費社區調解服務包括： 免費社區調解服務計劃、義務調解推廣及教育、義務調解諮詢服務及義務調解服務專線，旨在推動社區認識調解。

一般調解服務相關收費包括調解員費用、調解會議場地費用、調解機構的行政費及文件複印等雜費，以上費用一般會由爭議雙方平均分擔。

香港和解中心的免費社區調解服務範圍包括樓宇維修、大廈管理、租務糾紛、合約糾紛、工程糾紛、勞資糾紛、學校糾紛、家庭成員糾紛；個案涉及的總爭議金額為不多於港幣 100 萬元，服務時數以 4 小時為限。在此免費社區調解服務計劃下，申請人不需要支付調解員費用和調解機構的行政費，在香港和解中心的會議室調解會適用下，申請人亦不需要支付會議場地費用。市民常常查詢如果調解超出時間怎麼辦？雙方可自由選擇接續安排或雙方可按需要重新向香港和解中心申請調解服務，香港和解中心會酌情考慮申請。

調解的關注點是雙方的關係，關注的方向是將來，如何解決事件，不是基於過去發生的事情和事實，分對錯和責任，從而判斷誰是誰非，誰勝誰負。調解員透過促進式的調解技巧、有效的提問、談判技巧的現實測試、最好和最差的另類方案，分析/判斷真正問題所在，有系統地解決問題，有技巧地引出當事人說出可行方案，最後達成雙方共同接受的解決方案。

試想想，如果雙方可以在一個和平理性而又保密的情況下傾談，絕對可以令雙方對另一方有更深入的瞭解，從而避免很多「誤會」，令事件惡化及大家的關係更差，最後唯有採取法律訴訟去解決問題。爭議各方於達成協

[4] 如欲申請或有任何疑問，可聯絡香港和解中心秘書處，地址香港灣仔軒尼詩道 245－251 號守時商業大廈 21 樓，查詢熱線電話：2866 1800，電子郵件：admin@mediationcentre.org.hk

議後，調解員會協助各方草擬「經調解的和解協議」，當各方簽署後，該份協議就是一份有法律效力的合約，簽署各方均需要遵守。

調解作為另類紛爭解決方法，並不影響爭議各方的法律權力，如果調解未能協助各方解決爭議，或甚至達成協議後，任何一方也可以進行法律訴訟。但是，如果大家在努力商討而達成都大家同意和接受的解決方案，又何須要勞民傷財去進行訴訟呢？

「特定界別調解的美妙 — 簡介特定界別調解計劃」

黃繼兒先生[1]

常言道，有人的地方少不免有爭議。曾有兩名村民在草原上發現牛隻，雙方均稱牛隻為其所有，爭持不下，劍拔弩張。事情驚動「德高望重」的村長充當「和事佬」，憑其地位權勢，壹錘定音，決定牛隻誰屬。敗走的一方無奈帶著失望、不忿及疑惑離開。這位「和事佬」所作的裁決，是否真的不能令雙方心悅誠服，是否真的不能達致雙贏呢？

2. 時至今日，「和事佬」已有規範的稱呼及命名，現今社會擔任這角色的正是調解員。調解員的主要任務就是要令涉事雙方將爭端擱置在旁，帶領他們朝著「和」及「雙贏」這結局進發，從而解決問題。即使現今的司法制度已十分完備，「雙贏」的目標及解決問題的宗旨仍是各方所盼望的，因此「調解」已成為處理投訴的機構日常不可或缺的課題。

公署職能

3. 個人資料（私隱）專員公署（下稱「公署」）負責監察《個人資料（私隱）條例》（下稱「條例」）的施行。條例於 1996 年 12 月生效，公署的使命正是致力推廣、監察及監管，促使各界人士遵從條例，確保市民的個人資料私隱得到保障。

4. 公署接獲及處理投訴方面，可以分為「執法」與「監察及監管符規」兩大範疇。公署會透過正式調查及循規查察等形式，並夥拍其他規管者及海外的保障資料機構，公正、公平和具效率對涉嫌違反條例的事件進行調查及採取適當行動，以確保各界遵從條例的規定。

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[1] 香港個人資料私隱專員

5. 隨著時代的進步，市民對自己各方面的權利有更深入的認識。為捍衛個人權益的聲音漸響，投訴個案亦與日俱增。公署在 2015 至 2016 年度的數字創下歷年新高，較去年同期大幅增長 20%，達 2,022 宗。即使公署增聘人手處理投訴，在投訴數字日益增加的情況下，衡量成本效益等因素，本公署若仍墨守成規，拒絕靈活調配資源，實不能應付日積月累的個案。

公署調解的程序

6. 公署在接獲投訴之初，會先審閱評估投訴是否符合條例第 37 條[2]下的要求，以確定被投訴者的有關作為是否有表面可能違反條例的規定。在接納個案後，公署會開始作出初步查詢及「調解」，目的正是要找出可否透過其他方法解決問題而毋須專員行使他在條例下的法定權力。若未能成功「調解」，而個案又有違反條例的表面證據，但被投訴者不擬作出糾正措施，公署會按條例第 38(a)條[3]進行正式調查及搜證工作。最後，公署會考慮發出執行通知要求被投訴者予以糾正。

7. 然而，在調查過程中，公署除了要運用資源，投訴人及被投訴機構均要應對公署的調查，甚或需要花費時間、資源尋求法律或其他方面的協助及意見，可以說是各有所失，費力不討好。

調解的釋義

8. 要適時處理這情況便需要思考出路，加強「調解」的應用便是不二之選。我們有時說「調停」，有時說「調解」；英文亦有 “conciliation” and “mediation”。兩個詞的分別在於：

「*“mediation” (調解/調停)及 “conciliation” (調解/和解) 經常被*

[2] 條例第 37 條訂明，投訴是由身為資料當事人的個人，就資料使用者與個人資料有關的作為可能違反條例的規定而作出的。

[3] 條例第 38 條訂明，凡專員收到一項投訴，或有理由相信與個人資料有關的作為已經或正在違反條例的規定，則專員可進行調查，以確定有關作為是否屬違反條例的規定。

交換使用，兩者一般都是指由 1 名中立的第三方協助爭議各方溝通和談判，並就衝突或爭議達致和解。不過，這通常是令人混淆的起因，而且這兩個詞語在本港的調解文獻及法定條文中的用法亦十分多變。」

「在香港，英文詞彙“mediation” 和“conciliation” 沒有統一的中文對應詞彙。在法例當中，調解不受單一守則或法律架構規管，而是在多條法例條文中提述；就“mediation”和“conciliation”所採用的對應中文詞彙亦各有不同。對應詞彙不統一，尤其是“調解”一詞互換使用，難免會令公眾以及在香港進行調解程序的重要利益有關者產生混淆和誤解。」

9. 在《調解條例》（香港法例第 620 章）生效後，「調解」便有了清晰的定義[4]。

10. 「調解」顧名思義，調是手段，解是結果，但重中之重在「法、理、情」。既要消退投訴人的不滿，亦要闡明法理，再要顧及情由，將投訴背後的恨意歸空，絕對不是紙上談兵。公署「調解」的方法，與坊間一些機構或不盡相同，惟不同機構因地制宜使用不同的方法「調解」，殊途同歸，目的最終仍是希望取得一

[4] 《調解條例》第 4 條訂明，「 (1) 就本條例而言，調解是由一個或多於一個分節構成的有組織程序，在該等分節中，一名或多於一名不偏不倚的個人在不對某項爭議或其任何部分作出判決的情況下，協助爭議各方作出下述任何或所有事宜—

(a) 找出爭議點；

(b) 探求和擬訂解決方案；

(c) 互相溝通；

(d) 就解決爭議的全部或部分，達成協議。

(2) 就第(1)款而言，分節指調解員與爭議一方或多於一方的會議，並包括就下述事宜進行的任何活動—

(a) 為會議作出安排或預備，不論會議是否有舉行；及

(b) 跟進會議中提出的事宜或問題。

(3) 就第(2)款而言，會議包括透過電話、視像會議或其他電子方式進行的會議。」

個雙贏方案。

11. 公署的《投訴處理政策》中倡議在投訴個案中可應用公署的「調解」功能。公署的角色彷如一個天秤，在平衡法例的規定及情由的同時，致力向涉事雙方解釋條例的規定。公署的執行部日常接到的個案大多圍繞投訴人與被投訴者之間的爭議，既稱得上爭議，豈會容易妥協？但作為一個接受公帑資助的公營機構，必須迎難而上，部份個案即使在初步查詢時未能即時成功解決，公署都不會輕言放棄。在正式立案調查後，亦會繼續造就一個交流雙方的觀點和看法的機會。雙方可以重新檢視自己的處境，並在了解對方的期望後調整自己的堅持，有助日後磋商以達致最終和解。

調解之道 — 法、理、情

法

12. 公署進行的「調解」重點在「法、理、情」。「法」是公署的基石，雖然條例的歷史不足 20 年，現時仍不時有市民或機構未完全掌握條例的規定。若普羅大眾未完全了解條例，處理個案亦會遇到困難，故解釋條例的規定也是公署「調解」的首要步驟。經解釋後，市民或機構或會恍然大悟，了解所作行為原來或涉及、或不涉及違反條例的規定。例如一般人仍以為一旦被閉路電視攝錄便等於收集其個人資料，卻不知道根據個案的判例，收集個人資料的要素是資料使用者在編製一名已被確定身分的人士，而資料使用者視收集得的資料為涉及該名人士之重要情報。反之，大廈管理處以為在大堂張貼附有資料當事人的個人資料的催收管理費欠款通知書是以儆效尤，卻不知這樣可能觸犯條例的規定。

13. 公署作為一個監管機構，有責任根據法例賦予的權力執法。條例六項保障資料原則涵蓋個人資料的收集、保留、使用、保安、政策透明度，及查閱/改正個人資料的權利，藉以從各方面保障市民的個人資料私隱。如被投訴者違反保障資料原則，公

署需要確保他們明白法例規定，承諾不再干犯法例，並採取切實可行的措施或補救行動以糾正其違反事項。公署會要求被投訴機構採取補救措施，例如檢討及修訂政策、向職員發出適當指引、刪除持有的個人資料、書面作出承諾予以改善等。

14. 「法」同時給予市民對公署的信心，由於條例第 46 條[5]規定公署職員需就處理的投訴內容保密，即使投訴雙方對公署和盤托出事件的原委，職員也會對相關資料守口如瓶，這對公署要處理涉事雙方大量敏感度高的個人資料尤其重要。

理

15. 在「法」的框架下，公署在處理投訴上亦需要向涉事雙方說之以理，彰顯「法」的理據。若單純判斷某行為是否違反條例而不加闡釋，被投訴者難免心有不甘或仍對條例無知，重犯機會猶在。正是失牛者鬱鬱而去、得牛者心存僥倖！為免違反條例的情況重蹈覆轍，公署需用心和時間，透過技巧及方法以理服人才令被投訴者明白違反條例的原因，從根本規避重犯的可能。然而，公署在處理投訴方面也有限制，基於違反條例保障資料原則不構成刑事罪行，有部份涉及違反保障資料原則的個案不能按投訴人的意願（例如罰款或拘捕等）處理，公署亦不能強迫被投訴機構向投訴人道歉或作出賠償。這些限制在「調解」階段亦需要向投訴人說明，開宗明義管理其期望。

16. 公署對投訴人作出這些要求時，通常是以「轉達關注」的形式解決的，即不論表面看來是否涉及違反條例的規定，公署仍將投訴人關注的項目向被投訴者反映。與其執著於一句道歉或賠償，不如由公署作為橋樑，將投訴人自己無法令被投訴者聽進耳內的訊息，由公署以持平公正的角度轉達。如此，除了履行公署職能，亦可使被投訴者在公署的解說下，自動採取補救措施或加強保障個人資料私隱，毋須公署以硬性法定的職權要求被投訴機

[5] 條例第46條訂明，除第(2)、(3)、(7)及(8)款另有規定外，專員及每一訂明人員均須將他們在執行在本部下的職能或行使其在本部下的權力的過程中實際得知的所有事宜保密。

構處理。專員亦可以根據條例第 39(2)條[6]的規定，拒絕進行或決定終止由投訴引發的調查。

17. 面對堅持己見的被投訴者，公署亦會鍥而不捨，說之以理。堅持己見源自根深柢固的想法，但往往鑽入了「牛角尖」。公署的「調解」以法理為本，從另一角度思考解決問題的方法，將集非成是的思想束縛換位，讓投訴雙方以法理看事情。

18. 公署於 2014 年曾收到一宗投訴，投訴人是一個宗教團體的會友，因曾向該團體的職員透露與她的前男友於峇里進行結婚儀式但最終未有在港註冊，所以聲稱自己單身，而事後該團體的職員在一個聚會中向其他會友公開事件，並展示一些結婚儀式的相片，以表示投訴人已婚，並指她向外宣稱自己是單身的做法，實屬不當。

19. 公署向該團體查詢時，該團體堅持投訴人屬已婚但其聲稱未婚的行為不成體統，並透過律師代表多番辯解回覆。經本公署不斷「調解」後，該團體終於豁然大悟，明白到他們於一個聚會中向會友披露該事件，並透過簡報程式向會友展示投訴人提供予該職員的結婚相片，藉以勸勉會友的做法實嚴重侵犯投訴人的私隱。最終，該團體刪除相關相片，並書面向本公署承諾，日後在類似本案的情況下，不會向會友或無關的第三者披露會友提供的個人資料，除非事先取得資料當事人的同意。

情

20. 基於涉事雙方的背景、理解能力及接受程度不盡相同，單

[6] 條例第 39(2)條訂明，如專員在顧及有關個案的所有情況後，信納有以下情況，他可拒絕進行或決定終止由投訴引發的調查 —
(a) 該項投訴或一項在性質上大體與其相似的投訴已在先前引發一項調查，而專員在進行該項先前的調查後信納沒有違反本條例下的規定的情況；
(b) 在該項投訴中指明的作為或行為微不足道；
(c) 該項投訴屬瑣屑無聊或無理取鬧，或不是真誠作出的；
(ca) 該項投訴所指明的作為或行為顯示，該項投訴的主要標的事宜，與關乎個人資料的個人私隱無關；或
(d) 因為任何其他理由，調查或進一步調查是不必要的。

憑「講道理」未必能令頑石點頭。要令雙方對法理心悅誠服，便要做到「情理兼備」。公署接獲的部份投訴起源於對條例不認識，或因私人糾紛和積怨爆發而成導火線，職員往往要用心去發掘投訴事件背後的細節及違規的原因，以及了解投訴人向公署投訴的真正原因及期望。期間亦要理順雙方的敵對心態，以「同理心」剔除情緒的問題，將問題的癥結蒸餾出來。這些情況唯有以軟性手法動之以情，才可以將雙方心底埋藏的問題呈現眼前，讓公署對症下藥。

21. 公署於 2016 年曾接獲一個個案，投訴人應徵被投訴公司的工作時，該公司因誤信背景審查機構對投訴人作出的品格審查結果，以為她於 2000 年申請破產呈請，而拒絕僱用投訴人。

22. 若單純在法理上作出判斷，因涉事的機構信納的品格審查結果並非由該公司進行，故該公司甚至不算違反條例的規定。然而，在原本可以終止調查的情況下，公署運用「調解」及「同理心」，以安撫投訴人心有不甘的情緒。最終經本公署介入後，該公司承認錯信該項資料，在覆核有關紀錄後，從新聘用投訴人及向其道歉，投訴人亦因此取回她應得的錄用機會。由此可見，適當運用「調解」，個案中就沒有輸家。這些做法不但解決了問題，更令投訴人、被投訴機構與公署建立互信合作的關係，達致三贏局面。

成效

23. 眾所周知，「調解」節省時間和金錢、減少風險、減輕壓力、維護尊嚴和關係，保障涉事雙方的敏感個人資料被不必要的披露。「調解」的成效也需各方合作及坦誠溝通，經「調解」而達成的和解協議，可能超出法庭准予的法律補救形式，而且遵守協議的比率甚高。

24. 在提升公署處理投訴的效率方面，數據顯示，去年公署完成處理的投訴個案共 2,022 宗，當中 355 宗屬「調解」個案，成功「調解」的個案為 317 宗，「調解」成功率為 89%。過去三年，

公署收到的投訴數字雖然持續上升，但由於資源運用得宜，公署處理一宗簡單個案（即沒有違反條例的表面證據，以及毋須向被投訴者查詢的個案）的平均時間從 43 日減至 25 日；而處理一宗複雜個案（即需要向被投訴者查詢的個案）的平均時間則從 195 日減至 87 日。

25. 此外，根據過去兩年的數據，投訴人向行政上訴委員會就本公署的決定提呈上訴，個案數目分別為 26 及 31 宗。對每年逾 2,000 宗個案而言，上訴的百分比少於 1%，足見 99%的投訴人對公署的決定心悅誠服及感到滿意。

26. 在個案持續增加的情況下，處理時間仍有下調空間，當中不可抹煞「調解」處理個案的功勞。省下的人力資源和時間便可以用於教育及推廣保障、尊重個人資料私隱的用途。

每個人或機構心中總有其「調解之道」，但萬變不離其宗，「調解」的精粹在於解決糾紛，沒有一方是絕對的贏家或輸家，最重要的是「調解協議」及「締造雙贏」。解決問題及讓涉事雙方贏在結案時正是公署期盼的結果。公署在未來的日子亦會繼續朝著這個方向發展，精益求精深化「調解」的貢獻，讓市民和公署一同贏在「調解之道」。

金融消費者保障新里程——金融糾紛調解中心

吳子威先生[1]

成立背景

2008 年，雷曼兄弟迷你債券事件為香港金融市場帶來震撼的影響，香港金融管理局（「金管局」）和證券及期貨事務監察委員會（「證監會」）在該年所接獲的投訴，急升至約 30,000 宗。為協助雷曼相關產品的投資者與分銷金融機構解決爭議，監管機構引入調解方式，為部分爭議個案提供調解服務，最終效果令人滿意。於同年十二月，金管局及證監會就事件向財政司司長提交報告，建議政府研究為香港金融業設立糾紛解決機制。

2010 年政府就設立金融糾紛調解中心（「調解中心」）的建議展開公眾諮詢，建議得到公眾支持並獲立法會通過。2011 年 11 月調解中心成立，並在翌年 6 月正式運作。

如果消費者與金融機構出現金錢糾紛，一般情況下，他們會先向金融機構投訴，若糾紛未能得到解決，他們或會進一步向監管機構作出投訴，然而監管機構是處理金融機構是否違規，但不會介入投訴人的索償。若消費者要向金融機構追討賠償，只能訴諸法律或透過其他途徑，例如向傳媒投訴，過程中亦需花費不少精力、時間和金錢。

調解中心的成立，是為市民及金融機構提供獨立及不偏不倚的「先調解，後仲裁」爭議解決程序，以便捷有效及費用相宜的方法，協助解決他們之間的金錢爭議，讓糾紛在升溫前得以和解，從而締造和諧的金融市場環境，提升金融消費者對市場的信心，鞏固香港的國際金融中心地位。

成立四年以來，調解中心每年平均接獲逾二千宗查詢，當中的千多宗是涉及金融產品及服務的投訴。而調解中心於去年進行公眾認知度調查，調查結果顯示，超過四成整體受訪者及過半數擁有投資經驗的受訪者認識調解中心。對於一家只有四年歷史的機構而言，此認知度可算令人滿意。

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[1] 金融糾紛調解中心行政總裁

獨立運作

為了確保調解中心的爭議解決程序在獨立及持平的原則下進行，雖然成立資金及初期營運資金是由政府及監管機構提供，但調解中心並不隸屬於任何政府部門或為法定機構。調解中心的政策制定是由一個獨立的董事局負責，這個由九位成員組成的董事局，成員來自財經事務及庫務局、金管局、證監會、金融業界、調解界、保障消費者權益等界別，並由一位獨立人士擔任主席。他們一方面把不同持份者的意見帶進董事局內，同時也代表着不同的持份者監察調解中心的運作，並協助調解中心制定合適的發展策略及服務。

調解中心十分注重其調解及仲裁服務的質素，因此，調解中心設立了相關的委員會及小組以確保調解員及仲裁員的專業水平。遴選委員會負責甄選及審批有意成為調解中心名單上之調解員及仲裁員的申請，以維持及提升名單上之調解員及仲裁員的水平。而紀律委員會及紀律審裁組則分別負責建立及執行一套有關針對調解員及仲裁員之投訴的處理程序，確保投訴個案在公平、公正及不偏不倚的程序下進行審理。慶幸的是，調解中心成立了四年以來，從未有服務使用者就調解中心的調解員或仲裁員而作出投訴。

金融糾紛調解計劃

調解中心最核心的工作，是獨立持平地管理一個金融糾紛調解計劃（「調解計劃」），這個計劃是以「先調解、後仲裁」的方式，提供一站式的服務，協助解決個人客戶與金融機構的金錢爭議。調解中心的角色及運作皆詳列於《職權範圍》中，這份猶如調解中心憲法的《職權範圍》，闡釋了調解計劃的內容，包括可受理的爭議類別、解決爭議的程序、提供的服務等，不但調解中心職員受此文件所規範，調解中心名單上的調解員和仲裁員，以至調解計劃的成員，即金融機構，亦必須遵守《職權範圍》內的條文。若調解中心需要修訂《職權範圍》，必須先徵詢包括政府在內的相關持份者的意見。

所有受金管局認可或證監會監管的金融機構（只從事提供信貸評級服務的機構除外）均為調解計劃成員，當中包括銀行、有限制牌照銀行及存款公

司約二百多家，及逾二千家證券公司、期貨公司、基金公司、資產管理公司等。倘若市民與其金融機構的金錢爭議無法自行解決，便可向調解中心申請調解計劃下的調解及仲裁服務，當申請獲得調解中心受理，相關的金融機構便須參與調解，甚至仲裁，務求以有效及具建設性的方式處理爭議。

調解計劃的出現，是希望為金融消費者提供法律訴訟以外的另一個渠道來解決與金融機構的爭議。現時的調解計劃列明，合資格申索人須為個人或獨資經營者，同時必須是有關金融機構的現有或過去客戶，或曾經接受有關機構的金融服務。若申索涉及聯名戶口，戶口的所有持有人均需符合合資格申請人的定義。

當調解中心的個案主任接獲申索人的申索申請後，會根據《職權範圍》內的《個案受理準則指引》(「受理準則」) 進行審批。受理準則的其中幾項重要條件包括：

- 申請必須由合資格申索人提出；
- 涉及爭議的金融機構須為調解計劃成員；
- 申索人已向有關金融機構作書面投訴，並已收到最後書面答覆，但爭議未能夠解決；又或在書面投訴超過 60 日後，申索人仍未收到最後書面答覆；
- 申索必須屬金錢性質，每宗申索最高申索額為港幣 50 萬元或等值外幣；及
- 申索人須於購買該金融產品或首次得知有金錢損失的 12 個月內提出申索。

縱然消費者的申索符合了上述的條件，但調解中心亦會因應以下的情況而不能受理該申請：

- 申索個案正在進行法院訴訟程序或曾經循法院訴訟程序處理並已獲裁決；
- 申索屬已向保險索償投訴局作出的投訴；
- 申索與金融機構的雇傭事宜有關；
- 申索與金融機構的政策和做法、收取的費用、額外費用、收費或利率有關，但若指稱涉及隱瞞、資料披露不足、失實陳述、不正確施行、違反任何法律責任或職責、行政失當，或違反監管規定的爭議則除外。
- 申索與投資表現有關，但若指稱涉及隱瞞、資料披露不足、失實陳述、

疏忽或違反受信人責任的爭議亦獲除外。

當申請獲受理後，調解中心便會展開調解程序，並委任一位專業的調解員主持調解會議。調解會議中，調解員會努力促進爭議雙方溝通，讓他們了解對方的需要及關注事項，並協助他們發掘雙方接受的和解方案，以達致和解。若糾紛未能在調解階段得以解決，申索人可選擇以仲裁方式進一步處理該爭議，而仲裁裁決更是一個一審終局的決定，除因裁決的法律觀點問題外，雙方均不能就裁決提出上訴。調解和仲裁的過程及內容是保密的，而調解協議及仲裁裁決對申索人及金融機構均具約束力。

計劃特色

為實踐金融業界對保障消費者的承諾，調解中心向金融機構收取的費用會較消費者高出四至五倍。以申索金額低於港幣 10 萬元的四小時調解個案為例，消費者需付共 1200 元（包括 200 元申請費），金融機構則需付出 5000 元作調解費用；至於申索金額介於 10 萬至 50 萬的個案，調解中心會向消費者收取 2200 元（包括 200 元申請費），並向金融機構收取 10,000 元。若消費者選擇仲裁服務，消費者及金融機構分別需付 5000 元及 20,000 元。

調解中心之所以能一直維持着令人滿意的調解成功率，全賴專業團隊的共同努力。調解中心名單上的調解員及仲裁員均具備豐富的調解及/或仲裁經驗，同時擁有相關金融知識，讓他們在處理金融爭議時得心應手，盡展專業水準。而調解中心的個案主任亦受過嚴格培訓，不但具有紮實的個案管理經驗，更加備有認可調解員資歷，能有效地協助爭議雙方處理糾紛。

自成立以來，調解中心累積錄得逾八成的調解成功率，大部分的個案均能在三至六個月內結案，超過 88%的使用者對調解中心的服務表示滿意，93%的使用者表示會向別人推薦調解中心的服務，89%則表示日後會再以調解方式解決糾紛。

在未來的日子，調解中心計劃擴闊服務範圍，並進一步優化服務細節，期望能夠為使用者帶來更佳的服務，協助更多的消費者及其金融機構解決金錢爭議。

<<小型糾紛調解先導計劃>> 簡介

陳炳煥律師，銀紫荊星章，太平紳士[1]

聯合調解專線辦事處

聯合調解專線辦事處（“調解專線”）是由香港調解會、香港大律師公會、香港律師會、特許仲裁學會（東亞分會）、香港仲裁司學會、香港建築師學會、香港測量師學會和香港和解中心於 2010 年成立。聯合調解專線辦事處是以非牟利擔保有限公司模式成立，旨在推動調解成為在香港解決爭議的方式之一。於 2011 年 7 月 14 日起，聯合調解專線辦事處已獲認可為慈善機構，並按《稅務條例》第 88 條獲豁免繳稅。

小型糾紛調解先導計劃背景及目的

小型糾紛調解先導計劃(“先導計劃”)由香港賽馬會慈善信託基金捐助(“馬會”)及聯合調解專線辦事處(“調解專線”)獨立管理，目的是以符合比例的收費為財政有限人士提供解決調解服務，從而鼓勵更多人士於訴訟前使用調解。先導計劃亦透過協助當事人維繫關係，以促進社會和諧。

調解專線成立至今收到很多查詢個案涉及金額只有數萬元或數千元，但調解費用卻需要每小時$2,000 至$3,000 元，因此當事人放棄了申請調解。有見及此，調解專線於 2014 年開始向馬會申請贊助推行此計劃，並於 2015 年獲撥款贊助。

先導計劃於 2016 年 1 月 28 日正式開始運作，預計運行 2 年。

服務範圍

先導計劃下，調解專線提供免費個案諮詢，當中包括了解個案背景，評估個案是否適合進行調解，協助當事人準備參與調解會議等。另外，調解專線也進行案件管理的工作，聯絡另一方當事人的調解意向，委任調解員，協助租用場地及向調解員提供行政支援。獲委任的調解員為當事人提供 4 小時的調解會議，協助當事人溝通，找出爭議點及解決方案，並達成協議。

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[1] 聯合調解專線辦事處創會主席及義務顧問、調解督導委員會委員及其公眾教育及宣傳小組主席

合資格爭議

先導計劃下的合資格爭議指一般民事糾紛，可涉及或不涉及金錢。但金額不可超過港幣十萬元，當中例子包括：鄰里糾紛、家庭成員糾紛、租務、僱主僱員糾紛、侵權、人身傷亡、商品及服務爭議、代理和委託人爭議（買賣樓宇所涉及的糾紛）、金融糾紛、電訊服務爭議或牽涉名譽或有關無形資產糾紛。

不受理的個案

若個案涉及一般債務、有關收費的政策問題、涉及暴力或涉嫌刑事罪行、關於行使政府部門的權力等均不獲受理。

另外，如個案已由其他法定機構處理，包括司法機構的建築物管理調解辦事處及家事調解辦事處、消費者委員會、平等機會委員會、申訴專員公署、金融糾紛調解中心等，調解專線也不會受理這些個案。

合資格申請者

先導計劃下申請人必須是個人身分，以及正領取其中一項政府的津貼（公共福利金計劃、綜合社會保障援助計劃、自力更生支援計劃、交通意外傷亡援助計劃）或其個人每月收入不超過$25,000。

收費

由於獲得香港賽馬會慈善信託基金捐助，每方當事人只需支付$200 的申請費用可進行 4 小時的調解會議。調解費用及場地費用是免費的。

若調解會議超過 4 小時，於調解員同意下，免費為當事人提供額外調解服務。場地費用則由各方當事人承擔。

調解員名冊

先導計劃下共有 154 名調解員，來自八個專業團體的調解員，曾接受專業的調解訓練及為外界認可的。

數據分享

直至 2016 年 4 月 30 日，調解專線共收到 79 個查詢，申請個案有 15 個，當中 4 宗申請正等待確認對方調解意向，另外 2 宗個案正進行調解，而完成調解個案有 2 宗。

宣傳活動

先導計劃定期舉辦不同的宣傳活動，包括今年一月及二月於商業電台廣播電台廣告，並將於 6 至 7 月期間於巴士 roadshow 播放宣傳短片。為加深大眾對先導計劃的認識，調解專線亦會定期舉行公開講座。

盼望先導計劃協助更多有需要的市民大眾使用調解以處理糾紛。

「特定界別調解的美妙 - 簡介特定界別調解計劃」

廖嘉蓮女士[1]

你有、我有、佢都有；五歲用、四十五歲用、八十五歲都用；一個香港的貼地行業 — 電訊服務業。一個屬於資訊及通訊科技業界之行業，加上調解平台的時候，會有甚麼化學作用呢？

究竟電訊業之調解服務可稱得上美麗嗎？而那美麗是指內在美？還是外在美呢？

香港的電訊業擁有自由及開放競爭的特色，電訊商在廿一世紀的數據世界裏，可提供各式各樣的通訊及其增值服務，而作為用家的市民大眾日常亦可透過不同的應用程式自由自在地享用手機及網上平台的服務。要形容用家對通訊業服務之感受，莫過於「分分鐘需要你」。

不過行業的自由市場空間愈大，科技發展愈快，那麼不同步伐的電訊商和顧客，同時亦有機會遇上相應的糾紛和誤會。

正因如此，在 2012 年，電訊業界特別設立了 「解決顧客投訴計劃」（Customer Complaint Settlement Scheme （CCSS）），以調解形式協助電訊商及其客戶解決一些已陷入僵局的帳單爭議。

而一所獨立的調解服務中心在「通訊事務管理局辦公室」（通訊辦）支持下，由「香港通訊業聯會」成立，以實施此計劃。

計劃的主要特性包括：

- 業界自律性規管
- 業界自願性參與成為會員
- 獨立機構營運
- 一次式調解平台

[1] 香港通訊業聯會調解服務中心(電訊)執行主管

服務範圍包括:

- 個人及／或住宅電訊服務
- 帳單爭議金額不少於港幣 300 元
- 帳單爭議發生後 1 年內，雙方之爭議期間已超過六星期仍未能解決而陷入僵局 或 電訊商已通知顧客該爭議未能解決

符合資格的用家可直接聯絡通訊辦尋求協助，通訊辦負責將合乎資格的個案轉介給電訊業調解服務中心跟進。而中心設有專業的調解設施及擁有多名合資格調解員以協助過程。

調解的成功率很高，除了調解之基本獨有特點外，其實亦有賴於會議過程中有一項非常重要的部份。調解員會讓大家在會議中聽取事故發生後一直都「聽不到的說話」。

以下是由電訊業調解服務中心在調解過程中的聆聽經驗分享：

1) 我從來都没有用過數據服務……（聽不到的說話）其實母親節得來一部新款智能手機，換去舊式手機後，才發覺我是有數據服務的；
2) 我以往外遊時都不會產生漫遊數據費用……（聽不到的說話）上次手機失靈並維修後，不知為何會產生漫遊數據費用呢；
3) 我一向在國外都有使用漫遊服務……（聽不到的說話）但從來不知道每個國家的漫遊費用是不同的，而且更不知道有些地方的漫遊費用是那麼昂貴的。

科技日新月異，不知作為精明用家的你，有沒有遇過以上的問題呢？

每位客戶尋求調解服務時都帶着相同期望嗎？希望有中間人認同自己的期望嗎？最後是否人人期望可達到呢？

電訊業調解服務中心亦在此分享了不同客戶在調解過程中的期望：

1) 到這裡，我並不是為討回金錢而來，我其實覺得除了已知的服務外，我應該還有很多增值服務的問題需要有人對我解釋清楚；而且對於在購買服務時，未能完全一一解釋，感覺不高興，希望有人向我道歉；
2) 金錢並非我想在調解會所探討的項目，我今次參與的目的主要希望有人教導我使用這部手機，身邊朋友人人都說手機容易使用，根本

不需要學習也可使用吧！

在調解會議中，雙方的期望都可共同達成之際，就可邁向雙贏之道。雙贏是調解的重要意義之一，要達到雙贏的地步絕非簡單。

從電訊業調解服務中心收到的衆用家評語中，可充份了解他們對調解服務的期望達成之際，並邁向雙贏之道。當中不乏認為調解平台可提供雙方一個下台階，在大家爭持之下，誰可能先讓步呢？亦有用家覺得專業服務的重要，是協助解決問題的根源。有些則深深感受到調解是真正有效協助雙方溝通的過程等等。他們在溝通過程後的這些分享，正可給予中心推進日後之服務時，精益求精。

電訊業調解服務中心是一個揉合了科技化及人性化的平台，個案無論大小，精要並非在於最後結果，而是雙方在調解員協助下的溝通過程，並推進至雙贏的環境。

其實矛盾基本是我們生活的一部份，我們應該持開放態度去面對，各人應該珍惜各自的專業，讓自己的時間投放在自己的專業和目標當中，一起享受生活的藝術。大家每天應抱着正確的生活態度，故此遇上矛盾時，找獨立及專業調解人士幫忙就最適合了。

電訊業之「解決顧客投訴計劃」不單改善顧客及電訊服務供應商之矛盾及商業關係，並且可有效地減少過往未解決的個案，令雙方更自主及有彈性地解決問題。

其實此計劃的一群計劃持份者，在創造電訊業之調解服務的內在美及外在美的同時，亦不遺餘力地修補美中不足之處。在計劃長期實施後，大家都開始積極向大眾推廣計劃，務求令每位電訊服務用家都認識此計劃，從而可幫助每位真正有需要的用家。同時，讓大眾在無後顧之憂下，安心及快樂地享受廿一世紀的數據世界的生活。

最後，讓我再提醒大家日常可多聆聽別人的心聲，包括那一般認為是「聽不到的說話」。願大家繼續寫意地以「分分鐘需要你」的通訊業服務享受人與人之間的關係和生活。

消費者委員會經驗分享

莊龍五先生[1]

(一) 從「調解」到「調停」

消費者委員會（下稱“消委會”）一直調解各類消費者與商戶之間的消費糾紛，以保障消費者的權益。為更有效處理消費糾紛，消委會自 2009 年起積極鼓勵同事學習及運用調解技巧於處理消費糾紛。由於《調解條例》於 2013 年 1 月 1 日生效，並就調解訂下法律涵意，而消委會在處理消費糾紛亦肩負保障消費者權益的角色，或未如一般人心目中調解員需以中立的角色排解雙方爭議，故此，消委會自 2013 年起已轉用「調停」消費糾紛，代替「調解」一詞。

(二) 為何要運用調解技巧處理消費糾紛

消費糾紛涉及的金額由十元八塊之小額消費至過千萬自住物業交易，但無論涉及金額多寡，消費爭議其中一種特質是往往容易牽動消費者及商戶雙方的情緒，對解決雙方爭議造成障礙。

由於消委會並無執法權力，在調停消費糾紛時亦沒有調查權，故此，消委會是以「和事佬」的角色處理消費糾紛。一般處理投訴的技巧會強調先安撫投訴人情緒，繼而討論爭議事項。調解就是將這些概念轉成系統化的理論及步驟，讓人容易明白其理論基礎及按部就班地學習，而消委會採用的調解模式是「促進式調解」（facilitative mediation），當中四大原則之首是「人事分開」（Separate the People from the Problem[2]），意思是先處理「人」的情緒、觀感及預設等，疏導雙方高漲的情緒，才可處理實質的「爭議事項」，簡而言之就是「先講心情，再講事情」。

(三) 消委會如何推動運用調解技巧

消委會在推行初期曾邀請資深調解員分享調解個案經驗及效果，讓同事對調解有初步的認識，同時，管理層過去幾年亦大力資助同事報讀調解課程，現時消委會投訴及諮詢部超過一半處理個案的同事已完成正規 40 小時的調解課程，其中 7 位更取得認可調解員資格。經過數年累積的經驗，以及透過同事之間互相分享如

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[1] 消費者委員會 投訴及諮詢部總主任

[2] Fisher, R., Ury, W. and Patten, B. (2011) [1981]. Getting to Yes: Negotiating Agreement Without Giving In (3rd ed.) New York: Penguin Books

何運用調解技巧於處理個案的討論，初步將「促進式調解」之理念及技巧作為處理消費糾紛的基礎，自 2010 年起亦成為消委會投訴及諮詢部新入職同事培訓課程之一。

(四) 調解美妙之處

自從消委會積極推動運用調解技巧於工作上，除了提升處理個案的專業水平，亦得到外間的肯定及認同。過去數年已有 6 位投訴及諮詢部同事獲頒申訴專員嘉許獎個人獎，以表揚他們以積極態度處理投訴，在工作上發揮了正面的影響。此外，消委會近年獲邀到政府部門、大專院校及專業團體分享處理個案的經驗，以推動社會和諧，成效備受肯定。

調解其中一種技巧是「轉換框架」（Reframe），即使面對一些負面的處境亦可轉換成積極正面的思維應對。本質上處埋投訴容易接收負面情緒，我們有時候亦可能無意間發放這些負面情緒在工作間，在相互影響下，負面情緒更為顯著。反之，面對困難的個案，亦可以正面的態度應對，我們鼓勵同事之間可透過處理個案經驗的檢討，不論是成功或失敗，將負面情緒轉化成互相學習的契機，即使日後再次面對困難的個案及處境，可視為鍛鍊調解技巧的機會，同時減低產生負面情緒的可能。

當發生消費糾紛時，雙方或許預設了他們是在對立的處境，互不退讓，忽略了各自立場背後的關注事項。只要我們能協助雙方「先講心情」，讓他們知道我們正在認真聆聽他們所說所想，感到被尊重，繼而「再講事情」，發掘他們立場背後的關注事項，探討雙方均可接受的解決方案。運用調解技巧處理消費糾紛，不單可達至消費者及商戶雙贏，事實上處理個案的同事亦可從中得到工作的滿足感。以下分享一宗個案來示範如何運用調解技巧處理消費糾紛。

(五) 個案分享

投訴人在傢俬公司訂購一個衣櫃，送貨當日由母親接收貨品，投訴人晚上回家才發現衣櫃側面有幾條花痕，翌日便致電商戶要求換貨但不果，故向消委會投訴。

消委會初步聯絡傢俬公司，對方態度強硬及情緒高漲，堅持由於顧客已驗收貨品，並在送貨單上簽署確認，故不同意退換貨品。另一方面，投訴人對商戶不負責任的態度十分不滿，堅持追究到底。

在雙方僵持不下的情況下，並非討價還價便可解決爭議，而一般的投訴處理方案可能是建議投訴人諮詢法律意見後決定是否採取法律行動。但如使用調解技巧，可嘗試「先講心情」，從雙方因事件所牽動的情緒反應著手，探討事件對雙方有何影響。經瞭解後，同事得知原來投訴人的母親因接收衣櫃時沒有察覺瑕疵而甚為自責，投訴人遂在傢俬公司的社交媒體留言指摘商戶不負責任及欺侮長者老眼昏花，傢俬公司管理層得悉事件後，認為投訴人惡意中傷，故下達指令不可為投訴人更換貨品，並刪除投訴人在社交媒體的留言。

疏導雙方的心情後，便可「再講事情」。同事分別引導雙方發掘各自立場背後的關注事項，繼而引導雙方「互換位置」，感受對方因己方的行為所引發的可能反應。商戶便明白他們最關注是商譽，如事件未能妥善處理，商戶需長期安排人手不時刪除投訴人在社交媒體的留言，無從估算所需的人力資源成本，不是治本的方法，亦理解顧客接收有瑕疵的貨品的心情。另一邊廂，投訴人最關注是母親的感受，明白他持續在社交媒體留言指罵商戶，只會令商戶堅持立場，亦不能讓母親釋懷，適得其反。經同事因應各自關注的事項，探求雙方均可接受的解決方案，最後投訴人同意停止在社交媒體發放負面留言，而商戶同意退回部份貨款予投訴人，投訴人母親亦已釋懷，事件終告圓滿解決。雙方各取所需，互利雙贏。

從上述個案可見，運用調解技巧處理消費糾紛或需要較多時間疏導雙方情緒、發掘雙方立場背後的關注事項，以及協助雙方達至和解。從成本效益的角度，表面上是反其道而行，但長遠而言，這種用「心」處理個案的態度，有效針對雙方關注點而尋求雙方同意的最終解決方案，免卻雙方耗損時間及資源作進一步投訴，甚至訴諸法律；同時亦示範予消費者及商戶如何有效處理消費糾紛，他們日後可嘗試以調解的理念自行處理消費糾紛，減少耗用社會資源成本。

調解於澳門之發展狀況及將來之機遇

邱庭彪博士[1]

今天，調解的優越性越來越凸顯，尤其在新時代的背景下，推廣和完善澳門的調解制度更顯其實際意義。毫無疑問，傳統意義上的司法訴訟能夠幫助當事人解決爭議，而解決糾紛的途徑，筆者卻認為不應僅僅只有這一種。根據鄰近地區的經驗，調解同樣能夠解決民間的爭議，並且能夠快速地提出一個使得雙方滿意的解決方案。民間爭議各方以調解的方式去化解雙方之間的爭議具有各種優越性，特別是能夠使雙方學習互相尊重，接納和溝通。

澳門的社會不斷變化，經濟快速發展，商業的爭議也隨之增多，而隨著澳門回歸祖國之後，澳門居民對司法機關的信心亦與日俱增，訴諸法院的案件也就日漸增多，但由於司法資源有限及運作成本較高，因此，筆者認為澳門在法律改革中應該考慮通過司法訴訟以外的成本較低的其他方式來解決爭議，而調解是其中一種可行的方式。

加強、加快構建統一的調解機構和調解制度的步伐，讓調解在澳門社會中發揮其作用，以節約解決爭議的成本，減少雙方的矛盾，以促進社會和諧，為目前社會應當考慮的問題。

一、澳門的調解法律制度

在澳門現行的法律體制中，調解制度被分散於不同的法律規範之中，並無統一的規範，大致可分為訴訟內調解和訴訟外調解兩種。

訴訟內調解：主要是《民事訴訟法典》428 條、《民法典》1629 條、《勞動訴訟法典》第 27 條及 47 條。

訴訟外調解：主要是附屬於調解性質的法律規範，分別是第 29/96/M號法令《仲裁法律制度》及第 55/98/M號法令《涉外商事仲裁專門法律制度》則補充適用第 29/96/M號法令《仲裁法律制度》[2]《澳門消費爭議仲裁中心規章》、《澳門世界貿易中心仲裁中心內部規章》和《樓宇管理仲裁中心規章》。

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[2] 見同法令第 37 條（補充法例）一、凡在本法規內無明文規定者，均補充適用六月十一日第 29/96/M 號法令。

二、調解成功的效力

筆者先分析調解的結果與於澳門的效力或後果的關係。若調解成功，針對該協議於澳門的效力主要包括兩種情況，分別是在澳門境內調解成功的協議和在澳門境外調解成功的協議。

在澳門境內調解成功時，該協議的效力主要包括四點，分別是：

1. 訴訟待決期間，法官有一次主動要求召集調解的機會；
2. 訴訟待決期間，當事人亦可以要求調解；
3. 其他法定調解機制：調解協議的效力有一些是等同於仲裁的決定；
4. 亦有按一般規定調解。

成功的調解協議，須作成書面形式，經法定形式後，其效力是具有司法執行性的。這些規定分佈於澳門《民事訴訟法典》[3]和《澳門消費爭議仲裁中心的規章》中[4]。

若在澳門境外進行調解時，需要注意澳門法院的專屬管轄的問題。按照《民事訴訟法典》第 20 條的規定，針對澳門之不動產之物權有關之訴訟，是不脫離澳門法院的管轄的，即必須由澳門法院管轄的。

若是以法院判決作出調解成功的協議，必須經確認程序（形式上的審查程序）。這規定在澳門《民事訴訟法典》的第 1199 條[5]及隨後數條；在執行方面，該協議等同於判決，這規定在澳門《民事訴訟法典》第 680 條 1 款[6]；

其他法定調解機制的調解效力，如符合澳門《民事訴訟法典》第 677 條ｂ或ｃ項

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[3] 見第 679 條。

[4] 見第 13 條（卷宗的送交）嘗試調解結束後，卷宗得立即交予仲裁法官，以便根據調解與否而對協議進行確認或審理。

第 14 條（協議的確認）一、調解協議的有效性取決於下列條件的成就：a)當事人本人或透過具有該行為能力的受託人的參與；b)當事人的訴訟能力；c)調解之標的是成立的；d)爭議屬於仲裁管轄及權限之內；e)關於爭議的實質關係的其他前提的成就。二、確認的裁決與在仲裁審理中所作的裁決具有相同的價值與效力。

[5]《民事訴訟法典》第 1199 條審查之必要性：“一、澳門以外地方之法院或仲裁員所作關於私權之裁判，經審查及確認後方在澳門產生效力，但適用於澳門之國際協約、屬司法協助領域之協定或特別法另有規定者除外。二、如上述裁判係在澳門法院正處待決之案件中純粹被援引作為證據，且該證據須由應對該案件作出審判之實體審理者，則有關裁判無須經審查。

[6]《民事訴訟法典》第 680 條澳門以外地方之裁判及其他執行名義之可執行性：“一、澳門以外地方之法院或仲裁員所作之裁判，須經澳門具管轄權之法院審查及確認後，方可作為執行之依據，但適用於澳門之國際協約或屬司法協助領域之協定另有規定者除外。二、對於澳門以外地方所作成之其他執行名義，為成為可執行之依據，無須經澳門法院審查及確認。

[7]規定的情形，經過法定形式後，該協議的效力是具有司法執行力，無須審查或確認。這規定在澳門《民事訴訟法典》的第 680 條第 2 款[8]。

無論在澳門境內或以外，針對不進行司法訴訟前的調解的情況，澳門都沒有規定需要給予特別的制裁後果。至於費用方面的問題，澳門的規定是：只有在需要支付調解費的情況下，方需要支付。

三、澳門的商事調解的規範

目前來說，澳門的商事調解的機制主要的法律依據包括第 29/96/M號法令《仲裁法律制度》及第 55/98/M號法令《涉外商事仲裁專門法律制度》。除司法途徑的調解外，澳門法定的商事調解的機制都是附屬於仲裁機構的內部規章，如《澳門世界貿易中心仲裁中心規章》的第四章獨立的調解程序第 70 條，及隨後的規定。《澳門消費爭議仲裁中心的規章》第 9 條（嘗試調解及審理的召集）及隨後條文。

（一）澳門消費爭議仲裁中心，成立於 1998 年，專門處理爭議金額在澳門幣 50000 元或以下的消費爭議（有調解規則）；

（二）澳門律師公會自願仲裁中心，成立於 1998 年，專門處理：a）律師間之爭議；b）律師與顧客間之爭議；c）涉及民事、行政事宜或商事之任何爭議（無調解規則）；

（三）澳門世界貿易中心仲裁中心，成立於 1998 年（有調解規則）；

（四）一個專門性質的仲裁中心，由澳門金融管理局設立，專門處理：有關保險及私人退休基金的民事或商事的爭議，他們可以在該範圍內進行機構自願仲裁，但不得超過初級法院的法定上訴利益限額（無調解規則）。

四、商事調解人員的資格

對於現時的商事調解人員的資格，澳門一般沒有作特別的要求。根據資料顯示，

[7] 《民事訴訟法典》第 677 條執行名義之類別:"……ｂ）經公證員作成或認證且導致設定或確認任何債之文件；
ｃ）經債務人簽名，導致設定或確認按第六百八十九條確定或按該條可確定其金額之金錢債務之私文書，又或導致設定或確認屬交付動產之債或作出事實之債之私文書；……"

[8] 《民事訴訟法典》第 680 條澳門以外地方之裁判及其他執行名義之可執行性："二、對於澳門以外地方所作成之其他執行名義，為成為可執行之依據，無須經澳門法院審查及確認。"

商事調解人員不需經過特別的培訓。現時的培訓不是強制的，主要是由政府加上民間社團，或與鄰近地區通過合作制定的一些培訓班而進行的。

五、澳門發展商事調解的優勢

對於澳門現時商事調解的情況，筆者先從澳門現時發展上有何優勢談起，特別是從“一帶一路”戰略構想、澳門五年發展規劃和自身的優勢三個不同的角度來看。

（一）“一帶一路”戰略構想

首先，近期中央提出了建設“21 世紀海上絲綢之路”的戰略構想，澳門特區應積極參與到“一帶一路”的建設當中，積極發揮好“世界旅遊休閑中心”及“我國與葡語系國家商貿合作的服務平臺”的作用。

眾所週知，“一帶一路”是指“絲綢之路經濟帶”和“21 世紀海上絲綢之路”。這並不是一個實體和機制，而是合作發展的理念和倡議，其強調的是充分依靠中國與有關國家既有的雙、多邊機制而形成行之有效的區域合作平臺。橫向來看，“一帶一路”戰略貫穿歐亞大陸，東邊連接亞太經濟圈，西邊進入歐洲經濟集團。縱向來看，“一帶一路”戰略當中，一端連著過去，一端連著未來；同時一端是我國，一端是世界，貫穿中亞、東南亞、南亞、西亞、東非、歐洲。因此，“一帶一路”是對陸上及海上絲綢之路的傳承和提升。構建一個“中心”及一個“平臺”離不開法律的保障。根據中央的部署，澳門發展的目標定位有兩個，分別是“世界旅遊休閑中心”及“我國與葡語系國家商貿合作的服務平臺”，打造澳門成為我國與葡語系國家貨幣清算中心角色，需要加快澳門產業架構調整，推動澳門多元發展，使得澳門在未來的一段時期內能夠繼續保持穩定和繁榮的戰略抉擇。

（二）澳門五年發展規劃

近日，澳門特別行政區提出了自成立以來的首個五年發展規劃草案，並公開聽取各界意見。總的來說，這規劃草案所體現的發展願景與國家全面建成小康社會的發展理念一脈相承，將有助於澳門真正實現經濟適度多元及社會全面、協調、可持續發展。五年規劃草案的最高原則是堅定不移地全面準確落實“一國兩制”、“澳人治澳”、高度自治的方針，推進“一國兩制”偉大實踐與實現中華民族偉大復興的“中國夢”緊密相連。

（三）自身的優勢

在嚴格按照我國憲法和《澳門基本法》下辦事，澳門發展商事調解的三個優勢，分別是：

1、政策優勢

澳門擁有“一國兩制”的雙重優勢。如上所述，根據中央的部署，澳門發展的目標定位是兩個，分別是“世界旅遊休閑中心”和“我國與葡語系國家商貿合作的服務平臺”，同時需要加快澳門產業架構調整，推展澳門多元發展，使得澳門在未來的一段時期內能夠繼續保持穩定和繁榮的戰略抉擇。

2、地理優勢

近年來，我國內地積極發展調解制度，各地人民法院確立了“調解有限、調判結合”的原則。調解制度已經成為了當代內地社會法治建設的熱點。實踐證明，調解制度能夠良好地化解矛盾糾紛、促進社會和諧發展，为社會主義法治社會奠定了堅實的基礎。澳門毗邻廣東珠三角的沿岸城市，故在地理上有絕對的優勢。近年來，由於香港和解中心成立、內地-香港聯合調解中心設立、廣州、澳門、香港也共同參與了南沙國際仲裁中心的建設，澳門與內地、香港的合作與交流逐步加強，先進經驗互相借鑒。

3、文化優勢

由於特殊的歷史因素，澳門成為了擁有中葡歷史、中西文化交匯背景的都市。其中，三種文化四種語言的交集，也使得澳門具有先天的語言優勢。三文四語是指中文（普通話／粵語）、英文、葡文的語言環境。同時，根據《澳門基本法》第 9 條的規定，澳門特別行政區的行政機關、立法機關和司法機關，除使用中文外，還可使用葡文，葡文也是正式語文。這對於構建我國與葡語系國家商貿合作的服務平臺是非常有利的，對於澳門擔負起我國與葡語系國家貨幣清算中心角色也起到非常重要的保障作用，對於中葡互相交流互相促進也功不可沒。

因應社會上的適用問題，特別是商業運作是以英文為主，所以在回歸前、後，澳門的中、小學教學機構，主要是以中文（粵語）教學，第一外語是英文；其次是，主要是以英文教學，第一外語是中文（粵語）；還有一部份主要是英文，第一外語是普通話；真正以葡文教學的學校只有一所。其餘的是以課後的興趣班形式培養葡文人才。所以，澳門有部分人能夠以三文四語進行調解的操作。

同時，特殊的文化背景能夠使得澳門在和平與發展的新時代背景下積極發揮橋梁作用。澳門發展商事調解制度需要承載著作為中國與葡語系國家的交流平臺之重要任務，充分利用文化優勢大力發展商事調解制度，努力做好中央提出的澳門作為我國與葡語系國家商貿合作的服務平臺角色。

在商業活動方面，澳門有一部份商人非常熟悉葡語系國家的生活習慣、法律制度和鄰近地區的法律制度。

在學術交流方面（特別是法律方面），澳門大學法學院在很久以前已經與葡語系國家的大學的法學院或政府建立了一些定期的法律交流機制。所以，澳門政府及民間社團擔當的角色就非常重要了。

六、發展澳門商事調解的障礙

當然，發展澳門商事調解也有其障礙，一方面，理應來說，商事調解在澳門可以有很大的發展，但由於澳門人的生活方式是比較休閒，安於現狀的，所以即使很多年前已經有人提出要將（三文四語）發展起來，但是直到現在還有許多的提升空間。

近年來，普通話的普及率已經比較高，葡文的普及率仍然強差人意，甚至有些人更加提出不學葡文的主張。但仍然有政府官員及許多社會人士積極提出需要大力要求加強葡文的培訓，尤其是法律界的朋友。雖然熟悉葡語國家的法律制度和鄰近地區法律制度的人士依然存在，但為數不多。

另一方面，由於遠景不夠明確，加上瞭解和使用商事調解內容的人數不多，所以難以養活一個商事調解中心。

加強三文四語人才在商事調解方面的培訓，離不開澳門政府的推動。無論在國際上或鄰近地區，澳門政府都積極推動商業往來活動，特別是在葡語系國家。

綜上，筆者認為，有五點是值得思考的，分別是：

第一，制定調解綱要法：明確規定成功的商事調解協議等同判決，以便在澳門及其他地方更容易作出司法執行；賦權商事調解機構在其中一方申請的情況下，可以具有向法院申請保存措施的正當性；

第二，制定商事調解員的資格制度以及商事調解的執行細則，應當由處理商事調解機構制定。

第三，政府輔助設立商事調解中心，設立基金，為初期的運作提供行政、財政上的支援。

第四，積極推動由民間社團執行的商事調解員培訓、考核工作。

第五，由政府、民間社團共同合力推動商事調解的應用。

總的來說，調解在澳門還是一個未開發的市場，未準備好的市場。

廣東調解的發展狀況及未來機遇

王寧女士[1]

中國的調解被國際法律界稱爲“東方經驗”。調解在倡導“以和爲貴”的中國傳統文化氛圍中爲爭議當事人重新架設交流對話平臺，化干戈爲玉帛。作爲 ADR 的重要類型，調解能最大限度地提高經濟社會效益，緩解當事人的訟累，降低維權成本，實現法律效果與社會效果的有機統一。爲了更好地理解調解，我們先從非訴訟糾紛解决程序（ADR）開始瞭解。

一、非訴訟糾紛解决程序的定義及興起原因

（一）概念

非訴訟糾紛解决程序，英文全稱 Alternative Dispute Resolution，簡稱 ADR，是一種起源於美國的爭議解决的方式，現引展爲訴訟制度以外的非訴訟糾紛解决程序或機制的總稱。非訴訟糾紛解决機制是一個廣括性、綜合性的概念，其內涵和外延均難以明確的限定，對於 ADR 概念不同的國家也存在著廣義和狹義的處理理解。通說認爲，狹義的 ADR，是指非訴訟非仲裁的糾紛解决方式，即一般不包括仲裁和行政處理，行政裁决。廣義的 ADR 是涵蓋所有非訴訟解紛方式，既包括傳統的民間調解和仲裁，也容納行政裁决，行政處理，同時還能吸收今後可能出現的新的 ADR 類型。針對此，我國的學者和司法實踐者更傾向於廣義的 ADR 概念。

（二）興起原因

訴訟作爲一種傳統的、權威的糾紛解决方式，具有最高的權威性。然而，面對當今世界的法治發展和“訴訟高潮”的到來，傳統審判機制的訴訟負荷日益沉重，訴訟的高成本和審判的遲延成爲世界性問題。可見，僅依靠正式的司法訴訟程序難以滿足社會糾紛解决的需求，多元化糾紛解决機制應逐漸得到各國立法、司法機關的重視。在我國實行社會主義市場經濟、依法治國、加入世界貿易組織以及構建社會主義和諧社會的背景下，建立一種多元化糾紛解决機制更符合我國社會和法治可持續發展的需要。另外，我國畢竟有著悠久的非訴訟解决糾紛的傳統，擁有現存的各種調解、仲裁制度及豐富的經驗，社會主體對這些方式亦長期的認同和習慣。它的發展不僅是法治社會的需要和傳統社會的沿襲，而且反映幷促進著時代理念和精神的變化。

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[1] 廣東省中國國際貿易促進委員會涉外商事法律事務部副處長

據有關統計，廣東基層法院民事案件以調解方式結案所佔的比例在 50%左右，有的基層法院高達 60%至 70%。在這樣的大背景下，ADR 在廣東能够迅速發展也有其獨特的內在動因：1、傳統經濟大省，近 20 年來外貿進出口總量連續領跑，佔全國的四分之一强，伴隨龐大的經濟總量帶來各種類型的糾紛；2、當事人普遍希望簡單快捷解決糾紛，而訴訟仲裁等方式均有固定程序和審訊限制，唯有調解靈活簡便迅速且不傷和氣。

二、調解

現在主要的 ADR 方式爲：調解、調停、模擬法庭、專家裁定等。調停、模擬法庭等其他方式在此不加以闡述，本文重點闡述調解理論及其實踐。

（一）概念及類型

調解，是指雙方當事人以外的第三者，以國家法律、法規和政策以及社會公德爲依據，對糾紛雙方進行疏導、勸說，促使他們相互諒解，進行協商，自願達成協議，解決糾紛的活動。我國調解類型主要是行政調解、勞動調解、醫患調解、交通事故調解、保險調解、知識產權調解、婚姻家庭調解、商事調解。

（二）調解的現狀

近 30 年，調解的發展儘管有所起伏，但總體上呈現出“U”型回歸的態勢，其中 2002 年是這一發展史上的分水嶺。也正是從這個意義上講，調解在近 30 年呈現出一個“先衰落，後復興”的發展態勢。新世紀以來，調解解決的糾紛案件與法院受理的一審民事案件數量不相上下，但近三年來，調解解決的糾紛案件數量明顯高於法院受理的一審民事案件數量。

（三）調解的外部環境

調解之所以能够在 2002 年再度興起，主要在於三大外部環境的支持：

1、立法支持：2010 年頒布的《調解法》對人民調解進行了較爲全面的規定；新修訂的《民訴法》將調解寫進法律條文，通過立法保障調解優先，且貫穿訴前、訴中、執行和解整個程序，隨時可以進行。《民事訴訟法》第一百二十二條規定：“當事人起訴到人民法院的民事糾紛，適宜調解的，先行調解，但當事人拒絕調解的除外。”首次通過正式立法的方式將訴前調解程序規定出來。

2、司法解釋細化：2009 年 7 月開始，最高院、最高檢、公安部、司法部等機構相聚出臺《最高人民法院關於建立健全訴訟與非訴訟相銜接的矛盾糾紛解決機制的若干意見》、《關於進一步貫徹“調解優先、調判幾何”工作原則的若干意見》、

《關於深入推進矛盾糾紛大調解工作的指導意見》等，明確了調解在矛盾糾紛解決機制中的重要作用和地位。

3、司法確認賦予法律效力：2011 年 3 月最高人民法院頒布了關於人民調解協議司法確認程序的司法解釋，賦予經過法院司法確認的調解協議與法院判決同等的法律效力，保障了調解結果的有效執行。

（四）調解機構

我國調解的順利實施有賴於相關調解機構的主持與配合。目前，我國的主要的調解機構有：國家有關職能機關、基層組織人民調解委員會、商協會組織、各級法院、各仲裁委員會、專門的調解機構。本文以中國貿促會及其各省分會調解中心爲例作重點介紹。

三、中國貿促會

中國貿促會（中國國際商會）調解中心是以調解的方式，獨立、公正地幫助中外當事人解決商事、海事等爭議的常設調解機構。調解中心成立於 1987 年，目前在全國各省、市、自治區設有四十餘家分（支）會調解中心，形成了覆蓋全國的調解網絡。調解中心聘請在經濟、貿易、金融、證券、投資、知識產權、技術轉讓、房地產、工程承包、運輸、保險、物流以及其他商事、海事和法律領域具有專門知識和實踐經驗的、公道正派人士擔任。

其中，廣東省貿促會涉外商事調解做出了積極有效的實踐：

1、與多家法院建立“訴前聯調”機制；
2、在廣交會公益展區設立涉外商事法律服務展位，爲中外參展商、採購商提供現場調解服務；
3、與駐華駐穗使領館建立聯合調解渠道，多手段全方位開展跨國調解；
4、與外國商協會組織、境外調解機構聯合開展調解；
5、處理廣東省各地市貿促會提交的當地企業涉外商事糾紛；
6、接收和處理廣東國際商會會員企業投訴；
7、與中國貿促會法律事務部合作辦理涉外商事糾紛案件；
8、與其它省份的兄弟貿促會合作開展調解。

空洞的列舉可能讓人一時難以切實地瞭解到廣東省貿促會在涉外商事調解中所作出的努力，以下本文以三個具體案例加以佐證。

案例一、國際商會履約監管

2013 年春交會期間，奧地利某商人在香港注册的跨國公司向佛山某陶瓷工廠購買衛浴產品，發生多次信用證項下貨物質量和貨款糾紛，交貨方和付款方互不信任，在中國貿促會調解中心的推薦下找到我會，要求我會作爲公立公正的第三方進行見證和監管。最終經過兩輪談判，我會主持了調解幷達成三方協議，由外方先提存一筆與全部貨物價值相等的履約保證金，由我會監管，從而順利幫助買賣雙方完成了交易。

該案中我會既以公立公信的自身信用爲國際貿易雙方提供擔保監管，又融合了國際商事調解手段，是一例典型案例。受該案啓發，此後我會又探索嘗試幷成功辦理了數宗國際商事履約保證金監管案件，均取得了良好的社會效應和經濟效益。這些案件當事人中既有嘗到該方式甜頭的老客戶，也有認同該方式交易安全性的外國商會組織；既有初次合作的中外當事人，也有心存芥蒂亟需重建信任的多年合作夥伴，表明該案的創新模式的確能够幫助國際貿易當事人消除信任危機，建立合作信心，保障交易安全，從而促進對外貿易健康發展。

案例二、與外國駐穗領館合作調解

2014 年，順德向我會上報了其轄區範圍內某電器廠與印度客戶的國際貨物買賣糾紛。該案標的達到 2 千 6 百萬人民幣，滯留在印度港口的貨物面臨即將被拍賣的困境，而外方拒絕任何回應，溝通中斷。鑒於該案情況緊急、標的較大、外方客戶是印度知名企業，有較好的信用基礎，我會瞭解案情後，即時聯繫印度駐穗總領館（“印領”）尋求協助。隨後我會派員赴順德主持了中外雙方企業的面對面調解，達成了調解協議，幷在第二日帶雙方企業到印領對調解協議做了見證。

該案的成功調解，有賴於我會和印度駐穗總領館在中印商事糾紛解決上一直保持緊密的合作關係。近 3 年，我會與印領合作調解案件 20 餘起，我會的法律服務已經成爲雙方處理重大中印案件的首選渠道。有趣的是，該案的中方當事人，在請我會調解之前，嘗試了多種渠道無果，在走投無路的時候，是印度商人向他們推薦這種情況應該找廣東省貿促會。可見，與領館合作還起到了額外的宣傳效果。

案例三、與公安機關合作的國際商事詐騙案

2012 年，烏茲別克斯坦國家商會駐廣州代表處向我會投訴中山某制鞋廠收取定金後不交貨。通過前期調查，我會判斷這是一宗詐騙案，不具備調解基礎，屬於司法管轄領域。秉著爲外國商協會提供盡可能幫助的工作態度，我會協助外方報案，幷借助語言優勢和業務專長，在翻譯、外貿流程等方面與公安機關合作，跟進案件進展。在抓獲犯罪嫌疑人後的追討貨款過程中引入調解程序，最終幫助外

國商協會挽回了經濟損失。

以上三種案例選取了我們工作中的一個片段，它們都有一個共同點，就是都不屬於傳統的貿促會調解業務範疇，而是廣東順應時代經濟發展潮流，賦予了貿促會和國際商會調解更多嶄新的內涵和豐富的手段。正是因爲我們在開展工作的過程中，秉著對貿促法律事業負責任的態度，保持敏銳嗅覺，與時俱進，真抓實幹，大膽開拓創新，才使得廣東貿促會的調解、法律顧問、涉外知識產權服務、經貿摩擦應對等各項商事法律工作扎穩了根基，打開了局面，贏得了各界的認可和尊重。

廣東貿促會的法律工作曾經有過輝煌，後因法律服務市場化，最終導致了法律部的解散。重組後，我們的定位放在著力體現與市場化法律服務的差異，彰顯貿促會、國際商會的機構公信力，突出公益性優勢，在市場競爭中樹立商協會法律服務不可或缺、不能替代的地位，贏得了企業的認可和法律界的合作，拓展了貿促會法律服務的發展空間。

四、調解的前景

涉外商事調解未來大有可爲，因爲：

1、 涉外商事調解區別於訴訟和仲裁的優勢：高效省時、保密靈活、不傷和氣、費用低廉；
2、 有限的司法資源不堪重負；
3、 調解領域的細分要求專業人士更多地參與；
4、 公民法律意識的提高和社會誠信體系的建立有助於調解良性發展；
5、 當事人的明智選擇。

在不久的將來，涉外商事調解將會變得越來越重要，成爲解決涉外商事糾紛的最主要形式，讓我們拭目以待吧。

調解於深圳之發展現狀及將來機遇

鍾建生先生[1]

當今中國大陸的糾紛解決跟世界上大多數國家一樣，主要有以下四種方式：一是糾紛當事人自行協商，達成和解；二是通過第三方調解解決；三是獨立第三方仲裁裁決；四是訴訟，由國家公權力對糾紛進行判決。近年來，中國大陸經濟飛速發展，作爲糾紛解決主要方式的訴訟也出現了爆炸性增長，自 2005 年以來，大陸法院年均案件數量遞增 5.95%，2009 年受理案件數量比 1978 年增長了 19.87 倍。[2]以深圳市爲例，2015 年全年共受理各類經濟糾紛案件 12019 件，審結 11341 件，比上年分別增長 16%和 21.8%。[3]訴訟爆炸性增長是各類糾紛需要調解等多元化解決方式的直接動因。

一、大陸調解的主要渠道

調解制度作爲中國歷史悠久的法律傳統，自古以來就是解決爭議糾紛的重要方式，在當今中國大陸以訴訟解決糾紛機制已經相當發達的時候，還能够充分發揮重要的作用，富有極强的生命力。在大陸的調解主要方式包括以下六種：

（一）人民調解。它是大陸特有的調解制度，主要調解民間一般的民事糾紛和輕微的刑事案件，民間糾紛主要是指公民之間有關人身、財產權益和其他日常生活中發生的糾紛。它被西方學者譽爲“東方經驗”。

（二）行業調解。它是人民調解的基礎上，針對專門行業的調解，一般以行業協會作爲調解主體，通過說服、疏導等方法，促使當事人在平等協商基礎上自願達成調解協議，解決行業性糾紛的活動。

（三）商事調解。指的是專門針對商事關係發生的爭議和糾紛開展的調解，這裏的“商事”應作爲廣義理解，即涵蓋由於商事性質的所有關係而發生的事項，無理論這種關係是否屬於合同關係。

（四）行政調解。它是國家行政機關根據法律規定，對屬於國家行政機關職權管轄範圍內的民事糾紛開展的調解。

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[1] 中國貿促會深圳商事法律服務調解中心主任

[2] 李靜一：《司法附設 ADR 建構中的先行調解制度研究》。

[3] 詳見《2015 年深圳市中級人民法院工作報告》。

（五）仲裁調解。它最早源於中國經濟貿易仲裁委員會的早期實踐，主要指“仲裁中調解”，即在已啓動的仲裁程序過程中，由仲裁員對案件進行調解，調解不成後或調解成功後再恢復進行仲裁程序。

（六）訴訟調解。它又稱爲“法院調解”，是指已啓動民事案件審判過程中在法官組織主持下訴訟雙方當事人開展的調解，調解不成後恢復審判程序，如調解達成協議，則經人民法院認可以終結訴訟活動的一種結案方式。

二、深圳商事調解的發展階段及現狀

上述各種調解各有特點也各有利弊，商事糾紛當事人更爲關心是調解成功後和解協議的效力，迫切需要法院等權力機構對其效力予以確認，幷希望得到一定的執行力。因此深圳商事調解的發展也就是調解達成的協議效力賦予法院等公權力確認的發展過程。

（一）第一階段：訴訟與調解銜接階段

2009 年，最高人民法院發布了《關於建立健全訴訟與非訴訟相銜接的矛盾糾紛解決機制的若干意見》（以下簡稱《意見》），在原有的法律框架解決一些問題和迫切需要解決的司法問題，例如調解與訴訟如何銜接的基礎性問題。這《意見》吹響了大陸“大調解”的集結號，有調解職能的社會各類組織紛紛探索調解與訴訟相銜接。深圳市貿促會率先 2009 年與深圳市寶安區人民法院設立調解工作室，於 2010 年成功調解了 276 宗經濟糾紛案件，且絕大多數“案結事了”，體現出商事調解的獨特優勢，以實際行動響應了《意見》的發布。

（二）第二階段：商事調解與訴訟相結合全面推廣階段

2011 年 6 月深圳市貿促會主辦召開“深圳商事調解合作推廣會議”，明確中國貿促會深圳調解中心（2011 年正式成立的深圳市貿促會下屬機構）與深圳市綜治辦、中級人民法院、人大法工委、法制辦、司法局、深圳仲裁委員會等單位關係，共同推進商事調解工作。此會後，深圳調解中心已經與深圳市中級人民法院，羅湖、福田、南山和寶安法院簽訂合作備忘錄，幷陸續在上述各區人民法院派駐人員開展商事調解。這些商事調解與法院合作的實踐爲 2012 年最高院發布了的《關於擴大訴訟與非訴訟相銜接的矛盾解決機制改革試點總體方案》，由中央統一部署、統一實施，全社會建立多元糾紛解決機制奠定良好實踐基礎。

（三）第三階段：全面推進，整型升級階段

2013 年《民事訴訟法》的修訂，通過立法建立健全多元化糾紛解決機制，

是各種糾紛解決渠道納入法治軌道，形成多元化糾紛解決機制的法律框架，全面推進“大調解”。深圳調解中心隨著商事調解的發展先後實現了訴調對接（調解達成的和解協議通過法院的司法確認獲得法院的强制執行力）和裁調對接（調解達成的和解協議通過仲裁機構確認獲得仲裁裁決的域外執行效力），幷於 2016 年 2 月整型升級爲深圳市商事法律服務調解中心，業務拓展出與國家“一帶一路”戰略實施以及深圳企業“走出去”密切相關的應對經貿摩擦、知識産權保護等相關業務，這些都爲深圳的商事調解賦予更多國際和現實的色彩。

三、深圳商事調解未來發展機遇

深圳作爲大陸一綫城市（北上廣深），2015 年在全國經濟增長放緩的情況下其經濟仍能呈“速度穩、質量好、創新强、結構優”的態勢，GDP 有 8.9%的增長，達到 1.75 兆人民幣。

然而，經濟迅猛發展帶了各種社會問題越聚越多、越難以控制、越容易激化的程度，例如：貧富差距拉大、住房難、上學難、就醫難、養老難等問題在深圳等一綫城市最爲突出。而有關研究證明，平均大約 1%的經濟增長，會給社會帶來 1.6%的訴訟案件的增長。[4]再加上大陸法院立案制度改革（大大簡化受理程序）以及公務員體制改革（帶來法官大面積離職），這些因素都爲深圳的調解特別是商事調解帶來的巨大機遇。

（一）前海自貿區發展帶來的機遇

2014 年，包括蛇口—前海自貿區（下稱“前海自貿區”）在內的中國（廣東）自由貿易實驗區正式設立，該自貿區將立足面向香港深度融合，爲學習借鑒香港先進的商事調解經驗打了良好的制度基礎。

首先，自貿區內業務創新爲商事調解帶來的機遇。前海自貿區大力促進服務貿易發展，鼓勵離岸貿易、保稅展示交易、倉單質押融資、融資租賃、期貨保稅交割、跨境電子商務、外匯免稅店、市場採購等新型貿易方式發展。同時，前海自貿區還大力發展國際船舶運輸、國際船舶管理、國際船員服務、國際航運經紀等産業，在國際船舶管理、國際遠洋和國際航空運輸服務、航運金融等領域對境外投資者擴大開放。區內開展的創新業務，在國內沒有完善的法律規範調整的情況，需要調解來解決業務運行過程中産生的爭議，而這些大部分業務都是跟國際接軌的業務，涉及境外當事人參與的業務，當事人更傾向於用調解而不是訴訟來

[4] 何兵：《現代社會的糾紛解決》，法律出版社 2003 年版，第 2 頁。

解決爭議。

其次，前海自貿區管理創新爲商事調解帶來的機遇。跟其他自貿區一樣，前海自貿區對外商投資試行國民待遇加負面清單，減少行政機關審查，便利設立；自貿區企業可以開展多種形式的對外投資試行備案管理。這些管理上的創新，讓外資企業在自貿區設立企業更便利，讓內資企業通過自貿區設立企業對外投資更簡便，必將吸引大量具有國際因素的企業進駐，其業務運行產生的爭議糾紛也必將是帶有大量的國際因素，這就爲國際或者說是跨境商事調解開展提供了肥沃的案件土壤。

再次，前海自貿區商事調解制度創新爲商事調解帶來的機遇。基於自貿區業務和管理制度上的創新導致爭議的國際性、複雜性和新穎性，光靠訴訟是遠遠無法及時、有效地解決這些爭議，因此各自貿區在多元化爭議解決上都圍繞商事調解紛紛出臺不同調解制度和方式，例如上海自由貿易試驗區《調解優先承諾書》制度；厦門自貿區在保障措施上，規定了“政府購買調解服務”、“非訴訟法律援助”、“運行環境建設”等多項具體的促進舉措等。而前海自貿區則實施涉港案件第三方評估制度以及無異議調解機制等商事調解領域內的創新嘗試，爲商事調解開闢新的路徑。

（二）國家“一帶一路”戰略實施帶來的新的機遇

2015 年 3 月國際發改委、外交部、商務部經國務院授權發布了《推動共建絲綢之路經濟帶和 21 世紀海上絲綢之路的願景與行動》（下稱《願景與行動》），將習近平主席的“絲綢之路經濟帶”和“海上絲綢之路”的倡議化爲實際的行動綱領，企業響應“一帶一路”國家戰略必將紛紛走出“國門”在“一帶一路”上尋找商機，也必然爲商事調解帶來新的機遇。

第一，“一帶一路”的共建原則體現了調解的內涵。在 《願景與行動》中關於“一帶一路”的共建原則除了恪守聯合國憲章等政治性原則外，其他的如開放合作、和諧包容、市場運作、互利共贏等各項原則都與調解的理念和內涵不謀而合。“一帶一路”戰略實施要求更多企業“走出去”，無論是産品“走出去”、資本“走出去”還是技術“走出去”都要符合國際商業慣例和準則，發生了爭議和糾紛也會更多地考慮參照這些慣例和準則來調解，這都爲國際商事調解提供大量的案源。

第二，“一帶一路”沿綫國家法制不同讓當事人更傾向於調解解決爭議。粗略分析了一下，“一帶一路”沿綫 65 個國家和地區分別有以下不同的法制：

1、西歐發達國家的法制。作爲傳統意義上的發達國家，西歐國家法制完善，但也同樣存在普通法系和大陸法系兩種截然不同的法律傳統，成文法和判例法的選擇也會讓當事人選擇訴訟帶來一系列的困難；

2、受前蘇聯法制影響的國家。雖然蘇聯已經解體多年，但很多國家讓深受其法律傳統影響，這些包括俄羅斯、前蘇聯的加盟共和國以及東歐一些原社會主義國家，這些國家法制相比西歐國家法制較不完善，有不同程度的司法腐敗現象，同時也深受執政黨的影響，較不穩定，在這些國家從事經貿活動也會有較大法律風險，因此當事人更樂意開展調解避免在當地訴訟；

3、中東等伊斯蘭國家。除了中東國家還包括印尼、馬來西亞等伊斯蘭國家，他們的法制深受伊斯蘭教的影響，甚至直接採用伊斯蘭法律。企業在這些國家開展經貿活動產生的爭議更傾向於採用將更符合國際商業慣例和準則的商事調解而不是採用當地伊斯蘭法律訴訟；

4、受中華文化傳統影響的東盟國家。作爲“一帶一路”沿綫重點國家，東盟國家既跟中國經貿往來密切，又深受中華文化傳統影響，但各國法制發展不平衡讓從事經貿活動的當事人希望更多通過調解來解決爭議，維護大家合作關係。

綜上所述，“一帶一路”沿綫國家法制差異較大，企業瞭解這些國家的法律都存在一定困難，更何況在這些國家開展訴訟，特別是涉及資本類、直接投資類的案件需要跟當地政府溝通協調的案件更加採用調解的爭議解決方式，這也爲有公信力的調解機構提供了足够的用武之地。

（三）“互聯網＋”等新商業業態、模式發展帶來的新機遇

2015 年《國務院關於積極推進“互聯網+”行動的指導意見》積極發揮我國互聯網已經形成的比較優勢，把握機遇，增强信心，加快推進“互聯網+”發展，有利於重塑創新體系、激發創新活力、培育新興業態和創新公共服務模式，對打造大衆創業、萬衆創新和增加公共産品、公共服務“雙引擎”，主動適應和引領經濟發展新常態，形成經濟發展新動能，實現中國經濟提質增效升級具有重要意義。“互聯網+”帶來新業態包括：互聯網+創業創客，互聯網+金融，跨境電商，互聯網+物流，互聯網+智能製造、新能源、便捷交通、物流，互聯網+益民服務等等。這些産業、業態産生的爭議糾紛可以說都是全新的法律糾紛，很多現在都尚無法律進行規範，更多的需要當事人自行協商或者通過第三方調解解決。

深圳作爲高科技發展迅猛的城市，互聯網產業也得到了迅猛的發展，幷融入市民生活的方方面面，也同時帶來了形形色色的糾紛矛盾。以時興的互聯網金融爲例，它具有渠道的特殊性、對象的廣泛性、傳播的有效性和交易的高效性的特點，也就是只有一部智能手機下載互聯網金融的 APP 即可以金融理財操作，簡便而快捷。而這些特性决定當互聯網金融糾紛産生時，必然需要糾紛解决的簡便性、快捷性和私密性，然而傳統的訴訟來解决互聯網金融却存在效率低、立案難、證據保全難、解决成本高和私密性不足等缺陷，仲裁雖可一定程度上提高效率、保證私密，但是也存在管轄問題、成本問題、債務人難以確定問題和電子證據難以保全問題。第三方調解特別是有公信力的、中立的連同行業監管部門的調解將會是值得期待解决這類糾紛的重要方式。

（四）知識産權保護高度重視帶來的新機遇

深圳市作爲內地首屈一指的高科技城市，孕育了華爲、中興等世界 500 强的高科技企業，去年全社會研發投入佔 GDP 比重 4.05%，PCT（專利合作條約）國際專利申請 1.33 萬件，連續十二年居全國首位，佔全國 46.9%，獲國家科學技術獎 14 項，中國專利金獎獲獎數佔全國 1/5。以華爲技術有限公司爲例，2005 年－2015 年十年間在創新方面的研發投入就超過 2400 億元人民幣，累計申請中國專利超過 5 萬件，申請國外專利超過 3 萬件，連續兩年國際 PCT 專利申請居全球首位。

長期以來由於知識産權的專業性和技術性，其爭議解决的民間調解和仲裁相對較少採用。然而隨著知識産權保護的高度重視伴隨而來知識産權訴訟日益爆炸，社會已經開始重視以當事人自主自决的調解方式來解决本屬於“私權利”的知識産權爭議。

基於知識産權屬性，調解是知識産權爭議的最佳解决方式原因在於：

1、知識産權是私權利（知識産權人對權利有充分使用、保護和處分的權利，不受國家和第三人的干預）、無形的財産權（權利人在主張時才“發現”自己是權利人，核心是授予權利人對其智力成果的運用），而調解是當事人意思自治、自主地决定權利義務的糾紛解决方式；

2、法定性（要得到國家授權機關的認定，穩定性差）和期限性（知識産權糾紛的權利隨著時間推移呈現遞減趨勢），而調解能快捷高效幫助當事人解决糾紛，及時有效的保護，權利的利用比權利的維護意義更大；

3、權利人利益目標具有多元性（有的追求基本利益，追求知識產權的價值；有的追求對抗性的利益，禁止他人使用；有的則追求雙重利益結合），而調解因當事人自決而能靈活的解決當事人之間的糾紛；

4、權利人著眼於未來市場和商業利益，而調解最終的目的就是讓當事人保持良好的合作關係；

5、知識產權糾紛產生後通常結合公權力行政救濟，而訴訟與行政救濟相結合又冗長而低效，成本大巨大，而調解就是能省錢省事地解決當事人糾紛最好方式。

以中國貿促會深圳商事法律服務調解中心 2014 年調解一宗涉及知識產權案例爲例：國際知名品牌 A 企業委托一家港資科技 B 企業代工生產其產品，被一家深圳 C 企業認爲其產品侵犯其知識產權，經過三個月調解，最終以調解結案，達成協議，B 企業支付 100 萬元人民幣（原調解訴求爲 500 萬元人民幣）給 C 企業，另外此這三家企業還簽訂三年後續綁定式的供貨製作合同，即三年內 A 企業繼續委托 B 企業加工其產品，B 企業則向 C 企業購買相關原材料進行加工貼牌。這案例充分體現三方當事人的自主自決，既保護權利人權利，有實現市場利益，同時還爲訴訟無法解決的未來市場利益做出長遠協議，最終三方都履行協議，取得皆大歡喜的結果。

綜上所述，隨著深圳市經濟發展特別是高科技產業的飛速發展，加上國家“一帶一路”宏偉戰略以及自貿區的試驗田效應，深圳市傳統的糾紛解決主要方式——訴訟，已經遠遠不能滿足現實需要。新興業態、模式和產業出現，讓許多資深法官在新的糾紛形式和類型面前都變成了“娃娃”法官（對新生事物不認識、不瞭解，判案時需要重新學習案件所涉及的新知識）。在這些因素的驅動下，調解特別是商事領域作爲“東方經驗”必將在深圳煥發新的生命力，爲糾紛當事人提供更多自主自決的解決方式。

跨境調解可能面對的若干問題及探索解決方案

蕭詠儀太平紳士[1]

近期在香港最熱門的話題就是「一帶一路」。

「一帶一路」是中國對外發展的一項重要策略，相信能推動沿線各國促進經濟，使中國企業可以「走出去」，同時亦會「引進來」國外企業，因而沿線各處將會有大型基礎設施建設、更有項目融資等。無論在建設工程招標及投標時、或在合同起草及談判中，必會有很多的商機，各方面的糾紛自然也會隨之而增。企業對解決爭議服務的需求必也會越來越多。

因此，在 2015 年 7 月「最高人民法院關於人民法院為「一帶一路」建設提供司法服務和保障的若干意見」[2]，強調要"*加強相關仲裁司法審查工作，主要包括嚴格依照《紐約公約》進行審查，推動相互承認和執行仲裁裁決；探索完善撤銷、不予執行涉外仲裁裁決以及不予承認和執行外國仲裁裁決的司法審查程式制度；支援國際爭端解決機制發揮作用*"並要"*促進構建和完善"一帶一路"建設的多元化糾紛解決機制。支援當事人糾紛解決方式的自願選擇，推動完善各種糾紛解決方式的聯動工作體系，滿足中外當事人糾紛解決的多元需求*"。所以，國內的爭議，相信中外當事人也會以非訴訟方式解決糾紛。

早前，中國發展和改革委員會張建平主任應香港國際仲裁中心及香港律師會邀請來港擔任講者[3]，提及「一帶一路」的其中一個特徵是合作共贏。張建平認為，「一帶一路」沒有劃定確切的邊界，這是一個開放的空間，任何有合作意願的國家都可以參與其中，而合作過程也不需要談判，只需簽署一個合作備忘錄就可以了。所以「一帶一路」是沒有特定的起點及終點，起點可以是任何的地方，例如：中國任何一個城市：上海、南沙等；終點亦會經過亞洲不同的國家：中東、歐洲、非洲等國。

「一帶一路」會經過很多國家，而每一個國家有不同的宗教文化，法律又多元性，例如可能是普通法、大陸法或兩者皆非的法律；約定合約的適用法時時存有分歧，加上亦會有不同的語言或非語言的表達方法；在文化上也會有很大的差異。所以如遇上糾紛時，雙方一般不會願意在對方的國家提出訴訟。那時應該要考慮以非訴訟方式去解決糾紛，調解方式應該是最合適，因與仲裁相比，調解是較快

[1] 香港和解中心創辦人
[2] http://www.court.gov.cn/fabu-xiangqing-14900.html
[3] http://www.hkcd.com/content/2016-06/22/content_1005269.html

捷、費用平宜。

但是我們可以預見到跨境調解有一定的困難。首先，如何可以找到合適的調解員呢？以上已提及到跨境溝通不易，文化背境有差異、合約適用的法律有不同的認知等問題。基於以上的因素，調解員不一定可以與當事人溝通，更不一定瞭解適用的法律，對爭議往往不一定完全了解。

調解員在實際評審案件上亦會有相當的困難，如怎樣能夠作出現實評估（reality test）？如何探討解決方案（option generation）？即使達成調解協議，如何可以終止已進行的法庭程序？如何處理在另一個國家已進行的法庭程序？如何阻止其中一方在其國家再進行訴訟？如何執行調解協議？

調解並不像仲裁裁決受到《紐約公約》的規範，在香港所作的仲裁裁決可在所有簽訂《承認及執行外國仲裁裁決公約》－《紐約公約》的締約國。截至現在，《紐約公約》共有多過 150 個成員國。執行調解協議時，如一方拒絕執行，另一方如何呢？執行協議會否違反當地的法規呢？執行協議會否影響到第三者呢？雖然跨境調解不容易，但我深信及建議應該多考慮在香港進行跨境調解。

在香港進行調解有很多好處，例如：－

（一）健全而獨立的司法制度

香港是奉行國際熟悉的普通法，普通法是普用於國際貿易投資方面，多國的律師也十分熟悉普通法，而且有大量案例使到法律更加清晰。

（二）英文及中文是常見的商業語言

香港法律是雙語的（中英並重），在網上很容易搜查到香港的法例，中英文的版本皆同樣有法律的效力，所以中方的律師也很容易理解香港的法例。

（三）《調解條例》（第 620 章）

調解條例於 2013 年 1 月生效，令調解成為訴訟以外的解決爭議方法，在香港進行的調解提供法律依據，保障調解過程的保密性，令當事人更放心進行調解。

（四）專業的調解員輩出

調解員的標準、培訓及資歷認證由香港調解會負責制定。在律政司的倡議下，『香港調解資歷評審協會』於 2012 年由香港相關的專業團體成立，目的令調解員培訓標準及規範化，確保調解員的質素，得到國際認可。

（五）得到政府、司法機構及律政司的支持

政府政策：

在 2007 年的《施政報告》[4]，特區政府首次推動調解，但只提及勞工處可更有效進行調解勞資糾紛。在 2014 年的《施政報告》[5]特區政府推動提升香港作為亞太區國際法律及解決爭議服務中心的地位並承諾加強海外推廣，繼續透過「調解督導委員會」統籌調解服務的發展，以及設立諮詢委員會，就發展與推廣仲裁服務提供意見及協調。在 2016 年的《施政報告》[6]，更承諾協助提升香港作為國際知識產權仲裁和調解中心的地位。特區政府多次在《施政報告》推動調解，充分反映政府在這方面的支持。

司法機構：

2007 年成立調解工作小組（由林文瀚法官擔任主席，成員包括法官、調解機構代表、消費者委員會代表及法律援助署代表）研究如何在各法院及土地審裁處的民事糾紛中，促進當事人嘗試進行調解；成立多項調解試驗計劃；2009 年香港民事司法大改革發出《調解實務指示-31》鼓勵爭議當事人透過調解解決民商事糾紛；2010 年成立「調解統籌主任辦事處」及「調解資訊中心」為爭議當事人提供調解的資訊和相關協助。

律政司及相關委員會：

律政司於 2007 年成立的調解工作小組，工作涉及法律配套、調解員資格認可與訓練、推廣和宣傳等。2010 年訂立《香港調解守則》和《調解條例》，及協助業界成立一個專業調解員的資格評審組織。2012 年成立調解督導委員會，及轄下三個小組委員會，分別是規管架構小組委員會、評審資格小組委員會和公眾教育及宣傳小組委員會定期探討涉及推動調解的議題。

律政司非常重視推廣和宣傳調解的工作：每兩年舉辦一次大型的「調解周」。此外，自 2009 年開始舉辦名為「調解為先」承諾書的簽署活動，鼓勵企業採用調解解決爭議，承諾在遇到糾紛時首先考慮採用調解去處理。律政司司長更經常領隊到中國及其他國家推動在香港進行調解及仲裁服務。

[4] http://www.policyaddress.gov.hk/06-07/chi/pdf/speech.pdf
[5] http://www.policyaddress.gov.hk/2014/chi/pdf/PA2014.pdf
[6] http://www.policyaddress.gov.hk/2016/chi/pdf/PA2016.pdf

（六）有其他提供調解服務機構

在香港設有不同的國際另類解決糾紛（ADR）中心，例如:香港國際仲裁中心[7]（HKIAC）、國際商會[8]（ICC）、中國國際經濟貿易仲裁委員會香港仲裁中心[9]等。

以上特點能夠解釋在香港進行調解具有多方面優勢，而調解員處理跨境商事調解已成了目前的大趨勢。

但執行跨境調解協議仍有一定的困難，調解協議有別於仲裁裁判，仲裁裁判可以在所有《紐約公約》的締約國執行，所以聯合國國際貿易法委員會最近建議[10]，以《紐約公約》模式擬訂公約為執行國際和解協議提供框架。建議公約不涉及國內法規中處理的程式方面，只引入一種執行國際和解協議的跨境機制，並建議可以考慮給予各國靈活性。這是否可能呢？贊成的當然認為給予調解協議有仲裁裁決的“牙力”，必可使跨境調解更有吸引性；但反對者擔心調解協議會被濫用，如以虛假的調解協議，轉移財產到其他人或企業而逃避債務。

以下請嘗試想像「人間天堂」與「人間地獄」。

那些國家分別屬於廚師、情人、機械工程師、警察及主管？
你的選擇可造成「人間天堂」與「人間地獄」的分別啊！

[7] http://www.hkiac.org/zh-hant
[8] http://www.iccwbo.org/
[9] http://www.cietachk.org/portal/showIndexPage.do?pagePath=%5Czh_TW%5Cindex&userLocale=zh_TW
[10] https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/086/27/PDF/V1508627.pdf?OpenElement

我在這裡不寫出答案，希望透過這個小測驗可使各位體驗到不同的民族有不同的傳統、習慣、愛好、專長。在調解時也要特別留意啊！

創新跨境爭議解決平台，協助四地開拓新商機

羅偉雄先生[1]

香港自 1985 年開始發展調解已有很長久的歷史。在 90 年代初香港國際仲裁中心開設一個調解興趣小組及後改名為香港調解會。而香港首個專業調解組織－香港和解中心於 1999 年成立，其目的在推廣調解在商業和社會應用。香港政府和司法界亦於 2000 年開始推行各項調解先導計劃，讓各層市民和本地的商界能受惠於調解。經過多年的發展，香港開始推廣調解到亞洲地區，更於 2009 年成立亞洲調解協會，並建構成一個由十二個亞洲地區／國家所組成的龐大調解網絡。同年，民事司法改革積極改善香港司法制度提升效率和加強對市民和企業的保障。為了利便法律程序中的各方就其爭議達成和解，香港司法機構加入多個實務指示－當中在 2010 年 1 月 1 日起生效的實務指示 31（PD 31），更指示法院有職責協助各方和解案件，而各方及其法律代表也有責任協助法院履行有關職責。同時，法律代表須向其當事人提出忠告，法庭會對不曾參與調解但沒有合理解釋的一方，發出不利的訟費令，大大提升了調解在民事訴訟中的應用。資料顯示自 2010 年起差不多所有的民事訴訟案件的當事人也都會先嘗試使用調解解決糾紛，而和解的成功率也令當事人滿意。聯合調解專線辦事處於 2010 年成立，目標在非牟利之基礎上，為有意使用調解服務解決糾紛的當事人提供協助。同時推廣調解作為一種解決爭議方法，並向有意使用調解服務的當事人提供轉介服務，將個案轉交至調解服務機構處理。增加專業人員、企業及其它調解服務使用者對調解的認識，從而提升調解於解決本地及國際糾紛上的地位。

為了提高調解服務的專業及加強對當事人的保障，在香港特區政府律政司之全力推動下，香港和解中心、香港律師會、香港大律師公會及香港國際仲裁中心於 2012 年共同成立了香港調解資歷評審協會有限公司（調評會），目標是希望成為最優越的單一調解員資歷評審組織，為調解員、培訓、專業評審進行資格評審，更具備紀律審裁的職能。

[1] 香港和解中心會長、內地－香港聯合調解中心聯合主席

在 2013 年 1 月 1 日起生效的香港法例第 620 章《調解條例》更清晰地規管調解的框架。《調解條例》在不會影響調解程序的靈活性下，為調解服務提供了規管框架，旨在提倡、鼓勵和促進以調解方式解決爭議，令調解通訊得以保密，加強並確立了調解在法制上的地位。在調解國際化方面亦有很令人鼓舞的發展，香港和解中心在 2014 年擔任亞洲調解協會主席，更在同年舉辦第三屆亞洲調解協會研討會中取得空前成功。此外，滬港兩地在 2014 年舉辦了第一屆滬港商事調解論壇，粵、港、澳三地成立了粵港澳商事調解聯盟，推展跨境商業調解。香港在 2015 年推薦中國國際貿易促進委員會／中國國際商會調解中心加盟亞洲調解協會，令亞洲調解協會具有更大的代表性，亦成為亞洲最大的調解組織。而中國國際貿易促進委員會／中國國際商會調解中心與香港和解中心更於 2015 年共同成立了「內地－香港聯合調解中心」，標誌著兩地調解合作發展的新領域。

香港的調解優勢

香港是亞太區的法律服務和解決爭議中心，在處理跨境及國際商業糾紛享有多項優勢。我們在美國、英國和澳大利亞等世界頂尖調解機制上，加入亞洲及中國文化精髓及商業模式，經過多年的實踐及改進，香港調解模式可謂是國際調解的優化模式。香港無論在法制制定、專業資歷評審架構、紀律審查、專業培訓和調解服務水平亦有完善的發展，各項專業服務已達國際領先水平，也較其他亞洲地區先進。作為國際爭議解決中心，香港在推廣調解專業至亞洲國家有豐富的經驗和強大國際網絡，故此在國際爭議解決機構和系統中有相當大的影響力。

調解未來的發展

專業化

相比起其他的爭議解決方法以至訴訟，調解不論在自主性、創意性、兼容性、彈性和終結性也都有着明顯和無可替代的優勢。同時香港在調解法制、資歷評審、紀律及發展皆超過國際專業水平。事實上，調解是一個獨立的專業，其優點和調解專業對市民的保障必需要在政府的政策推動下才能向市民和商界大力推廣，並藉此鼓勵他們使用。

專門化

現時市民若希望使用調解服務，要找到合適的調解員並不容易。市民選擇調解員時應考慮其調解資歷外，也可以考慮他是否有足夠的行業專業知識或背景去協助解決其爭議。此情況就如家事調解員亦需要具備相關的心理學或輔導技巧，因為解決一些專項糾紛時除了需要專業調解技巧外，更需要一些和爭議相關的行業知識，例如術語，習慣和行規等。故此，長遠來說，調解需要專門化，以行業分類來發展專門協助各類的專項調解員，讓認可綜合調解員的技能得以持續提升。另一方面亦需要讓市民有更多資訊去選擇合適的調解員協助解決自己行業的糾紛，相信這專門化調解的發展將可提升調解服務的效率和市民的認知。

國際化

在發展專業化和專門化的同時，我們更要大力推廣香港的調解優勢到國際。香港擁有條件去滿足國際商企對調解服務的需求，更可利用調解業界已建立的龐大國際合作的網絡，把優越的調解服務推向世界，與世界分享香港獨特的優勢和經驗。這不但能夠吸引國際商企使用香港的調解服務，更能將調解服務國際化，令香港真正成為亞太區國際法律和解決爭議服務中心。

協同化

面對全球化和「一帶一路」的發展，調解可配合其他各項的爭議解決方法，如調解配合仲裁、調解配合訴訟及調解配合專業評估等，以達至最佳的成效。協同調解和各項的爭議解決方法的優點以協助解決不同類型的爭議將會是調解突破地域限制的一個嶄新發展趨勢。

香港創新跨境爭議解決平臺

面對高效法律及解決糾紛服務的殷切需求，中國國際貿易促進委員／中國國際商會調解中心與香港和解中心於 2015 年 12 月 9 日成立，首次在「一國兩制」基礎下，由兩地主要的調解機構共同組建，跨境調解服務結合香港調解和國際仲裁的優點增強兩地解決商業糾紛的合作，對兩地商業及國際貿易發展具有莫大幫助。善用一帶一路可能帶來的國際商業機會，積極發揮兩地的優勢，進一步鞏固香港作為國際調解中心的地位。

成立聯合調解中心有四個主要的目標，包括：

(一) 為企業提供一個完善的跨境糾紛解決平臺；
(二) 推動及鼓勵兩地企業及國際企業使用調解解決可能出現的商業爭議；
(三) 協助完善中國調解評審及培訓機制；及
(四) 推動跨境及國際商貿在兩地發展。

內地－香港聯合調解中心之成立，是首次在「一國兩制」基礎下，由兩地主要的調解機構共同合作而設立的聯合調解中心，大大增強兩地解決商業糾紛的合作，對兩地商業及國際貿易發展起著積極的作用。

內地的經濟發展愈趨成熟，企業「走出去」的情況亦不斷增加，這些企業對高效法律及解決糾紛服務的需求也愈來愈殷切。內地－香港聯合調解中心的跨境商業糾紛調解服務將大大保護各地投資者的權益。跨境調解服務結合香港調解和國際仲裁的優點，和解裁決在全球超過 150 多個地區適用及可以執行，企業可無須在不同的司法管轄區提出重複訴訟。調解服務將大大減低糾紛對商業帶來的壓力、內耗和經濟損失。最重要的是調解強調保密性及以企業的利益為本的理念，對企業商譽是有最大的保障。此外，爭議各方更可透過機制建立新的合作關係，擴大投資商機，促進業務增長。

隨著內地－香港聯合調解中心成立，香港擁有更完備的條件去滿足對高效調解服務的需求。內地－香港聯合調解中心會繼續積極發揮兩地的優勢，進一步鞏固作為區域性國際調解中心的地位。對國際商企而言，兩地最適合處理「一帶一路」沿線國家和內地企業之間的商業爭議。我們希望內地－香港聯合調解中心跨境商業糾紛調解服務能吸引沿線國家企業選擇在兩地解決商業糾紛。同時籍「一帶一路」的發展把兩地優越的調解及中國的多元化糾紛解決服務推向世界，把兩地在不同法律制度下達至共融，再發展互保優勢的經驗和世界分享。

香港律政司司長袁國強資深大律師在「內地－香港聯合調解中心」的設立儀式上指出當內地企業與外國企業之間發生爭議的時候，香港特區憑藉其「一國」和「兩制」的雙重優勢，可擔當中立的第三地，提供跨境解決爭議服務，從而發揮香港作為亞太區法律服務和解決爭議中心的優勢。他

說：「內地企業『走出去』和外地企業到內地進行投資的情況將不斷增加。面對預期隨之而來的商業糾紛，這些企業對法律及解決爭議服務的需求也會越來越大。」

內地－香港聯合調解中心對商界的好處

這個創新的香港跨境爭議解決平臺可為商界締造多種的好處包括：

- 保護各地投資者的權益不受地域及政治因素所影響
- 簡單、省時、透明、公平保障
- 企業可單一程序，而無須在不同的司法管轄區提出重複訴訟
- 可自由選擇獨立的調解員與獨立的仲裁員
- 減少訴訟費用
- 減免企業訴訟壓力
- 減少公司資源消耗
- 確保商業秘密不被公開
- 確保商譽不被爭議影響
- 可保持或建立新的合作關係
- 創造更多的商貿機會

內地－香港聯合調解中心為法律界帶來的機會

另一方面，服務亦為法律界和司法界帶來極大的機遇。隨著國家「一帶一路」的發展，投資及業務增長勢必大增，伴隨的糾紛必然增加，所以我們需要有效的跨境商業糾紛調解服務。有效地使用跨境商業糾紛調解服務將為法律界帶來的多種機會包括：

- 讓律師可參與處理跨境商業糾紛
- 減少訴訟對律師之壓力
- 增強法律專業對當事企業利益的保障
- 具彈性的調解服務可讓律師處理更多的糾紛個案
- 更多的工作發展空間
- 有新的調解相關的專業發展如調解員、調解代理、調解導師和專業評審等

個案參考

利用跨境爭議解決方法已成功解決多個涉及內地和香港的商業糾紛，其中的一個商業糾紛涉及多位在內地投資的港商，多年來他們投資多家內地和港資企業、娛樂和房地產投資項目等。數年前在他們公司股份，房地產及租賃擔保，金融貸款等出現爭議，相關爭議涉及超過一億元人民幣。由於資產投資分佈在多個省市又跨越不同司法管轄區及跨境，當事人走遍多個省市也都找不到一個可行的方法。兩年多的糾紛令他們的關係完全破壞，公司運作受到嚴重的影響，更出現重大危機。不幸的是他們發覺傳統方法並沒法解決他們的糾紛。

最後他們申請使用跨境爭議解決服務，並在協商下把爭議金額修訂在價值 5500 萬元人民幣的資產上。在申請服務的一星期後，各方於調解會議中在調解員的協助下達成和解。緊接由仲裁機構依照和解協議的內容作出裁決，並可在香港和內地各省執行。

個案中當事人未能以傳統方法解決他們的糾紛。假若各方以訴訟方式處理，則耗時十分長，加上不理解程序會對各方構成很大壓力，更可能會加強敵對態度。而所涉及的費用亦相當巨大，涉及超過 500 萬元人民幣的訟費和佔爭議三成約 1600 萬元人民幣的保證金也是當事人無法承受的。相對地當事人使用跨境爭議解決服務的開支則大幅減少，只需約 90 萬元人民幣。整體而言，是次個案中當事人節省了不少訴訟費用、時間、人事和其他資源消耗，最重要的是各方得以維持關係，保障了公司的聲譽，令公司得以重上軌道。

總結

總括而言，香港的調解優勢和這個創新的香港跨境爭議解決平臺可為商界締造多種的利益。隨著內地－香港聯合調解中心成立，香港擁有更完備的條件去滿足對高效調解服務的需求。希望香港在提供優質的跨境商業糾紛調解服務之外，亦可為兩地商企、調解員和法律人員帶來巨大的發展機遇。同時藉「一帶一路」的發展把兩地優越的調解及中國的多元化糾紛解決服務推向世界，把兩地在不同法律制度下達至共融，再發展互保優勢的經驗與世界分享。

Mediation for Intellectual Property (IP) cases

Mr Anthony Rogers, GBS, QC, JP[1]

Why Mediation in Hong Kong now?

Having started from a standpoint of scepticism, based on the premise that, in the past, those in Hong Kong have been adept at settling disputes, it has become apparent that more formal mediations have an important part to play in nearly all aspects of litigation and IP cases are no exception. Times have changed. Litigation has become more prevalent. Parties are more inclined to litigate. At the same time litigation has become more complex and more costly.

The changing attitude to litigation can be attributed in some respects to decreased aversion to confrontation and less fear of Courts. Some industries, particularly the electronics industry, have evolved from being prone to granting licences and now concentrate on the benefits of maintaining monopolies. The ugly side of patents has manifested itself in patent trolls. These are organisations that acquire patents not with a view to carrying out manufacturing and using the particular invention but with the sole aim of extracting as much revenue as possible, whether justified or not, from manufacturers and those who do use the inventions.

IP cases have always been long and involved, none more so than patent cases. The advent of the copying machine has increased the ease of producing bulk written material; the computer and the internet make finding multiple references and citations a "no brainer".

Coupled with difficulties of complexity there are other reasons for dissatisfaction with court proceedings. Waiting times are extending by the year, Court Rules have ceased to simplify litigation, they tend to cause the generation of more work. Judgments can be delayed for an unacceptable

[1] Former Vice-President of Court of Appeal

period.

Mediation brings forward the time when people think about their cases; it brings the parties together; it concentrates the minds. Mediation should be quick and efficient. It should therefore save time, trouble and cost. Although it is true that the result of a mediation cannot be the immediate imposition of an injunction, which is often the outcome desired by a claimant in an IP case, nor can a mediator be given power to revoke an IP right whether it be a patent or a trade mark, nevertheless parties can agree to submit to an injunction or to revoke their IP right. On the other side of the coin, a result can be achieved by mediation that is beyond the scope of any court order.

There are, of course, other ways of resolving disputes outside Court. There is arbitration. That can be as costly and time consuming as Court litigation. Arbitration, like mediation, is, by its nature, confidential. That may or may not be desirable depending on whether the claimant wishes to establish a precedent. There are other methods of bringing about a resolution of disputes. The parties can agree to a non-binding assessment, perhaps somewhat unnecessary in IP disputes where parties are often fully advised. In the past, in other jurisdictions, lawyers have been given access to the Boards of opposing companies to give very short presentations of their cases in order that each party would be fully appraised of the other side's case. That in itself, would only be a step in the process of achieving a resolution.

The fundamentals of a mediation

Not to be overlooked are 2 essential criteria for any mediation:

1. There must be confidentiality. This has at least 2 aspects. The first is that what takes place in any mediation must be kept confidential. The other is that the parties can have confidence that the mediator will keep confidential matters that each party needs to disclose to the mediator so that the mediator knows what that party needs

2. Mediation is only appropriate if both parties wish to mediate. There must be a basic consensus to mediate.

The successful conclusion of a mediation is an agreement by and between the parties. If the parties are content to settle on a particular basis, then that should be the basis of the settlement, irrespective of what the mediator may or may not think the agreement should be.

The types of IP dispute that can be mediated

Clearly one of the most common types of IP dispute will involve straight forward infringement. Inevitably almost every infringement dispute involves a challenge to the existence or validity of an IP right. Disputes between licensors and licensees are often highly suitable for mediation, even though it is common for licence agreements to include arbitration clauses. The breakdown of commercial arrangements between parties that have hitherto worked together can often be a situation where resolution by agreement is far more preferable to litigation.

Considerations which have to be taken into account in infringement cases

All IP rights by their nature are territorial. Frequently the position in other countries becomes highly relevant. Sometimes that can be of considerable advantage in reaching a settlement and sometimes it can be an obstacle. If each party's interest in a particular jurisdiction is different then settlement may well be in view. On the other hand, the contrary is often the case and a clear position in the country of mediation may not necessarily lead to a settlement.

The position of customers also has to be considered and frequently in manufacturing situations the ultimate customers will be in another jurisdiction. A settlement which does not take that into account could be worse than no

settlement at all.

As in any mediation, the mediator has to judge where and with whom to focus attention. In patent cases, the technical advisers tend to have fixed ideas and think any settlement should be according to their previous advice or even their views, even if not previously expressed. The mediator will have to feel out exactly what the technical people really think. Lawyers can be just as bad. They may also feel they have to put on a "good show" in front of their clients; they may find it difficult to abandon their view of the likely outcome in litigation. At the end of the day, any settlement is a settlement by the clients themselves and not by the lawyers, it is the clients' interests which will determine whether a settlement is reached. The mediator may have to find a way of getting the litigants themselves to concentrate their minds. The skill of the mediator is to know how to do that and where patience which will succeed. Sometimes having a discussion with lawyers alone can help, when the clients are not present a more frank approach becomes possible. On other occasions getting the litigants together without the lawyers can help.

Evaluative mediations

More recently there has been considerable discussion about what has been termed evaluative mediations. That is a reference to the possibility of the mediator giving a view as to the likely outcome of an issue or even the whole dispute.

All mediations entail what is termed some sort of "reality check". This might involve questions or suggestions. It will involve trying to bring home to each party the strengths and weaknesses of their respective cases. But evaluative mediations go further.

In considering evaluative mediation it must, of course, be remembered that mediation is not a form of adjudication. The object of a mediation is to enable the parties to reach a settlement that is acceptable to all parties, the

rights and wrongs of the issues in dispute are unlikely to form the basis of any satisfactory resolution.

The second thing that must be borne in mind is that mediation is founded on consensus. There must be consensus for a mediation in the first place. Before any question of evaluation can be considered it would be necessary for all the parties to request an evaluation either of a specific point in issue or, possibly the strengths or weaknesses of each party's case generally. That must be the foundation for any evaluation to be given by the mediator. If it were otherwise one or other of the parties or even both would lose confidence in the impartiality of the mediator.

When a request is made the mediator must be satisfied that there is good reason for the request for evaluation. The mediator should ask and probe as to the reason for the request for any such evaluation and not just proceed because a request has been made. In IP cases it is usual for the parties to be represented by specialist lawyers and they will have a good idea of issues. The need for the mediator to give his views is often not apparent. In making the request the parties will have to make clear to the mediator exactly what they want the mediator to give his opinion in respect of.

The next matter of which the mediator must be extremely careful is as to the basis upon which the evaluation will be given. For any decision to be presented, the factual basis is usually crucial. Mediations do not entail witnesses. It is therefore important that if the parties do request an evaluation of one or more of the issues the factual basis on which the mediator has to base the evaluation must be clear. The parties have to make clear exactly what they want the mediator to take into account. That will inevitably involve both parties agreeing as to what that factual basis is.

From the above it would be apparent that any request for evaluation would almost certainly have to be made prior to the mediation proper taking place and would have to be based, in normal circumstances, on proper written

submissions made by the parties in which the factual basis is made clear without any prevarication.

From the mediator's point of view it would be essential that it is made clear is that his view is only an opinion and would not be a definitive judgment and it must also be made clear that it is an opinion and not an advice. If an evaluation is to be given, it would no doubt be a counsel of prudence that the mediation agreement spells out clearly the basis upon which an opinion or evaluation is given and that no liability is to be incurred by the mediator in making any requested evaluation.

Despite the structures, which as a matter of prudence should be observed, it can be said that in the right circumstances giving an opinion may be of assistance to the parties in their quest to reach a settlement. If one considers such things as questions of infringement of patents which often turn upon arguments as to equivalents or questions of obviousness, an opinion of an independent party who has some knowledge of the law in that respect may be of considerable assistance to the parties in their quest to reach a settlement. Even here, it must be noted that though a mediator may be a patent specialist his knowledge of the technology involved may be less than perfect.

It is to be remembered that giving an evaluation is only a step in the process of reaching a settlement. The parties would still have to reach an agreement albeit they may or may not take into account the opinion of the mediator.

Before leaving this topic it is as well to make the point that the mediator in giving an opinion or evaluation would not know the full story. There is no discovery, the parties are not obliged to reveal anything and there may well be facts and documents which would be revealed at a trial of which not all the parties would be aware and certainly, the mediator may not have been given.

MED-ARB

Brief mention can be made of a hybrid system which has been referred to as Med-Arb. Quite apart from the appalling name, the system in some of its forms is fundamentally flawed. In some places and in some jurisdictions it has been suggested that if mediation is unsuccessful and no settlement is achieved, the mediation can be turned into an arbitration. There are variations on that theme. One variation is that an arbitrator can try and mediate a dispute during the course of an arbitration and if unsuccessful can revert to being an arbitrator.

The problem with any arrangement that entails the same person performing both roles of mediator and arbitrator is that it would fall foul of the true concept of mediation. The two systems, namely mediation and arbitration and the approaches are quite different. In mediation the parties can tell the mediator as much or as little as they want. The mediator's task is to understand as much as possible what the respective parties' positions and interests are. The mediator often has to know what each party's fears and concerns are. These are normally very sensitive and highly confidential but they may be quite different from the legal issues. If a mediator reverts to being an arbitrator he may and most likely will have confidential information and knowledge of a party's circumstances which he otherwise would not have. Even if having such knowledge does not prejudice the arbitrator or even subconsciously affect the ultimate award, nevertheless one of the important aspects of any legal system is that the Tribunal should be seen to be fair and impartial.

In the case of *Gao Haiyan and another v. Keeneye Holdings Ltd and another [2011] 3 HKC 157* Reyes J, at first instance, was faced with a case where the law in the PRC enabled an arbitrator to break off and try and mediate a case and if that was unsuccessful he could revert to being an arbitrator. That is what had happened and Reyes J, obviously felt disquiet about the process. His decision that the award should not be enforced in

Hong Kong was overruled in the Court of Appeal *[2012] 1 HKLRD 627*. It is perhaps unfortunate that the Court of Appeal took the view that because the law of the PRC allowed what must on any view be a dubious system, that an award that came from such a system should be enforced in Hong Kong.

It might be mentioned that WIPO does have a Med-Arb system whereby if the mediation is unsuccessful the parties will then proceed to arbitration. Such a system would not fall foul of the problems associated with the confidentiality that is crucial to the mediation process provided that the arbitrator would not be the same person as the mediator and nothing from the mediation is used in the arbitration. But such a system in reality is hardly anything more than parties attempting mediation before arbitration.

Trade Marks and Passing Off

The rights and wrongs of a Trade Mark or Passing Off dispute are often much clearer than that of a patent dispute. The technicalities that are associated with inventions and the intricacies of the specific art involved are absent. This may be of assistance in enabling parties to resolve their disputes, but the more clear the similarities and confusion the more it is likely that other factors have cause the dispute. Often the problem is regional. The position in Hong Kong may be clear enough. But the position in other countries may not be so clear or may be reversed. This can be a disadvantage or an advantage in enabling the parties to reach a settlement. The regional aspect may hold up an otherwise reasonable settlement. But if the parties can divide up the countries up that may provide a solution.

Copyright and Design

The situation similar to patents. Copyright always has the background of copying which increasingly these days is equated to theft. The mediator has to find ways to soften any stigma attached. The matter in dispute is often whether a substantial part has been taken or copied.

Split of business relationships

Where there is a breakup of business relationships, commonly partnerships and private companies, often the key to helping the parties to achieve is to keep the lawyers out of it. Lawyers tend to view such matters on the basis of what they perceive as the correct legal result. They also tend to be more partisan in these types of cases than in other IP cases. But where there has been a close business relationship the approach based on strict legal rights is not the route to success. Often consideration of the strict legal rights and wrongs is not the key. The chemistry between the parties is the key. Somehow the mediator has to manage to get the litigants talking. Even if there is no settlement at the mediation, if communication has restarted then a settlement often ensues. When parties who might not have spoken to each other for 2 years, agree to have dinner together the mediation is working fine. A simple conciliatory word may be all that it takes. An apology may be difficult to articulate but it may work wonders.

Confidential Information

The problems encountered are often not dissimilar to those encountered in other aspects. As in copyright cases, there is always a pejorative connotation to confidential information cases.

Licence/ agency problems

The start of considering Licensor/ licensee conflicts is, often, to find what the problem is. Time needs to be taken to find out what each party wants. Sometimes the solution is quite simple and the parties may not appreciate it because they have not seen natters in the others' eyes. One may be concerned to protect its customer base, whereas the other is only concerned with being paid outstanding amounts. One party may simply want out and the other may not realise that it would be a question of terms. In other

situations the continuing business relations may be a key to the whole thing. By questioning, probing and getting each party to open up, the parties may realise that there is more benefit in keeping the relationship going than disagreeing over one event.

Conclusion

In IP cases, as in other cases, the key to helping the parties to achieve a settlement starts with listening to the parties, picking up the vibes, understanding what their real interests are, what they want, what they need. It can be very small. Often the parties can resolve their disputes, but regrettably some disputes cannot be resolved.

Pros and cons of using evaluative mediation in intellectual property disputes - the legal consideration to be taken into account by parties

Mr Norman Hui[1]

The law of intellectual property is a combination of laws (such as copyright, registered design, trade marks, passing off, standard patents, short term patents, confidential information and trade secrets) which interrelate with our society and have a long, storied and significant relationship to areas of commerce, science and the arts. The law of intellectual property having such a lengthy and close relationship to many facets of our society has therefore been the subject of many legal disputes. With any area of the law, intellectual property has also changed correspondingly with changes in our society and improvements in technology.

Despite the courts and various government tribunals (such as the Trade Marks Registry and the Copyright Tribunal operated by the Intellectual Property Department of Hong Kong) being effective in dealing with intellectual property disputes, improvements in dispute resolution have been recently made.

On 1st January 2013, the *Mediation Ordinance* (Cap.620) ("the Ordinance") came into operation after taking into account recommendations of the *Report of the Working Group on Mediation* (February 2010). By virtue of section 4 of the Ordinance, mediation is a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following, namely, identify the issues in dispute, explore and generate options, communicate with one another, and to reach an agreement regarding the resolution of the whole, or part, of the dispute. With the implementation of the *Civil Justice Reform* ("CJR"), mediation has been a centerpiece of increasing the cost-effectiveness of court practice and procedure. Mediation is now a part of several discrete Practice Directions.

Mediation is now a part of Hong Kong's litigation process in that failure to engage in mediation will result in the courts having the right to exercise its discretion on costs, including any unreasonable failure of a party to engage in mediation. Legal advisors have a duty to ensure that the parties are properly informed of the right to mediate as per *Practice Direction 31* (a Mediation Certificate which confirms that parties have been advised of the option of mediation must be filed). Facilitation alternative

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dispute resolution (including mediation) is also a duty of the courts as per Order 1A, Rule 4(2)(e) of the Rules of the High Court (Cap. 4A). Additionally, if the Legal Aid Department reasonably believes that mediation is appropriate, the legally aided party should try mediation and failure to do so may result in the termination of legal aid.

Failure to mediate would result in examples such as *Wu Yim Kwong Kingwind v Manhood Development Ltd* [2015] HKEC 1475, *Chong Cheng Lin Courtney v Cathay Pacific Airways Ltd*, HCA 898/2007, *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd*, HCA 2032/2007, where the court may reject a successful party's costs (or any enhanced costs order) due to the unreasonable rejection of mediation.
Some obvious advantages to mediation as opposed to litigation are: speed, neutrality, confidentiality, finality and costs.

The two “main” ways to mediate are by “facilitative” mediation or “evaluative” mediation.

Facilitative mediation is by facilitating a settlement between the parties and the goal is obtained without commenting directly (or not initially) what would happen upon the court’s decision if the case were to proceed to judgment. A facilitative mediator would not need to exclusively have a legal background.

Evaluative mediation is by assisting in the structuring of a settlement between the parties based on what would likely be the court’s decision and is thus a merits driven approach.

A criticism of evaluative mediation is that there is an overemphasis on legal outcomes and it lacks flexibility and understanding in resolving the needs or interests of the parties involved in the case.

An evaluative mediator must normally have a legal background since such a mediator might also be required to enhance the parties’ knowledge on their respective merits, or otherwise referred to as “reality testing”.

An advantage of evaluative mediation is that an explanation of the (remaining) process and steps towards a legal outcome and their associated costs are highlighted and central to the process. As such, the advantages of highlighting the need to avoid

further litigation is emphasized by "reaching a deal" before embarking on significant use of time and energy on "trial preparation" and their related costs are the targets.

The Secretary for Justice previously addressed that both facilitative and evaluative mediation will be used as one of the means to resolve intellectual property disputes.

The *World Intellectual Property Organization* ("WIPO") has commented positively on the need for mediation to be considered as being "integrated" within "judicial structures" – Press Update UPD/2004/227, 1 July 2004.

Typical types of intellectual property cases (in no particular order): copyright (inclusive of Copyright Tribunal references), registered design, trade marks (inclusive of trade mark oppositions), passing off, standard patents, short term patents, confidential information and trade secrets.

The primary reason for intellectual property disputes arising is due to infringement of intellectual property rights which can be generally categorized as being in the nature of infringement "simpliciter", licensing issues, ownership disputes and conflicts between existing and/or earlier rights owners.

As such, the primary forms of relief sought in an intellectual property dispute are typically in the order of an injunction, damages (or an account of profits), additional damages (for copyright cases), delivery up, and costs. Where the parties are minded to settle a dispute, it is the scope of the relief which will be negotiated.

In relation to the injunction, factors such as the duration and scope of the injunction will become the focus for the parties to agree upon.

In relation to damages (or an account of profits) and additional damages (for copyright cases) require certain procedural steps to be taken. All intellectual property cases first proceed to interlocutory judgment on liability only, with a possibility where the case (after all matters in relation to interlocutory liability are completed such as disclosure, delivery up and related relief are completed such as "*Tring-type*" discovery as per *Island Records Ltd v Tring International Plc* [1995] FSR 560 as the procedure was also described in *Auto-Treasure Ltd (t/a Albert Jewelry Creation) v Noble Diamond Ltd (t/a Noble Jewellery)* [1992] HKC 117 followed in *Full Range Electronics Co Ltd v General-Tech Industrial Ltd* [1997] 1 HKC 541 which disallows interrogatories which related to revenue generated by the defendant's use

of the plaintiff's intellectual property rights but discovery would allow discovery of documents which relate to both issues of liability and quantum of damages) that an assessment of damages may be proceeded with.

The measure of damages in an intellectual property case can be generally summarized as applying the measure of damages in a tort case. Damages for intellectual property infringement were awarded in *Oriental Press Group Ltd v Apple Daily Ltd* (1997-1998) 1 HKCFAR 208, [1998] 2 HKLRD 976 as per Lord Cooke of Thorndon referring to Lord Wright M.R. in *Sutherland Publishing Co. Ltd. v Caxton Publishing Co. Ltd.* [1936] Ch 323 at 337 *'… the measure of damages is the depreciation caused by the infringement to the value of the copyright as a chose in action'* and the aim of the task of assessment was confirmed by Lord Wilberforce in the leading case of *General Tire and Rubber Co v Firestone Tyre and Rubber Co. Ltd.* [1976] RPC 197 at 212, to find the sum of money which will put the injured party in the same position as he would have been if he had not sustained the wrong. In other words, *General Tire* applied a notional royalty per pound of infringing material and therefore decided upon the basis of a notional licensor dealing with a notional licensee basis with a singular lump sum payment being suitable in typical infringement situations.

<u>Pros and cons of evaluative mediation in intellectual property cases: the factors involved</u>

<u>Speed (pros)</u>:

Despite a significant number of intellectual property cases are initiated with an interlocutory injunction, mediation provides a potential quick and easy path to avoid further litigation.

Practice Direction 31 on Mediation applies to all civil proceedings in the Court of First Instance and the District Court.

Active case management by the court will usually provide an early date for such mediation (after close of pleadings) so that the parties are able to identify the issues and determine the general strength and weaknesses in their respective cases. If successful, the parties will not need to proceed to a trial which may take years.

Since all intellectual property cases proceed to interlocutory judgment on liability first as previously discussed, afterwards there is the standard procedure to be followed such as "*Tring-type*" discovery so that thereafter an assessment of damages may be proceeded with.

As such, speed from a successful mediation is a definite advantage where no interlocutory injunction is in force.

Speed (cons):

Where there is an interlocutory injunction in force, the urgency for a permanent injunction becomes less of an issue to the plaintiff since it is already protected in a similar manner.

Given that an injunction is normally the most essential relief sought in intellectual property cases, the advantages of damages (or an account of profit, or an assessment of damages) usually becomes secondary in nature and thus added speed towards being awarded damages is usually of less importance.

Most Copyright Tribunal cases are amenable to a built-in mechanism for interim payment under section 164 of the Copyright Ordinance (Cap. 528), and thus the issue of speed is less of an issue in relation to recovery of outstanding license fees. There is "usually" no issue of "infringement" and thus injunctive relief (or lack thereof) is not an issue that needs determination. Unlike the usual basis for damages in an intellectual property case as per *General Tire*, as per the Copyright Ordinance (Cap. 528) at sections 155(3), 156(3), 157(4), 158(4), 159(3), 162(3), 163(4), 165(3) the amount of license fees to be found payable by an order of the Copyright Tribunal are "*to be reasonable in the circumstances*" and that the statutory duty of the Copyright Tribunal is determined by the "general considerations" of section 167 of the Copyright Ordinance (Cap.528) where it shall have regard to, *(a) the availability of other schemes, or the granting of other licences, to other persons in similar circumstances; (b) the terms of those schemes for licences; (c) the nature of the work concerned;(d) the relative bargaining power of the parties concerned; and (e) the availability to the licensees or prospective licensees of relevant information relating to the terms of the licensing scheme or licence in question."* but that the Copyright Tribunal *"shall exercise its power so as to secure that there is no unreasonable discrimination between licensees, or prospective licensees"* but this will not *"affect the general obligation of the Tribunal to have regard to all relevant considerations*

and in particular, to whether the exercise of its power will result in a conflict with a normal exploitation of the work or will unreasonably prejudice the legitimate interests of the copyright owner".

Speed is not an issue for trade mark oppositions at all since the Trade Mark Rules (Cap.559 sub. leg. A) provide for a rather lengthy timetable set by statute and in any event, the Applicant has yet to use the trade mark (in this jurisdiction) which is being opposed.

Neutrality (pros):

Without being "bound by the pleadings", the parties are free to make their terms of settlement tailored to their own choosing. This is particularly helpful, especially where the plaintiff is a multinational corporation and would allow the parties to think "out of the box", particularly where cross-jurisdictional actions are involved.

Since the parties consider their interests rather than their duties, mediation allows for settlements to be made in more flexible and practical ways which might go beyond the legal remedies that the court is empowered to grant. In cross-jurisdictional actions, mediation is particularly appropriate as opposed to litigation since it is often difficult for a judgment to be enforced in a number of jurisdictions due to the differences in the law, territorial sovereignty and also possibly political considerations.

Neutrality (cons):

In intellectual property cases, the relief sought by the plaintiff usually and squarely fits within the prayer for relief and therefore (aside from cross-jurisdictional actions) there is less attraction in a mediated settlement.

Confidentiality (pros):

Without the court making any pronouncement on the merits of the claim, the parties are not "labeled" with being the "winner" or the "loser". Through the process of discovery during litigation, disclosure of potentially sensitive and confidential information with commercial value may arise.

Settlement terms made in the course of mediation are kept strictly private and confidential. The practice of mediators is to observe confidentiality in respect of all matters disclosed during the mediation. The parties are required to sign a Mediation Agreement to ensure all negotiations are conducted on a "without prejudice" basis. Confidentiality in mediation is recognized in several cases, including but not limited to *Champion Concord Ltd v Lau Koon Foo* (2011) 14 HKCFAR 534 and *S v T* [2011] HKLRD.

Confidentiality (cons):

It is distinctly in intellectual property cases that much of the time the plaintiff seeks judgment and its publication so as to deter other potential infringers of their intellectual property rights. "Product" and "brand" protection is on the minds of all intellectual property rights holders, in particular, multinational and/or multi-product type companies, intellectual property rights are the key assets for several types of prominent and innovative intellectual property rights holders and "public" protection of those rights is fundamental to their continued existence.

Finality (pros):

As already discussed, a successful mediation would end all matters that would normally go through various stages (i.e. trial preparation, interlocutory judgment, assessment of damages – if any) with the potential that even cross-jurisdictional cases can all be concluded. Outcomes from the court might be considered by the parties to be complicated and unpredictable with the appellate process looming in the background.

A successfully mediated settlement is likely to be satisfactory to all parties and thus mediation might especially be able to assist the parties where before litigation had commenced those parties were in cooperation with one another.

Finality (cons):

There are some remedies which are available by way of a court order but not available in a mediated settlement. The lack of a judgment and/or court ordered relief may compel a defendant to not fully or properly provide the full relief sought by a plaintiff which might mean continued litigation and therefore a lack of certainty. As such, further relief such as committal proceedings are not open to a party

defaulting on the terms of the mediated settlement. Again, the benefit of a published judgment to a successful party, especially intellectual rights holders who seek an element of deterrence to other potential infringers, would not be available.

Costs (pros):

Obviously, the scale of costs needed towards mediation are truly insignificant when compared to litigation and intellectual property cases are no different, especially considering when after trial, only interlocutory judgment is awarded (with damages to be assessed).

Costs (cons):

There are virtually no drawbacks in this regard when considering the scale of costs involved compared to litigation.

The legal consideration to be taken into account by parties

Obviously the starting point is defined by the pleadings. With intellectual property cases, the issues and relief are usually well-defined with specific particulars and therefore the “legal consideration” is particularly tied into the relief being sought.

As such, the “legal consideration” may be juxtaposed with the pros and cons of evaluative mediation.

The parties being guided in an evaluative mediation are well served, especially with intellectual property cases, since there are some technical issues that need to be resolved on both substantive and procedural legal issues which are less commonly seen as compared to more typical commercial cases (some examples already discussed).

The benefit of an evaluative mediation as opposed to a facilitative mediation is that due to the procedural requirement in intellectual property cases of there being no discovery or interrogatories relating to quantum requires the mediator to be able to provide a framework for providing a “reality check” on both issues of liability (injunctive relief, delivery up) and the “unknown” amount of quantum (damages, or an account of profits and additional damages in copyright cases) where at least the framework for the amount of quantum would need to be considered (*General Tire*).

Areas of intellectual property disputes that might be of added difficulty for mediation generally would be disputes relating to patent validity (due to matters of interpretation), trade mark oppositions and invalidation proceedings (due to matters relating to relative and/or absolute ownership) and trade mark disputes relating to distinctiveness (due to matters of perception) all require skilled interpretation and experienced legal considerations.

The lack of a judgment and the publicity that it would create to deter other potential infringers might well be unattractive to intellectual property rights holders and therefore the mediated settlement would need to be both convincing and attractive to an intellectual property rights holder with merits being clearly considered.

A facilitative mediation would arguably be more constrained since the mediator would not normally comment directly (or not initially) on the merits of the case (whether on liability or the unknown amount on quantum) with the added possibility that the mediator might not have a legal background and thus be limited in providing what might be a more complicated mediated settlement, in particular if cross-jurisdictional issues are at hand and on-going.

In infringement cases ("simpliciter") – the typical "copying" competitor scenario, the main legal consideration goes towards issues relating to "Speed" and "Confidentiality" since they are forms of relief that usually determine the issues most sensitive to the parties.

In infringement cases (licensing) – the typical "agent" vs "principal" or "licensor" vs "licensee" scenario, the main legal consideration goes towards "Speed" and "Neutrality" since the scope of their relationship, if defined in an agency or licensing agreement, will be "spelt out" but at the same time will usually be for several years and possibly also across various jurisdictions. Therefore, the long duration of such an arrangement will require flexibility towards ending or modifying that arrangement.

In infringement cases (ownership disputes) – the typical "employee" vs "employer", or "assignor" vs "assignee", or a "commissioned work" scenario, the main legal consideration goes towards "Speed" and "Finality" since the intellectual property rights in themselves would mean the actual continuation (or lack thereof) of use of those intellectual property rights which would go on for years (copyright, registered

design; standard patent, short term patent) or possibly indefinitely (trade marks, passing off; confidential information and trade secrets).

Perhaps the one "legal" consideration which is applicable to all intellectual property cases and an overwhelming reason for evaluative mediation – costs. There is no meaningful reason not to try mediation in intellectual property cases given the potentially prolonged (i.e. given that only interlocutory judgment is awarded after trial) and costly efforts it would take through litigation.

To provide an example:

Samuel Smith Old Brewery (Tadcaster) v Philip Lee (trading as "Cropton Brewery"), Case No: HC09C02982, 22 July 2011, Arnold J. held that:

"Postscript

164. In her skeleton argument, counsel for Samuel Smith drew attention to a number of open offers to settle the dispute which had been made by Samuel Smith. I asked her during her opening speech whether the parties had attempted mediation, and she said that they had not, although there had been two without prejudice meetings. In my view this is a case which should have been referred to mediation at an early stage.

As I observed at the outset of this judgment, the costs are out of all proportion to what is at stake, particularly from Cropton Brewery's perspective. The legal process appears to have caused the parties to become entrenched in their positions rather than seeking common ground. I suspect that the costs will themselves quickly have become an obstacle to settlement.

Whether the fact that Cropton Brewery has been represented under two conditional fee agreements is a factor in this I cannot say. But what I can say is that in future disputes of this nature the possibility of mediation should be explored as soon as is practicable."

“Mediate First - Advance with the times”

Mediation Conference in Hong Kong

13 May 2016

Welcome Address

The Honourable Mr Rimsky YUEN, SC, JP[1]

Mr Justice Barnabas FUNG, Mr Raymond YIP, Mr Thomas KWONG, Distinguished Guests, Ladies and Gentlemen,

On behalf of the Department of Justice, may I start off by welcoming you all to this Mediation Conference 2016 co-organized by the Department of Justice and the Hong Kong Trade Development Council, and supported by various key players in the field of mediation in the Hong Kong SAR.

2. This is the fourth Mediation Conference held since 2007. Further, since 2014, the Department of Justice introduced the Mediation Week. As the name denotes, various programmes were organized within a week so as to promote interest in mediation. As today's Conference marks the closing of the Mediation Week 2016, may I take this opportunity to share with you some thoughts on this year's theme: *"Mediation First – Advance with the times"*. Two key areas will be covered, namely, a brief survey of what had been done in the past, and what will be the future directions and challenges.

<u>Hong Kong's Mediation Landscape</u>

3. The use of mediation in Hong Kong can be traced back to the 1980s, if not earlier. Significantly, in 2007, the highest level of our Government formally included the promotion of mediation as part of its policy objectives. Much progress has since been made. Today, mediation is an integral part of our dispute resolution landscape. This development is the result of the joint efforts of the Government and the relevant stakeholders in four main areas, namely: (1) institutional support; (2) regulatory framework; (3) accreditation and training; and (4) public education and publicity.

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[1] Secretary for Justice, Department of Justice, HKSAR; Chairperson of the Steering Committee on Mediation

Institutional Support

4. Starting with institutional support, it is pertinent to note the role played by various committees and task forces. The first one is the Working Group on Mediation set up in 2008 to map out plans for the overall development of mediation in Hong Kong. The Working Group published a report in 2010 with 48 recommendations which set the scene for subsequent development. In the same year, a Mediation Task Force was established to take forward the recommendations including the enactment of the Mediation Ordinance and the establishment of the Hong Kong Mediation Accreditation Association Limited ("HKMAAL"), which is an industry-led body to oversee matters concerning accreditation, training and discipline. In 2012, the Steering Committee on Mediation was formed to continue with the mission. To-date, the Steering Committee continues to assist in the further promotion and development of mediation in Hong Kong.

5. Other institutions in Hong Kong have also made significant contributions. Apart from introducing the Civil Justice Reform which has proved to be a strong catalyst for mediation, the Judiciary set up the Mediation Information Office in 2010 to provide mediation information to the general public, especially litigants in person. Further, since 2009, the Legal Aid Department has extended the provision of legal aid to cover mediation costs incurred by legally aided persons.

Regulatory Framework

6. In terms of regulatory framework, the Mediation Ordinance, which has been in operation since 1 January 2013, provides a legal framework for the conduct of mediation without hampering the flexibility of the process. The Steering Committee has been closely monitoring the operation of the Mediation Ordinance, so as to ensure that it serves its objectives. Later today, Ms. Lisa Wong SC, the Chairperson of the Regulatory Framework Sub-committee, will launch the Guidelines for Mediation Communication.

Confidentiality is one of the most important features of the mediation process. On the other hand, researches based on empirical data are essential to facilitate studies on how mediation can be further and better developed. The Guidelines seek to strike a balance between these two and other relevant considerations, and is yet another step to ensure the smooth and effective operation of the Mediation Ordinance.

7. Another on-going effort is the study on apology legislation. The key objective is to encourage the making of apologies so as to enhance the possibility of settlements by clarifying the legal consequences of making an apology. Two rounds of public consultation have been conducted since last year and the overall response is positive. The Steering Committee is formulating its final recommendations with a view to introducing an appropriate apology legislation in the next legislative year.

Accreditation and Training

8. In the area of accreditation and training, the HKMAAL that I mentioned earlier assists to ensure the quality of mediators and consistency of standards, which is crucial in maintaining public confidence in using mediation as a means to resolve disputes. Since its commencement of operation in April 2012, there are now a significant pool of accredited mediators with diverse backgrounds and expertise. A question that is often asked is whether this body should be converted into a statutory body. The Government maintains an open mind and we will continue to study the pros and cons of doing so.

Public Education and Publicity

9. In terms of public education and publicity, you would note that the seminars organized during the Mediation Week are mostly sector-specific, including education, medical, community, commercial and intellectual property (IP). The aim is to explore how these specific sectors can make the

best use of mediation, as well as to enrich the sustainable development of mediation in Hong Kong.

10. In order to promote the mediation culture, the Department of Justice initiated the "Mediate First" campaign in 2009 to encourage business and other organizations to first consider the use of mediation before resorting to litigation or other dispute resolution processes. The campaign was repeated in 2013 and 2014. To date, about 360 entities from very different sectors (ranging from international corporations, small businesses and NGOs) have signed the pledge.

Government's Commitment to Promoting Mediation

11. One may ask why the Government is so committed to promoting mediation. There are of course various reasons behind this policy. To highlight a few of them, may I stress the following.

12. First, as Lord Bingham pointed out, one of the key elements of the rule of law is the provision of effective means to resolve *bona fide* civil disputes which the parties themselves are unable to resolve[2]. Traditional litigation in courts has its strength, but may not always be able to fully satisfy the needs of parties to disputes. Other dispute resolution processes, including arbitration and mediation have become increasingly popular both in Hong Kong and beyond. Hong Kong, as a place where the rule of law is our core value, simply cannot afford to turn a blind eye to this important development.

13. Second, legal and dispute resolution services are closely related to economic growth. Various studies and researches have established this point beyond doubt. As an international financial and commercial centre and to maintain its competitiveness, a robust dispute resolution regime is of utmost

[2] Tom Bingham, The Rule of Law (Allen Lane) (2010), Chapter 8 (at p. 85): "[m]eans must be provided for resolving, without prohibitive costs or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.".

importance, and no effective dispute resolution regime can be completed without an effective mediation service.

14. Third, globalization and regional integration have significantly transformed the global economy and posed new challenges. Against this background, the world is not lacking in new economic initiatives. Examples include China's "Belt and Road" Initiative and the ASEAN's Regional Comprehensive Economic Partnership, which are opening up exciting business opportunities. While the volume of cross-border activities are expected to surge, the same trend can be expected of cross-border commercial and investment disputes. Traditional court litigation has its limitations, and those involved in cross-border trade often find mediation more attractive given its various advantages including flexibility and cost-effectiveness.

Advance with the times

15. Although considerable efforts have been made in the past, a lot remain to be done and the road ahead is full of challenges. A piece of good news is this: not only has the Hong Kong SAR Government remained firmly committed to promoting mediation, the Central People's Government has also expressed its support by formally stating, for the first time, in the recently announced *13th Five-Year Plan* that it supports Hong Kong's role as a centre for international legal and dispute resolution services in the Asia Pacific region.

16. Looking forward, we believe mediation should be promoted towards the directions of professionalism, specialization, integration as well as internationalization.

17. For the purpose of today, I believe the need for professionalism hardly requires further detailed elaboration. In short, the practice of mediation should not be seen solely as a gainful employment. Instead, it should be regarded as a profession and the ultimate consideration is public interest, including the provision of high quality professional services with

utmost integrity. In this regard, we will work closely with HKMAAL and other stakeholders to ensure that the practice of mediation will be developed along this direction.

18. Another important aspect is the development of a specialized list of mediators for specific sectors. Similar to other professions such as medical doctors, lawyers and engineers, specialization is the natural development in the history of every profession. Besides, we expect that the demand for mediation services in specialized areas is going to increase. This happens in, for instance, IP disputes where parties may consider that evaluative mediation may in appropriate circumstances serve their needs better. With over 2,000 accredited mediators with diverse backgrounds and expertise, Hong Kong has an edge to develop specialization.

19. Mediation is only one of the various means of dispute resolution. To maximize the potentials of mediation, it is necessary to further explore how mediation can be best fitted into the overall landscape of dispute resolution, and how mediation can interact constructively with other means of dispute resolution (such as expert determination and early neutral evaluation) so as to achieve synergy.

20. Moreover, the collaboration and cooperation between different mediation organizations, regardless of their jurisdictions, may enhance cross-fertilization and thereby generate synergy. In this regard, I am glad to report that in December last year, the China Council for the Promotion of International Trade and the Hong Kong Mediation Centre established a Joint Mediation Centre in Hong Kong. This is the first joint mediation centre established by major mediation institutions in the Mainland and Hong Kong to provide an effective platform in Hong Kong for resolving cross-border commercial disputes.

21. Lastly, internationalization is another important aspect. I have briefly mentioned the upsurge of cross-border disputes. In the context of

mediation, the increasing demand for cross-border mediation raises significant issues that call for serious research and studies. One of them is the enforcement of cross-border mediated settlement.

22. This is not a new issue, but it remains an issue that should be properly addressed. Earlier this year, a Working Group of the United Nations Commission on International Trade Law delivered a report on its study on the matter. In short, it is considering whether an international convention modelled on the New York Convention[3], or model legislative provisions or a guide to legislation enactment would be the feasible option for addressing the issue of enforcement of cross-border mediated settlement. With a view to ensuring effective enforcement of mediated settlement agreement, Hong Kong will be following this development closely.

Conclusion

23. Ladies and gentlemen, it takes time to cultivate a mediation culture, but I believe that we have built a solid foundation for future growth. Today's Conference will provide an excellent opportunity to exchange views on how we may advance with the times and how mediation services can be further improved in Hong Kong.

24. Before I conclude, I would also like to take this opportunity to express my utmost gratitude to all the supporting organizations, sponsors, and speakers (especially those who travelled from overseas jurisdictions to share with us their insights and experience). Without their support, the Mediation Week 2016 and this Mediation Conference would not have been possible. I, of course, also thank all of you for attending this Conference since your presence is the best demonstration of the interest in mediation.

[3] This refers to the New York Convention, which is the international convention dealing with enforcement of international arbitration award. Based on this New York Convention, arbitral awards made in Hong Kong can be enforced in around 150 jurisdictions. Besides, the reciprocal enforcement regimes entered into with the Mainland and the Macao SAR are also modelled on the New York Convention.

25. On this note, it remains for me to wish this Conference a great success.

Thank you.

Keynote Speech

Mr. Phillip Howell-Richardson[1]

Good morning,

I would like to say right at the start thank you for inviting me. It's a real pleasure and an honour to be here, at the end of this week – "Mediate First" which forms part of many of your initiatives undertaken to promote and develop mediation. There can be no doubt that I am standing in one of the main homes of mediation development in the world. The developments already undertaken, and continuing to be undertaken are significant with impacts far beyond this part of the world. So, thank you for inviting me to share some of my thoughts where of course we all recognize that it is experience gained through mediating that is most important.

May I say that I started off as a mediator by chance. Perhaps many of you did the same. In fact I learnt of mediation in 1990 by chance in a large construction claim and I met a mediator from America who I had never met and took part in a process that I had never even heard of. Then, ten years on took me to the civil law reforms in 1999 in the UK when Lord Woolf raised for the first time as a matter of policy and a matter of court rules, the prospect of dispute resolution by means other than the courts; This primarily involved, the introduction for the first time of court rules and arrangements for the promotion and use of mediation. I can remember thinking "this is going to change my life" because I had already spent ten years talking to people about mediation. Sometimes not many people listening: thank you for listening.

Then came a period which I call the first growing period when the young infant mediation began to stand up and walk. In 2000, the walking started, and five years later in 2005, I became a full-time mediator. Now, I could not have done that and given up practice as a lawyer and as a partner in a law firm, unless there had been significant development in the UK sufficient to enable me to put bread on the table and to have a professional mediator career. So from 2005 to present day, I have been mediating full-time in the UK, in Europe, and other areas of the world, and I have seen the global development of mediation. None of this is new to you. But I would invite you to pause to consider for a while. I think I am correct, that it was on the first of January 2010, your Practice Direction 31 and other civil justice rules

[1] International Commercial Mediator

supporting mediation were brought into effect. That caused me, when I read them again recently, to think back to my experiences in mediation where mediation in the UK is now and the potential of various developments. I wonder whether I could share with you, some of the things that I've seen, in the last eleven years of development since 2005.

Firstly I would like to bring out the importance of the Judiciary in mediation development. We have just been hearing a truly excellent summary of the institutional structures and the way in which the judiciary have reformed the civil litigation process here. I notice that you have learnt a great deal from world best practice and developed your own approach. Of course, although it may have been controversial on occasion, the adoption of the mediation certificate, and the need to explain and implement that, brings mediation right into the heart of the dispute. In the UK, we approach the same issue differently. I think yours is to be preferred. You have brought in a formal focus on the early adoption of mediation and what is required for resolution of the dispute. We have protocols and we have expectations. So I think in that area you have certainly developed an approach that may have within it a greater pressure for the use of mediation.

The Judiciary is very important. We have been lucky in the last eleven years in that the Judiciary at the Court of Appeal and the lower courts have supported, by and large, the development of mediation through case law. But again, you may have a better position than us in the UK in that we use the standard without prejudice rules and case law, without any specific application for mediation. We do not have the confidentiality arrangements of your Mediation Ordinance. I think we may learn from you. We are debating whether to undertake a Mediation Act and whether we should create a specific mediation privilege. I think that is something that I would like to encourage; that is continuing to develop your own way here. But I would also like to bring out that it is everyday case management, everyday case interaction by claimants and defendants and their lawyers with the court that really provides one of the main sources of mediation growth. I think I have seen the phrase "judicial activism" before. It's a bit unfortunate. What it really means is that the judiciary is informed and supportive. Judges who are prepared to take initiatives where they need to, and the judiciary speaking out and developing case initiatives where they see things that need to be encouraged or challenged. Certainly, during the last eleven years that is something that has been happening quite considerably in the UK and Judicial support has contributed very importantly to the ever increasing growth in demand and usage.

I remember that eleven years there were phrases like “it’s a tick box”; “it’s a waste of time”; “you just need to attempt”; “you don’t need to engage”. There were conversations about bad faith involvement. There were anecdotal tales of cases where people turned up and would then walk away. Those phrases have melted away gradually over the last eleven years partially through judicial involvement and partially through user engagement and experience. In a particular case where perhaps a Judge gets a feel that one or more parties are giving excuses to not engage fully, or not appoint a mediator, it is quite to be expected that such behavior is not accepted. I see you can do it here. But putting pressure on for appointment of a mediator is one thing but discovering what happened in a mediation is another. In general, disclosure of what occurred in mediation should not occur. But I have seen orders in the UK courts, which have provided for disclosure of information; how many people were there; how long did it last; was it successful; is it continuing? There are some basic questions that can perhaps, with care and subtly by the Judiciary, really make a difference and start to drive out, some of the behaviors that need to be declared not good enough, not here in mediation. So I would encourage the Judiciary in their own various ways to continue to remain active and it is their activism that has proved very successful and is one of the main factors in the UK’s development.

Quite apart from the development of case law and from Judicial encouragement for engagement, may I now move on to lawyers. ADR, an alarming drop in revenue was one of the acronyms I think I heard in the beginning. But I see now, instead, lawyers viewing mediation not as a threat or a tick box, but they actually see it as an opportunity. Through experience and increasingly successful usage, they see it as way to demonstrate skills, to enhance the relationship between client and lawyer and to be seen to be creative and working in the client’s best interest in the place it really matters in the cockpit of negotiation. The days when people turned up and did not contribute beyond the law are slowly and certainly going away. Now also we see other sectors picking up mediation and expanding usage beyond insurers and bankers. We see that the clients’ pressure is there for their lawyers to perform and that there is a way in which they can do that by performing a wider role within negotiation. So it is not just pure law skills alone. No one lives in a perfect world but I am seeing, as a mediator mediating a significant number of cases a year, that there are now much higher skills of preparation and presentation. There is now much greater realization of the potential of the mediation process. I think I can probably best illustrate this by considering creativity in the use of mediation process.

Clearly, the development of mediation in the UK also took place through training and the introduction of a relatively standard format that is often known as the “one day case”. A mediator arriving for a day and very often the parties undertaking positional bargaining through the use of money and with a dedicated intent to achieve certain outcomes. If this is a commercial world, that is a commercial tool. But time has proved also as mediation has developed that the debate about evaluative and facilitative mediators or mediations is only a start.

And what we are now seeing in the UK, is that users, lawyers and mediators are understanding that in fact there is no one standard process. There may be expectations, but in fact you have no one process. You have an infinitely variable process that answers the needs of each dispute. Now, easily said and in the majority of cases if you went to the UK today, you would still see the one day model. But you would also see there are emerging variations in it, and emerging uses of it. It is not just that sometimes the opening session is only conducted by the clients and not the lawyers; it is not just that the mediator may in fact chair a meeting which in fact debates the issues from the start; it is not just that the mediator may ask carefully prepared questions with the consent of both parties; it is not just the fact that people might not do an opening meeting at all until later in the day in the process; it is not just the fact that there may be a high degree of preparation. With the standard model, people are realizing through experience of the last eleven years, that the standard model is but a start. I’ll come back to this when I talk about globalization and professionalization.

So as I review the last eleven years, I would see far greater complexity and variations in the mediation cases I am dealing with as a mediator. The other thing I would see in the UK is the creation of an experienced pool of mediators. Maybe by this time, there are ten to twelve thousand mediators trained by various mediation agencies. I lose track. There are many trained mediators who do not practise and use their mediation skills as lawyers to better serve their clients. There are others who treat mediation training as negotiation training for use in commerce and, of course, there are others who do become mediators. In 1999, seven of us, we were already involved in mediation, started up the first independent mediators’ organization in the UK. We were thought to be quite extraordinary people who declared we were going to be independent mediators, although we all recognized that we would be very much part-time at that point. Now in the UK, I think there are hundreds of mediators, some of whom are mediating full time; maybe in the region of 50 cases or

more a year. There are many who mediate alongside other aspects of their lives and non-lawyer mediators with experience from other areas of life. So you see the creation of a pool of experience and that there is no substitute for experience as a mediator. Experience brings user confidence and an increasing professionalism.

So, there is, in the UK, this pool of mediators which, in European terms, is probably the biggest most experienced pool in Europe. Although of course as you would expect European countries with their considerable diversity and different cultures are developing their own pools of mediators in their own ways.

I think I would like to turn now to an area which is at the heart of all of this and that is demand. There has been a change in the demand in certain levels of mediations due to the changes in civil legal aid in the UK. I commemorate you to the tremendous civil legal aid arrangements you have here. But because of the recession in the UK, the Ministry of Justice has virtually withdrawn civil legal aid from civil matters as a matter of policy. As a result, in fact, far from mediation disappearing, mediation has been shown to become more effective and central to maintaining access to justice. Wider use has occurred, particularly in the family area where there has been quite a heavy Judicial involvement in order to ensure that mediation takes place to obtain good outcomes and to preserve limited wealth family. Also in the civil area, following the removal of civil legal aid there has been the substitution of other funds, whether ATE insurers or funders of various descriptions and thus the emergence of new stakeholders in mediation. Now, all of this has resulted in the increased use of mediation as users have realized that mediation thrives and controlled effective negotiations that can still take place. These changes have actually resulted in a further pressure for extensive or more extensive use of mediation.

I am describing a particular effect relating to the UK caused by the well-publicized issues in controlling public expenditure, and what we have had to go through in the last few years. We have also seen the growth of litigants-in-person in the courts. The litigant-in-person in the courts can lead to problems through having to ensure at all times that there is a fair hearing, when perhaps the person concerned is not properly advised. I was involved in creating the Court of Appeal Mediation Scheme which has proved to be very successful in attaining resolution of cases where problems have arisen due to limited public resources lower down in the court system.

So these are ways in which this changing environment has in fact seen an increase in

the use of mediation. Over the last eleven years, we have developed a well established maturing mediation world.

I would like now to turn to globalization. Something that is very much on your mind, I suspect in many ways. It is an enormous subject. I will just touch on 4 or 5 things that may interest you. You will know that there was a European Mediation Directive which was to be implemented by 20 May 2001 which required member states to undertake various arrangements for the promotion and development of mediation. As you would expect where you have 28, maybe 27 if Brexit gets going, governments and countries together there has been a very very wide variation in the implementation of that directive. On the one hand, you have some more frequent users by history and by experiences, such as, Demark, Holland and the United Kingdom. And then you have traditional legal structures in Germany, France, Italy, and Spain and in central Europe, who have difficulty adapting their judicial systems and processes to achieve the full benefits in mediation. Then I think there are various paces in adoption. You see that Spain may have some time to go yet; and France has issues where support for mediation is thin. Without anyway singling Italy out, they originally introduced compulsory mediation. There was widespread opposition, in fact a strike of judges and lawyers. The original arrangements were withdrawn and amended arrangements have been brought in. I am told by my Italian friends that they do now have a problem of over regulation leading to “tick box” and that may be a message for all.

You then have the former Eastern Block countries who more recently joined the EU. They have had the advantage of designing from the start new systems and there has been a marvelous variety of approach as each society has gone about the issues of confidentiality, relationships with the judges and encouraging use. The approaches can be divided into those that preferred regulation against those that do not. I leave it at that but I will say that if the variety is enormous, the pace of the development is enormous. It is a European problem to obtain harmony. It will take perhaps many years yet.

I commend to you the steps you have taken here, clearly really working hard to make certain there are the right structures in place and adopting and moving forward. From the UK experience, it is usage that matters. What you are concentrating on now, rightly so in my view, is to accelerate the use of mediation.

I would like to turn now to the question of one specific aspect of globalization and

that is to look at the interaction of mediation and arbitration.

The growth of international arbitration has been one of the miracles of modern dispute resolution and has itself grown out of the globalisation of international trade in the last fifteen or twenty years; where Hong Kong of course has its own powerful position in this development. We know that the Global Trading Hubs and those who have ambitions to be one of the Global Hubs, must have full service capabilities, one of which is you must have an integrated dispute resolution process capable of dealing with multi-jurisdictional and multi-cultural issues as well as capable of dealing with indigenous issues. In arbitration, the hubs have traditionally been New York, London, Paris, Geneva, Hong Kong and perhaps now Singapore. There is now an active developing market of international arbitrations and arbitrators; we have major law firms with considerable resources; we have significant global users investing time and money. But despite all that it still takes years to obtain resolution through arbitration in many cases.

Coming to mind in this context is a case I dealt with, involving an African State and an Indian corporation where they had been in arbitration for at least five or six years before they found mediation.

The essential harmony of the relationship between mediation and arbitration is yet to be realized because mediation as an international global force, is still emerging. But I think if you want to be a Global Trading Hub, you must have an established and developed harmony between arbitration and mediation.

I spoke recently at a conference in Queenstown, New Zealand, hosted by the arbitrators of New Zealand. There was a complete mixture of arbitrators and mediators from throughout the world, discussions about med-arb, arb-med and a range of process issues, and there was a common view that users will expect to see greater collaborative interchange in the future. I am conscious of the fact that med-arb and arb-med are not particularly used or developed as yet but development is required and how both professions get together around those techniques is going to be interesting to see. It is very much a matter of seeing what develops and how the leaders of these two professions want to collaborate and how users would like to see it develop.

But I encourage you, as mediators, to take part in those developments. The Mediators' time is now. I remember when I came here in 2008 and took part in

discussions that were giving rise to your developments in the use of mediation. The twinkle in the eyes of policy makers and many mediators, was to do international mediation and to have international mediations centered around the hubs of the world. It is happening in London now. People are choosing to use London for international mediation in cases which have no connection whatsoever with London. They want experienced mediators partnered with a choice of neutral venue, the use of English language, a recognized ability in dispute resolution and then the parties use informed choice. We can develop this as we go through the day, but I would like you to think about what is necessary to encourage international mediation here.

Finally, as I finish now, I'd like to just raise one last important issue that is creating professional standards. The continuing growth of mediation can be badly affected by low standards, bad mediators and bad users. This could be dealt with by the regulation of the mediation process and mediators which I would thoroughly object to. It can certainly be addressed by proper effective training, continuous learning and promulgation of standards. Here again the threat in the opportunity is this; do not regulate so that you destroy the power of mediation to give people their ultimate autonomy to decide their process and reach their own decisions in an informed way assisted by a neutral mediator operating in any way that is permissible in law. How that is done as each society chooses what is safe for its people and yet encourages universal global standards will be very interesting. And so I see this as one of the important areas that everybody must get right and it is one which in true mediation style will benefit from informed, directed conversations exploring options so as to arrive at a solution that can just about be lived with.

So thank you very much for listening to me, I hope some of this is of use to you. I look forward to taking part in the panel discussions. You have, there is no doubt, a young, vibrant mediation strength and your development of mediation will, I am sure, be skillful, well informed and effective. Thank you.

A Michelin Guide to Mediation

Prof. Nadja Alexander[1]

Regulatory robustness of cross-border mediation in Hong Kong[2]

As mediation worldwide seeks to claim a larger slice of the cross-border dispute resolution pie, an increasingly important question for legal advisers is: which jurisdiction offers the best legal framework to support the mediation of my client's matter?

Consider the situation of a client that is a multinational corporation doing business with numerous organizations around the globe. As a lawyer, your advice is to insert a dispute resolution clause with mediation as a central component. In terms of international trade, business people and lawyers typically select places and regions with which they are familiar as the basis for the governing law and jurisdiction clauses.[3] This is sometimes referred to as the status quo bias. For example, you might select your own jurisdiction or another well-known jurisdiction in your region that has been the standard home for applicable law in dispute resolution (arbitration) clauses for decades.

But what if the various jurisdictions in your region did not have the best laws to support a mediation process? What if, for example, the laws on non-admissibility of mediation evidence in court were unclear? What if the attitude of the courts, while strong and clear in relation to arbitration, remains uncertain and unpredictable in relation to mediation?

Making a choice about the applicable law for a mediation clause should never be a default reaction on the part of a legal adviser. Clients expect their advisers to offer reasoned, researched and rational advice. Of course, sometimes lawyers may not be in a position to select the applicable law. Due to a pre-existing mediation clause or court referred mediation, parties and their legal advisers may find themselves committed to a mediation in a jurisdiction with which they are not familiar. In these situations it is imperative to be able to develop a thorough understanding of the regulatory environment in which the mediation will take place within a short amount of time.

Regardless of context, legal advisers need to have a good sense of the law applicable

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[1] Director of Conflict Coaching International

[2] Parts of this paper were first published in the Kluwer Mediation Blog: www.kluwermediationblog.com.

[3] Smits, Jan (2005): *Diversity of Contract Law and the European Internal Market.* Published in: The Need for a European Contract Law: Empirical and Legal Perspectives No. Groningen (2005): pp. 153-186.

to mediation processes in jurisdictions in which their clients are doing business. This is no easy task, especially given:

- the relatively short experience with cross-border mediation compared to arbitration;
- the fast pace of development in the mediation regulatory environment; and
- the absence of a uniform mediation regulatory regime, especially in relation to cross-border matters.

So, this got me thinking. To the extent that users of mediation services, whether they be lawyers or parties, have the opportunity to select a jurisdiction and a law in relation to a future cross-border mediation, wouldn't it be helpful to develop a system to rate the robustness of regulatory framework in relation to cross-border mediation? Sort of like a Michelin Guide to Mediation-Friendly Jurisdictions?

Such a system would not offer a comprehensive and complete analysis of the law on mediation on a jurisdictional basis. Rather, it could offer a starting point for legal professionals and other users seeking to locate a mediation-friendly jurisdiction with a robust regulatory framework for cross-border mediation to sort out their disputes.

The Regulatory Robustness Rating System

In this paper I introduce a Regulatory Robustness Rating ("RRR"). As the name suggests the RRR System focuses primarily on regulatory criteria to determine the "mediation-friendliness" of a jurisdiction in relation to cross-border mediation. The System is based on a set of assumptions about what makes good mediation law and what makes a jurisdiction attractive for mediation purposes in terms of its regulatory framework.

Regardless of the type of legal system, it is important to clarify how the term 'law' is defined here. In the RRR System, "law" is understood broadly to encompass diverse regulatory forms beyond legislation. Legislation, case law, practice directions, codes of conduct, standards and other regulatory instruments on mediation determine how mediation is understood and applied by a range of actors, including referring bodies such as courts, dispute resolution organisations, mediators and legal advisers and by the parties themselves. Thus the notion of law extends to soft law options and private contracting (e.g., mediation agreements and mediation clauses) and industry norms (e.g., codes of conduct, practice standards, and accreditation standards). This broad understanding of law is consistent with contemporary regulatory theory, which has shifted its focus from government rulemaking to the context of institutions and interest groups.[4]

[4] J Black, M Lodge and M Thatcher, *Regulatory Innovation: A Comparative Analysis* (Cheltenham: Edward Elgar 2005).

Certainly, there will be other factors not of a regulatory or legal nature that will influence the choice of law and jurisdiction for mediation— *inter alia* economic, behavioural, psychological, cultural, policy and so on. These and other considerations are dealt with by various existing benchmarking instruments such as the World Bank Group Doing Business Report and they can be used in conjunction with the RRR System.[5]

In sum, therefore, the RRR offers a way to:

- analyse the quality and robustness of a jurisdiction's legal framework for cross-border mediation;
- factor such an analysis into choices about governing law in mediation clauses and other agreements;
- inform law- and policy-making in relation to cross-border mediation.

The twelve criteria upon which the RRR System is based are set out below. These factors and the assumptions underpinning them are explained. Together they form the foundations of the RRR System and inform the ratings given to each jurisdiction.

Jurisdictions are given a star rating of up to five stars (highest score) in relation to each criterion. So, for example, a country might receive three stars (***) for Criterion 1 and four stars (****) for Criterion 2, two stars (**) for Criterion 3 and so on. It is important to note that criteria carry different weight. Some are likely to hold greater importance than others for users of mediation. For this reason, a weighting system has been introduced, with a weighting of three units allocated to high priority items, a weighting of two units for those considered to be of moderate importance, and a weighting of one unit for criteria that are considered to be desirable but not a priority for users. For example, the enforceability of mediated settlement agreements is generally considered a matter of high importance for users, so it receives a weighting of three units.[6] In contrast the congruence of domestic and international legal frameworks is a desirable regulatory feature but likely to be viewed as less essential from a user's perspective; accordingly it receives a weighting of one unit.

Therefore, once a star rating is allocated to a particular criterion, it will be multiplied by the weighting factor to receive the Regulatory Robustness Rating for that criterion. Take for example, a criterion with a four-star rating:

- a weighting of one unit would result in a Regulatory Robustness Rating of four points;

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[5] See World Bank Group, Doing Business Report 2017, especially in relation to enforcing contracts: http://www.doingbusiness.org/data/exploretopics/enforcing-contracts (last accessed 4 June 2017).

6. For the purposes of this paper, the priorities of users have been assessed based on the (limited) empirical evidence available and supplemented by anecdotal evidence. See, for example, *IMI 2016 International Mediation & ADR Survey*, available at <https://imimediation.org/imi-2016-biennial-census-survey-results> (last assessed 4 June 2017). *See also* SI Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 *Washington & Lee Law Review*_ (2016).

- a weighting of two units would result in a Regulatory Robustness Rating of eight points;
- a weighting of three units would result in a Regulatory Robustness Rating of twelve points.

It is important to note that there is no total Rating computed for a jurisdiction. Although this may seem like an obvious next step (i.e., to add up the RRR scores for each criterion), such an approach is likely to divert attention away from the merits of specific criteria in favour of a much less informative, and arguably misleading, overall Rating.

The aim of the RRR System is to encourage users and other regulatory stakeholders to look closely and critically at mediation regulatory regimes in order to make informed choices and develop appropriate strategies in relation to the law that governs their mediation. Accordingly, a set of twelve Ratings is presented for each jurisdiction.

Twelve Criteria of the Regulatory Robustness Rating System

The twelve criteria upon which the RRR System is based are explained here.

Criterion 1: Congruence of domestic and international legal frameworks

Here the view is taken that domestic and international legal frameworks for cross-border mediation are useful and robust if they are congruent rather than wholly or partially separate. In disputing situations where domestic and cross-border elements are present in the same dispute or in related disputes, it would make mediation potentially difficult if different laws were applicable to domestic and cross-border aspects in the same mediation. Mediation promises users the flexibility to address related disputes together in one mediation process and to address issues which may not technically form part of the legal statement of claim. This aspect of mediation is made significantly easier if domestic and international mediation legal frameworks are identical or harmonised.

A weighting of 1 is allocated to this criterion.

Criterion 2: Transparency and clarity of content of mediation laws in relation to:

- **how mediation is triggered;**
- **the internal process of mediation;**
- **standards and qualifications for mediators; and**
- **rights and obligations of participants in mediation.**

A robust legal framework is considered to be one which contains mediation law that

is readily identifiable and accessible for local and foreign lawyers and users in all four listed content areas. The ease with which foreign lawyers can identify and assess the cross-border mediation law of another jurisdiction is highly relevant as foreign lawyers usually have the right to participate in mediation (and this is also the case for arbitration) in jurisdictions other than their own.

A weighting of 2 is allocated to this criterion.

Criterion 3: Mediation infrastructure and services: quality and access

The greater the access to quality mediation services and information, the more attractive the jurisdiction is considered as a mediation venue in terms of accessibility to and affordability of suitable mediation services of a high quality for a wide range of users. Relevant factors here include:

- the regulatory regime around standards and qualifications for mediators;
- the existence of feedback and complaints systems for mediation services;
- the offering of mediation services both independently and also as part of existing dispute resolution structures such as courts and arbitration centres; and
- the ease of access to mediation services, including for those with limited financial capacity, limited technological literacy, and significant geographical distance to mediation service centres.

A weighting of 3 is allocated to this criterion.

Criterion 4: Access to internationally recognised and skilled local and foreign mediators

Cross-border mediation comes in all shapes and forms and the needs of its users will vary from case to case. Sometimes parties will select the venue and applicable law from jurisdiction A and the mediator from jurisdiction B. The question may then arise: to what extent can foreign mediators selected by the parties practise in the jurisdiction of the mediation and be recognised under its legal framework? This can be important in jurisdictions in which certain aspects of mediation legislation (such as mediated settlement agreement enforceability options or confidentiality provisions) only apply to mediations conducted by a recognised mediator.

According to the RRR system, best practice in mediation means that users mediating in a given jurisdiction have access to an internationally recognised pool of local and foreign mediators, who are:

- both appropriately qualified and skilled; and
- permitted to work across mediation services in the jurisdiction.

This criterion is often achieved through recognition of prior (foreign) mediator qualifications and/or through a system of mutual recognition among jurisdictions.

Business leaders such as Deborah Masucci, former Head of the American International Group Inc's (AIG) Employment Dispute Resolution Program, have publicly endorsed the need for a pool of internationally recognised mediators who carry with them a trust mark of competence, skill and experience and the backing of reputable organisations.[7]

A weighting of 2 is allocated to this criterion.

Criterion 5: Enforceability of mediation and multi-tiered dispute resolution (MDR) clauses

A robust regulatory framework in relation to mediation and MDR clauses typically features:

- formal generally applicable regulation (e.g., legislation) specifically supporting the enforceability of mediation and MDR clauses, as is the norm in relation to arbitration clauses; and
- clear, consistent jurisprudence supportive of the enforceability of mediation and MDR clauses.

A weighting of 3 is allocated to this criterion.

Criterion 6: Certain, predictable regulation of:

- **insider/outsider confidentiality with some flexibility; and**
- **insider/court confidentiality**

Both insider/outsider confidentiality and insider/court confidentiality traverse the interface between the mediation process and the broader legal system.

The former deals with the extent to which participants in mediation (insiders) can share information from the mediation with others who did not attend the mediation (outsiders); the latter deals with the issue of admissibility of evidence from the mediation session in subsequent proceedings.

The underlying assumption for Criterion 6 is that it is desirable to have a uniform approach to mediation participants' rights and obligations in relation to confidentiality, while at the same time respecting the principle of party autonomy. Furthermore, the integrity of the mediation process requires that participants be held accountable for their behaviour in mediation – for example, that parties participate in good faith and do not engage in behaviour such as misrepresentation or other

7. *See* comments by business leaders such as Masucci at www.imimediation.org.

conduct amounting to a contract defence. To this end, confidentiality provisions must be balanced with certain exceptions. Further, it is important that regulation covers all relevant mediation participants and not just the mediators.

In relation to insider/outsider confidentiality, best practice can be achieved by a uniform default approach. A generally applicable default standard (e.g., legislation) generates certainty and uniformity, while allowing parties to make an informed choice to opt out and make their own variations. Variations can be reflected in the terms of parties' mediation agreements and these are recognised and enforced by the courts.

In relation to insider/court confidentiality, there is an overarching need for predictability and certainty in relation to the (non-)admissibility of evidence. For this reason, generally applicable formal mandatory regulation (e.g., legislation) is desirable. Parties cannot opt out of the general rule. However, certain exceptions provide for accountability of those who participate in mediation processes including mediators, lawyers and parties.

A weighting of 2 is allocated to this criterion.

Criterion 7: Informed self-regulation of insider/insider confidentiality

Insider/insider confidentiality relates to the internal conduct of the mediation process and therefore party autonomy and flexibility are higher order principles than uniform regulation. These considerations suggest a self-regulatory approach in relation to Criterion 7, which differs from insider/outsider confidentiality (Criterion 6) and insider/court confidentiality (Criterion 6).

A self-regulatory approach permits informed parties to tailor insider/insider confidentiality to meet their procedural needs. In so far as there are formal regulations on insider/insider confidentiality in legislation, court rules or other regulatory forms, these are default in nature (i.e., subject to different arrangements by the parties).

It is good practice to draw on institutional "standard" provisions on insider/insider confidentiality that can be included into, and adapted for, written mediation agreements. It is also good practice that written mediation agreements expressly provide for insider/insider confidentiality on a case-by-case basis.

A weighting of 1 is allocated to this criterion.

Criterion 8: Enforceability of mediated settlement agreements ("MSAs") and international mediated settlement agreements ("iMSAs")

There is a range of legal forms for MSAs/iMSAs e.g., contract, settlement deed, notarised deed, special mediation deed, arbitral consent award, court order. A robust regulatory system is one which offers users a real choice about the legal form of their mediated settlement agreement and effective options for (expedited) enforceability. To this end, there are clear and transparent criteria that apply for the recognition and enforcement of MSAs/iMSAs in their various forms.

When documented in the appropriate legal form, MSAs/iMSAs are recognised by the law and, depending on the choice of legal form, can be directly enforceable in the courts without further preconditions needing to be met or demonstrated. When documented in the directly enforceable form, the ability to challenge is restricted.

A weighting of 3 is allocated to this criterion.

Criterion 9: Impact of commencement of mediation on litigation limitation periods

Mediation is often recommended to parties on the basis that they have nothing to lose in terms of their legal rights and remedies – aggrieved parties can always pursue their rights in court should mediation not result in a resolution. Such promises assume, *inter alia,* that permitted time periods for parties to lodge their claims do not expire during the course of the mediation with the result that the claim cannot be heard in post-mediation proceedings. In addition, where parties are compelled to comply with mediation clauses, there is a strong argument that this compliance should not prejudice them in terms of the time available to prepare and lodge documents to initiate legal proceedings and comply with other relevant time periods. Finally, allowing limitation periods to run during mediation could have the effect of encouraging respondent parties to participate in, or even initiate, mediation for the primary purpose of delaying initiation of court proceedings in the hope that the limitation period expires before the mediation avenue is exhausted. For these reasons, robust regulatory regimes will provide for the efficient and effective suspension or interruption of legal proceedings/litigation limitation periods without any detriment to the rights of the parties once mediation has commenced. Suspension occurs either automatically or with a simple notification procedure.

A weighting of 1 is allocated to this criterion.

Criterion 10: Relationship of courts to mediation

Where courts support mediation programmes, judges tend to understand the nature of the mediation process well, and this is likely to be reflected in judicial decisions on mediation issues from enforceability to confidentiality. Accordingly, the relationship of the courts to mediation is a relevant factor when studying regulatory robustness.

Jurisdictions would rate well on this criterion if mediation is integrated with, or aligned to, the court system such that most courts have mediation programmes which promote a formal, effective and transparent referral process to mediation.

A weighting of 2 is allocated to this criterion.

Criterion 11: Regulatory incentives for legal advisers to engage in mediation

Legal advisers play a key gatekeeper role in the development of mediation practice and mediation law. The more experience lawyers have with mediation, the more likely they are to be able to competently draft and interpret mediation clauses, agreements and MSAs and advise clients in relation to mediation law, and the more likely they are to direct appropriate cases into mediation in the first place. To this end a robust regulatory regime offers a range of transparent, highly effective regulatory incentives for legal advisers to inform clients about, and engage with, the mediation process. Incentives comprise both soft and hard regulatory forms and some incentives include sanctions for breach.

A weighting of 1 is allocated to this criterion.

Criterion 12: Attitude of courts to mediation (based on case law/jurisprudence).

Regulation is much more than provisions written into a law, a code or a contract. Regulation comes to life through its application by parties, lawyers, and the courts. This criterion considers the extent to which the courts of a given jurisdiction support mediation in terms of:

- generating a clear line of judgments which clarify the law around mediation;
- recognising properly drafted mediation and multi-tiered dispute resolution clauses, mediated settlement agreements and other contractual documents;
- recognising the importance of confidentiality as a central tenet of the mediation process; and
- other mediation factors.

Here, a high RRR reflects a court system that uniformly recognizes and is prepared to enforce mediation agreements, MSAs/iMSAs and other mediation protocols and processes. It is difficult for jurisdictions with little or no jurisprudence on mediation issues to achieve a high score on this criterion. To some extent this reflects the nascent nature of mediation law and the uncertainty that this stage of its development necessarily brings with it.

A weighting of 3 is allocated to this criterion.

The RRR System in Action: Hong Kong

Having explored the thinking, logic and structure supporting the RRR, it is useful to turn to its application in practice. For this purpose I will use the jurisdiction of Hong Kong as an illustration. Next I present an overview of the regulatory-institutional framework for (cross-border) mediation in Hong Kong that offers a context for the analysis of the same using the RRR System.

An overview of mediation regulation in Hong Kong: context

The regulatory framework for mediation in Hong Kong is the result of focused and deliberate policymaking. In October 2007, the Chief Executive of the HKSAR made a policy address outlining plans to employ mediation more extensively and effectively in Hong Kong, from higher-end commercial disputes to relatively small scale local disputes. Since that time, three bodies have played a significant role in the development of mediation practice in Hong Kong:

1. The Working Group on Mediation (2008–2010);[8]
2. The Mediation Taskforce (2010–2012); and[9]
3. The Steering Committee on Mediation (since December 2012).[10]

The Hong Kong Mediation Report (2010) recognised the importance of the then freshly introduced Practice Direction ("PD") 31 and made a number of recommendations. The Report recommended a mediation law and the establishment of a single mediator accreditation body. It also recommended that the possibility of apology legislation in the territory be explored.

Today the regulatory framework for mediation reflects the vision of the 2010 Mediation Report. PD 31 provides a significant triggering mechanism for litigating parties to enter mediation and places a duty on parties and their lawyers to mediate where it is reasonable to do so. The Mediation Ordinance ("MO"), which into force in 2013 deals with the primary rights and obligations of participants in mediation. The MO explicitly applies to cross-border and domestic mediation. In 2012, four major mediation service providers in Hong Kong joined forces to help form a uniform mediator accreditation body, the Hong Kong Mediation Accreditation Association Limited ("HKMAAL").[11] This body has now become the premier body for mediation standards and qualifications as well as providing templates for mediation clauses and

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8 Department of Justice, *Report of the Working Group on Mediation*, Hong Kong, Hong Kong Government 2010. Available at <www.doj.gov.hk/eng/public/pdf/2010/med20100208e.pdf> (last assessed 4 June 2017).

9 Department of Justice, *Mediation Task Force Terms of Reference*, Hong Kong, Hong Kong Government 2010, at 2–3. Available at <www.doj.gov.hk/eng/public/pdf/2011/mediation20110729e.pdf> (last assessed 4 June 2017).

10 Steering Committee on Mediation, Terms of Reference, available at www.doj.gov.hk/eng/public/pdf/2013/medie1.pdf.

11 J Budge, 'The Development of a Unified Mediation Accreditation System' in *'Mediate First' Conference May 2012*, (Hong Kong, LexisNexis 2014). See also R Yuen, 'Legal Framework and Social Change' in 3rd Asian Mediation Association Conference, 3 April 2014, at 2. Available at <www.doj.gov.hk/eng/public/pdf/2014/sj20140403e.pdf> (last assessed 4 June 2017).

mediation agreements. At the time of writing, an Apology Bill has been drafted and is before the Legislative Council. It is expected that the proposed apology legislation will encourage the early resolution of dispute and in this context, the use of mediation.

The Regulatory Robustness Rating System for Mediation in Hong Kong

The RRRs for Hong Kong are presented next in a tabular form. There are four columns:

1. The far left hand column with the heading *Criterion* identifies each of the twelve criteria, numbered 1 through to 12.
2. The next column with the heading *Jurisdictional description* offers a short statement on how the jurisdictions in question deal with that criterion. This is a very brief and basic description that enables the RRR to be presented in a tabular form so that readers can benefit from an overview of the jurisdiction's regulatory framework.
3. The column entitled *Star score and weighting* contains the star rating with anywhere between 1 and 5 stars. It also indicates the weighting given to the criterion and this is indicated by the numeral 1, 2 or 3.
4. The far right and final column calculates the jurisdiction's Regulatory Robustness Rating (*RRR*) in relation to this criterion. This is done by multiplying the star score with the weighting score.

Regulatory Robustness Ratings: Hong Kong

Criterion	**Jurisdictional description**	**Star score and weighting**	RRR
1. Congruence of domestic and international legal frameworks	The legal frameworks for domestic and international mediation are fairly comprehensive and largely integrated so that domestic and cross-border mediation are regulated in the same way, according to the same rules.	★★★★☆ Weighting: 1	4
2. Transparency and clarity of content of mediation laws in relation to: **i. how mediation is triggered** **ii. the internal**	The law applicable to mediation is mostly readily identifiable and accessible in most or all of the four listed content areas. Mediation is triggered though incentives such as PD 31 and the mediation pledge. Dispute resolution clauses containing mediation are increasingly used. The internal process of mediation is regulated	★★★★☆ Weighting: 2	8

process of mediation **iii. standards and qualifications for mediators** **iv. rights and obligations of participants in mediation**	largely by contract and recommended standard mediation agreements and rules are readily available through HKMAAL, the Law Society, and various other organisations. Uniform standards and qualifications for mediators are set by HKMAAL. Rights and obligations of participants in mediation are clearly set out in the MO with the major exception being the enforceability of mediated settlement agreements and mediation clauses and agreements. To the extent that rights and obligations are not covered by the MO, they are generally covered in institutional rules and standard agreements. Case law is also relatively clear regarding enforceability issues and enhanced by numerous mediation law commentaries.		
3. Mediation infrastructure and services: quality and access	Well-developed and good quality mediation services and infrastructure. Transparent mediation and quality assurance standards exist in the primary body, HKMAAL, which the main mediation service providers follow. HKMAAL also has a complaints and disciplinary process. Mediation services are offered independently and there is some integration with existing dispute resolution structures such as courts and arbitration centres. For the most part mediation services are easily accessible.	★★★★☆ Weighting: 3	12
4. Access to internationally recognised and skilled local and overseas-based mediators	There is a HKMAAL recognised pool of local mediators, who are both appropriately qualified and skilled. These mediators are permitted to work across most mediation services in the jurisdiction (special qualifications needed for family mediation).	★★★½☆ Weighting: 2	7

	The rules for overseas-based mediators joining are less transparent; there is however a limited number of overseas-based HKMAAL mediators. Overseas-based mediators are permitted to work across most mediation services in the jurisdiction without registering with a local body e.g. HKMAAL. Users have recourse to a complaints/ feedback/disciplinary body for locally registered mediators (e.g. HKMAAL). In relation to overseas-based mediators, it is less clear. It is easy for users to access the local pool; it takes more effort and usually some word-of-mouth recommendations to access overseas-based mediators.		
5. Enforceability of mediation and multi-tiered dispute resolution (MDR) clauses	The general law of contract supports the enforceability of mediation and MDR clauses. Case law and academic commentaries demonstrate a mostly clear and consistent view about the application of the general law to support the enforceability of mediation and MDR clauses.	★★★½☆ Weighting: 3	10.5
6. Certain and predictable regulation of: **i. insider/outsider confidentiality with some flexibility** **ii. insider/court confidentiality**	<u>Insider/outsider confidentiality</u> Insider/outsider confidentiality is subject to generally applicable legislation ("MO") with certain opt-out provisions by the parties. This creates certainty and uniformity on this issue, while allowing parties to make an informed choice to opt out and make their own variations. When parties opt out, they privately regulate insider/outsider confidentiality in their mediation agreement. Such terms in mediation agreements are recognised and	★★★★☆ Weighting: 2	8

	enforced by the courts. <u>Insider/court confidentiality</u> Generally applicable mandatory legislation exists for all mediation participants exists ("MO"). Parties cannot opt out of the general rule. However, certain exceptions provide for accountability of those who participate in mediation processes including mediators, lawyers and parties.		
7. Informed self-regulation of insider/insider confidentiality	Insider/insider confidentiality relates to the internal conduct of the mediation process and is therefore subject to party autonomy. This flexibility permits parties to tailor insider/insider confidentiality to meet their procedural needs. There are various institutional "standard" provisions on insider/insider confidentiality that can be included, and adapted for, written mediation agreements. At the same time, the practice of insider/insider confidentiality being determined on a verbal, *ad hoc* basis by the mediator still occurs.	★★★★☆ Weighting: 1	4
8. Enforceability of mediated settlement agreements ("MSAs") and international mediated settlement agreements ("iMSAs")	There is a range of legal forms for MSAs/iMSAs e.g., contract, settlement deed, arbitral consent award and, in some cases, court order. Criteria applicable for the recognition and enforcement of MSAs/iMSAs in their various forms are mostly clear and transparent. When documented in the appropriate legal form, MSAs/iMSAs are generally recognised by the law and are generally enforceable in the courts subject to certain pre-conditions. However case law on enforceability (apart from ordinary contractual MSA) is still	★★★½☆ Weighting: 3	10.5

	somewhat limited. The scope for challenges to MSAs/iMSAs depends on the legal form adopted.		
9. Impact of commencement of mediation on litigation limitation periods	Commencement of private or court-related mediation may suspend litigation limitation periods, but only after action is taken by parties/legal advisers to ensure such.	★★★½☆ Weighting: 1	3.5
10. Relationship of courts to mediation	Courts are largely supportive of mediation and support regulatory incentives to use mediation such as PD 31. Informal or ad hoc referral procedures to divert cases into mediation exist also and both these and formal processes are used enthusiastically by the courts.	★★★★☆ Weighting: 2	8
11. Regulatory incentives for legal advisers to engage in mediation	There is a range of hard and soft regulatory incentives to encourage legal advisers to engage with the mediation process, the best known of which is PD 31. For the most part the legal profession responds positively to these incentives, however there remains a vocal minority who seek to avoid or pay lip service to complying them. However, there is ongoing active promotion of mediation within the legal profession.	★★★½☆ Weighting: 1	3.5
12. Attitude of courts to mediation	Courts are considered pro-mediation. Many courts have demonstrated through court decisions/jurisprudence that they recognise and are prepared to enforce mediation agreements, MSAs/iMSAs and other mediation protocols and processes that comply with the regulatory requirements. Where court decisions have exposed a loophole or weakness in the regulatory regime, law- and policy-makers have sought	★★★★☆ Weighting: 3	12

	to address it. Courts, including higher level courts often include comments in speeches and other public communications to indicate their active support for mediation.		

As these RRRs show, Hong Kong is a mediation-friendly jurisdiction with a robust regulatory framework, as indicated by the relatively high scores across all criteria. Further, there was little variation between scores (i.e. scores were either 3.5 or 4). Given the high star score of four for congruence between cross-border and domestic mediation regulatory regimes, it can be said that the Regulatory Robustness analysis applies both to cross-border and domestic mediation. The star scores suggest that Hong Kong enjoys strong institutions, transparent laws and a pro-mediation judiciary. In identifying areas that may warrant attention with a view to further development and improvement, it is helpful to look to the 3.5 star (lower) scores. User priorities can be taken into account by referring to weightings allocated to each criterion and the Regulatory Robustness Ratings in the final right-hand column. So, for example, 3.5 star scores have been allocated to the following criteria:

- Criterion 4: Access to internationally recognised and skilled local and overseas-based mediators;
- Criterion 5: Enforceability of mediation and multi-tiered dispute resolution ("MDR") clauses;
- Criterion 8: Enforceability of mediated settlement agreements ("MSAs") and international mediated settlement agreements ("iMSAs");
- Criterion 9: Impact of commencement of mediation on litigation limitation periods; and
- Criterion 11: Regulatory incentives for legal advisers to engage in mediation.

Criteria 5 and 8 (aspects of enforceability of mediation clauses, agreements and iMSAs) have a weighting of 3 and are therefore considered to be priority areas for users of mediations services. Accordingly, working on further improving the attractiveness of the legal regime in relation to enforceability of mediated related contracts and mediated settlement outcomes of various forms might be identified as a priority area. Alternatively, facilitating better access to internationally recognised and skilled overseas-based mediators with appropriate checks and balances such as complaints and disciplinary mechanisms may be relatively easy to achieve and therefore a useful starting point for further development of the mediation legal regime.

Working with the Regulatory Robustness Rating System: uses and applications

No overall Rating has been given for Hong Kong. As previously explained, an overall Rating would be meaningless even in comparison with other jurisdictions. It is the individual criteria and the star scores and weightings allocated to each criterion that are important. The short descriptions and Ratings allocated to each criterion offer a structured overview of mediation law and its regulatory framework that enables readers to quickly grasp the main features and issues relevant to mediation in a particular jurisdiction, in this case Hong Kong. The above Ratings offer a useful starting point for a further informed exploration of (cross-border) mediation law in Hong Kong.

Furthermore, legal advisers may factor an RRR analysis into their choices about governing law when drafting mediation clauses and other agreements. For example, lawyers looking to identify suitable governing laws for their clients' mediation clauses might use the RRR System to identify three jurisdictions with high RRRs in relation to the enforceability of mediation clauses and other regulatory factors they consider important for their client. The RRR System can thus provide a starting point for further research to look more closely at these jurisdictions with the goal of identifying a mediation-friendly jurisdiction with a robust governing law for a mediation clause. As explained previously, other non-regulatory factors specific to the clients' interests will also be relevant in the final choice of law and jurisdiction, and these should be considered alongside the RRR System.

Finally, the RRR System can be used as a monitoring and research tool for law- and policy-makers in the field of cross-border mediation.

A Glimpse into the Future of Mediation – Opportunities for Cross Border Mediation

Ms. Wang Fang[1]

1. Firstly make a brief introduction of "one belt, one road" initiative, the goal of "one belt, one road" is to promote the spirit of peace, communication, understanding, tolerance, cooperation and common win.

"One belt, one road" initiative is the abbreviation of "Silk Road Economic Belt" and "the 21st Century Maritime Silk Road", also can be called OBOR for short, which is not an actual body or mechanism, but a concept and advocacy of cooperative development. It depends on the established bilateral and multilateral mechanism between China and other countries, and relies on the existing and effective regional cooperation platform, aiming at borrowing the historical sign of ancient "Silk Road", holding peaceful development flag, actively develops the economic cooperation partnership with the countries along the silk road in order to create common benefit, fate and responsibility of political mutual trust, economic involvement and cultural tolerance." One belt, one road" initiative adheres to the principle of common consultation, common share and common construction. "One belt, one road" initiative, a national strategic decision, aims at cooperation under the equally cultural recognition, which embodies the spirit of peace, communication, understanding, tolerance, cooperation and common win.

2. To fulfill "One belt, one road" initiative faces not only opportunities but also challenges, which require our conscious of risks to be existing and preparation for the tactics to prevent the risks.

To fulfill "One belt, one road" initiative, it presents opportunities but also challenges, which require us to be aware of the risks and prepare tactics to prevent the risks from becoming major problems.

Firstly, since 1999, the Chinese government has encouraged enterprises to "go-out policy of China". The preliminary investment is mainly on resources development project of some poor countries. Recently, as the domestic economy is strengthening increasingly, China's direct investment outside of China surpasses the foreign investment inwards China, and the China's direct investment is led to more appealing projects of some developing and developed economic bodies. Five to six years ago, Chinese "go-out policy of China" mode basically focused on the commodity, but now it has turned to the national fundamental equipment project. We know that

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some developing countries are willing to accept our investment, but when we conduct the “One Belt, One Road” initiative, we have to do some detailed research on the political situation, legal system and so on in order to make a very good preparation for the potential risks.

3. Commercial mediation enjoys some features which traditional litigation and arbitration don’t have, that is, flexibility, low-cost and efficiency. We can foresee that under the “One Belt, One Road” initiative, the disputants’ demands for mediation services are increasing.

Mediation is a process in which the parties in disputes seek assistance from the third party, which mediates, conciliates and persuades them on the future-orientation outcome so that the differences can be made up and the settlement agreement can be reached.

Commercial mediation belongs to a specific type of mediation. It can be defined as the process in which disputes arise from the commercial transactions among natural persons, legal persons and other organizations of equal status, and the disputes are submitted and mediated by a third party.

Commercial mediation enjoys some features which traditional litigation and arbitration don’t have, that is, flexibility, low-cost and efficiency. We can foresee that under the “One Belt, One Road” initiative, the disputants’ demands for mediation services are increasing.

4. The reasons are as follows, which derive from the features of commercial mediation.

Firstly, the flexibility of mediation, Secondly, the outcome of commercial mediation is not adversarial, but cooperative. Thirdly, focus on the future business benefits.

The reasons are as follows, which derive from the features of commercial mediation.

Firstly, the flexibility of mediation, the disputants can choose mediators, and agree to initiate mediation on the time, place and method appropriate to them, which is quite different from the rigid procedures and rules of arbitration and litigation, which meets the disputants’ demands for efficiency and flexibility.

Secondly, the outcome of commercial mediation is not adversarial, but cooperative. The mediator is trying to build a bridge for disputants to get rid of the doubts and confrontations between the disputants, which meets the disputants’

demands for harmony and cooperation.

Thirdly, focus on the future business benefits. The aim of the mediation is not judging who is right, who is wrong, but resolving the dispute, which meets the disputants' demands for resolving problems.

In addition, the commercial mediation has the characteristics of being fast and confidential.

CCPIT Mediation Center and its sub-centers around all over China, are the permanent mediation organizations which help the foreign and domestic disputants to resolve the disputes with mediation independently and neutrally. The CCPIT Mediation Center was founded in 1987. Since its establishment, the CCPIT Mediation Center has adapted itself to the demands of China's opening up policy and socialist market economy and formed a domestic working network of 47 sub-centers and built more than 15 mediation cooperation platforms. The CCPIT Mediation Center is the biggest and authoritative commercial mediation organization in China now, which is affiliated to China Council for the Promotion of International Trade, that is, CCPIT, the biggest national trade promotion organization in China.

5. In order to help the mediation to become one challenging alternative dispute resolution method, we, mainly handle cross border trade disputes, from our practical perspective, advocate that commercial mediation should be put into a law and the recognition and enforcement of the settlement agreement should be written into an international convention.

Firstly, no commercial mediation laws to protect the commercial mediation.

Secondly, the social credit system is not sound, which leads to the disputants' lacking of confidence of mediation

In order to help the mediation to become one of the most challenging methods of alternative dispute resolution, we focus on handling cross border trade disputes, from a practical perspective we also advocate that commercial mediation should be put into a law and the recognition and enforcement of the settlement agreement should be written into an international treaty.

Firstly, no commercial mediation laws to protect the mediation.

There is not a commercial mediation law in China now, compared with civil procedure law and arbitration law. Such a situation as practice first, no legislation, is not fit for our current mediation development.

We take CCPIT Mediation Center practice as an example. Since its establishment, CCPIT Mediation Center follows the international practice, refer to the United Nations Commission of International Trade Law and formulate our own mediation rules and devote ourselves to promoting ADR, however, due to lack of laws, businessmen are not familiar with modern commercial mediation, and they are not willing to choose mediation voluntarily because the settlement agreement reached is not legally enforced but a new contract.

Secondly, the social credit system is not sound, which leads to the disputants' lack of confidence of mediation

As we know, on the base of mutual trust should mediation be conducted effectively. However, in the market economy, people focus on economic benefits, which lead to the decrease of the social credits. Nowadays, the credits situation is not very optimistic in China and in the whole world. Breaking the promises in the commercial field is very often. The global credits crisis gives the economy a heavy blow. Lack of credits cause the lack of trust, then to reach a settlement agreement and to fulfill it voluntarily become more difficult. For some disputes, no settlement agreement can be reached by mediation due to the voluntariness of mediation, for others, a settlement agreement can't be fulfilled due to the non-enforceability of the settlement agreement. So a settlement agreement is reached after a hard endeavor, but become futile at last. The hard work of a mediator becomes in vain and the mediation users are very disappointed at the outcome.

6. How to resolve the execution problem of cross-border settlement agreement?

Firstly, the support from the courts is an important protection for commercial mediation development.

Secondly, Speed up the legislation of commercial mediation.

Thirdly, call for the recognition and enforcement of the settlement agreement of an international treaty to be signed

How to resolve the execution problem of cross-border settlement agreement?

Firstly, the support from the courts is an important protection for commercial mediation development

Firstly, the judicial interpretation should be perfected, and the civil commercial mediation organization should enjoy relevant legal position. Secondly, the courts should separate the trial from the mediation, and pre-trial mediation should be

encouraged and the courts should guide the disputants to some mediation organizations to conduct mediation, in this way can the legal resources be saved and taken great advantage of. Thirdly, the settlement agreement should be enforced in the law so that the settlement agreement can be fulfilled effectively.

Secondly, Speed up the legislation of commercial mediation

Currently, there is not a commercial mediation law, which is not helpful for the mediation to develop very well. Among litigation, arbitration and mediation, the three dispute resolution system, only the mediation does not have mediation law, which is not good for forming a united dispute resolution system.

Thirdly, call for the recognition and enforcement of the settlement agreement of an international treaty to be signed

Only when the settlement agreement reached by the disputants from the cross-border disputes can be recognized and enforced by the courts can the disputants be willing to choose mediation, then more and more cross border commercial disputes will be resolved by mediation,.

7. The differences in the cultural background or language used by the parties impact on the outcome of the mediation, from the perspective of "one belt one road" initiative.

Traditional ideas and attached values play an important role in the impact on the outcome of the mediation.

The "one belt one road" initiative helps to create a common cultural identity and economic collaboration, which is useful for mediation, as a cross border dispute resolution method develop well.

Will the differences in the cultural background or language used by the parties impact on the outcome of the mediation?

The answer is YES. In my opinion, language is a part of culture, so we discuss the culture's impact on the outcome of mediation.

Culture is a very big word. Different people have different ideas of culture. One of the academic definitions of CULTURE is "patterned ways of thinking, feeling and reacting, acquired and transmitted mainly by symbols…; the essential core of culture consists of traditional ideas and especially their attached values"; and the reality is the culture communities or groups can't be described along national or ethic lines because of a shrinking world and the segmentation of cultures. For the disputants

with different cultures, their traditional ideas and attached values play an important role in the impact on the outcome of the mediation.

In the “One belt, one road” initiative, there are different people with different cultures, how to help them to reach a settlement agreement when the disputes arise? The answer is the same with the spirit of “One belt, one road”, that is, peace, communication, understanding, tolerance, cooperation and common win. “One belt, one road” provides a fresh way of thinking about regional and global cooperation by including both bilateral and multilateral cooperation in politics, economic, cultural and other field. It envisions regional integration beyond pure economic union, forming a political community founded on common interest in an attempt to forge, as much as possible, a common cultural identity.

“One belt, one road” initiative aims to build infrastructure connectivity, free trade, free circulation of local currencies and people-to-people connectivity. Free trade is necessary for “One belt, one road” initiative in that Asia as a whole needs to upgrade its place in global production and value chains, with a freer and more integrated production network that embraces individual countries’ advantages so that there will be a more open region wide economic system.

To sum up, ”one belt, one road” initiative needs commercial to help to resolve disputes amicably, and commercial mediation needs “one belt, one road” initiative to help to develop better. During the co-existing and co-developing period, as a commercial mediation provider, we, CCPIT Mediation Center have a lot to do. Firstly, to make more and more people know the commercial mediation by various channels. Also as the rotating chairman of Asian Mediation Association (AMA) from 2016-2017, we would like to invite more countries to be members of Asian Mediation Association. And we will hold the 4th AMA Conference in October in Beijing. We welcome all the participants to attend the conference and enjoy the best season of Beijing. Secondly, to train our mediators, a commercial mediator plays an important role in mediating a dispute. To be a good commercial mediator should obtain professional mediation skills and techniques, because our users are smart and sophisticated in doing business. Last but not least, to make mediation more agreeable and acceptable, put commercial mediation into a law is a good way to make people know mediation and choose mediation. For cross-border disputes, we can call for the recognition and enforcement of the settlement agreement of an international convention to be signed.

Developments in Mediation in Australia

Mr. Alan Limbury[1]

Merger of LEADR and IAMA

2015 saw the merger of LEADR and IAMA to form Resolution Institute.

LEADR was created in 1988 as a lawyer-only membership organization intended to educate lawyers about ADR. The rationale was to respond to the very first ADR organization, the Australian Commercial Disputes Centre (ACDC), which was believed to be suggesting that major corporate clients should take their disputes to ACDC instead of to their lawyers. The founders of LEADR (which originally stood for Lawyers Engaged in ADR and was later changed to Leading Edge ADR) worried that if lawyers lost dispute work, there may be little left for them to do, so the legal profession needed to understand and be trained in mediation and mediation advocacy skills. After several years LEADR opened its membership to non-lawyers and extended its operations throughout Australia and New Zealand.

IAMA was founded in 1976 as the Institute of Arbitrators Australia (IAA), a membership organization of arbitrators, predominantly in the building industry. As mediation took hold, IAA changed its name to the Institute of Arbitrators and Mediators Australia and welcomed mediator members.

The merged entity, Resolution Institute, thus brings ADR practitioners together in an environment in which they may be trained as both arbitrators and mediators, with the possibility that they may feel comfortable conducting hybrid processes in appropriate cases.

Mandatory mediation

The mistaken argument is often heard that because mediation is quintessentially a voluntary process, mandatory mediation is a contradiction in terms, with the implication that dreadful consequences will follow, both for the parties and for mediation, if mandatory mediation were to be allowed. This view was adopted by the Court of Appeal in the UK in 2004 in the much criticized case of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ. 576[2], citing this (misguided) passage from the White Book of Civil Procedure[3]:

> "The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes **voluntarily entered into** by the parties in dispute with outcomes, if the parties so wish, which are non-binding.

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[2] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 (11 May 2004).

[3] White Book (2003), Volume 1, para 1.4.11.

> Consequently the court cannot direct that such methods be used but may merely encourage and facilitate." [emphasis added]

The mistake is to focus on the process rather than the outcome. Australian experience shows that, so long as the outcome is voluntary, it matters not that the parties may be compelled to engage in the process. Hence the Law Council of Australia describes mediation as "a process in which…a mediator… [promotes] uncoerced agreement by the parties to the dispute"[4].

In discussing this issue, I shall focus primarily on the State of New South Wales, with which I am most familiar.

Before New South Wales courts had jurisdiction to order mediation, even with all parties' consent, they had considered several applications to enforce mediation clauses in contracts by staying proceedings pending compliance with the clause. In that context, it was held in 1992 that:

> *'What is enforced is not cooperation and consent but participation in a process from which consent might come'.*[5]

This echoes the well known sentiments expressed by Harvard Emeritus Professor Frank EA Sander:

> *"There is a difference between coercion into mediation and coercion in mediation".*[6]

The difference is of vital importance, since the Australian experience with mandatory mediation is that settlement rates and degrees of satisfaction are similar, whether participation be voluntary or compelled[7]. Indeed in retail tenancy disputes, which are required by statute to be mediated before they can be heard,[8] the settlement rate before, at or shortly after mediation has remained steady at over 80% over the last several years.

The UK Court of Appeal in *Halsey* found it difficult to conceive of circumstances in which it would be appropriate to exercise jurisdiction to order unwilling parties to refer their disputes to mediation, saying:

> "If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process."

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4 Law Council of Australia: *Ethical Guidelines for Mediators,* (1996, updated in 2000 and 2006).
5 *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 206 per Giles J.
6 *The Future of ADR*, 2000 J. Disp. Res. 3, 7-8.
7 Kathy Mack, "Court Referral to ADR: Criteria and Research", NADRAC 2003.
8 E.g. *Retail Leases Act 1994* (NSW), *Farm Debt Mediation Act, 1994* (NSW).

Australian courts have had over 20 years' experience of mediation and have in numerous cases found, not merely conceived of, circumstances in which it is appropriate to order participation in mediation over the objection of parties. Most courts now have statutory power to refer cases to mediation and other forms of ADR, in some instances with the consent of the parties and in others with or without consent.[9] As mentioned, some legislation requires mediation to be undertaken or offered before a claim is filed[10] and since 2011, Commonwealth legislation requires applicants in the Federal Court of Australia and the Federal Magistrates Court to file a statement setting out what "genuine steps" they took to resolve their disputes before initiating litigation[11]. Steps are "genuine" if they constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute. Examples include:

- giving notice of the dispute to the other person and offering to discuss it with a view to resolving it;
- providing relevant information and documents to the other person; and
- considering and participating in an ADR process.

In November 1994 the Supreme Court of New South Wales was given power to refer a matter to mediation if it considered the circumstances appropriate and if the parties consented to the referral and agreed upon the mediator. Participation in mediation sessions was voluntary and parties could withdraw at any time.[12] In August 2000 the Court was empowered to order parties to any civil proceedings into mediation, with or without their consent.[13] If the parties cannot agree on a mediator, the Court will appoint one.

Speaking shortly after this development, the then Chief Justice of New South Wales said:

> "It appears that, perhaps as a matter of tactics, neither the parties nor the legal representatives in a hard-fought dispute are willing to suggest mediation

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[9] *Federal Court of Australia Act 1976* s 53A; *Federal Magistrates Act 1999* s 34; *District Court Act 1973 (NSW)* s 164A(1); *Supreme Court Act 1970 (NSW)*s 110K(1); *Local Court Act 1989 (NT)*s 16(1); *District Court Act 1967* (Qld) ss 97-98; *Supreme Court of Queensland Act 1991* ss 102-103: *Magistrates Court Act 1991* (SA) s 27(1); *District Court Act 1991* (SA) s 32(1); *Supreme Court Act 1935* (SA) s 65; Supreme Court Rule 518 (Tas); Supreme Court Rules (Vic) Chapter I – General Rules of Procedure in Civil Proceedings *1996* Rule 50.07; County Court Rules of Procedure in Civil Proceedings *1999* Rule 34A.21; *Victorian Civil and Administrative Tribunal Act 1998* s 88; *Magistrates Court Act 1989(Vic)* s 108; District Court Rules (WA) 2 and 5; Supreme Court Rules (WA) 29, 29A.

[10] See for example *Retail Leases Act 1994* (NSW) s 68(1): "A retail tenancy dispute … may not be the subject of proceedings before any court unless and until the Registrar has certified in writing that mediation under this Part has failed to resolve the dispute … or the court is otherwise satisfied that mediation under this Part is unlikely to resolve the dispute …".

[11] *Civil Dispute Resolution Act, 2011* (Cth).

[12] *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW), amending the *Supreme Court Act 1970* (NSW).

[13] *Supreme Court Amendment (Referral of Proceedings) Act 2000 (NSW), amending the Supreme Court Act 1970 (NSW) by adding a new section 110K. In 2005 the mandatory mediation provisions of the Supreme Court Act were repealed and re-enacted in the Civil Procedure Act 2005 (NSW), sections 25-34.*

> or even to indicate that they are prepared to contemplate it. No doubt this could be seen as a sign of weakness. Nevertheless, the parties are content to take part in the mediation conference if directed to do so by a judge. There is a category of disputants who are reluctant starters, but who become willing participants. It is to that category that the new power is directed"[14].

The legislation requires each party to participate, in good faith, in the court-ordered mediation. What does participating in good faith in mediation mean? Fortunately this had already been decided in another case over whether a dispute resolution clause was enforceable, which Parliament presumably had in mind when introducing this section.[15] The dispute resolution clause in that case (in a construction contract) read in part:

> *"The Parties agree to use all reasonable endeavours in good faith to expeditiously resolve the Dispute by mediation".*

Despite the split infinitive, the judge found this sufficiently certain to be enforceable16 and held that, without being exhaustive, the essential or core content of an obligation to negotiate or mediate in good faith is:

> (i) to subject oneself to the process of negotiation or mediation: and
> (ii) to have an open mind, that is: to be willing to consider putting forward options for resolution of the dispute and to consider options proposed by the opposing party or the mediator.

Numerous cases have considered under what circumstances it may be appropriate for the court to exercise or to decline to exercise the power to order mediation over the objection of a party. The court emphasizes that its discretion under the legislation is very wide and that the court should approach an application for an order without any predisposition, so that all relevant circumstances going to the exercise of the discretion may properly be taken into account.[17] "All relevant circumstances" are worked out through the cases as the court considers objections by parties resisting mediation orders. Such objections have included, not always successfully:

- the parties are a long way apart in their negotiations[18]

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[14] Address by Spigelman CJ to LEADR Dinner, University and Schools' Club Sydney, 9 November 2000, cited with approval by Einstein J in *Idoport Pty Ltd v National Australia Bank Ltd (No 21)* [2001] NSWSC 427.

[15] *Aiton v Transfield* [1999] NSWSC 996 (1 October 1999).

[16] The dispute resolution clause as a whole was held unenforceable for other reasons.

[17] *Higgins v Higgins* [2002] NSWSC 415.

[18] *Hopcroft v Olsen* [1998] SASC 7009 [mediation ordered]; *Barrett v Qld Newspapers Pty Ltd & Brennan & Ruddiman* [1999] QDC 150 [mediation ordered].

- there are too many parties and/or lawyers[19]
- there are too many/too complex issues[20]
- factual dispute is central, complex facts, credibility is crucial[21]
- liability is contested[22]
- commercial parties are involved rather than emotional or non-rational forces[23]
- mediation means additional cost and delay[24]
- previous settlement attempts have failed[25]
- mediation would be futile[26]

The complexity of the issues has also been advanced by applicants seeking mediation orders[27] and by the court in making them.[28] In ordering mediation in a defamation action in which counsel opposing an application for a mediation order submitted that "*the plaintiff, for reasons which may or may not be justified, would rather die than accept a mediator selected and forced on him by the defendants and it wouldn't matter if it was the Archangel Gabriel*", the judge said:

"Litigation of an action of this kind in this Court is one that leads to the determination of what might be described as "*rights*". Mediation is not conducted to the exclusion of "*rights*". The mediation might be directed to consideration of "*interests and needs*" independently of or against the backdrop of "*rights*' as exposed in the forensic environment".[29]

The uncertainties, costs and delay of litigation and the damage it can do to relationships are also factors the court takes into account in making mediation orders:

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[19] *Kilthistle No 6 Pty Ltd et al v Austwide Homes Pty Ltd and Ors* [1997] FCA 1383 [mediation not ordered]; *Barrett v Qld Newspapers Pty Ltd & Brennan & Ruddiman* [1999] QDC 150 [mediation ordered].

[20] *Kilthistle No 6 Pty Ltd et al v Austwide Homes Pty Ltd and Ors* [1997] FCA 1383 [mediation not ordered]; *Hopcroft v Olsen* [1998] SASC 7009 [mediation ordered]; *Barrett v Qld Newspapers Pty Ltd & Brennan & Ruddiman* [1999] QDC 150 [mediation ordered]; *Rajski & Anor v Tectran Corporation Pty Limited & Ors* [2003] NSWSC 478 [mediation ordered].

[21] *ACCC v Lux* [2001] FCA 600 (24 May 2001) [mediation ordered]*; Hopcroft v Olsen* [1998] SASC 7009 [mediation ordered]*; Barrett v Qld Newspapers Pty Ltd & Brennan & Ruddiman* [1999] QDC 150 [mediation ordered].

[22] *Barrett v Qld Newspapers Pty Ltd & Brennan & Ruddiman* [1999] QDC 150 [mediation ordered].

[23] *Morrow v chinadotcom* [2001] NSWSC 209 [mediation not ordered].

[24] *Morrow v chinadotcom* [2001] NSWSC 209 [mediation not ordered].

[25] *Rajski & Anor v Tectran Corporation Pty Limited & Ors* [2003] NSWSC 478 [mediation ordered].

[26] *Idoport PL v National Australia Bank Ltd* [2001] NSWSC 427 [mediation ordered].

[27] *Waterhouse v Perkins* [2001] NSWSC 13 [Mediation ordered].

[28] *ASIC v Rich [2005] NSWSC 489 [mediation ordered after 80 sitting days in a civil penalty case].*

[29] *Waterhouse v Perkins* [2001] NSWSC 13 [Mediation ordered]

> "Another advantage of settlement that must not be forgotten is that, where there is bitterness between parties, whatever the result of a trial, there must always be the risk of an appeal, with the prolongation of conflict and enmity, the continuing uncertainty in the lives of all involved and the chasing of an ever increasing burden of costs. Whilst it will be unfortunate if some additional costs are incurred in a mediation and yet the whole litigious process goes on, in my view the rational course is to compel mediation to be tried."[30]

In 2005, in a civil penalty case brought by a corporate regulator,[31] after 80 sitting days at trial, the judge invited the parties to make submissions as to whether the Court should, of its own motion, order mediation. The defendants opposed the making of such an order. The judge decided that mandatory mediation was appropriate, saying:

> "In my opinion, this combination of consumption of time, escalating costs and strain on the Court's resources provides an ample basis for the Court to exercise its power of mandatory mediation. The making of a mediation order may provide the opportunity for the parties to take stock of their positions away from the battleground of the courtroom. An independent mediator should be able to encourage the parties to look at the issues from a different perspective and in a different light, and mediation may provide the occasion for the parties to obtain advice from a broader range of sources than the specifically legal sources used in litigation."

Experience in New South Wales with courts having power to order parties into mediation indicates that:

- the existence of the power often persuades parties to agree to mediate when they otherwise would not;
- in exercising the power and in declining to exercise the power, courts give reasons that also assist parties and their lawyers in deciding whether to agree to mediate;
- the outcomes from mandatory mediations attain settlement and satisfaction levels similar to voluntary mediations and, even when not wholly successful, often narrow the issues to be litigated; and
- the need for the courts to give reasons for exercising or declining to exercise the power to order mediation over the objection of at least one party may help to educate the judges into seeing mediation as having inherent value rather that merely as a way to shorten the court waiting list (always a false

[30] *Singh v Singh* [2002] NSWSC 852.
[31] *ASIC v Rich* [2005] NSWSC 489.

premise, since success will attract newcomers to the court system and the list will lengthen again).

The evidentiary mediation "black hole"

Although mandatory mediation has been proven to work in practice in Australia, there is one problem with the way in which legislatures have gone about catering for it. In their enthusiasm to support the use of mediation for the resolution of disputes, Australian State and Federal legislatures have frequently enacted provisions designed to protect the confidentiality of communications made at mediation, often in terms which override the common law exceptions to the "without prejudice" rule, with consequences that may not have been intended. An example is in the *Federal Court of Australia Act, 1976* (Cth). Section 53A gives the judge power to order the parties into mediation. Section 53B provides in broad terms:

> "Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A is not admissible:
>
> (a) in any court (whether exercising federal jurisdiction or not); or
>
> (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence."

A similar approach is taken in the *Civil Procedure Act 2005* (NSW) although there are limited exceptions which allow evidence, including from the mediator, that a settlement has been reached and as to its substance and which allow specified disclosures by the mediator in certain circumstances.[32]

The policies said to underlie such statutory provisions are to encourage use of mediation and to discourage satellite litigation.

The common law has long encouraged parties to attempt to resolve their disputes by according "without prejudice" privilege to communications made in the course of settlement negotiations. Mediation is simply assisted "without prejudice" negotiation.[33] The purpose of the "without prejudice" rule is to encourage compromises by sparing the parties embarrassment should the negotiations fail and their communications be liable to be put in evidence.[34]

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[32] *Civil Procedure Act 2005* (NSW), sections 29, 30 and 31.
[33] *Brown v. Rice and Patel* [2007] EWHC 625 (Ch) (14 March 2007).
[34] *Field v. Commissioner for Railways for NSW* (1957) 99 CLR 285 at 291; *Rush and Tompkins Ltd v. Greater London Council* (1989) AC 1280 at 1300.

The rule has numerous judge-made exceptions, designed to enable justice to be done and to avoid mediation becoming an evidentiary "black hole":

> "[T]he privilege that may arise from the cloak of 'without prejudice' must not be abused for the purpose of misleading the court".[35]

Accordingly, the common law exceptions which allow evidence to be given of what transpired in mediation include circumstances in which the court hearing the dispute would otherwise be misled,[36] for example, by excluding evidence which would rebut inferences upon which a party seeks to rely;[37] and where a party seeks to rely on what was communicated during the mediation in order to prove that settlement was reached;[38] or that a settlement that was reached should be set aside, for example, by reason of alleged misleading conduct,[39] misrepresentation,[40] oppression[41] or unconscionable conduct;[42] or that, even in the absence of a concluded settlement, what transpired gave rise to an estoppel;[43] or where a party sues her solicitors over their conduct in the mediation;[44] or where those solicitors join counsel and the mediator seeking contribution as joint tortfeasors.[45]

It is difficult to see how justice can be done when such matters are in issue unless all the evidence is available to the court. The High Court of Australia has reaffirmed that, where the ordinary rules of evidence apply (i.e. without statutory interference), "without prejudice" material will be admissible in these situations.[46]

It is also difficult simply to brush aside as merely "satellite litigation" (and presumably unworthy of judicial attention) the circumstances recognised at common law as warranting exceptions to the "without prejudice" rule, as if no question of injustice arises.

As John Locke put it in 1690: "Where-ever law ends, tyranny begins".[47]

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[35] *McFadden v. Snow* (1952) 69 WN (NSW) 8.
[36] *Pitts v. Adney* [1961] NSWR 535.
[37] Ibid at 539. See also *McFadden v. Snow* (1952) 69 WN (NSW) 8 at 10, referred to in *A.M.E.V. Finance Ltd v. Artes Studios Thoroughbreds Pty Ltd* (1988) 13 NSWLR 486 at 487 and *Trade Practices Commission v. Arnotts* (1989) 88 ALR 69 at 73.
[38] *Barry v. City West Water Limited* [2002] FCA 1214; *Rush and Tompkins Ltd v. Greater London Council* (1989) AC 1280 at 1300; *Tomlin v. Standard Telephones and Cables Ltd* [1969] 1 WLR. 1378.
[39] *Quad Consulting Pty Ltd v. David R Bleakley and Associates Pty Ltd* (1990) 27 FCR 86.
[40] *Williams v. Commonwealth Bank* [1999] NSWCA 345; *Underwood v. Cox* (1912) 4 DLR. 66.
[41] *Pittorino v. Meynert* [2002] WASC 76.
[42] *Abriel v. Australian Guarantee Ccrporation Limited* [2000] FCA 1198; *Commonwealth Development Bank of Australia Pty Limited & Anor v.Cassegrain* [2002] NSWSC 965.
[43] *Hodgkinson & Corby Ltd v. Wards Mobility Services Ltd* [1997] FSR. 178.
[44] *Tapoohi v Lewenberg & Ors (No 2) [2003] VSC 410 (21 October 2003).*
[45] Ibid.
[46] *Harrington v. Lowe* [1996] HC 8.
[47] John Locke, *Second Treatise of Government* (1690), Chap XVII, s.202 Cambridge University Press, 1988, p 400, cited by Spender J. in *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273.

One might well ask: "Why should participation in court-ordered mediation place parties in a worse position than privately agreed mediation or bilateral negotiation?"

In February, 2011 NADRAC, Australia's National Alternative Dispute Resolution Advisory Council (a government-established body which advised the Australian Attorney-General on ADR matters) recommended that, at the Commonwealth level with which NADRAC was concerned, ADR communications should generally be inadmissible and confidential save by consent of the disputants or by leave of the court, having regard to the interests of justice and the public interest.[48] Under the reforms proposed by NADRAC, judges would be able to strike the right balance between competing public interests by continuing, where appropriate, to protect the integrity of mediation and other ADR processes while at the same time avoiding injustice by granting leave, where appropriate, to introduce evidence of what happened. The Hong Kong Mediation Ordinance, 2013 s.10 adopts this approach.

NADRAC was abolished shortly after the Federal election in 2013. It has been replaced by a non-government body, the Australian Dispute Resolution Advisory Council Inc.[49], established in 2015 by former members of NADRAC, its mission being to educate Australians about forms of ADR and their application in all walks of life including government, business, community and interpersonal settings.

Hybrids

The practice of combining mediation and arbitration by the same neutral has been traced back to ancient Greece and Ptolemaic Egypt.[50]

Interests-based mediation gets at the real interests of the disputants and allows them to craft their own solution. Going straight to arbitration will determine the issues but may leave those interests unaddressed. Combining the two can save time and money and may preserve or restore relationships.

Prevalent concerns about hybrids and particularly doubts about the enforceability of arbitral awards consequent upon their use are well known and will not be repeated here. In my opinion, Australian domestic arbitration legislation provides a framework to overcome these concerns.

Section 27D of the *Commercial Arbitration Act 2010 (NSW)* which has been adopted in other States and Territories, enables disputants to consent in writing to the arbitrator mediating. It also requires them to consent in writing, after the mediation

[48] NADRAC Report: "*Maintaining and Enhancing the Integrity of ADR Processes*", paragraph 4.7.
[49] http://www.adrac.org.au/
[50] Roebuck, D. *The Myth of Modern Mediation* (2007) 73 Arbitration 1, 105 at 106.

has terminated, to the mediator arbitrating.[51] The section also requires the arbitrator, having mediated and before taking any further steps in the arbitration, to disclose to the parties any confidential information learned during the mediation which the arbitrator considers material to the arbitration.[52] This echoes comparable legislation in Hong Kong[53] and Singapore.[54]

Although there has been little resort to hybrid processes in Australia hitherto, this section should prompt more disputants and their advisors to put their toe in the water, knowing they can withdraw after the mediation phase if they feel uncomfortable with the mediator arbitrating. The section should also stimulate mediators to learn to arbitrate, arbitrators to learn to mediate and advisors to learn to choose the process to suit the dispute and the disputants. The outcome should be the swifter and cheaper resolution of disputes, as distinct from mere settlement.

To make hybrids work, I suggest:

- Training: at present mediators and arbitrators are different species. Train them to inhabit the same world and become adept at both processes.
- Triage: choose cases where the mediator can explore creative possibilities and need not discuss who is right or wrong or how much parties are prepared to pay or accept.
- Timing: mediate as soon as the issues to be arbitrated are clear, to avoid waste and gaming (such as proposing mediation towards the end of the arbitration hearing, in order to get rid of an arbitrator who seems to be likely to decide in favour of the other party).
- Avoid surprise: parties should find out what confidential information of theirs will be disclosed before they decide whether to consent to the resumption of the arbitration.

The move towards evaluative mediation

Today we see increasing use, where lawyers are not involved, of transformative mediation, narrative mediation and victim/offender mediation (restorative justice),

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[51] **A similar approach is adopted in** Article 12 of the UNCITRAL Model Law on International Commercial Conciliation (2002), as explained in the accompanying Guide.See http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf at paragraphs 78 – 81.

[52] *Commercial Arbitration Act 2010* (NSW) s.27D(7).

[53] See section 33 of the Hong Kong *Arbitration Ordinance 2015*.

[54] See section 17 of the *International Arbitration Act* (Cap134A) (Singapore.

while mediation training remains focussed on the kind of facilitative mediation which provides a vehicle for Principled Negotiation, i.e. which explores the underlying interests of the parties and encourages, where appropriate, suggestions by the mediator as to substantive outcomes, best done by way of a question such as "have you considered this"? rather than a statement such as "I suggest you do this".

The early (mid-1980s) response of lawyers to mediation was that mediation was a passing fancy, so "just hunker down and it will go by". Thanks to the enthusiastic endorsement of mediation by the former Chief Justice of New South Wales, Sir Laurence Street, mediation did not go by, so lawyers accepted it, but proclaimed that the only time when parties could be expected to give the necessary informed consent to settlement terms was "at the door of the court" when all pleadings were closed, all documents inspected, all interrogatories answered and all witness statements filed.[55]

To this day there is a strong movement amongst lawyers to treat mediation as only about settlement, as distinct from resolution. In this they are aided by the attitude of many judges, who consider that since courts must be "just, quick and cheap" and mediation is quick and cheap, mediation should be ordered and encouraged as a means of docket control, while worrying that disputes may not be "ripe" for mediation until sufficient information has been exchanged and the issues to be tried are clear, even where the dispute is between family members.[56]

As the renowned English critic, Malcolm Muggeridge said: "no dispute is ever about what it's about". In other words, the parties know what it's about long before the lawyers have teased out all the issues to be litigated, so parties are able to address the "big picture" in a facilitated mediation, something they are usually denied in evaluative mediation, often conducted by retired judges having no mediation training.

The result is that mediation in Australia is mainstream but becoming more evaluative in litigated disputes, where interests-based mediation is used far less frequently than evaluative mediation and mediation is not promoted as a way to explore creative possibilities. But there is hope: some lawyers consult mediators before commencing litigation; some clients actively seek mediation and lawyers and clients expect more of a mediator than "mere" facilitation.[57]

[55] Statement by the then President of the NSW Bar Association to the Senate Enquiry into the Cost of Justice, circa 1991.
[56] See *Welker & Ors v Rinehart & Anor (No. 2)* [2011] NSWSC 1238 at [51].
[57] LawyersWeekly May 2016 28-29 www.lawyersweekly.com.au

A Review of the Latest Global Development: A U.S. Perspective

Professor Sharon Press[1]

It is a tremendous honor to be with all of you today and to share some thoughts on developments in mediation which are taking place in the United States. I commend you for your deliberate consideration of mediation in Hong Kong and including this look at what is happening in other places around the world, and specifically in the US.

I think it is important to note that identifying trends in the United States is a little like the story of the blind men touching the elephant – each had a very different perception of what they were touching depending on the part of the elephant they felt. What I mean by this is that the United States is itself a rather diverse country and thus, it is a bit challenging to draw conclusions about which of the various *developments* are actually *trends*. I will do my best to sort through them and to describe situations in which there are contradictory developments and therefore it is less clear, which of the developments (if any) will evolve into trends. So with that disclaimer, I will attempt to provide my perspective on U.S. developments with regard to mediation. I will try to identify the trend and also include my personal perspective as to whether this is a positive development or one for concern and therefore one which I hope you will **not** emulate.

1. **Use of Mediation Continues to Increase**.

This statement is true across the board – both in terms of more mediations taking place within already established programs and expanded areas of use for mediation. I view this as both something positive and something which raises some concerns. On the positive side, mediation in the US has certainly entered popular culture in a way that 30 years ago we only dreamed about. There are TV shows and movies which feature mediation (or even have mediation as the entire premise) and now the connection between *mediation* and *meditation* is intentional and not because of mistakes. There also is an increase in what I would refer to as "the institutionalization" of mediation. I would point to an increase in the amount of regulation in terms of statutes (laws), court rules, and procedures and an increase in attempts to codify qualifications and ethical practice. While we can certainly debate whether this is a good thing or not, I think it is clearly a sign of the evolution of mediation as a process alternative to or outside the traditional litigation

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process to now a process as integral to traditional processes as discovery and settlement discussions.

A sub-trend here is the decrease in civil trials which continues at all levels. This phenomenon in the U.S. has become known as “the vanishing trial.” The decrease in civil trials is not exclusively the result of mediation or even all “alternative dispute resolution,” but it does have an impact on the expectations that attorneys and litigants have as to how their disputes will be resolved. This phenomenon has led to the next trend –

2. **Why not try mediation?**

While on first blush, this appears to be a positive development, I believe that there is reason for caution. First, even mediation advocates (of which I would count myself) acknowledge that mediation is not the appropriate intervention for everything. Sometimes the issue is not appropriate for mediation (for example mediating the “abuse/neglect” of a child or vulnerable adult), sometimes the dynamics between the parties render mediation inappropriate (for example, where a party lacks capacity to exercise self-determination), and so on. Pushing all cases to mediation may result in either “bad” mediation where parties experience something other than a facilitative process or result in an increase in skepticism about the benefits of mediation and a corresponding decrease in desire to use it.

The increased institutionalization of mediation which I spoke about above, can put pressure on mediation, which is at its core a flexible process, to become more rigid. The very reasons mediation has been successful may be diminished as creativity and voluntariness decreases.

3. **Increase specialization/niche markets**

The increased use of mediation for a range of issues has led to an increase in mediation specialization and niche markets. By way of example of how things have changed, in 1987, the state of Florida (and the state of Texas) enacted the first comprehensive mediation laws. The Florida law authorized state court judges to refer/order parties in civil cases to mediation at the trial judge’s discretion (and subject to some relatively minor exceptions adopted by court rule). The law also authorized the Florida Supreme Court (the head administrative court for the state) to adopt qualifications for mediators along with standards of conduct and a grievance procedure.

Initially, Florida divided court mediation into three categories: county (civil cases up to $5000), family (dissolution of marriage and issues related to child custody/parenting time and support even if never married); and circuit (civil

cases over $5000). Over time the jurisdiction of the courts changed so that county courts now include civil cases up to $15,000 and mediation was added for dependency cases (abuse and neglect of children) and appellate cases.

The initial court rules implementing the statute created different qualifications and training standards for each of the types of mediation. At the time this was done, the mediation community was concerned. This had not been standard practice. Instead, it was common for a mediator to mediate whatever case came his/her way. I believe that the Florida rules was the start of the trend towards specialization and against the previous focus on "process knowledge" (or the belief that a mediator could mediate anything – no substantive knowledge was required).

After two decades of qualifications relying on prior educational and experiential background (substantive knowledge), Florida changed its rules to recognize that there are multiple paths to being qualified to be a mediator and one such path includes experience as a mediator. Despite the Florida experience, it is common to find experienced mediators who offer particular areas of specialization – for example, large construction project mediations, family mediations involving single sex partners, employment mediations, etc.

At the same time that we are seeing this increase in specialization, we are also seeing an increase in the use of "hybrid" processes – combinations of adjudicative/evaluative processes and facilitative processes. In the state of Minnesota this is increasingly true in the family area where there now is routine use of parenting time expeditors, financial early neutral evaluators, social early neutral evaluators, as well as mediators. The Supreme Court of Minnesota will be considering a proposed revision to the court rules to recognize these additional processes.

4. **Increase in both "evaluative/directive" mediation and transformative mediation**.

Despite the apparent increase in hybrid processes, there also is a proliferation of evaluative or directive mediation. From my perspective this is a very troubling development and I am hoping it is not in fact a trend. While the nomenclature of evaluative/directive is not very helpful in understanding what is happening in the process, I am using it here as a short-hand to encompass activities and interventions of a mediator which are less facilitative and less dependent on and attentive to party self-determination. Increasingly, the use of directive interventions is justified by mediators as "that's what the parties wanted." My experience is that usually what they mean is "that's what the attorneys wanted." This is an area where I am

hopeful that you, in Hong Kong, who have been very clear about the importance of using a facilitative approach will not follow the U.S.

In support of this, I point to two other *contradictory* developments. First, at the same time that we are seeing an increase in directive practices, we also are seeing an increase in transformative practices. Baruch Bush and Joseph Folger wrote the Promise of Mediation over twenty years ago, in 1994. Since that time the transformative practice has a developed a stable following, numerous mediators and centers around the world who practice from a transformative perspective, and an Institute devoted the study of conflict transformation. It is impossible to ignore its impact and to ignore the fact that there are people who wish to deal with their conflict through a transformative process rather than an evaluative one.

The second development is a recent study out of the judiciary in the state of Maryland. This comprehensive, rigorous evaluation included 1) Pre and Post Surveys to compare **attitudes and changes in attitudes** of participants who went through ADR to an equivalent comparison group who went through the standard court process; and 2) the Coding of mediator interventions to evaluate **effectiveness of various mediation strategies** on short-term and long-term outcomes. This second feature is particularly significant because there are no other comprehensive evaluations in the U.S. which have done so. In addition, we know from experience that mediators are not particularly aware of what they say or do in a mediation. Prior studies have shown that mediators *think* they are far more facilitative than they actually are.

The full reports can be accessed here: www.mdcourts.gov/publications/reports.html

I want to share some of the statistically significant findings from the reports because they are the result of rigorous analysis and the findings are so interesting in terms of your interest in thinking more deeply about the relative benefits of “facilitative” interventions versus “evaluative” interventions.

Those who went to ADR, *regardless of whether they reached an agreement,* are more likely to report:

- They could express themselves, their thoughts, and their concerns
- All of the underlying issues came out
- The issues were completely resolved (rather than partially resolved)
- They acknowledged responsibility for the situation
- They increased their rating of level of responsibility for the situation from before to after the intervention

- They disagreed more with the statement "the other people need to learn they are wrong" from before to after the process

In addition, participants who developed a negotiated agreement in ADR were more likely to be satisfied with the judicial system than others (*including those who reached a negotiated agreement on their own*).

Three – six months later, participants who went through ADR were more likely to report

- Improved relationship & attitude toward the other participant
- The outcome was working
- Satisfaction with the outcome
- Satisfaction with the judicial system

Perhaps even more importantly, the evaluation studied what actually went on in the mediation by coding what the mediator said and did and what the parties said and did. Specifically, the observers coded for the following types of behaviors:

Reflecting – reflecting emotions & interests

Eliciting – asking participants to suggest solution; summarizing solutions that have been offered; asking participants how those solutions might work for them

Offering/Telling – offering opinions; advocating for their own solutions; offering legal analysis

The statistically significant results follow:

Reflecting Strategies

- Positively correlated with participants reporting:
  - The other person took responsibility and apologized
  - Increase in self-efficacy
  - Increase from before ADR to after ADR that court cares

Offering Strategies

- Long term – the more offering strategies used, the **less** participants report
  - Outcome was working

- Satisfaction with outcome
- Recommend ADR
- Change in approach to conflict

Eliciting

- Positively associated with reaching an agreement
- Positively correlated with participants reporting
  - They listened and understood each other & jointly controlled the outcome
  - The other person took responsibility and apologized
- Long term – participants were more likely to report a change in their approach to conflict and were less likely to return to court for an enforcement action

As I read these results (and is evident in the full report), this evaluation validates what many of us knew intuitively already, namely, there is tremendous benefits for the parties and for the courts, if mediators rely on elicitive and reflective strategies and equally important, there are some real dangers in using "offering" strategies.

5. **"Death of the joint session" in mediation.**

Here is another development which I am hopeful will not be replicated here in Hong Kong. What happens in these mediations is that there is substantial use of caucus (separate session) and in some cases that translates to the parties never being in the same room together. While I believe that there are some legitimate reasons to use a caucus, I am very troubled by this trend because it does not imply a strategic or tailored use of caucus. As a practical matter, when parties are not in the same room there is little chance for an effective apology. It becomes difficult, if not impossible for a party (and counsel) to do their own assessment as to the credibility of the other side and to really assess their case against the other. As a result, the parties become overly dependent on the mediator providing this assessment. And when parties are represented by counsel, this results in an overreliance by parties on their attorneys to help them make assessments. I don't view any of these as advantages.

Interestingly, the Maryland evaluation also was able to provide some insight into this issue. Specifically, the researchers were able to find that the **percentage of time** one spends in caucus led to the following:

- Participant reports that the ADR practitioner controlled the outcome, pressured them into solution, and prevented issues from coming out
- Increase in sense of powerlessness, increase in belief that conflict is negative, and increase in desire to better understand the other participant

Over the long term, the greater percentage of time in caucus, was statistically significantly tied to the more likely the case will return to court for enforcement AND

- **less likely** for participants to report
  - Consideration of the other person
  - Self-efficacy
  - Court cares

I will end where I began. I congratulate you on taking the opportunity to reflect on your practice and to learn from others – both what has been effective and should be emulated and embraced and also what should be avoided. The diversity of the United States makes it difficult to know what developments are trends and it is abundantly clear to me that where one sits dictates how one sees the world – including what is a development and what is a trend. Having said that, I hope that I have given you some data and "food for thought." I leave you with the following conclusions I draw from the Maryland Study with deep appreciation for the opportunity to share them with you.

- ADR (mediation) is effective as an intervention – not just because it is not court
- "Supportive/facilitative" mediator interventions result in some important benefits for the parties and for the judicial system
- "Overuse" of caucus leads to some negative results
- Mediation takes time and should not be rushed
- If there is a need for evaluative processes, create *other* options. Not everything is mediation.

A Review of the Latest Global Development

Mr. Nicholas Seymour[1]

1. Content

- A few notable and important features in the latest mediation development; and
- The use of the Med-Arb, particularly in Asia where it is more prominently used.

2. Notable features in the latest mediation development

2.1 The ad hoc approach to the growth of mediation has created a push in many jurisdictions towards regulation and more cohesion within the mediation field. The really new ideas in this regard seem to be emerging from Asia.

2.2 Supporters of the ad hoc approach common in the US and the UK suggest that the potential for over regulation could destroy the flexible nature of mediation and result in mediation simply becoming another process undertaken before litigation. This however does not appear to be shared in Asia.

2.3 Hong Kong and Singapore in particular are investing considerable time and energy in the creation of new institutions, rules and infrastructure to support mediation in the region.

2.4 Australia has also been a global front runner in mediation law and practice and regulation of the mediation industry and in 2009 established a National Mediation Accreditation System with a new revised version having come into effect from 1 July 2015.

2.5 In China there has been a lot of interest over the last few years in the current international model of mediation that has led to the creation of new mediation organization alliances and an increasing emphasis on mediation training.

2.6 The Beijing Mediation Alliance ("the BMA") was established in April 2015 co-initiated by 16 organizations. The aim of BMA is to enhance co-operation between the various organizations and promote the quality of mediation.

2.7 Southern China in order not to be left behind also in 2015 established the "Commercial Mediation Alliance" in Qianhai in Shenzhen between Guangdong, Hong Kong and Macau.

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[1] A panel member of the CEDR mediation practice group experienced in various forms of dispute resolution including mediation

2.8 The aim of this mediation alliance was to enhance the exchange and co-operation in order to promote the quality of mediation services in the Qianhai region.

2.9 Singapore has revisited its mediation services especially in the international area. Singapore continues to promote Med-Arb and the new Arb/Med-Arb/Arb Protocol refreshes an earlier offering of a hybrid dispute resolution model.

2.10 In just 10 years Hong Kong has created what is today an increasingly sophisticated mediation infrastructure and probably the most notable latest development has been the establishment of the Hong Kong Mediation Accreditation Association Ltd ("HKMAAL") in 2013 as an umbrella regulatory body for mediation in Hong Kong.

2.11 HKMAAL was the first jurisdiction in Asia to bring mediation under one roof and as of July 2015; 85% of Hong Kong's mediators had become members.

2.12 In summary, it appears to be Asia where most new activities and ideas are happening. In particular, it is in China, Hong Kong and Singapore where new mediation bodies and organizations have been created, mediation legislation is being introduced and training for both lawyers and new mediation is quickly gaining pace.

3. The advantages & challenges in the use of Med-Arb

3.1 What is Med-Arb? It is a combination of mediation and arbitration, and in short-hand is a reference to the mediation-arbitration procedure.

3.2 In med-arb, the parties to a dispute mutually agree to mediate the dispute with an undertaking that if the issues are not settled through the mediation they will resolve the dispute by arbitration. They also agree that the same person will act as both mediator and arbitrator.

3.3 Med-Arb offers parties the ability to participate in a mediation having agreed in advance that if unable to reach a settlement, the process will shift to arbitration. The process gives the parties the opportunity to rely on a decision by a neutral if there are issues on which no agreement can be reached.

3.4 The neutral:

- can serve as both mediator and arbitrator in an "integrated process", acting to facilitate negotiations and also making binding decisions on stalemate issues along the way;
- in a "separate" process will attempt to achieve a mediated settlement before

"switching hats" to decide any unresolved issues;

- acts as either the mediator or the arbitrator if the local rules do not allow the same person to act in both roles, and
- can make a binding settlement decision between the final offer or final demand given in a final offer.

3.5 The biggest potential difficulties to the same person acting in both roles:

- the knowledge that the mediator may eventually act as arbitrator may cause parties to be more restrained in revealing their real needs and position;
- particularly challenging is the question of how to treat information obtained in confidence during private meetings; and
- given the last point, it is often considered desirable for a different neutral to arbitrate on the outstanding issue or issues even though this will involve a further presentation of the parties' cases and further costs.

3.6 Med-arb is commonly offered as part of arbitration practice in different jurisdictions in South East Asia and included in some European arbitral practice with some provisos.

3.7 The use of med-arb varies from being regularly employed in China to infrequently used in places like Hong Kong.

3.8 Singapore has well established med-arb procedures used in conjunction with the Singapore Mediation Centre and Singapore International Arbitration Centre and parties who wish to make use of the Med-Arb service are able to incorporate the SMC-SIAC Med-Arb clause in their contracts.

3.9 CIETAC allows for Med-Arb in Article 45 of its Arbitration Rules and the joint med-arb practice is a feature of arbitration in all Chinese local arbitration commissions.

3.10 In Hong Kong under the Arbitration Ordinance, a member of an arbitral tribunal is permitted to serve as a mediator after arbitration proceedings have begun, provided all parties have given their written consent and it is provided that no challenge can be made against an arbitrator solely on the grounds that he has acted previously as a mediator.

4. **Notable features in the latest mediation development**

4.1 What should be noted is that the Hong Kong provision on med-arb is different from both Singapore and the Mainland because under the Ordinance if mediation fails, the arbitrator turned mediator is required to disclose to all parties any confidential information obtained during the mediation which he or she considers to be material to the arbitration proceeding.

4.2 This requirement was included to deal with the due process concerns of Hong Kong lawyers who would balk if not outright refuse to engage in any process which allows private session where statements are made where their client has no right of reply of is able to challenge.

4.3 Notwithstanding the above safeguard, med-arb is still very rare in Hong Kong compared with other processes like stand-alone mediation.

5. The advantages & challenges in the use of Med-Arb

5.1 Advantages

- Familiarity of the arbitrator with the case, and he or she is better placed to help settle the matter and when to hold a mediation.
- Can result in an early settlement, avoiding substantive hearings and cost
- Any settlement during med-arb can then be rendered into a formal award by the tribunal.
- If the parties do not reach an agreement in mediation, there is no need to spend time having to agree to a new potential arbitrator, since the same person will serve as the arbitrator.
- The Med-Arb process is flexible and allows the parties to switch between mediation and arbitration.
- Some remedies which cannot be used in arbitration, might serve as alternatives for mediation agreements.

5.2 Disadvantages

- The risk of an appearance of bias on the part of a mediator when the mediation fails and he or she turns again into an arbitrator.
- The parties will be less likely to reveal weaknesses in their case.
- Wearing 2 Hats – the neutral may find it difficult to switch roles from facilitator to decision maker and back.
- A party may find pressure to agree with the neutral a settlement in case he or she might issue an unfavourable award.
- The arbitrator may find it difficult not to be influenced by “without prejudice” disclosures during settlement negotiations.
- A risk if the mediation is used by the parties as a test run for their strongest arguments.
- Due process issues and not giving the other party the opportunity to challenge the facts and circumstances obtained by the Med-Arb during caucus sessions.

6. Suggestions for engaging with Med-Arb

6.1 In 2008 the CEDR Commission on Settlement in International Arbitration Co-Chaired by Lord Woolf and Gabrielle Kaufmann Kohler was convened and consulted with mediation and arbitration bodies from around the world.

6.2 The Report included some suggested Med-Arb guidelines and safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement.

6.3 The Commission suggested that it is best not to use the 2 Hats Med-Arb model and that the same person should not act as the mediator and the arbitrator.

6.4 However, acknowledging that in jurisdiction like China med-arb is widely used, in the event the med-arb is used, it suggested some safeguards to avoid challenges to the arbitrator award.

6.5 The parties' consent to the mediator resuming as arbitrator should include consent as to the way in which the arbitrator is to deal with information learnt in confidence by the arbitrator during the mediation.

6.6 Whenever the parties' consent is required, that consent should be recorded in writing.

6.7 The parties should give their consent in writing both before the mediation and after the mediation has concluded and before the mediator resuming in the role of arbitrator.

6.8 The consent should include a statement that the parties agree to the arbitrator meeting with each privately during the mediation/conciliation phase and withholding from the other party information disclosed during their private meetings.

6.9 The consent should include a statement that the parties will not at any time later use the fact that the arbitrator has acted as a mediator/conciliator as a basis for challenging the arbitrator or any award which the arbitrator may make (either alone or as part of a tribunal).

6.10 If as a consequence of his or her involvement in the mediation/conciliation phase, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceeding, then the arbitrator should resign.

7. The Keeneye Case [Gao Hai Yan v Keeneye Holdings Ltd – 2011 CFI, 2012 CA]

7.1 Here the Hong Kong Court of First Instance refused to enforce an arbitral award made in mainland China on public policy grounds.

7.2 Specifically, the court held that the conduct of the arbitrators who also acted as mediators in the case would "cause a fair minded observer to apprehend a real risk of bias".

7.3 This was overturned by the Hong Kong Court of Appeal decision who said it was not for the Court of First Instance to express an opinion on the correctness of the arbitral tribunal and that such an award would be contrary to public policy under the Hong Kong Arbitration Ordinance and held the arbitrator award could be enforced in Hong Kong based on two main grounds:

- <u>The Waiver</u>
  C of A took the view that a party to an arbitration that wishes to complain of non-compliance with the rules governing the arbitration must do so promptly and not proceed with the arbitration keeping the point of non-compliance up its sleeve for later use.

- <u>No Apparent Bias</u>
  The Mainland court was better able to decide whether holding a mediation over dinner in a hotel is acceptable. There might be unease about the way the mediation was conducted because mediation is normally conducted differently in HK but whether this would give rise to an appearance of bias may also depend on a full understanding of how mediation is normally conducted on the Mainland.

7.4 The C of A stressed that enforcement of an award should only be refused if to enforce it "would be contrary to the fundamental concept of morality and justice" of the forum and one should not be too quick to block enforcement of an award on the basis of one's notion of what amounts to apparent bias. The C of A will consider both local mediation/arbitration practices when deciding whether to enforce an award.

7.5 The C of A decision reinforced the view that Hong Kong courts are keen to support the enforcement of arbitration awards and challenging enforcement on grounds of public policy and apparent bias remains an uphill task.

7.6 The decision in Keeneye is unlikely to dispel the concern of common law lawyers and their clients regarding "med-arb". Parties are likely to remain reluctant to disclose confidential information during mediation to an arbitrator who will ultimately be called upon to rule on their case.

7.7 Further, s.37(4) of the Hong Kong Ordinance, which requires a mediator/arbitrator to disclose confidential information that it deems "material to the arbitral proceedings" before the proceedings re-commence following an unsuccessful mediation, may also make parties reluctant to participate in med-arb.

7.8 As a result, it is likely that the use of med-arb can be expected to remain relatively rare in Hong Kong, although it will continue to be used in Singapore and of course China.

8. Conclusion

8.1 It is likely that the Asia Pacific mediation stalwarts of Australia, Singapore and Hong Kong will continue to lead the way in introducing mediation legislation to more formalize the mediation process. However, in terms of the hybrid methods of Med/Arb and combining mediation and arbitration, it is hard to see this gaining regular use other than in China and Singapore due to the hurdles and disadvantages that need to be overcome.

Choosing Suitable Mediation Tools and Achieving Results
A Glimpse into the Future of Cross Border Mediation

Mr. Phillip Howell-Richardson[1]

Choosing Suitable Mediation Tools and Achieving Results

Good afternoon.

I am going to talk in this session about the thinking that gives rise to the frequent discussions analyzing the differences between the evaluative and facilitative mediation models. I would encourage you not to think in such rigid terms. Maybe such a debate is born out of the initial training to get you started and there is nothing wrong with that. It is very good. But it only starts you.

Next you may remember that there has been academic work which analyses mediation approaches against two criteria. At one end you are evaluative pressing people in discussion and pressurizing them into a solution by effectively leaving them to a decision. On the other end the approach relies heavily on asking questions and letting people progress in the way they want thus allowing a decision to emerge. Possibly these descriptions might be helpful to get some idea of the range of styles and behaviours by a mediator but it is not helpful to think exclusively in such terms.

I invite you to think that as a skillful mediator you will deploy a range of skills and behaviours, and you will deploy many skills in one mediation. I would like you to think how you go about your techniques, and the number of hats you would put on as you do a mediation. For example, if you start a mediation, what role are you doing? How are you presenting yourself when engage in conversation on the phone seven days before hand, because of course, you will speak to the parties before the day. You will use informal conversation on the telephone, and you will start the process by designing with the parties, something that fits the set of circumstances that are at work in that dispute.

Now in the simpler cases which are straightforward, two parties may have defined a relatively confined perimeter of their dispute. Thus it maybe is easier to undertake the initial preparation and contact in a telephone call where you will be talking to the lawyer or the individual concerned. In the bigger cases, you may do a lot of work in private meetings, in building alliances, in seeking out information, in dispute process design, in ensuring that considerable preparatory work is done before you get anywhere near the mediation table. For example, you may be heavily involved with the parties in checking and designing the authority systems that are to be in place to

[1] International Commercial Mediator

ensure that the decision makers have effective authority in the negotiations that are to take place. You may be dealing with the number of attendees and their roles, you may be dealing with particular areas which the parties need to develop before you get anywhere near negotiation. Your role is to ensure that the decision makers when they arrive around the table do so with the maximum chance of success. So I am concentrating on the idea of the need for preparation to achieve success and the need for process design.

Also, even before you get into the mediation room, you will in fact be a teacher as well as an expert process designer. You will be someone who is gaining trust and you will be doing this way before any of the other skills you use as mediator in the dynamics of negotiation are put in play. From the start you will use your skills in effective conversation.

Again, the parties are affected by your behaviors and skills and the guidance you give on starting the negotiations. Does it need a quiet introduction to reaffirm confidence? Does it need the mediator to be an active chairman of the meeting? What role will you provide as you open-up the conversation. You may summarize. You may encourage people to talk about themselves. You may not be talking about rights or negotiation positions at all in an opening session. You may have already coached the parties so that they decide who is to speak and what is to be addressed.

So meeting leadership may come from the mediator as he creates the conditions for parties to express themselves. You may be suggesting please speak for six or seven minutes. Studies have shown that is often, the most effective time for maximum concentration when people have been embedded in dispute. Personal emotion is around that table and you will be managing emotion. We have heard today that in opening session emotion maybe not encouraged because that might be too much for people but emotion is extremely important in any dispute. So you must have emotional intelligence as a mediator and deploy that awareness. Is this evaluative? Is it facilitative? Perhaps yes and no. But this is part of your range of techniques. You are expert in negotiation having at your disposal all that you have seen in the mediations you have conducted and the development of your training. You have been through mediations many times before and you have an advantage as not many people have been in mediation for more than six or seven times.

So what does this all mean? This means that during one mediation, you are a process designer; you are a person who listens and communicates, you are an active and skilled chairman, you are an expert on negotiation techniques, you have a bank of experience of successful and failed negotiation techniques, you have alert emotional intelligence, you have the ability to provide inspiration and options, you have the ability to deal with people you may walk away from this room with a distressed person to look out across Hong Kong and ask them what do you really

want on a truly personal level. So you are all of these things and more as a mediator. And so that's why I say to you is not just about evaluation or facilitation.

Thank you.

A Glimpse into the Future of Cross Border Mediation

Let us look at what the future might hold in cross border disputes by looking at where things are going and my thoughts on what the users might want. The modern form of mediation that we use, we have heard about in great detail today, faces its biggest challenge in the environment we are just about to discuss; that is cross-border mediations where you may have joint venturing between several different organisations with different cultures. So you have several environments where the commercial and institutional involvement spreads like tentacles in many different directions.

I think that the first area I would like to look at is the question of creating real decision making authority in the hands of the negotiators in the process. The traditional area of difficulty can often be where a government or organisations with complicated and often transparent authority systems have got to provide some kind of effective authority and ability to negotiate successful to the negotiators and yet many need to be involved in the ultimate decision and the process. Here you are talking about finding effective authority over many different organizations, over many differences and different people who may not even speak the same language. So it really is an area where mediators have to be alert and need to spend quite a lot of time in negotiating with all the stakeholders on what they might need to do to provide effective authority to the negotiator. I will give an example to illustrate this.

I can talk about this because this case became public. In an African state during the day, members of The Treasury Ministry acted as the negotiators and negotiated with a particularly powerful individual. At night there was a second mediation with all the vested parties political and otherwise behind those people. So we have two concurrent mediation cases that were kept apart. There was a political negotiation which I tried to assist and a commercial negotiation. But it might as well have been a hidden investment bank in another case. It could have been a large sub-contractor behind a main contractor. It might have been a minority shareholder. It could have been stakeholders in joint venture infrastructure projects.

The second area I would like you to think about is where you may have two hundred, three hundred people who may be interested in the mediation. This may not just be mediating group actions based on nuisance or negligence. This may be because these people need to be present in the process itself. This is often seen in town

planning. A controversial example is a second runway in the UK which we are actually particularly bad at reaching a decision upon. I think our runway dispute is coming up for its 20th birthday. Maybe they need a mediator. An example to illustrate this occurred in Dubai in a dispute involving an Indian corporation and another African state. The Indian corporation interestingly had a relatively autocratic decision making system. The person who led that Company had a retinue and advisors who worked in a pecking order. So the mediator must understand how that system works. The problem is who is the significant advisor or group of advisors? Who is the fixer so that when you deal with the chief decision maker you more or less know what's going to be decided before you ask the question.

But when we sat down at the table, I didn't quite know who was going to come from the other side Down one side was the Indian corporation with a Mr Big sitting in the middle with his advisors. On the other side, the table and the room just kept filling up. People I've seen before and people I've never seen, and they came to a mediation meeting because they have influence back in their particular state. So how do you deal with large numbers of people and how do you organize it so that you can get concentrated views that will assist the negotiations or do you say this is about transparency and bearing witness for certain distant stakeholders who need to feel involved at this point. Big decisions, big issues and large numbers of people shape the mediation process. In this particular case, I invited a group of 20 people to go to a corner of the room and select two spokesmen. They were arguing furiously for about 15 minutes. Then I went to the group and asked them to nominate two people. The two people who were arguing the most between themselves became the spokesmen.

As you know, mediation is infinitely variable in many and various ways. In cross border disputes the underlying law of the dispute may be very different from the underlying law of the mediation. And in fact, maybe the mediation itself may be taking place anywhere that's convenient to the parties. Can I illustrate this variety? In a particular case there was an extremely rich man from the Asia Pacific basin who had money in France which had been invested elsewhere in the world by others. He was very very unhappy when all that money was lost by a 24-year old trader who was completely unsupervised. And the time came, when his attention turned to this problem. He was angry. He then went on for a couple of years in arbitration. After a while he decided something had to be done to settle or one of his advisors came to that conclusion. So he went to Rome and brought his retinue with him to mediate. I went into his room and saw that he sat at the head of the table with his large group of advisors set out in front of him. He stood up and moved his chair away and invited me to sit in his chair. What would you do? I said thank you very much for that thought. That is a very kind and respectful thing to do but I would ask that you continue as before. I sat at the other end of the table. He sat down. He had lost no respect at all with his team and it had been done as a test of power between him

and me. In fact there was never any conflict between him and me and that moment was passed with mutual respect. Why did I do that as a mediator? I have no idea except that it felt polite. And that may be something too. If you are polite with people in whatever way your own culture asks you to do, you have a good chance you will be received well in any culture. So issues such as these will arise as you deal with diverse cultures.

And finally I am going finish my session, with my last war story. This illustrates the strength and power of the world that we are about to enter in cross border mediation. It is a European mediation but I want to give you some detail because it brings out in one case, some of the issues that you will be dealing with in such mediations. This was a dispute between a German bank and Bulgarians. There was a clash of culture. The German bankers were very precise. They were mathematical of mind. They were very careful. They were very accurate. The Bulgarians had had the idea. They were new to money. They were part of the new revolution sweeping through Bulgaria and were part of the importation of investment into Bulgaria in major manufacturing projects. There was a long term joint venturing project between the two, funded primarily by the Germans but also by money supplied by other syndicated funders. There were concurrent proceedings in Germany and in Bulgaria. The Bulgarian proceedings were, let us say, aspirational under Bulgaria Law at that time and difficult to understand what they really meant. What we do know is the Germans were very fed up with the way in which money was disappearing without accountability and what is more, the project was already slipping away badly. So we sat down together but the first question was where is the venue of the negotiation to be? Where would we go? In this case, we chose London. It could have been Hong Kong, it could have been anywhere in the world where there was a good reason and where the parties felt secure. But they chose London. That's the first point. Depending on what point in the process you are, you use your venue for your particular occasion.

In this particular case, we had three separate stages. The first stage was fighting. Both sides had their army of lawyers fighting over legal issues and threatening dark consequences. They had already issued winding up and bankruptcy proceedings. So it was not a pretty sight. So the fight was being continued in London on the first day. But the Bankers quickly appeared to lose interest and you could see that their eyes had already begun to glaze over. Why was this? It became apparent that the first conflict was between individuals and their understanding of English was imperfect for both. There was no need for and they did not want interpreters. It was better that they face each other, look at each other again because they had negotiated the agreement in the first place.

The next problem was confidentiality. Both parties were answerable to different parties outside the mediation in different ways. One of the first arrangements that

the mediation did was to agree what could be told to other people, whilst the negotiations were going on. So you're managing the outside world as well, as well as managing the internal negotiation.

The second day which happened a couple of weeks later was the most emotional day as both parties gave full force to failed expectations. So much so that the German bankers late at night stood up from the table and literally ran away from the table. They had found that some of things being said were too personal and were destructive of any relationship. I spent maybe half an hour with each of them "Going to the balcony" and talking through the reactions and reminding them what they were trying to achieve. I stopped the mediation that night whilst they thought about what their first step was to be the following morning.

The following morning, the atmosphere had changed away from what they had lost to actually what they needed, and in the following three days, they reconstructed the joint venture. They never did fully find the necessary trust, but it was understood that once re-construction instead of destruction had taken place, the Bank would in fact exit. Most of the restructuring of the joint venture was to make the returns of the project more attractive. So the Bulgarians knew they could go on with their project and the Germans knew they could get out.

At this moment, I have in the bottom drawer of my desk, the irrevocable authority, signed by both parties, to withdraw the arbitration once the final steps have been completed, and the Bank has refinanced. I have had it there for over a year and I anticipate that I will release those signed deeds and documents to the parties in the next two weeks.

I hope these examples give you something to take away with you and also illustrate to you the endlessly inventive power of mediation in cross border disputes.

Thank you.

Bringing in an additional tool to the mediation process – conflict coaching

Ms. Jody Sin[1]

Introduction

The facilitative mediation model has been adopted and applied in Hong Kong since mediation has become a means of alternative dispute resolution process. While mediation is more widely used by disputing parties to resolve disputes, it is time to consider whether other techniques, such as the evaluative techniques and strategies, may work more effectively for some types of disputes. I would like to begin with a brief examination of the features of facilitative mediation, which are followed by my observation and thoughts about the applicability of evaluative strategies and techniques. Lastly, I will share with you a conflict story, which was resolved through the incorporation of conflict coaching process in both the pre-mediation and post-mediation phases. The conflict coaching process is a tool that I have recently used extensively in the pre-mediation process. This process not only enables the disputing parties to acquire deeper understanding as to why conflicts happen and how their own reaction and behavior contributed to the conflict, but also provides support, assistance and encouragement that helps them to improve their knowledge, skills and competence to manage conflict in an individualized, tailor-made process.

The facilitative mediation model ("FM Model").

The FM Model is the predominant model of mediation that I have been using extensively. In my view, the following key features of FM are effective in assisting the parties to resolve their differences.

- Parties' autonomy is respected: the disputing parties and counsel feel that they have more control and have greater participation in a safe, neutral and supportive environment

- Process oriented: the mediator takes on the role to guide and facilitate the process. The parties, through the guidance of the mediator, are able to understand more about their own perspectives and those of the other parties. Further, the mediator assists the parties to explore their interests through communication and information exchange, so

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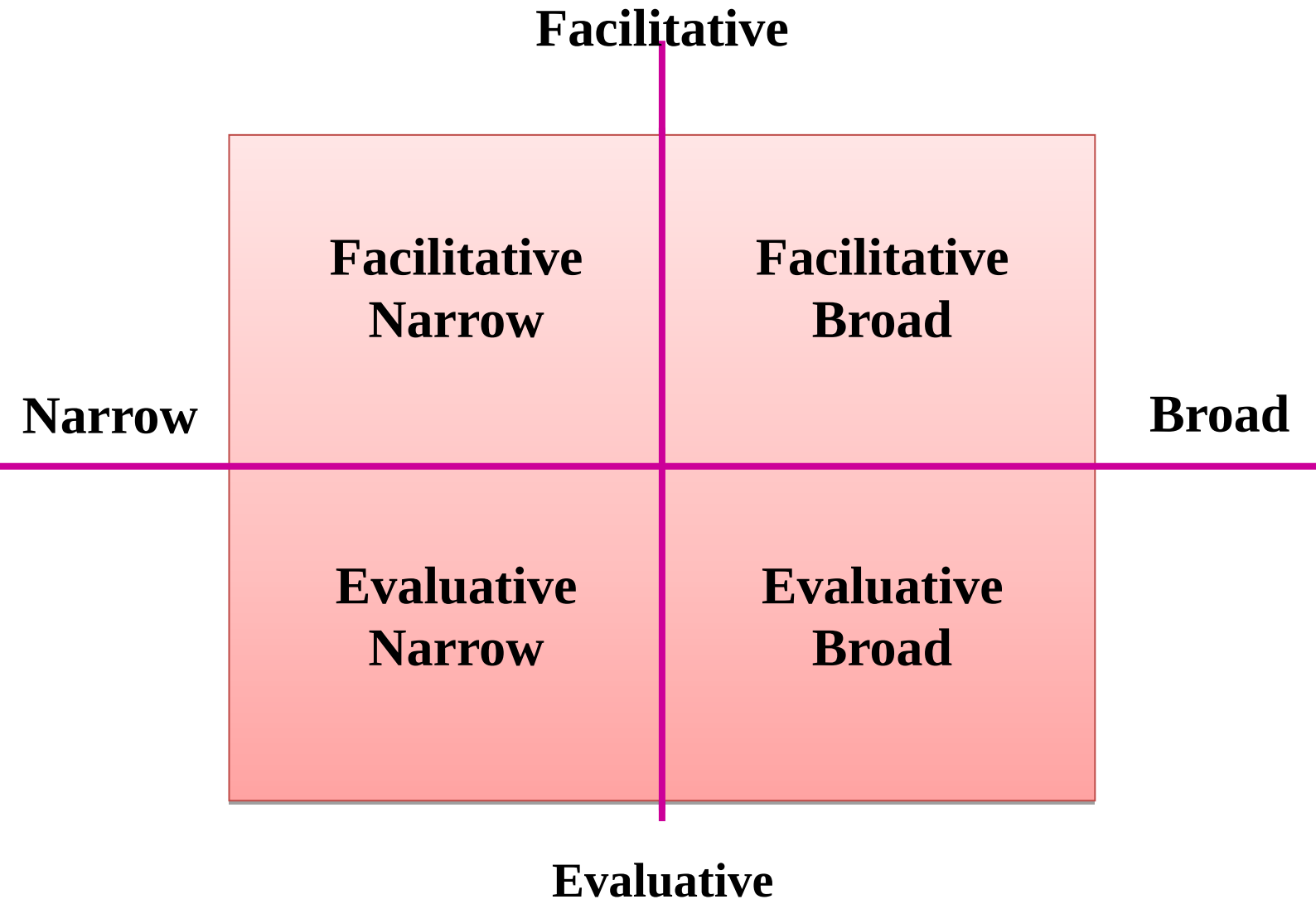
that they reach their own joint decision for a reasonable settlement or solution.

- Confidentiality: the disputing parties are assured safety and confidence in discussing issues in the dispute or their real concerns during the process under the protection of the principles of confidentiality.

- The mediator remains neutral and impartial and focuses on the interests of the parties who are directed to explore options and potential outcomes

While the FM Model provides a structure of the mediation process, every mediator has his or her own predominant style in conducting it. Further, a mediator style may vary during different stages of the process. In understanding the dimensions of how a mediator style may vary, it is useful to refer to the Riskin's grid (published by Professor Leonard Riskin in 1996) which describes mediator's behavior by way of a grid and divided those styles in the following matrix:



According to Professor Riskin, mediation activities are described by two continuums. The first continuum relates to the **goals/issues** in the mediation, which concerns the scope of the problem that the process is used to resolve. At one end of the continuum sits the narrow problems, such as legal ones, framed by legal counsel and the pleadings where the mediator helps the parties to reach a compromise between two conflicting positions.

However, when the mediator works with a broad orientation, he looks beyond the initial positions of the disputing parties and explores their interests, and creates solutions out of the parties' interests to reach a mutually satisfactory solution.

The second continuum relates to the **activities/style** of the mediator. One end relates to **strategies and techniques** that facilitate the parties' communication, understanding and negotiation, while the other end covers strategies and techniques that are intended to evaluate those matters which are important to the mediation.

Strategies used in a FM Model

- At the early stage of the process, the subject matter of the mediation is defined in terms of the interests of the parties, and they are given assistance in developing and choosing their own options;

- the business interests as well as the personal/relational interests (emotional or relational aspects) of the parties are identified;

- the parties are assisted to understand their respective interests and options; and

- develop broad interest based proposals.

Movements into other quadrants

However, mediation is a fluid process. As the process unfolds, the strategies and techniques applied may fall into the **facilitative narrow quadrant**:

- Strategy: a mediator may assist the parties to explore the strengths and weaknesses of their legal case;

- Techniques: questions will be used to enable the parties to understand the legal positions and consequences of non-settlement;

- A mediator may also predict what the likely court outcome will be if the case goes to court;

- the parties may be assisted to develop position based options;

- the mediator will help the parties to evaluate proposals by asking questions so that they can weigh the costs and benefits of each proposal against the likely consequences of non-settlement.

Another half of the Riskin's grid refers to the evaluative quadrants that include the evaluative broad mediator, who performs the following:

- Strategy**:** learn about the circumstances and underlying interests of the parties and use that knowledge to direct towards an outcome that responds to the interests.

- Techniques: the mediator will probe the underlying interests of the parties;

- Predict the impact on interests if no settlement is reached; and

- Develop and propose broad interest based proposals that satisfy many of the parties' interests

- Urge/push the parties to accept interest based settlement (present the proposals with force and intended impact).

- The evaluative broad mediator focuses on the parties' legal positions and arguments, provides the parties with his evaluation of the issues after the joint session, and gives an opinion on reasonable settlement value of the case.

On the other hand, an **evaluative narrow mediator** will do the following:

- Strategy: the mediator will help the parties understand the strengths and weaknesses of the parties' legal case;

- Techniques: a mediator will assess the strengths and weaknesses of each side's case;

- Predict the court outcome if the case goes to court;

- Develop and propose position based options and

- Urge/push the parties to accept position based settlement.

Whilst there has been immense debate as to whether a mediator should facilitate or evaluate, I would like to refer to comments made by the **Professor Randy Lowry**:

*"all mediators are least involved in internal evaluation in the sense of **making judgments on information presented**. It is the basis on which [they make decisions] regarding the process, the people or the resolution of the problem. Even facilitative mediators exercise evaluative judgment internally while deciding how to reframe issues or which areas of questioning to pursue with the objective of bringing the parties to an agreement."*

"If one concedes the reality that evaluation takes place, then the question changes to whether or not the door is open to reveal the evaluation to the parties…."

Hence, evaluative strategies and techniques are tools used by mediators to move the parties from disagreeing stances to concurrent positions so that a settlement can take place. They also assist the parties to assess whether they should accept the settlement proposal on the table, or to pursue the litigation alternative. Nonetheless, whether these strategies or techniques should be used at all, when they should be applied and how they should be applied vary from one case to another. Before using such techniques, a mediator needs to diagnose if the circumstances are appropriate, respect the wish of the parties, observe their response and prepare to be flexible in the depth and breadth of its application.

Application to a conflict story of Mr Lam and Funny Toys

Mr Lam's story started in the offices of Funny Toys, a successful toy company with outlets all over the world. He was a middle-rank merchandising manager with over ten years of experience, and he loved every angle of his job. There was only one issue: despite his unwavering commitment towards his work, he had not been promoted since he joined the company. He found that his supervisors were never serious at the appraisals and merely ran through the procedures. As far as promotion goes, the few supervisors in the department came up with their own list and only the people in their camp could have prospects of promotion.

However, the straw that broke the camel's back came when a young lady, Julia,

was promoted to Lam's paygrade. Lam resented her quick ascension, and found her utterly incompetent. In particular, her written and spoken English and her computer skills were sub-standard. Twelve months ago, a supervisor spot was open, and both Lam and Julia were the potential candidates shortlisted by management. Unfortunately, Lam was beaten out by Julia for the position. He was aggrieved but there was very little that he could do.

Three months ago, Lam found that Julia sent some work emails to her brother, asking him to correct her written English. Those emails contained confidential information about Funny Toys' merchandise. Lam thought that this should be reported to the company with some evidence in support. As such, when Julia was not at her desk, he did a quick search of her mailbox and took photos of those emails before bringing them to the Head of Merchandising Department. He never considered that this attempt to undermine Julia's credibility would become a problem for him—Lam's boss condemned his actions as well as Julia's. Both were issued a written warning.

Lam was totally devastated when the HR Manager administered the written warning to him. Ironically, his whistleblowing actions had granted him a serious punishment. He spiraled into depression and was clinically diagnosed with several psychiatric conditions. Since then, Lam had been on sick leave. He also posted this "trauma" on his own blog, and forwarded those stories to his peers and subordinates in the Merchandising Department to gain their support. The HR managers attempted to explain the reasons for the warning and why his act was unacceptable. However, their efforts were in vain.

Since the incident happened, Lam tried to escalate his complaints to both the top management in Hong Kong and the headquarters in Europe. He also pleaded for support from a legislative councilor and laid complaints with a number of government departments. The management of Funny Toys was under a lot of stress with the investigations and enquiries the various government departments and external bodies. Before Lam took the matter to court, the management proposed to resolve the dispute with an independent mediator. Lam accepted the invitation.

The mediation process commenced with a pre-mediation meeting with Lam. I started the process in the **Facilitative Broad quadrant** of the Riskin's grid by helping Lam to identify the most important goals that he would like to achieve in the mediation with the management.

Lam's top priority was:

- to get his written warning cancelled;

- recover from depression;
- the company should compensate all his medical expenses incurred in consulting the psychiatrists, and
- to address the issues in relation to the performance appraisal system in the company.

The interests of Lam are to restore his physical health, achieve moral vindication and to ensure financial security for himself and his family.

Introduction to Conflict Coaching

Whilst I read into the materials of the dispute, it appeared that Mr Lam was unable to understand why he was in the wrong in the company's perspective. Lam had been claiming that he merely followed the company's manual by reporting wrongful behaviour of colleagues to the management. As the company's manual did not prescribe how the evidence of wrongful acts should be collected, he took photos of Julia's mailbox out of convenience. He was outraged that his perceived good deed had led to a punishment. I have therefore decided to do conflict coaching with Mr Lam in the pre-mediation phase.

Conflict coaching is a one-on-one structured process where a trained coach assists people to gain competence and confidence to handle their interpersonal conflicts and disputes.

Application of conflict coaching to the mediation process

During the pre-mediation, I assisted Lam to "deconstruct" the conflict into different elements. Lam was asked to identify the trigger in the incident. Whilst the imposition of the written warning was the factual trigger, the whole incident challenged his values of honesty and justice. His identity as a loyal and honest employee was undermined. From his perspective, he was "wronged" and betrayed, and he felt that his supervisors had bad motives. He thought that his supervisor did not like him and made use of this incident to terminate him. Lam considered himself was a victim. He needed his feelings to be validated and acts to be vindicated by the company.

Apart from analyzing the conflict from Lam's perspective, I also asked Lam to consider the company's perspective on the conflict. This was a challenging part in the process for Lam, who had never approached the dispute from this angle.

More importantly, when he was asked to ponder the motives that the management would have attributed to his acts, he realized that one possible interpretation would have been his retaliation against Julia for the lost promotion.

There were 3 sessions of pre-mediation coaching with Lam before the mediation took place. The later sessions were spent on exploring the possible courses of actions open to him, as well as the pros and cons of each option. In addition, to prepare Lam for the meeting with the company, Lam and I explored the potential outcomes that he wished to achieve in the meeting, as well as the key messages that he wished to impart to the management. In the last coaching session before the mediation, the mediator even started some practice with Lam for the dialogue he was to use with the management, and gave him feedback to facilitate achievement of his goal.

This part of the process was invaluable, as Lam was able to gain increased understanding and awareness of himself and the other party. Further, he was able to reflect on his contribution to the conflict, reduce his defensiveness, and appreciate the company's perspective. These lessons were instrumental in bringing about the shift of his mindset from blame to contribution. His victim needs of validation were addressed, and he was ready to proceed to the actual mediation process with the company.

At the mediation, Lam also had moments of outbursts of high emotions. However, the joint session with the top management executives of Funny Toys proved to be helpful in allowing an exchange of ideas and perspectives, leading to mutual understanding between them.

During the joint session between Lam and the company's management, three key issues were discussed:

- The performance appraisal system of the company where the HR Director of Funny Toys, having heard the issues raised by Lam, agreed to conduct a thorough review of the PA system of the company;

- Regarding the issue of written warning, the HR Director explained from the company's perspective that it was not acceptable for Lam to intrude into Julia's mailbox, which might contain a lot of confidential information about the company and other colleagues.

- There was also some discussion about Lam's posting the details of the incident on Facebook. The management expressed their concerns and their expectation of the staff to keep the workplace incidents and

information to their own.

Hence, the mediation process had moved from the facilitative broad quadrant at the pre-mediation phase to the facilitative narrow quadrant when the mediation began and the parties discussed various issues in relation to the dispute and the employment.

Post mediation coaching

During caucuses, the management proposed two options to resolve the problem, one of which was to remove the written warning administered to Lam when he agreed to resign from the company. A payment package was also proposed and explained to him. Lam, however, was devastated when he heard that the company preferred him to take the departure package rather than the other one (in which the written warning would only be cancelled when Lam was able to fulfil certain performance milestones in the next 12 months after he returned to work). Lam said that he was unwell and would like to go home.

There were several post mediation coaching sessions with Lam to discuss the options proposed. These sessions mainly focused on:

- Hearing out the grievances of Lam towards the company and the management;
- Understanding further Lam's worries about the livelihood of himself and his family;
- Allowing space for Lam to deliberate over the matter and analyze the pros and cons of the choices that he had.
- Facilitating and helping him to understand and accept the company's perspective about the incident and reasons behind the decision.

Outcome

These post mediation coaching took place over a month. Finally, Lam accepted the departure package from the company and the dispute ended with a full and final settlement.

Lessons learned

Whilst this dispute was finally resolved through the mediation process, settlement would have been impossible had Lam not gone through the conflict

coaching process. By enabling Lam to step into the shoes of company management, Lam was able to develop mutuality and better understand their perspective. He appreciated that his actions might have started the same conflict cycle on the side of the company, and acquired some understanding of the other side's behavior. These insights acquired by Lam were pivotal in causing the change in his mindset and facilitated the subsequent meeting with the company at the mediation. When Lam was asked to explore possible choices to resolve problems and analyze each of them, he made remarkable improvements in his conflict management competence. From this situation, the benefits of adopting the conflict coaching process at the pre-mediation stage are unquestionable. Mediators may wish to consider learning more about conflict coaching process and secure it as one of the tools for resolving disputes.

The Art and Science of Crisis Negotiation

Dr. Gilbert Wong[1]

"Let us never negotiate out of fear.
But let us never fear to negotiate" John F. Kennedy

The Police Negotiation Cadre (PNC) of the Hong Kong Police Force came into the being in 1975 under the impact of the global and the local public safety environments at that time.

Since the earliest days of crisis negotiation, pioneered by Schlossberg and Bolz[2] in New York in the 1970's, the importance of crisis negotiation as a tool to peacefully and successfully resolve crisis situations has been well recognized.

Although PNC was originally established to respond to counter-terrorist incidents, most of our day-to-day work is spent responding to criminal and domestic incidents as well as suicide intervention and public order related incidents. Here is our PNC's Vision and Mission statement.

Our motto *"Who Cares Wins"* is an intentional variation on *"Who Dares Wins"*, the

[1] Commanding Officer of the Police Negotiation Cadre, Hong Kong Police

[2] Frank Bolz, Jr. is a legendary law enforcement expert and leader of the first NYPD Hostage Negotiations Team. His co-founder is Harvey Schlossberg, former NYC/NYPD Forensics Psychologist.

motto used by the Special Air Service (SAS).[3] By changing one letter, namely the letter "D" to a "C", we reflect a very different mindset.

"Who Cares Wins" is symbolic of our commmitment to selflessly saving lives. It places an emphasis on negotiation through empathy and rapport building. Passion is one of the core values of our Cadre and we believe that by adopting the highest standard of care in crisis situations, we can ensure a win for all parties.

"Win-win" applies both in mediation and crisis negotiation. Actually, we aim for "win-win-win". For example, in successful suicide interventions, we are looking at first, a win for the subject and the family, second, a win in terms of minimising risk and danger to our tactical units and third, a win for the general public.

We prepare by getting ourselves to a mental-emotional space where we have a neutral and non-judgmental mindset, stable and calm emotions, an open mind and the capacity to empathize with the subject's personal situation. We need to leave our "action-oriented, problem-solver" mindset at home. For crisis negotiation, it is 100% art and 100% science and I see it in four parts: NE-GO-TI-ATION[4].

1. **NE** is for NEED: Be aware of your own needs and those subjects in crisis.

2. **GO** is for GOAL: Know your operational goals and get to know those of the other stakeholders in crisis.

3. **TI** is for TIME that you may have for negotiation and also taking TIME out for self-care and stress management.

4. **ATION** adds a C and becomes ACTION: we need to be prepared in advance for both strategic and tactical action.

PNC also developed a 7Cs Strategy in crisis negotiation and it comprises of the following

1. Cordon: Cordon off the affected area.

2. Command: Establishment of a command structure at scene.

3. Communication: All-round communication with the subject, his or her family members, significant others as well with other law enforcement officers.

[3] SAS is the United Kingdom Special Forces that has served as a global model for military special forces units trained to perform unconventional, often high-risk missions.
[4] The Chinese-English Journal of Negotiation: Vol. 2 Issue 1 July 2014 (page 14-31)

4. Control of Emotion: Buy time while the emotionality of the person decreases and their rationality increases.

5. Coordination of Information: Information-led negotiation will focus on the psychosocial aspect of the subject as well significant issues leading to the crisis incident.

6. Commitment: To save lives and resolve crisis situations.

7. Care: For the subject, incident commander and team members.

Each strategy works in parallel with one another or may be in a sequential manner depending on the case nature.

ACTIVE LISTENING SKILLS

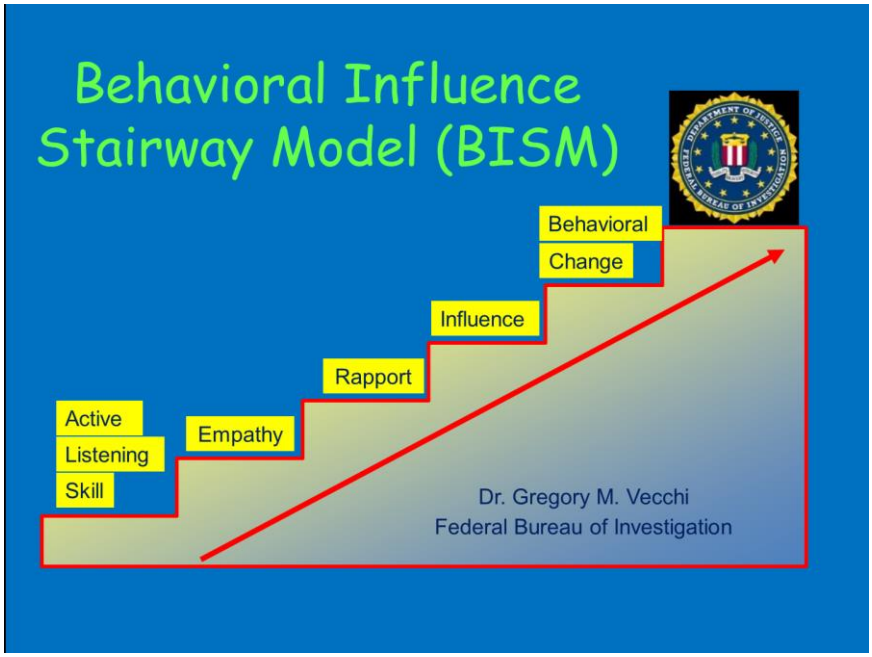
PNC have been using active listening skills to resolve crisis situations and confrontations successfully. These positive results have led us to emphasize active listening skills in all our crisis negotiation trainings. We adopted a mnemonic "MORE-PIE" following seven techniques constitute the core elements of the active listening approach.

These techniques provide a framework for crisis negotiators to respond to the immediate emotional needs of expressive subjects, clearing the way for behavioral changes that must occur before negotiators can resolve critical incidents.

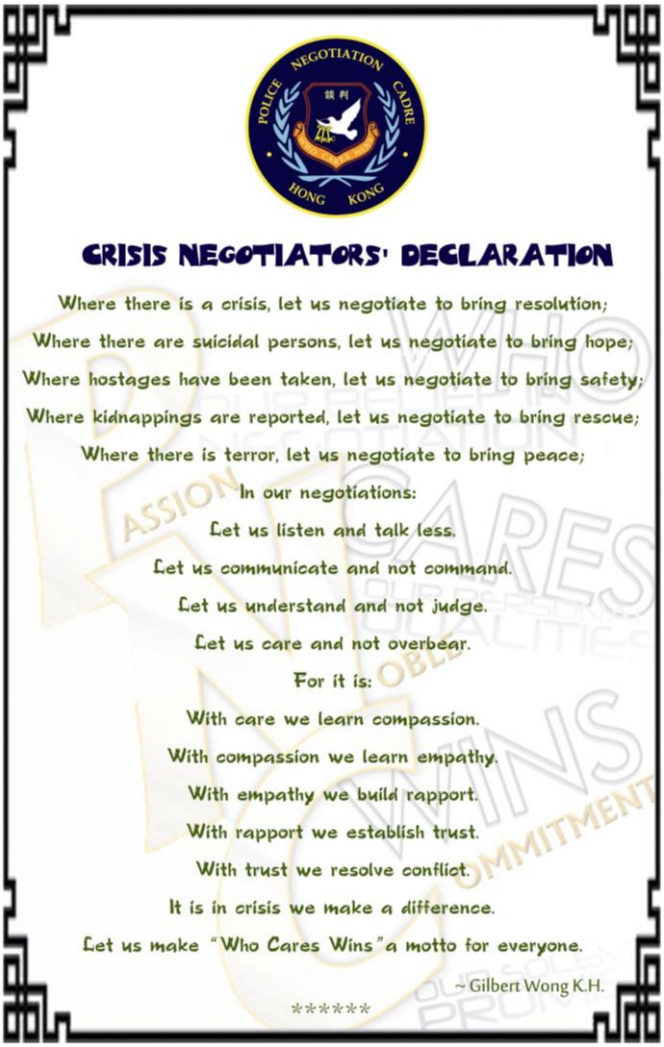
The Behavioral Influence Stairway Model (BISM) developed by Dr. Gregory Vecchi[5] and his team is the current model of crisis negotiation. The emphasis on the relationship-building process highlights the importance of having a positive and trusting relationship between the subject and negotiator if behavioral change and peaceful resolution are to take place.

The BISM is a relationship-building process with four dynamic elements: active listening, empathy, rapport and influence. Active listening is the foundation of the BISM and it takes place throughout the negotiations. Empathy follows as a demonstration of understanding of the situation. Rapport is then developed, which is trust derived from understanding. Finally, influence occurs as the subject is persuaded to change behavior.

[5] Aggression and Violent Behavior 10 (2005) 533–551: Crisis (hostage) negotiation: Current strategies and issues in high-risk conflict resolution.



In closing, last but not least, let me share with you the Crisis Negotiators' Declaration which was written for all crisis negotiators around the world.



CRISIS NEGOTIATORS' DECLARATION

Where there is a crisis, let us negotiate to bring resolution;
Where there are suicidal persons, let us negotiate to bring hope;
Where hostages have been taken, let us negotiate to bring safety;
Where kidnappings are reported, let us negotiate to bring rescue;
Where there is terror, let us negotiate to bring peace;

In our negotiations:
Let us listen and talk less.
Let us communicate and not command.
Let us understand and not judge.
Let us care and not overbear.

For it is:
With care we learn compassion.
With compassion we learn empathy.
With empathy we build rapport.
With rapport we establish trust.
With trust we resolve conflict.
It is in crisis we make a difference.
Let us make "Who Cares Wins" a motto for everyone.

~ Gilbert Wong K.H.

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Appendix 1

Mediation Week 2016
"Mediate First - Advance with the times"
7 – 13 May 2016

Programme for Mediation Week 2016

Date/Time/ Venue	Sector	Topic / Event	Co-organiser(s)
7.5.16 (Sat) 10:00 – 12:00 Venue: Justice Place	Education	Seminar on "Use of Mediation in Schools to Build a More Harmonious Environment" (Conducted in Cantonese)	• Hong Kong Family Welfare Society • Hong Kong Institute of Mediation • The Hong Kong Mediation Council
8.5.16 (Sun) 14:00 – 17:30 Venue: Lok Fu Plaza	Community	Mediation Carnival (Conducted in Cantonese)	• Hong Kong Mediation Centre
9.5.16 (Mon) 14:30- 16:30 Venue: Justice Place	Medical	Seminar on "Medical Mediation Scheme: A Feasibility Discussion" (Conducted in Cantonese)	• Hong Kong Society for Healthcare Mediation
10.5.16 (Tue) 14:30 – 17:00 Venue: Justice Place	Community	Seminar on "Community Mediation for Ethnic Minorities and New Immigrants" (Conducted in Cantonese)	• New Home Association • Community Mediation Services Association
11.5.16 (Wed) 9:30 - 12:00 Venue: Justice Place	Intellectual Property	Seminar on "Assessing the Suitability of Evaluative Mediation to Resolve IP Disputes" (Conducted in English)	• Intellectual Property Department

Date/Time	Sector	Topic / Event	Co-organiser(s)
11.5.16 (Wed) 14:30 - 17:30 Venue: Justice Place	Commercial	Seminar on "The Beauty of Sector-specific Mediation – An Introduction to Sector-specific Mediation Schemes" (Conducted in Cantonese)	• Hong Kong Mediation Council
12.5.16 (Thurs) 14:30 – 16:50 Venue: Justice Place	Commercial: Cross –Bord er	Seminar on "Resolving Cross-border Commercial Disputes by Mediation" (Conducted in Cantonese)	• Hong Kong Mediation Centre
13.5.16 (Fri) 9:00 – 17:30 Venue: HKCEC Meeting Room N201		Mediation Conference 2016 "Advance with the times" (Conducted in English)	• Hong Kong Trade Development Council

2016 年調解周
「調解為先　與時並進」
2016 年 5 月 7 – 13 日

2016 年調解周節目表

日期/時間/地點	界別	主題/活動	協辦機構
7.5.16 (星期六) **10:00 – 12:00** 地點: 律政中心	教育	“家校善用調解，共建和諧校園” 講座 (以粵語進行)	• 香港家庭福利會 • 香港調解學院
8.5.16 (星期日) **14:00 – 17:30** 地點: 樂富廣場	社區	調解嘉年華 (以粵語進行)	• 香港和解中心
9.5.16 (星期一) **14:30 - 16:30** 地點: 律政中心	醫療	“醫療調解先導計劃-可行性討論” 研討會 (以粵語進行)	• 香港醫療調解學會
10.5.16 (星期二) **14:30 – 17:00** 地點: 律政中心	社區	“社區調解與少數族裔及新來港人士” 研討會 (以粵語進行)	• 新家園協會 • 社區調解服務協會有限公司
11.5.16 (星期三) **09:30 - 12:00** 地點: 律政中心	知識產權	“探討使用評估式調解以解決知識產權爭議” 研討會 (以英語進行)	• 知識產權署

日期/時間	界別	主題/活動	活動詳情 協辦機構
11.5.16 (星期三) **14:30 - 17:30** 地點: 律政中心	商界	"特定界別調解的美妙 - 簡介特定界別調解計劃" 論壇 **(以粵語進行)**	• 香港調解會
12.5.16 (星期四) **14:30 – 17:00** 地點: 律政中心	商界- 跨境調解	"以調解方式解決跨境商業 爭議" 研討會 **(以粵語進行)**	• 香港和解中心
13.5.16 (星期五) **09:00 – 17:30** 地點: 香港會議展覽中心 會議廳 **N201**		調解研討會 **2016** – "調解為先 與時並進" **(以英語進行)**	• 香港貿易發展局

Appendix 2

Mediation Conference 2016
"Mediate First - Advance with the times"
Hong Kong Convention and Exhibition Centre, Meeting Room N201

Conference Programme 2016

13 May 2016 (Friday)	
09:00-09:30	**Registration**
09:30-09:45	**Welcome Remarks** **Mr. Rimsky Yuen, SC,** Secretary for Justice, HKSARG
09:45-10:15	**Keynote Speech** **Mr. Phillip Howell-Richardson,** International Commercial Mediator
10:15-10:30	**Launch of the Guidelines for Mediation Communication** **Ms Lisa Wong, SC ,** *Chairperson of the Regulatory Framework Sub-committee of the Steering Committee on Mediation*
10:30-10:45	**Break**
10:45-12:05	**Session 1：A Review of the Latest Global Development** Mediation – a flexible dispute resolution process which is constantly evolving to suit the parties' needs. A review of the latest development from UK, Europe, the United States of America, Australia and South East Asia and how mediation may be combined with other forms of ADR to meet clients' needs. **Moderator** **Mr. Michael Beckett,** Senior Teaching Fellow, City University of Hong Kong **Speakers:** **Mr. Alan Limbury,** Negotiator, Specialist Accredited Mediator, NMAS Accredited Mediator and Arbitrator Managing Director, Strategic Resolution **Prof. Sharon Press,** Director, Dispute Resolution Institute Mitchell Hamline School of Law **Mr. Nicholas Seymour,** A panel member of the CEDR mediation practice group experienced in various forms of dispute resolution including mediation **Prof. Nadja Alexander,** Director of Conflict Coaching International

12:05-12:20	**Question and Answer**
12:20-13:45	**Lunch**
13:45-14:00	**Registration**
14:00-15:20	**Session 2：Advance with the times – Choosing the Suitable Mediation Tools and Achieving Results** In Hong Kong, facilitative mediation is the most commonly practised model of mediation. Are there limits to facilitative mediation in resolving particular types of disputes? Would evaluative mediation be more suited to deal with certain types of disputes in order to best serve the interest of the parties? How can negotiation skills be applied in these models of mediation, which is a type of "assisted negotiation"? How to improve one's skills to deal with "deadlocked" negotiations and achieve results? **Moderator** **Mr. John Budge, SBS, MBE, JP,** Chairman, Hong Kong Mediation Accreditation Association Limited **Speakers:** **Mr. Phillip Howell-Richardson,** International Commercial Mediator **Prof. Sharon Press,** Director, Dispute Resolution Institute Mitchell Hamline School of Law **Ms. Jody Sin**, Immediate past Chairperson of Hong Kong Mediation Council **Dr. Gilbert Wong.** Senior Superintendent, Commanding Officer of Police Negotiation Cadre
15:20-15:35	**Question and Answer**
15:35-15:50	**Break**

15:50-17:10	**Session 3：A Glimpse into the Future of Mediation – Opportunities for Cross Border Mediation** Increasingly, parties in disputes are seeking non-adversarial dispute resolution methods. With the "One Belt One Road" initiative, demands for cross border mediation services are expected to rise. Such trend will impact and shape the types of dispute resolution services provided in the future. Will the differences in the cultural background or language used by the parties impact on the outcome of the mediation? Will enforcement of the outcome of a cross border mediation be problematic? **Moderator** **Mr. Danny McFadden ,** CEDR Representative Asia Pacific, Regional Mediator World Bank **Speakers:** **Mr. Phillip Howell-Richardson,** International Commercial Mediator **Mr. Alan Limbury,** Negotiator, Specialist Accredited Mediator, NMAS Accredited Mediator and Arbitrator Managing Director, Strategic Resolution **Prof. Nadja Alexander,** Director of Conflict Coaching International **Ms. Wang Fang,** Deputy Director of the Secretariat of Mediation Center of the China Council for the Promotion of International Trade)/China Chamber of International Commerce), Secretary-general of Asian Mediation Association
17:10-17:20	**Question and Answer**
17:20-17:30	**Closing Remarks for the Mediation Week 2016** **Mr. Justice Johnson Lam Man Hon** Vice President of the Court of Appeal of the High Court, HKSAR

2016 年調解研討會
「調解為先　與時並進」
香港會議展覽中心會議室 N201

2016 年調解研討會議程

2016 年 5 月 13 日 (星期五)	
09:00–09:30	**入場登記**
09:30-09:45	**歡迎辭** **袁國強資深大律師，**香港特別行政區律政司司長
09:45-10:15	**主題演講** **Phillip Howell-Richardson 先生，**國際商業調解員
10:15-10:30	**推出調解通訊指引** **黃國瑛資深大律師，**調解督導委員會轄下規管架構小組委員會主席
10:30-10:45	**茶歇**
10:45-12:05	**討論環節 (一)：檢視全球調解最新發展** 調解 —— 不斷演變以迎合各方需要的靈活解決爭議程序。會上檢視英國、歐洲、美國、澳洲和東南亞的最新發展以及調解如何結合其他解決爭議程序以滿足客戶的需要。 **主持** **白克勤先生,** 香港城市大學高級專任導師 **演講嘉賓** **Alan Limbury 先生**，談判員、認可專家調解員、(澳洲) 全國調解員資格評審制度認可調解員、Strategic Resolution 仲裁員董事總經理

	Sharon Press 教授, 哈姆萊大學法律學院解決爭議研究中心董事 **Nicholas Seymour 先生,**CEDR 太平洋中心調解實務組成員，在各種解決爭議程序包括調解具豐富經驗 **利珊雅教授,** Conflict Coaching International 董事
12:05-12:20	**問答環節**
12:20-13:45	**午宴**
13:45-14:00	**入場登記**
14:00-15:20	**討論環節 (二)：與時並進 —— 選擇合適的調解工具並取得成果** 在香港，促進式調解是最常用的調解模式。以促進式調解去解決特定種類的爭議有否限制？為了最能符合各方利益，評估式調解是否能更合適地處理某種爭議？談判技巧如何應用於這些屬於“輔助談判”的調解模式？如何提升處理談判“僵局”的技巧並取得成果？ **主持** **白仲安律師, SBS, MBE, JP,**香港調解資歷評審協會有限公司理事主席 **演講嘉賓** **Phillip Howell-Richardson 先生,** 國際商業調解員 **Sharon Press 教授,** 哈姆萊大學法律學院解決爭議研究中心董事 **冼泇妤律師,** 前任香港調解會主席 **黃廣興博士,** 高級警司、香港警察談判組主管
15:20-15:35	**問答環節**
15:35-15:50	**茶歇**

15:50-17:10	**討論環節 (三)：展望調解的未來 —— 跨境調解的機遇** 爭議各方日益普遍尋求以非對抗方法解決爭議。在“一帶一路”策略下，對跨境調解服務的需求預期會上升。這種需求趨勢會影響和塑造日後解決爭議服務的類別。爭議各方在文化背景或使用語言上的差異會否影響調解結果？執行跨境調解的協議時會否遇到問題？ **主持：范維敦先生,** CEDR 亞太區代表，世界銀行地區調解員
	演講嘉賓 **Phillip Howell-Richardson 先生,** 國際商業調解員 **Alan Limbury 先生**, 談判員、認可專家調解員、(澳洲) 全國調解員資格評審制度認可調解員、Strategic Resolution 仲裁員董事總經理 **利珊雅教授,** Conflict Coaching International 董事 **王芳女士,** 中國國際貿易促進委員會 / 中國國際商會調解中心副秘書長、亞洲調解協會總秘書長
17:10-17:20	**問答環節**
17:20-17:30	**2016 調解周閉幕致辭** **林文瀚法官,** 香港特別行政區高等法院上訴法庭副庭長