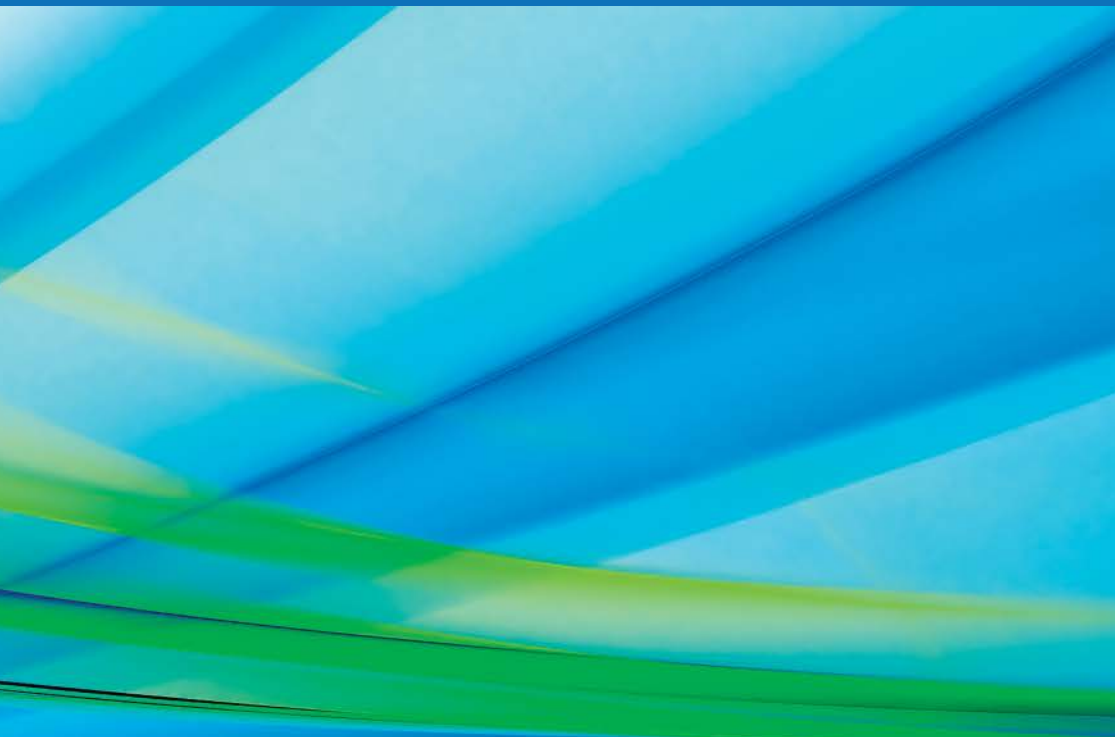
Mediation Conference 2018

Mediate First - Exploring New Horizons
調解為先 共創新天

18 May 2018 • 2018年5月18日



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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

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

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

香港和解中心 Hong Kong Mediation Centre

內地—香港聯合調解中心 Mainland - Hong Kong Joint Mediation Center

CCPIT MEDIATION CENTER

Hong Kong Institute of Arbitrators 香港仲裁司學會

CEDR CENTRE for EFFECTIVE DISPUTE RESOLUTION

HKMAAL

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

ICC HONG KONG INTERNATIONAL CHAMBER OF COMMERCE

FDRC 金融糾紛調解中心 Financial Dispute Resolution Centre

香港調解仲裁中心 Hong Kong Mediation and Arbitration Centre

AAIL ASIAN ACADEMY OF INTERNATIONAL LAW

CHARTERED SECRETARIES 特許秘書

Mediation Conference 2018

2018 年調解研討會

"Mediate First – Exploring New Horizons"

「調解為先 共創新天」

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Table of Contents

VII. Closing Remarks

VIII. Programmes of Mediation Week 2018

Keynote Speech

The Honourable Ms Teresa Cheng, GBS, SC, JP[1]

Distinguished Guests, Ladies and Gentlemen,

On behalf of the Department of Justice ("DoJ"), it is my great pleasure to welcome you all to the Mediation Conference 2018 co-organised by the DoJ and Hong Kong Trade Development Council ("TDC"), and supported by various key players in the field of mediation in Hong Kong as you have seen just now.

2. The theme of the 2018 Mediation Week is "Mediate first – Exploring New Horizons". Mediation is by now a proven highly effective tool for achieving harmonious resolution of conflicts arising in different sectors. The DoJ avidly supports the development of mediation and we have been fortunate to have the support of many stakeholders who share our belief which is succinctly captured in the theme. And that is why we would today not just discuss what has been achieved in Hong Kong or in the international community, but perhaps to explore what new horizons can be achieved when we keep mediation first as one of our main themes.

3. Hong Kong has been organising the mediation week biennially. The aim is twofold. Domestically we wish to promote the use and understanding of mediation to the general public so as to assist them in resolving conflicts amicably and harmoniously. At an international level, we wish to bring together experts in this area so that Hong Kong continues to provide a unique platform for exchange of views in this area as part of its aim and vision to be a leading dispute resolution centre in the Asia Pacific region.

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

4. In alternate years, however, we are not dormant. Hong Kong also has been organizing activities such as training and seminars, promoting mediation in different sectors, and following up on the discussions that took place in the mediation week and so forth. You will therefore appreciate the importance of discussion and the ideas that Hong Kong get from the conferences such as this particular one today. We have also launched the Hong Kong Mediate First Pledge and many sectors and organisations have signed up to the pledge, and we will continue to promote it and attract more people to understand the concept as well as appreciate the importance of mediate first. For instance, I understand that the entertainment industry has expressed interest in this particular area after the Entertainment Mediation seminar held earlier this week.

Latest Development of Mediation in Hong Kong

5. It is apt for me to give you a brief update on the latest development of mediation in Hong Kong.

6. Since the first Mediation Week, much has happened in the promotion and development of mediation in Hong Kong. The Government has been working closely with the mediation community and other stakeholders so as to foster a mediation-friendly environment and strengthen the legal infrastructure. In particular we have introduced legislations, started to conduct a study on aspects of certain mediation skills and brought mediation to the people. And importantly, we are also working on a mediation framework for investments between the Mainland and Hong Kong. Let me give you a little bit more about these ideas and experience.

(i) Apology Ordinance and Third Party Funding

7. First, allow me to introduce to you the legal framework that Hong Kong has put in place after the Mediation Ordinance.

8. In December 2017, we enacted the Apology Ordinance. Hong Kong made history that day as the Apology Ordinance is the first piece of such legislation in Asia. It aims to encourage the making of an apology with a view to preventing escalation of differences into disputes thereby ultimately facilitating amicable settlement.

9. Hong Kong has also passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017. This also took place in 2017 and this piece of legislation would put beyond doubt that third party funding for mediation is not prohibited by the common law doctrines of maintenance and champerty.

10. The enactment of these two pieces of legislation will enable Hong Kong's mediation regime to stay at the forefront of international development and reinforce Hong Kong's position as a leading centre for international dispute resolution.

(ii) Special Committee on Evaluative Mediation

11. Secondly, Hong Kong is conducting a review of the scope and utility of evaluative mediation. Facilitative mediation and evaluative mediation tend to be viewed as mutually exclusive, but are they? Whilst all mediation would focus on the interests of the parties when it comes to the point of reaching a settlement, it is, in my own experience, inevitable that certain evaluative skills will have to be deployed in some way during the mediation process. This is sometimes called playing the devil's advocate. It will encourage the parties to be realistic about its own strengths and weaknesses, re-assess the alternative to no agreement, leading ultimately to focus on the interests of the parties. Indeed the interaction of using facilitative and evaluative skills reflects the very essence of mediation, that of flexibility. After all, the role of the mediator is to use appropriate skills to assist the parties to communicate and facilitate settlement. Under the Steering Committee on Mediation set up

by the Department of Justice, a Special Committee on Evaluative Mediation has been formed to explore and research on the proper use of evaluation in mediation. You will hear more from the chairperson of the special committee on this topic later today.

(iii) West Kowloon Mediation Facilities – Pilot Scheme

12. Thirdly, we bring mediation to the people. One of the purposes of organizing Mediation Week is to promote the understanding and use of mediation by the general public. To achieve this aim, one of the best ways is to allow them to experience the advantages of mediation. In consultation with the Judiciary, the DoJ will implement a pilot scheme to provide mediation services to litigants of Small Claims Tribunal cases that are suitable for mediation, and other suitable cases can also be brought in. For this purpose, we have completed the construction of new mediation facilities, a unique facility dedicated to mediation, next to the West Kowloon Law Courts Building. We believe that the purpose-built mediation facilities will mark the Government's strong commitment to promote the use of mediation and to enhance public awareness of its benefits.

(iv) CEPA Mediation Mechanism

13. The last development I would like to mention is actually the start of one of the new horizons that Hong Kong is exploring and pursuing, and that is investment mediation.

14. Not only do we push ahead with various initiatives within Hong Kong, the Government is also capitalising on our unique competitiveness in promoting international investment mediation services.

15. As Asia's World City, Hong Kong is a well-connected cosmopolitan hub. Under the "one country, two systems" principle enshrined in the

Basic Law, Hong Kong maintains its common law system which the international commercial community is familiar with. Apart from a sound legal system and infrastructure, we also have a mature dispute resolution regime. Hong Kong courts are also highly regarded for their judicial independence and well-reasoned judgements. Furthermore, Hong Kong also enjoys the advantage of sharing the same language and culture with the Mainland whilst also having a style of living and cultural empathy with the West. Our legal system instils confidence, provides predictability and certainty. All of these unique strengths provide solid foundation for Hong Kong to act as a perfect "springboard" for inbound and outbound investments involving the Mainland.

16. To strengthen trade and investment between the Mainland and Hong Kong, in 2003, the Mainland and Hong Kong Closer Economic Partnership Arrangement ("CEPA") was concluded. The latest enhancement is the CEPA Investment Agreement concluded in June 2017. This is the first investment agreement made between the Mainland and Hong Kong under the framework of CEPA.

17. Among other things, the CEPA Investment Agreement aims to provide protection for investors in the host jurisdictional territory. It has all the key features of a bilateral investment treaty such as protection accorded under fair and equitable treatment, full protection and security, non-discriminatory protection, etc.

18. The CEPA Investment Agreement will undoubtedly be a catalyst for inbound and outbound investments of the Mainland. I would say that Hong Kong is best placed to play the role of a "deal maker" for these investments. Further if disputes do arise, Hong Kong can play the role of a "dispute resolver".

19. The CEPA Investment Agreement provides that the mechanism for settlement of investment disputes is mediation, which offers the benefits of flexibility and confidentiality without the need for parties to

go through the more expensive and sometimes tortuous arbitration route. You may wish to know that research in 2014 shows that on average, a party to an investment arbitration paid approximately US$5 million in legal cost. On average, parties jointly paid arbitral tribunal fee to the amount of about US$1 million[2].

20. The parties to CEPA Investment Agreement recognise that the better way forward for resolving investment disputes is mediation. The reduced cost is a huge incentive. With mediation as the first mechanism to be attempted and bearing in mind that no investor would wish to end up litigating in the other side's court, it provides a strong impetus and reason to settle the disputes amicably through the mediation mechanism established under the CEPA Investment Agreement. That is exactly why our theme is "Mediate first – Exploring New Horizons".

21. Hong Kong is finalising a detailed mediation mechanism to resolve investment disputes under CEPA. This is a significant move and a sign of our commitment in taking forward mediation to the next level.

22. Under the CEPA Mediation Mechanism, Hong Kong and the Mainland will respectively designate their own mediation institutions and mediators, and publish the list of mediation institutions and mediators mutually agreed by both sides. Whilst both sides can in principle have different mediation rules, we are engaging with the relevant Mainland bodies to agree on similar, if not identical, sets of mediation rules so as to create certainty and harmony for the benefit of the users.

23. With regard to mediators to be designated for Hong Kong, we have developed a set of eligibility criteria which, among other things, requiring the mediators to possess necessary professional knowledge in investment law and the requisite mediation skills.

[2] Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide (2014) 29 ICSID Review 66, at 77-78.

24. International mediation is clearly gathering importance. This is evidenced by the intensity of the interests in the United Nations Commission on International Trade Law ("UNCITRAL") Working Group II's recent preparation of a draft Mediation Convention. This is for the enforcement of international mediated settlement agreements[3] and there is a draft amended Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation. Again, you would hear a lot more on this particular aspect later today.

25. The United Nations' move to effect the enforceability of mediated settlement agreements across the globe attests to the growing importance of mediation. Just as the New York Convention has provided a solid framework for arbitration and is clearly responsible for the increased use of international arbitration in commercial and investment disputes, the Mediation Convention, once concluded and coming into effect, will have the same implications on the growth of international mediation.

26. The value of mediation in resolving investment dispute has also been recognised by the UNCITRAL Working Group III. Working Group III has been entrusted with a mandate to work on the possible reform of investor-State dispute settlements. At a recent session in 2017, there was a "generally-shared view" amongst members of the Working Group that mediation could operate to prevent the escalation of disputes to arbitration and could alleviate concerns about the costs and duration of arbitration.[4] Hong Kong is actively participating in this Working Group and hopes to bring to it an Asian perspective.

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[3] Article 15(1) and Article 16(1) of the draft amended UNCITRAL Model Law on International Commercial Mediation (2002), available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/083/22/PDF/V1708322.pdf?OpenElement..

[4] See UNCITRAL's 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Part I)' (available at: k of its thirty-fourth session (Part I)' (available at: http://www.uncitral.org/pdf/english/commissionsessions/51st-session/CN.9_930-_REV_1_ADV_COPY_.pdf), para. 31.

27. With this growing interest in investment mediation and with the CEPA Mediation Mechanism in place, Hong Kong will provide dedicated training for investment mediators.

28. Almost all of the investment conciliation cases conducted under the International Centre for settlement of investment disputes ("ICSID") Conciliation Rules involve African states. It is noteworthy that they are generally conducted by local law firms of host states as opposed to major international law firms. It tends to suggest that costs and culture have a bearing on the choice of the form of dispute resolution for investment disputes.

29. It may be said that if investment mediation works, it will work also in this part of the world which has a strong common historical culture of mediation. Asians are less litigious and more conciliatory in nature, and very much prefer harmony. Whilst conciliation requires more of an evaluative mind-set or approach, the skills for interest-based mediation are indispensable as the aim is ultimately to reach a mutually acceptable settlement.

30. For investment mediation to take root in Asia, it is necessary to build up a team of investment mediators in Asia. For that reason, we are very pleased to inform you that Hong Kong and ICSID are working together to provide an investment mediator training course which will focus on a scheme for training in investment law and mediation skills. We are hopeful that the first training session will take place around October this year and we hope to attract investment mediators as well as government officials in Asia.

31. To further enhance the use of mediation (and for that matter also arbitration), Hong Kong representative from DoJ is chairing a Working Group in APEC promoting the use of on-line dispute resolution system, focusing on the needs of small and medium sized enterprises. This initiative benefits from the synergy in the private sector in Hong

Kong which actually is also working towards providing a similar platform in the name of eBRAM.hk. The platform of such online dispute resolution aims at reducing costs and dealing with the geographical distance that the parties in dispute. It would be no doubt another very important enhancement to the promotion and use of mediation.

32. Needless to say, one cannot overlook the immense opportunities offered to Hong Kong's legal and dispute resolution services sector under the Belt and Road Initiative and the Guangdong-Hong Kong-Macao Bay Area Development. In this particular aspect, Hong Kong is also looking into how mediation and other forms of dispute resolution can be amalgamated in order to serve the needs of the users, whether it is "mediate first and arbitrate next" or Med/Arb or Arb/Med. We will closely monitor the latest developments and step up our efforts on these fronts.

33. Ladies and Gentlemen, Hong Kong has been, and will continue to, actively develop and promote the use of mediation as an efficient means of dispute resolution, while staying alert to the challenges and promises of the future, and what it holds for mediation. Hopefully, one day we will develop an Asian way, a Hong Kong way, an international way of resolving investment disputes through mediation, or an amalgamation of mediation and other forms of dispute resolution to better serve the needs of social development that is happening around the world.

34. Open dialogues as is going to happen today will no doubt provide a lot of food for thought for all of us, and for us in Hong Kong as a matter of making our future policy for dispute resolution to see how that can be taken forward even further. On this note, I wish this event every success. For those coming from overseas, I wish you an enjoyable stay in Hong Kong.

Thank you.

Keynote Speech

Professor Robyn Carroll[1]

(Transcript)

I'm delighted to speak today at this conference about developments in mediation on the horizon. There have been a number of important developments, some of which will be the subject of more detailed presentations throughout the day by others. Many of the speakers will look to developments on the distant horizon, some closer than others. Today's conference invites us to look at the horizon, to what is coming in the mediation field. In my talk, I will suggest to you that some of the ships of change have long since sailed into the famous Port of Hong Kong, some are still on their way, while other ships of change, that are departing from these shores, are likely to have, are likely to influence developments elsewhere in Asia and beyond.

The overarching question I suggest for all of us is how mediation can contribute to the resolution of disputes. In this short talk, I will respond to this question by posing and addressing three sub-questions and offering a few concluding remarks. First, what are the features of mediation that continue to make it an important part of dispute resolution in modern legal systems and in Hong Kong in particular? Second, what are the major issues facing the mediation community and those who promote mediation and other ADR processes here and elsewhere? And third, what are the key ways those issues are being and can be addressed, to encourage and promote mediation. And it'll be very evident that in this sense, I will only be able to touch on many of the initiatives that were referred to by the Secretary of Justice in her excellent talk. I conclude that it is the opportunity that mediation offers parties in dispute to have meaningful dialogue and to agree on creative solutions to their disputes in a timely and cost effective manner, that remain the reasons why mediation needs to and will continue to grow as an integral part of

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[1] Professor, University of Western Australia Law School; Co-founder, International Network for Law & Apology Research (INLAR)

modern dispute resolution.

To turn to my three questions – first, what are the features of mediation that continue to make it an important part of dispute resolution in modern legal systems? Here I step back to remind ourselves of why mediation is so important. First, it allows for direct party participation in the process and for confidential and meaningful dialogue, which can include interpersonal dialogue, which is important in many types of dispute. Parties have an opportunity to express their needs, and how they believe those needs might be met. Second, it provides an opportunity to repair damage to any pre-existing relationship between the parties or at least to contain the damage, in ways that litigation does not. Third, mediators are trained to recognize when it is important to parties that their needs are met, other than through legal outcomes and remedies. In doing so, mediators can empower parties by guiding them to resolutions that go beyond legal solutions and reflect their deeper interests. This allows for more varied and creative solutions to resolve disputes than is possible through adjudication and removes the uncertainty of an imposed outcome. Fourth, mediation offers flexibility of process, giving parties greater control over timing, place, who sits at the table, the length of the process and ultimately the costs involved in resolving their disputes. Fifth, even if mediation does not result in a settlement of all issues between the parties, it can reduce the complexity of the dispute and allow each party to understand more clearly the case of the opposing party. And finally, where successful, mediation reduces the demand on increasingly scarce court resources.

In a recent address on ADR, delivered in March this year by the Chief Justice of the Supreme Court of Western Australia, my home state, Chief Justice Wayne Martin said ADR, which includes any form of consensus dispute resolution, is not new. What has emerged over the last 30 years, however, are techniques and processes specifically designed to encourage the achievement of consensus, including most significantly mediation. Indeed, in the Supreme Court of Western Australia, the vanishing trial is a reality. The Chief Justice

reports that less than two percent of the cases initiated in that court are resolved by adjudication. This reflects the position in other Australian courts and studies show that the experience is much the same in the US and the UK.

This means that of the very small number of disputes that are actually referred to courts or tribunals, only very few are resolved by adjudication. And importantly we need to remember that the disputes that make their way to the courts are only a very small fraction of the disputes that are resolved one way or the other, without recourse to a court or a tribunal. This does not mean, of course, that there are no disadvantages associated with mediation. These are also well known. In fact, they were pointed out by Lord Wolf, in his keynote speech to this conference in 2014 and remain true today. First, if the parties are unable to reach agreement in mediation, they may still have the expense and delay of proceedings with litigation. However, they may have narrowed the issues and this will still be valuable and can save the costs of an eventual trial. Second, a party who may have been wholly successful if litigation were pursued to an outcome, may be required either to compromise partly on his or her legal entitlement or provide some other benefit to the other party that he would not otherwise be obliged to offer. Third, a process in which parties negotiate the outcome can be weighted in the favor of a stronger party against a weaker party. It is, of course, a central function of a properly trained mediator to guard against this and to manage the process so as to hold the balance between the parties. Fourth, mediation usually takes place behind closed doors, which means that the benefits that follow from the judgments of the court, on the law, and the outcomes of litigated disputes are not available to us. Finally, as his lordship notes, mediation at best produces only an agreement. It cannot be directly enforced and this may create problems, particularly in the case of international disputes. Those comments, of course, said some time before the developments that were referred to in the Secretary of Justice's talk and will be the subject of discussion today.

As we will hear from our speakers and panelists today, mediation is not a fixed or one size fits all process. I agree with my Chief Justice, when he says one of

the great advantages of mediation is its capacity to flexibly adapt to the circumstances of the case, the personalities of the client and their expectations. For him, as he says, the question is not which of these forms of mediation is preferable, per se, but rather which of these and other forms of mediation is preferable in the circumstances of the case. In his paper, his honor refers to consensus as the defining feature of ADR. This resonates with the goals that have been expressed be judicial and other legal leaders in Hong Kong, over more than a decade and their encouragement of and support for mediation in this jurisdiction. At the 2012 Mediation Conference, for example, in his opening address, the Honorable Wong Yan Lung, senior counsel, former Secretary for Justice, said then that a core value, encapsulated in mediation, is harmony, which is a sentiment echoed in the speech we have just heard this morning, by the current Secretary for Justice.

At a broader level, the Chief Justice of the Court of Final Appeal, the Honorable Justice Geoffrey Ma, expressed the view in his welcome address at the 2014 Mediation Conference, that far from being just another form of dispute resolution, mediation has turned out to be an established and integral social and public service. Mediation is an integral activity in the administration of justice, aimed at achieving the resolution of disputes to arrive at a just, proper and legally justifiable result. So with all this knowledge and experience of mediation, what is it that constrains the growth of mediation and ADR as the primary means of dispute resolution? This is the second question for my talk.

I suggest that the major issues facing the mediation community, and those who promote mediation and other ADR processes, here and elsewhere, fall into three broad categories. I refer to these as process outcome issues, process fit issues and process uptake issues. There is an inevitable overlap between these categories and the way they influence each other, but I suggest it provides a framework to identify the need and drivers for change and for monitoring progress. Let me begin with process outcome issues. I've already referred to this as a potential issue, by referring to the fact that mediation

settlements are enforceable only as a contract, unless and until they become the subject of court orders, for example by a consent or by an arbitral award. In practical terms, this does not necessarily pose a difficulty for the enforcement of domestic settlements, but it does pose challenges, as we've already heard this morning, for mediation of cross-border and international commercial disputes. There are on the horizon, as we've heard, developments that promise to overcome these difficulties. And obvious advantage of mediation is that the outcome agreed between the parties can be tailored to suit the social or business culture in which the dispute arises, rather than being constrained by the law as it stands and the remedies available at the time.

Second, what I call the process fit issues. This refers to the tendency to see ADR processes as based on models and as alternative processes to one another, rather than as adaptive processes that can be integrated. We often hear about arbitration versus mediation, facilitative mediation versus evaluative mediation. And mediation versus litigation. In reality, in Common Law jurisdiction like Hong Kong and the UK and Australia, these approaches can be and are used in combination. It is also rare that a litigated civil matter will progress to trial without mediation being offered or even required at some stage. Recognition that ADR processes sit along a continuum between adjudicative, determinative processes on the one hand, and facilitative, non-determinative processes on the other, does not take full account of the many productive combinations that are available. One needs only review the wide range of combinations of arbitration and mediation processes to see that processes, like outcomes, can be tailored to meet the party's needs and expectations. At the same time, I recognize that there are many constraints on the blended and integrated use of ADR processes and in the next part, I will briefly refer to some of the many ways that these can be, these constraints can be tackled.

Third, process uptake issues. This refers to the old adage that you can lead a horse to water, but you can't make her drink. Likewise, notwithstanding, the

sustained efforts and creative and at some time strong initiatives by governments, courts and practitioner associations, parties and some lawyers remain reluctant to drink at the mediation trough. I turn now to my third question – what are the key ways these issues are being addressed so as to encourage and promote mediation. Again, these can be grouped conveniently into three. Firstly, laws – domestic and international – including model laws, rules and international treaties. There are multiple examples of ways that the law can influence the use of mediation and time will permit me only to touch on these. We've heard already this morning, and we'll be hearing more about the way that international treaties can promote consistency, certainty and enforceability of mediation agreements.

At a domestic level, stimulation of and support for legal claims and settlement of disputes takes many forms and we've also heard about some of these in the previous speech this morning. Prominent examples include the Arbitration Ordinance, Mediation Ordinance and now the Apology Ordinance and the arbitration and mediation legislation third party funding amendments. Legislation itself is no guarantee that ADR processes will be taken up. This goes to the process uptake issue. The second way to address issues affecting the use of mediation is by court, government and non-government bodies, agencies, practitioners and researcher initiatives to promote the use and development of mediation. The remarks made by previous Secretaries of Justice, and again this morning, exemplify the importance of champions and advocates for social and legal change in this context. There are a number of examples, locally, of initiatives to combine arbitration and mediation services and no doubt those will continue to be an exciting area of development. Another area of development that cannot go unnoticed, also the subject today, is the use of information and artificial intelligence in ADR.

I would like to just refer very briefly to the development of adaptive and blended processes. An example from my own experience, which exemplifies the creativity that can be achieved when researchers, academics, practitioners and the judiciary put their heads together. I was fortunate to supervise an

international PhD student who set out to examine how the combinations of mediation and arbitration in international dispute resolution could be enhanced. Time does not permit me to elaborate on her enquiry and results and recommendations, but the good news is that a book is shortly to be published by Empress Books, in which her recommendations for furthering that will be set out, which I am sure will be of great interest to practitioners in Hong Kong. The third way that constraints can be addressed is through education, training, cooperation and collaboration between practitioners. As an academic, I'm accustomed to hearing that the solution to most problems in the legal profession, in ADR and in fact the world at large, lies in more comprehensive education at universities.

One important point made by my former PhD student, Dilyara Nigmatullina, I think which is very pertinent for today, is that in international commercial dispute resolution environment of today, more arbitrators need to be trained in mediation and more mediators need to be trained in arbitration. That itself may allow for more adaptive processes. And in my paper, when it's published in the conference booklet, you'll read about a recent initiative in Western Australia, where one of my colleagues is developing an innovative process which is referred to as facilitated arbitration.

Let me then make my concluding remarks. To return to what I said at the beginning of this talk, mediation provides parties in dispute the opportunity for meaningful dialogue and to agree on creative solutions. This remains the reason why we need to promote mediation. There are challenges ahead, as well as opportunities, none the least, for example, posed by the absence of human contact in many aspects of online dispute resolution. Central to the growth of mediation is the need for broad training of dispute resolution practitioners, starting in law school in ADR training and continuing on thereafter. The Apology Ordinance in a reminder that by looking at the central tenant of mediation, conversation, rather that confrontation, there are opportunities to do less harm and even repair existing relationships between the parties. I conclude that adhering to consensus and harmony as guiding

principles in civil dispute resolution is the masthead of the ship that will being the mediation horizon closer to Hong Kong and to other systems. Thank you.

Hong Kong Apology Ordinance (Cap.631)

Professor Robyn Carroll[1]

(Transcript)

The enactment of the Apology Ordinance has its beginning in the recommendations in 2010 of the working group of mediation and over the last eight years, there's been a lot of work done to bring this ordinance into existence. And so it's very fitting that this would be a topic of one of the sessions today. Commenced operation on the 1st of December of 2017, it's a very short ordinance, it has 13 sections and a schedule. And you can see here what I am going to run through in this short presentation, what is apology protecting legislation, an overview of the ordinance, how it works and how it relates to mediation and then to make some concluding remarks.

What will be obvious in my talk is that the Apology Ordinance applies to all sorts of disputes, including medical and other professional negligence, traffic accidents, workplace matters, employment, building, constriction and commercial disputes. The full gambit of matters. And I will use a simple example of an accident to illustrate the operation of the ordinance. We see here a badly damaged bus. We can imagine that people were seriously injured when this damage occurred. Being a school bus, it may be a child was badly injured. The need to provide financial compensation to pay medical expenses and the pain and suffering for accident victims will have arisen. But there are likely to be other needs that arose. Needs that are not necessarily recognized as loss by the law. The parents of a child, for example, might suffer emotional distress from the incident and one could make sure that better safety measures are used in the future. They may want an apology from the bus driver, of from the bus driver's employer, to feel reassured that suffering is acknowledged and more care will be taken in the future. Let's assume that the driver of the bus says the following to the passenger: I am so sorry. It's my fault that you are injured. I was distracted by one of the other passengers on

[1] Professor, University of Western Australia Law School; Co-founder, International Network for Law & Apology Research (INLAR)

the bus. I looked away from the road for an instant. And that is why I accidentally drove into the barrier. I will pay you compensation and be more careful in the future. What is said here, in this illustration, can be understood as making up multiple components of an apology. An apology can be made up of an expression of emotion, sorriness, and acknowledgement of fault, the second line. A statement of the facts relating to the accident. The reference to being distracted. And an undertaking to avoid such accidents in the future. So imagine now that a dispute has arisen, disagreement about who is responsible for the accident or over the amount of compensation that should be paid. Enters the apology ordinance. The common feature of apology legislation relates to the rules of admissibility of evidence. Evidence of an admission of fault or liability, which might come in the form of an apology, is generally admissible in civil proceedings to prove fault or liability. The central feature of apology legislation is to modify or provide that the usual rule of evidence does not apply. In many, in fact the majority of jurisdictions that have this legislation, they only protect a statement of sympathy, or the "I am sorry part" of what we've seen. This is sometimes referred to as protecting a partial apology. This means that the rest of the apology, which accepted fault and explained what happened, would not be protected, the evidence of that would still be admissible. But other jurisdictions, now including Hong Kong, provide wider protection and define an apology as an expression that includes an admission of fault, sometimes referred to as a full apology. This is consistent with research that shows that most people do not regard an apology that does not acknowledge fault as a real apology.

Another feature of apology legislation is that in no jurisdiction does it apply to criminal proceedings. So we're only talking about civil proceedings here. And also in Canada and Hong Kong, the legislation makes void a term of a contract that denies an insured party a payout, under the contract, if they make an admission of fault or liability. Distinctive features of the Hong Kong legislation – there's a number of these and I will mention three. Most significantly, I suggest, is the definition of apology to include a statement of fact. Secondly, the Hong Kong legislation applies to the widest range of applicable

proceedings, because it includes regulatory proceedings and the legislation applies retrospectively to contracts of insurance that were entered into before the first of December of 2017. So although the ordinance only applies to an apology made on or after the first of December, 2017 it can apply to an insurance policy that was entered in before that time. You can see, and this is to use the language by my co-author, James Chiu, who is in the audience today, that there have, in a sense, been waves of this legislation, starting in 1986, in the State of Massachusetts in the US, where most of the jurisdictions in the US only protect the partial apology, coming to the shores of Australia where we have a mixed type of legislation, then to Canada, very extensive legislation and finally to Hong Kong, after Scotland, the most extensive protection provided.

The object has already been spoken of by the Secretary for Justice, so I'll say nothing more than to reinforce that, to promote and encourage the making of apologies, with a review to preventing the escalation of disputes and facilitating their amicable resolution. The definition of apology is very important for the operation of the ordinance. You can see here, then, it begins that it applies to an apology made in connection with a matter, as I've said, any tort, any contract matter, any civil proceedings arising under statute. It means an expression of regret, sympathy or benevolence, but it goes beyond that. It can be oral, written or by conduct. But it also includes any part of the expression that is an express or implied admission of a person's fault and liability and it includes a statement of fact. So everything that was in that example I gave you, after the bus accident, would be covered and be inadmissible as evidence in civil and non-criminal proceedings.

In terms of applicability of the legislation, the scope of its application is again determined by a number of sections. Section 5 of the Ordinance says it's only apologies made on or after the first of December 2017. Proceedings vary wide, judicial, arbitral, administrative, disciplinary and regulatory proceedings. There are some laws that are not effective. These are all laws that operate to encourage the resolution of disputes in some way, facilitating, party resolution through discovery rules, defamation law, which actually provides some

protection and some defences to a party who has made an apology for a defamatory publication. And if they do publish an apology, then it can be used in mitigation on their damages. And under the mediation ordinance, an apology made in mediation would be non-disclosable and inadmissible mediation communication in any case.

I'll run through quickly the operative provisions. An apology made by a person in connection with a matter does not constitute an admission of fault or liability, must not be taken into account in determining fault or liability in connection with a matter of prejudice of a person. It is not admissible evidence in applicable proceedings, it's not an acknowledgement for purposes of the Limitation Act and does not void a contract of insurance or indemnity. There is one exception, where evidence in an apology of a statement of fact can be admissible. That is if there is an exceptional case. In that case, the decision maker can exercise the discretion to admit that statement of fact, but only if satisfied that it is just equitable to do so, having regard to the public interest, or the interests of the administration of justice. There is – as I say, the interaction between the Mediation Ordinance and the Apology Ordinance, for those of you as mediators, is that both ordinances provide legal protection of an apology by making it inadmissible in proceedings. The mediation ordinance applies to an apology made in mediation. And what's significant about the apology ordinance is that it extends the protection to an apology from the time that the apology is made. In other words, the spontaneous apology. The objects, I would suggest to you the objects of both ordinances are complimentary, in that they promote amicable resolution of disputes. And what's significant about the apology ordinance is that it creates opportunities for parties to prevent their dispute from escalating and facilitates amicable resolution. Perhaps not in full, but maybe partially, before mediation is needed and instead of or before there's any litigation. That concludes my presentation.

The Ombudsman on Apology Ordinance

Ms Connie Lau, JP[1]

Introduction

Chairman, Distinguished Speakers, Guests, Colleagues and Friends,

2. Good morning! I am much honoured to be here this morning, participating in this Mediation Conference. Over the past two decades, mediation has been an effective means in resolving disputes in Ombudsman cases and we have never stopped advocating the use of mediation. With this, I must pay tribute to the late Mr David Newton -- a pioneer mediator, the first Secretary General of the Australian Disputes Centre, a much respected trainer of trainers -- who in 1999 kicked off training for the Hong Kong Ombudsman Office with an intensive programme. The programme, specifically designed for the Hong Kong Ombudsman Office, was attended by some 30 Ombudsman investigators, including the then Ombudsman herself. Upon completion, some were formally assessed as able to act as sole mediators. Those who are still with the Office still relish his warmth, his knowledge and his incredible abilities to inspire.

3. Since then, the Ombudsman Office continued to provide mediation training or incentives to receive training. Today, most Ombudsman investigators are trained in mediation.

4. In 2001, section 11B was added to the Ombudsman Ordinance to make mediation lawful and official in Ombudsman cases which involve no or only minor maladministration. The Ombudsman Office was well prepared for it. To promote mediation among Government departments and public organisations, we made mediation a “must say” item in our talk materials and took every opportunity to introduce the process. We held mediation workshops where public officers from different Government departments studied mediation theories and did role plays. Today, mediation has for many public officers become the preferred mode of handling complaints. Those who used to be reluctant are now forthcoming. It is a remarkable achievement and I give credit to my predecessors. They have laid down, through their strenuous efforts, an

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[1] The Ombudsman, HKSAR

unshakeable foundation for mediation in Ombudsman cases.

5. I assumed Office in 2014 and continued to promote the use of mediation on that foundation. The number of Ombudsman cases concluded through mediation has since increased six-fold from 38 in 2013/14 to 237 in the last financial year, i.e. 2017/18, representing almost 9% of the total cases pursued and concluded. Considering the nature of our cases, this is not a small percentage.

6. I wish to say so much more about our commitment in mediation. But that will have to wait. Today I am tasked to do another important job. I am here to share my thought, as Ombudsman, on the Apology Ordinance.

The Apology Ordinance

7. The Ombudsman Office is all for apology. A timely expression of regret, sympathy or condolences will reduce the escalation of dispute. In our cases, most complainants are looking for rectification, improvements; justice; and where due, an apology.

8. Even in cases where the public officers have done nothing wrong; where all they can do is to explain the Government policies, procedures and resources constraints that have resulted in the complainant's grievance -- for instance -- a single, young public housing applicant complaining about the long waiting time for allocation of a unit, the complainant may be more willing to listen to an officer who cares; who understands the predicament of the complainant; and who is willing to say the Government is sorry for the situation. As a matter of fact, we believe that a number of complainants might not have come to us had they received an early apology from the Government direct. In other words, some complaints to the Ombudsman can be avoided through the making of apologies.

9. As early as 2013, the Ombudsman Office urged in its Annual Report Government departments and public organisations to adopt a more open attitude towards making apologies and encouraged public officers to apologise to complainants for any injustice sustained. We then urged the Government to initiate study and discussion on legislation with a view to formulating laws to remove the worries of parties making apologies about implications on their liabilities.

10. In July 2013, my predecessor, Mr Alan Lai shared in a radio programme: *Letter to Hong Kong* our views on Government officials tendering apologies. We expressed our disappointment in the lack of incentives to apologise to complainants when they have experienced mishaps; we rebutted the contention that apologising was a show of weakness; and we made reference to overseas' apology laws.

11. So, we do not just welcome the Apology Ordinance -- we advocated it. In our view, the Ordinance will encourage the making of apologies by removing some disincentives.

Admission of Fault?

12. The most common concerns in making apologies seem to be the possibility that an apology will be considered an admission of fault which may be used against the apologiser in subsequent civil proceedings. These may be legitimate concerns in the legal setting. In the context of an Ombudsman case, however, they are not.

13. Section 10(1)(e) of the Ombudsman Ordinance precludes the Ombudsman from investigating a complaint which relates to any action in respect of which the complainant has or had a remedy by way of proceedings in a court. In other words, an Ombudsman case is bound by the law to be a case where it is unlikely to result in legal proceedings seeking substantial damages. If we feel that it is possible that the complainant has suffered substantial pecuniary loss and if we feel that the case should be pursued through legal proceedings, we probably will not take up the case.

14. Let me give an example in the medical setting. Complaints lodged with us about the medical setting will usually include long waiting time at the Accident and Emergency Room; rude doctors; unhelpful nurses; and poor ambulance service. These are typical administrative matters in the medical setting. One quick look and you will see that it is unlikely that these cases have caused any substantial pecuniary loss to the complainants; we cannot reasonably expect these complainants to resort to legal proceedings seeking damages. In our view, therefore, worries that an apology in these cases will subsequently hurt the apologiser in civil proceedings are unjustified, simply because subsequent civil proceedings are highly unlikely.

15. A complaint about possible medical negligence resulting in permanent disability or even death will probably not become an Ombudsman case, section 10(1)(e) mentioned above being one of the reasons; our lack of jurisdiction over medical judgment[2] being another. Even if we do take up such a case, we will look at it from an administrative perspective and seldom, if ever, touch on matters concerning medical negligence.

16. However, I am not saying that our investigations do not result in remedies. They certainly do. A public housing applicant whose application had been wrongly cancelled gets it resumed with no loss in waiting time; a mail sender whose mail item had gone astray owing to a Post Office mistake gets his compensation with an apology; a wrongly accused customs officer gets her name cleared, not to mention "remedies" in a larger scale: faster ambulance arrival; fewer late buses; fairer auctions; safer roads and highways, etc.

Public Duty to be Just

17. In any case, unlike private entities which are responsible mainly to their shareholders and their profit-making objectives, the Government and for that matter public organisations exist to serve the people. Government departments and public organisations have a public duty to be just and morally sound. A Government worthy of its people's trust does not lie, does not seek to be "economical with the truth" to avoid liabilities, and certainly does not take pride in doing so. Public officers represent the Government. If they have done something wrong, they should apologise to the person wronged. If the apology or the statement of fact is subsequently admitted as evidence against the apologiser, so be it. Even if this results in claims for damages which could otherwise be avoided, so what? Indeed, Government should proactively offer compensation and remedy to the wronged party instead of evading claims.

18. In this regard, while we would like to see senior officials aim at removing the fear in being frank, at times they are the ones who instil it. They usually base their concerns on legal advice, which would more often than not advise against making apologies. We understand the reasoning. To protect the interest of

[2] *Ong Kin Kee Tony vs The Commissioner for Administrative Complaints* [1997] Hong Kong Law Report and Digest 1991.

their clients, lawyers would always advise them to avoid incurring legal liabilities. However, the ultimate decision whether or not to apologise depends on other considerations as well. Justice is at stake. We ask that decision makers -- department heads, directors, high ranking officers -- to have the courage and decency to make decisions which best serve the wider public interest. Sometimes, they have to do it in spite of legal advice. After all, we are not only concerned about the law, but also morality.

Statistics

19. Since 2012, we have been keeping track of apologies offered by Government departments and public organisations in our cases. That year, we concluded some 2,300 complaints. Apology was tendered in around 350 of them, that is, a mere 15%. Most of the apologies were tendered only after our intervention: of the 350 apologies, nearly 300 had been tendered after our intervention.

20. Over the years, number of cases with apology has consistently been on the low side and often only after our intervention. Let me show you the figures for the past three years.

Year	No. of Cases	No. of Cases with Apology	% of Cases with Apology	Apology offered?			
				Prior to our action	In the course of our action	Upon our recommendation / suggestion	No apology despite our recommendation / suggestion
2014-2015	**2,718**	275	10.1%	22 (8%)	248	6	0
2015-2016	**3,100**	245	7.9%	24 (9.8%)	219	4	0
2016-2017	**2,907**	248	8.5%	18 (7.3%)	228	2	0

21. We expect, however, the numbers to rise with the enactment of the Apology Ordinance. To this end, we need more education and promotion on the merits of apologies. In short, we need a new mindset.

Way Forward

22. The Apology Ordinance does not compel the making of apologies. It encourages it. At times, we need a stronger push than just encouragement. You can see from the table that a few apologies had been tendered upon our suggestion. That was our push. Ideally, apologies should not be pushed. They should come willingly. You do not just say sorry without your heart. You

say sorry because you are. For an apology to be authentic, "a person has to be sorry and has to say so"[3].

23. For public officers to be more forthcoming in making apologies, we need to change our mindset; to remove our fear, real of otherwise; to overcome our inertia; and to step out of our comfort zone. Enactment of the Apology Ordinance is the first step towards an even more transparent and accountable Government.

24. We can do it. Remember my earlier remark about the change of mindset in handling cases by mediation? About public officers becoming forthcoming? My dear fellow public officers, my dear colleagues: it is time for us to do the same for the making of apologies. And, as Ombudsman, I will see to it that we do.

Thank you.

[3] Nicholas Tavuchis, Mea Culpa: A Sociology of Apology and Reconciliation, Stanford University Press 1991, 36.

The Use of Evaluation in Mediation

Mr Robert Fisher, QC[1]

(Transcript)

Good morning everybody, I'm sorry we are running a little behind in our programme, but I'm encouraged to say sorry, because apologies can't do you any harm. And if I seem to be galloping through my material, you'll understand why. My secret ambition have been to be a racing commentator. So first of all, I see that what we have here is the material from the presentation that I gave yesterday. This material relates to what we refer to as hard money mediation, which is a reference to one end of the spectrum of different kinds of dispute. The first thing for a mediator to understand is that there is a range of disputes, which at one end start with feelings, emotions and relationships and at the other end involves simply the result that would happen in court and how much somebody would pay. And the way in which the mediator operates needs to adjust to the kind of dispute that you are dealing with, and it also needs to adjust to the way in which the mediation is progressing. But just to illustrate one extreme end of that continuum of different kinds of dispute, we have a dispute which is solely about money, such as the interpretation of an insurance policy where one person wants to get as much money as possible, and the insurer wants to part with as little as possible. And features of that kind of dispute are that they have no interest in an ongoing relationship, they are at least primarily driven by the result that would happen in court. And feelings play a relatively small part.

Now, it's a simplification to say that any mediation is just about money or the result in court and we can forget feelings and relationships altogether. One way of looking at the many techniques invoked by a mediator is to recognize five of the well-known ones, but obviously we don't have time to go through those as to how they all operate. But the most well-known of all are facilitative at the top, and that's because that's the foundation for all modern mediation.

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[1] Fellow, Arbitrators and Mediators Institute of New Zealand; Former Judge, High Court of New Zealand

You can then graft onto that other techniques of which evaluative is only one, and you would often in a hard money mediation have a lot of emphasis towards the end of the mediation on settlement techniques, where the mediator is very active in urging the parties to settle. So the particular thing which I think may be of most interest today is the evaluative aspect of these techniques, bearing in mind that there's no such thing as an evaluative mediation. There is simply a mediation in which among the techniques that are required, one of them is being given more emphasis than in other kinds. So a typical sequence for a hard money mediation can be divided into four.

The things you do before the mediation starts, what happens at the main joint session with everybody together in the room, what happens in caucus and then finally the process of negotiation? For an evaluative technique to work, a lot of work needs to be done by the mediator and others before you get there on the day. And so you are – a well-organised mediator will typically have a conference agenda that gets distributed, you will then have a preliminary conference, either in person or by telephone, often with the lawyers. Usually there won't be time for unilateral meetings. But we then come to two items which are of special importance. One is preparation by the mediator. It's not possible for a mediator to run a highly effective evaluative technique without understanding the material. The other important thing to which much thought must be given before the mediation begins is the drafting of issues. It was Albert Einstein who said if I had an hour to solve a problem in order to save my life, I would spend the first 55 minutes working out which are the right questions. And someone else once said our job is not to provide the answers, it is to find the right questions. Because when we've found the right questions, the answers will be obvious. And this is where I think a mediator must contribute greatly in arriving at the issues. It is not something to simply hand over to the parties. It is something to help the parties coming to an understanding over.

When you get to the mediation itself and the main joint session – and this is the second of the four steps that I have referred to – in everything to do with

mediation, you need to be flexible but most of us have a pattern which is our default that we work through in a mediation. And I would always start with everybody in the room and give an opening and I would, in the course of that process, check with the parties that we have the right issues. And I deliberately do that before I hand it over to the parties to give their openings. Now, you'll recognize that this is a much more interventionist approach by the mediator than you would have been used to if you are purely facilitative mediator and it is much more interventionist than you would be taught if, like me, the training as a mediator was of the facilitative model. But one of the most critical things in a mediation is to make the best possible use of time and what I have found is that rather than simply handing it over to the parties and their lawyers to flounder around with a suggested agenda, it is better to come up with a draft and to then get their input and that's something they seem to appreciate.

The other importance about choosing the right issues is that you can offer the parties, and their lawyers, a structured debate. By a structured debate, I mean that you will have a series of issues and you will take one issue at a time. You will get everybody's input to that particular issue and in that way you avoid the problem of getting long speeches from one side with which the other side cannot engage because it covered 32 different aspects. So then we would move on to the caucus, because when we've been through that joint session, we would divide up into private groups and the mediator toddles along and talks to each group in private. And there are broadly three things which are significant in evaluative terms. There are lots of other things that are going on in the mediation but I am here to talk about the evaluative part of it. And the evaluative part of it involves going through the merits, that is to say what would happen if the case went to court. And again, you're looking at each issue as well as talking to people about what would happen if you went to court, you're trying to help them. And then you talk about best interests and finally you convert that into offers. Then we get to negotiation and there are various techniques that are possible there. I think the final thing to mention is simply that there are different degrees to which the mediator can intervene on an evaluative basis. The ideal is to have no opinion offered from a mediator,

but if the mediator does need to intervene, and typically you do to some degree, the way in which you intervene on an evaluative basis can range all the way from starting innocent questions through to an increasing level of intervention where you say that's all very well, but what are you going to say to the judge when he asks this question and so on, all the way through to the most extreme case where you start to express an opinion as to the outcome. Thank you everyone.

Special Committee on Evaluative Mediation – Background, Terms of Reference, Workplan and Way Forward

Professor TK Iu, MH[1]

(Transcript)

Distinguished guest from overseas, distinguished speakers from overseas and local distinguished speakers, ladies and gentlemen, good morning. I was a speaker of the same conference in the year of 2012. There after I was not invited any more. I must have messed up something on that occasion. They did not invite me to come in the year of 2014 and 2016. That's fine. But they sentenced me to do community service. They asked me to work on the apology legislation for five years without pay. And the CSO was extended. They asked me to do something which I don't know – evaluative mediation. Dr Robert Fisher, QC, said there's no such thing called evaluative mediation. So it is easy to go through the PowerPoints and then we have coffee.

Background. For those who are familiar with mediation in Hong Kong, we know that in the year of 2012, February, the former SJ, Mr Wong, SC, he published a working group report. That's not this report, that's a working group report for the development of mediation in Hong Kong. In that report there are 48 recommendations, none of which was about evaluative mediation. The idea of evaluative mediation came about when we had this report, the Report on the Working Group on Intellectual Property Trading. And in Chapter 8 of the Report, we have this. It is the intention of the Government to promote Hong Kong as an international IP arbitration and mediation centre. And we would like to make Hong Kong to be a hub for ADR. We would like to promote and develop the use of mediation as means to resolve IP disputes in Hong Kong. And at page 55 of the report, we have this. The Intellectual Property Department, as well as the Department of Justice, would like to explore the use of evaluative mediation on top of facilitative mediation for the purpose. And we have this, in the last paragraph, it should be considered whether the more company used facilitative model of mediation or rather the evaluative model, is more appropriate for IP disputes, particularly for disputes involving complex legal and technical issues.

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[1] Chairman, Special Committee on Evaluative Mediation of the Steering Committee on Mediation

Then we have the CE's policy address. Once again, everyone here I am sure will like to see that Hong Kong is an international legal and dispute resolution centre, providing high quality ADR services. And it is the CE's policy that we would like to promote the use of evaluative mediation in addition to, not to the exclusion of, in addition to facilitative mediation for resolving appropriate types of disputes, including those concerning intellectual property. And then we have the Central Government's policy. The dedicated chapter on Hong Kong and Macau SARs expressed the thought that Hong Kong be made a centre for international, legal and dispute resolution services in the Asia Pacific region. So with this backdrop, we are going to develop evaluative mediation, look into the issue and then we have the committee.

The special committee was formed in May 2017. And it is a committee, along with the other three committees under the Steering Committee on Mediation. What's so special about the special committee? You know that English is not my mother tongue, I look up the Oxford Advanced Learners Dictionary. Special may mean not ordinary, more important than the others – wow. And then I talked to a person with wisdom, a judge, in Hong Kong. The judge said, "TK, as you may know, under our judicial system, the basic entry point is a special magistrate. If he or she is able to get promotion, he will become a permanent magistrate. So special may mean not permanent". We have CK Kong there, and IP expert, as my deputy and then we have Mr Robin Edgerton, Professor HF Leung, and also Danny McFadden as our members. Terms of reference, I just read this out. Our job is to review the current development of evaluative mediation and provision of evaluation mediation services in Hong Kong, make recommendations on the necessary supporting regulatory framework standard, training and accreditation. Report and make recommendations to the steering committee, which is a body advising on and assisting in the promotion and development of mediation in Hong Kong. We have a work plan, just like what we did for the apology legislation, or what we did about ten years ago, eight years ago, for the development of mediation. We will start with a loose definition of evaluative mediation and then we may formulate a more accurate definition for that. And we will look around to see what happens overseas. We consider whether it is necessary to amend the mediation ordinance as well as the mediation code, in order to cater for the use of evaluative mediation. Training, code of practice, institutional providers – because we would like to make sure that our evaluative mediators are of high standard, so we have to look into these areas. Training is of utmost

importance. I am pleased to see that the Royal Chartered Institution of Surveyors, they have provided some training here, in relation to evaluative mediation, HKIAC, Hong Kong International Arbitration Centre, they also provide training courses for some of our mediator. Accreditation, this is a big question, whether we should have accredited facilitative model mediators, and then accredited evaluative mediators. We have to look into the practice of other jurisdictions and we have to work things out and I remain open in all these possibilities. Liability insurance, very important, because if somebody is going to give opinion, advice on certain matters, whether that person may attract liability. Sample mediation clause, we must seek the consent of the parties. So whether we have to change the usual form of the agreement to mediate, that is something we have to look into. Work done so far.

So what I have done as the Chairman – I sent a box of cookies, Fortnum and Mason, to Mr Robert Fisher QC, at the Bankside Chambers, asking him to come to Hong Kong to talk to us. That's the job of a Chairman, right. So we dispatched questionnaires to overseas mediation organizations, collect views from them, learn from them and we make use of this international conference to learn from our experts. We engage in dialogues with local mediation practitioners and stakeholders. I mentioned this before – we have seen organizations conducting mediation training in respect of the use of evaluation. The Department of Justice, Hong Kong International Arbitration Centre, Hong Kong Mediation Centre, Hong Kong Institute of Arbitrators, they have organized seminars and talks on evaluative mediation. It sounds like people are more receptive to this concept. Just imagine, 20 years ago, in Hong Kong, when we talk about mediation, people would have, you know, a very skeptical view. We hope that with our joint efforts we could work together and make Hong Kong as an international ADR hub, as the food paradise in the region, we don't just serve Cantonese food, you know? We could have Japanese food, Shanghainese food, Beijing food and Korean food, anything. So my committee welcomes recommendations and suggestion and we hope that you can give views to us. I managed my time properly, because the next speaker is with the name of Kim. Kim is somebody I can't afford to offend. Thank you very much.

Recent Developments in Mediation in Hong Kong - Third Party Funding

Ms Kim Rooney, Barrister[1]

(Transcript)

Thank you very much. Thank you for the opportunity to speak with you about recent developments in third party funding of mediation. I hope that I can keep to time and that I can share with you why this is hopefully an important part of supporting Hong Kong as in international dispute resolution centre. So what I would like to speak with you, in ten minutes, I know someone will share with me even to the extent of turning off my slides if I am over time, are a few things. What is third party funding of mediation, the law reform process in Hong Kong that's got to the situation where we now have a legislation pass that permits third party funding of mediation, arbitration and related dispute resolution mechanisms. Whether and why third party funders would become involved in mediation. And what their role may be. And how that relates to the question why regulate third party funding. Try and share with you briefly what the proposed approach to regulation is. And mention briefly next steps.

Now, I am going to skip the slide on what mediation is, because this room is full of experts about what mediation is. And let me move on to whether or not third party funding is relevant to mediation. As you all know, and we have heard again today, mediation is not contentious. The work of our Law Reform Commission sub-committee considered whether or not mediation is contentious. Why did we think about that? Because if it is, then these ancient 700 year old plus doctrines of maintenance and champerty would apply, which prohibited third parties from engaging in funding of disputes for money, to put it very simply. However, if mediation's not contentious, they don't apply. But further than that, as we know, mediation is increasingly promoted and in fact why am I saying this to you as experts, you know, to promote access to justice and promote settlement. Third party funders that we're talking about, and I'm

[1] Chair, Sub-committee on Third Party Funding for Arbitration of the Law Reform Commission

going to come to our definition in a minute, fund for commercial return. They're in a business. And this impacts potentially on the types of mediation funded.

As you've heard, as our SJ said, legislation that allows third party funding of arbitration and mediation was passed in June 2017. The good news is, it's been partly implemented but we still have some further steps to take. Now, here is a definition – I know it's always hard to look at them on screens, but I'd like to share it with you because it's relevant to what comes next, including why regulate. Third party funding and mediation is defined in our law as being mediation funding for mediation under a funding agreement, which will be in writing, to a funded party, by a third party funder. And here's one of the punchlines – in return for the third party funder receiving a financial benefit, only if the mediation is successful within the meaning of the funding agreement. In other words, no success, no pay. The funded party gets funded, legal assistance and other assistance, but only has to repay the funder or allow the funder to get a benefit compensation if there's a win in terms of the settlement, I'll withdraw that, the funding agreement. Okay. So who's the third party funder? And why am I mentioning this? Because as we know, and as some critics have said who don't think third party funding needs to be regulated, we've had funding for, what, probably thousands of years of disputes, in different ways. But this is, for our law, a special type of funder. A third party funder's a person who is a party to that funding agreement I mentioned, that agreement in writing, that is expressly to provide funding for the mediation and who doesn't have an interest otherwise recognized by law in the mediation, which is building on the definition for arbitration. Now, because time is short I'll just tell you, if I may, share briefly with you, there was a Law Reform Commission sub-committee, SJ was a member of that, with Robert Pang SC, Victor Dawes SC, Jason Karas, Justin D'Agostino, and I was the Chair. Kitty Fung was our secretary from the Department of Justice. We reviewed law in many countries and issued a paper in October 2015 with some preliminary recommendations. And we asked the public to comment. We had a public consultation period and we got quite a few responses who were

overwhelmingly supportive of allowing this kind of funding. We issued our final report in October 2016 and one of the things of this, one of the features of this report was we had draft legislation attached. That draft legislation was prepared by the drafting section of the Department of Justice, the Secretary for Justice and his colleagues had kindly said we could work with the drafting colleagues. So we had draft legislation prepared and in fact that really helped speed up the presentation of the legislation and its passing. Now, the recommendations that we made that are relevant to mediation include having clear standards for third party funders operating in Hong Kong, wherever they're based. And that there should be a light touch approach to regulation – I'll come back to that quickly – but the key part of that is the code of practice. And that's one of the aspects of this approach that Hong Kong still has to implement. A draft code needs to be circulated to the public, for comment and then finalized and issued. And there'll also be an advisory body, but I don't think time will permit me to talk about that. I will just say that the then Secretary for Justice, Mr Rimsky Yuen, spoke about the need to have this legislation to remain competitive, all our competitors in Asia and around the world pretty much have it, India and Ireland don't, but most jurisdictions allow this. So as we mentioned, the draft legislation was introduced, it was passed in June and it's partly implemented.

Everybody here knows why use mediation, so I won't go into that and I will skip some of these other points, because I am coming back to them. What does it mean, having clear standards for third party funders operating in Hong Kong? It means that we try and create a framework to ensure that integrity of the mediation and arbitration process in the interest of public, interest of parties. The courts, because there hasn't been much third party funding by reason of champerty and maintenance, they're still developing standards in Hong Kong. So it was thought that a code of practice should be developed that will apply to all third party funders, funding in Hong Kong, irrespective of where they're located. And it'll be issued by a body authorized under the arbitration ordinance after public consultation. So you can expect there will be consultation.

So what does this code of practice cover? Amongst other things, conflicts of interest, degree of control of the funder, confidentiality, disclosure, termination, complaints. What kind of regulation? Well, let's move through – you can find this, by the way, in the legislation that was passed last year. If you look at the arbitration ordinance, that regime's been applied to the mediation ordinance and you can see the checklist of points that the code will have to address. Why does this matter? Because funding can impact on the dynamic of a mediation. A funded party has that security blanket, they may approach their mediation a little bit differently. A funder may well want to exercise control over the process and then you get into questions of who the lawyer's duty is, if there is a lawyer or advisor, and whether in the end it's a party that decides on a settlement, or the funder. And it may impact on costs, not so much for mediation.

In fact, I've sped up so much I've got towards the end. So I can tell you a little bit about the advisory body. I should say it was recommended and the government accepted the recommendation that there should be an advisory body to monitor how this works, when it's implemented, and to keep talking to everyone who's got a stakeholder, members of the public, funders, legal profession, other advisors, to see if it's working. And so that advisory body will be established and will be in place to review this legislation, the operation of this scheme, over three years. Report regularly and prepare a final report after three years to say has it worked? What can be done better? What reforms are needed? I am sorry, I have gone through a complex topic quickly, but thank you very much.

The Role of Mediation in Resolving Disputes Relating to The Belt and Road and Bay Area Development Initiatives

Mr Adrian Hughes, QC[1]

(Transcript)

Thank you. Good morning everyone. Thank you very much to the Department of Justice for your kind invitation to me as one of your international speakers. It's a real pleasure and a real interest to take part. I see the size and enthusiasm of the audience supports the importance of mediation. In fact, Hong Kong is leading the way internationally in some of the developments that we've heard of this morning led by your highly experienced and respected Secretary of Justice in the area of arbitration and mediation. As a member of the English bar it's also a great pleasure to me to be able to cooperate with the Hong Kong bar and legal professional. Whenever we get that opportunity we take it, and it's great to see old friends. You might think inviting a barrister to talk in the context of mediation is a hopeless task. I mean, we're renowned for scrapping and fighting and not using our common sense and trying to get to get to a commercial solution, but times have changed and it's mediation and I'm going to be mentioning dispute avoidance. There are aspects of international dispute resolution of real, real importance. Just to give a little bit of background, I focus on construction and commercial law, I'm a barrister and an arbitrator, and I've long had an interest in China and in Hong Kong. When I was 18, I first came to Hong Kong aboard a ship, and I've come back as often as I could since. And since I started my career at the bar I've run a training scheme for Chinese, young Chinese lawyers in the UK in cooperation with Hong Kong. This started in the late 1980s and it continues to this day. And young Chinese lawyers comes to the UK and in the first 20 years they undertook a one year program, which involved time with London University, with the bar, with solicitors firms, and they visited the European Institutions, which in those days were relevant to the UK, and then they came to Hong Kong, which was the bridge between practice in common

[1] Barrister and International Arbitrator; UK Bar Council China Committee

law jurisdictions and legal practice in China. And I've also been on the CIETAC and CCPIT panels for a number of years. So it's a real pleasure to share the panel with Wang Fang from CCPIT today, my other colleagues.

So in the words of a prominent English judge who has no become an arbitrator and mediator, this talk is in seven parts, but because I'm going to run through things fairly rapidly don't be put off. My brief is to address firstly how mediation can contribute to resolving commercial disputes on the Belt & Road and the Bay Area development initiatives, and secondly to suggest how mediators can embrace the opportunities brought about by these initiatives. And I want to start from my experience in mediation, looking at two mediations: one that was successful, and one that was not. And they're in the context of the sort of disputes between parties from different cultures that we're likely to see on the Belt & Road and under the Bay development initiatives. The first was an arbitration at CIETAC in Beijing, and it involved Chinese and US parties and it was arose from a distributive ship agreement with an American distributor and Chinese manufacturer, and at the outset of their relationship they had wondered what governing law to choose, so they had asked an Australian consultant in Xiamen who had said, well why don't you choose English law, it's as neutral as anything. So they chose English law, but they hadn't appreciated what that entailed, and this dispute involved the finer points of fiduciary duty owed by an agent to a client and not being allowed to represent more than one client without disclosing the fact. And so I had come to the arbitration and I was part of the argument over English law. And for CIETAC this arbitration was getting very lengthly and it had lasted two and a half days, and we had two very distinguished Chinese law professors and an arbitrator from Hong Kong. The Chinese law professor chairman, after the second day he looked at the lawyers who were all scrapping, myself included, and he said, sit down, sit down everyone, until your 60 years old and fully mature you can't sensibly argue a case, and I'm going to take a break with the clients and we're going to discuss the case. So he went outside with the two principal clients and they had a smoke and they came back 15 minutes later and they announced they settled the case. They didn't want

anything more to do with the lawyers. And the chairman considered that this was a great success and he wrote a book about the case, and about the mediation techniques, the Med-Arb techniques that were involved. And it certainly was a very successful outcome where they rekindled their relationships and abandoned what would have been a costly and very destructive dispute.

Moving onto the second case, this was a case, an ICC construction arbitration in London and it was a Belt & Road project, power station, and it involved Chinese and foreign parties. An independent mediator was appointed to try to head off this very risky and expensive dispute. But the process really didn't interest either party. One party appeared not to appreciate the difficulties in its case and the risks, didn't appreciate the implications of the costs rules because the costs would have been so onerous at the end of the case for the losing party, and this was unfamiliar to a party from that jurisdiction. And then there was clearly difficulty in getting a decision to compromise the case. It was going to be easier if there was a decision and that decision had to be complied with. On the part of the other party, culturally they wanted to fight, they came to do battle. So it was a hopeless failure, the mediation, and the matter went through to acrimonious arbitration.

I'll move on to the next subject which is there are cultural issues which cause problems for international dispute resolution which will be seen in, particularly in Belt & Road, disputes in many different jurisdictions with many different cultural issues. And those are difficulties for dispute resolution and arbitration. But they suggest that mediation would be, would be a welcome solution, and I'm not going to run through them because it's announced I've got limited time, but different attitudes to the binding nature of contracts. Different attitudes to document disclosure. The different understanding of factual evidence, and whether one puts forward a project director who has to take responsibility for issues in the project, to give oral evidence. Differences in understanding of experts and independent experts, and the length and different understandings of the length and complexity of hearings. So that

mediation, all those factors, favours trying to get the parties together to discuss the case. Now, the context in China, long history of mediation in China and Asia, it's now fashionable in the UK and Western countries, but only in the last 20 odd years. So it's entirely appropriate that mediation should play a central role in Belt & Road commercial dispute resolution and avoidance. But the context in Asia has been Med-Arb and there's some skepticism in common law jurisdictions about Med-Arb, but I think that that is in part a lack of cultural understanding.

There's an example of a successful Med-Arb model in the Taiwan High Speed Rail project. And this was where there were three stages to dispute resolution. The first stage was a decision by the engineers' representative, if the parties were unhappy an independent conciliator was then appointed who also had a role as an adjudicator, and if the matter could not be conciliated within 120 days then the mediator or adjudicator made a decision. Now this was sometimes criticised because the mediation stage was thought to be inhibited by the fact that there would be an adjudication decision. And the adjudication deadline pressurised the mediations as the deadline grew nearer, but this was a successful process. A number of potential disputes were headed off by this. And so it's an example of a Med-Arb approach being effective in international construction dispute resolution. I want to mention, and I do have two or three more things that I'm going to run through, I want to mention my experience of a successful evaluative approach, or a compromise approach to mediation involving Chinese and other parties. But this was a case where the parties knew what they wanted. They came and they said that they wanted two stages, they wanted me as mediator to hear their submissions on an issue and decide that issue, and then they would take on board the decision and they'd come back a month later and they would have a facilitated mediation on the financial fall-out, and that was very successful but I think that one of the reasons why it was so successful was that they had a shared interest in football, and football brought them together, and football cemented the relationship. And I'm a great believer in international sport for setting the scene for parties to actual make friends and create an atmosphere or a

common interest which enables them to discuss the outcome of the case.

Now talking about the Med-Arb approach, but CIETAC and other Chinese institutions provide the alternative for independent mediation so that both approaches are recognised. London 2012, I want to emphasise the importance of dispute avoidance techniques. Now I believe we took the approach taken in the London Olympics from the Hong Kong disputes advisor this was a concept that led the way in putting in place a dispute advisor at the outset of a project successfully in relation to a Hospital projects here but also in relation to the construction of this convention centre, where the dispute advisor will informally discuss with the parties issues to prevent them becoming disputes. And for London 2012 we, under an NAC contract, we had parallel panels, a dispute avoidance panel and a dispute adjudication panel. And the dispute avoidance panel involved allocating an appropriate professional from that panel to discuss issues with the parties if they arose to prevent then proceeding to disputes. And then the dispute adjudication panel would only take a case for temporarily binding adjudication if the dispute avoidance panel couldn't succeed in heading it off altogether. And there were only two or three adjudications, it was a very successful process. Cross Rail is the current largest infrastructure project in Europe. They've used adjudication and management negotiations as the principle forms of dispute avoidance. These new sets for the latest NEC form, and FIDIC 2017, both incorporate dispute avoidance and the creation of a dispute avoidance and adjudication board. I won't go into this, but it just shows the importance in the most popular forms of international construction contact that everyone has taken on board the concept of dispute avoidance. And the multi tiered business dispute resolution clauses, the parties will be responsible for agreeing contractual clauses that provide for the steps in effective approach to dispute avoidance and dispute resolution.

So finally, embracing the opportunities, and I've suggested here, effectively three ways in which mediators and dispute resolvers should get involved with the development of arbitration and dispute resolution and mediation in Belt &

Road countries and in relation to, potentially to Belt & Road projects. The first is the importance of working with commercial clients to familiarise them with the options that they have for preventing any issue from becoming acrimonious disputes. And that involves education and familiarity with the contract clauses and with the choices. And two and three go together. They are…well two and four go together. Cooperation and training mediator in Belt & Road jurisdictions and in different regions in China and generally encouraging the cultural familiarity with the process of mediation and the processes of dispute avoidance. And then finally I think the exciting prospect of creating pools of mediators from the jurisdictions who might be involved, who are involved in the contracts and might be involved in the disputes. So for example, we're looking at joint pools of UK and China, arbitrators and mediators, for the Belt & Road, and no doubt you have similar arrangements in relation to Bay development and the Belt & Road. So I think there are huge opportunities. It's a very important time and I thank you for including me in this important conference, very exciting, and congratulations for the important initiatives that we've heard of this morning. And truly Hong Kong is leading the way in this very important area. Thank you very much.

The Belt and Road – Greater Bay Area

Ms Christine Khor[1]

(Transcript)

Thank you Mr Raymond, the moderator, distinguished guests, ladies and gentlemen. It's still 10 minutes till afternoon so still good morning to you all. It is an honour to be given a chance to be able to speak in this important conference and this interesting topic, which is what we discuss lately. Right. These recently announced Bay Area initiative which comprises of Hong Kong, Macau, and the nine coastal cities of the coastal southern China that include Shenzhen, Guangzhou, Dongguan, Zhongshan, Zhuhai, Foshan, Huizhou, Jiangmen, Zhaoqing, which has a regional population of 66 million and a GDP of 1.3, of USD 1.39 trillions as indicated by Raymond. Does the size of this population and the GDP as such would expectedly generate an impactful economic effect for the Belt & Road initiative. And in expecting a rapidly increasing business activity in such a dynamic business environment prevention and dispute resolution could help to mitigate the cross border business risk. At present, even given the volumes of the business activities we have crossing the borders nowadays, the present cross border disputes which come from my personal experiences include the following, like a procurement of a construction services which include the import of knowhow and technique of construction from a Chinese to Malaysia for construction of infrastructures. The partnership, joint-venture and the shareholder disputes among the parties from a different nations distribute the ships, the claims on the sales of goods and services, the banking which is now may include internet banking, cross border banking, cross border finance, and also involve the protections of intellectual properties. Now when there is a disputes over the parties from, originally from different nations, you expect legal complications. Legal complications arise as every nation has their own jurisdiction with their own legal system. The multi-legal system within the Belt & Road initiative, regions which, I mean broadly speaking, consist of common law, common law country, common law, civil law, and also Islamic law, right, for instance from Pakistan and from other Muslim countries. So these three roles actually run parallelly within the Belt Road systems. And within this Belt road initiative we understand that it covers approximately 66 countries and when business activities escalate disputes are inevitable. I mean, unavoidable. In view of the possible complications and the costly consequences if prevention is not taken preventions as

[1] Member, Alternative Dispute Resolution Committee of the Malaysian Bar Council

well as the dispute resolutions measures are to be embedded and built within the ecosystem of the Belt Road initiative for the success of the plan. Now, what do we do when we have cross border disputes? Most of us understands that we have a two broad systems, one is adversarial, the other one is non-adversarial. One by the conventional adversarial system such as local court or arbitration, when it comes to cross border disputes as jurisdiction and applicable law have always been a concern of the parties of different nation. Arbitration is generally chosen over the local court in securing a better chance and possibility of judgement, the court judgement through the recognition of arbitrary work under the New York conventions. The avenue by arbitration though principally could resolve the issue of governing law and jurisdictions would end up with scenario of one win and one loss situation and indeed the choice of the governing law and the jurisdiction may have implications on sovereignty issues, which is indeed sensitive to every nation. Whereas the non-adversarial way of resolving the disputes, one of those is a growing trend, is mediation. It is a growing trend globally given the obvious advantages we see for the mediations. Among others is the mediation, the process of mediations focuses on issues rather than the governing law which decides on whether someone is legally right or legally wrong. And the issue of sovereignty is being preserved in that manner, and needless to say mediation is also a cheaper and a speedier way to resolve, to resolve conflicts. Having said, mediation is a suitable way, is a suitable way to resolve the conflicts, mediation do have its difficulties, or we say challenges. The first known challenges as we know is the possibility of the mediator settlement agreement. Presently what we do when encountering this challenge is by combining mediator with arbitration proceedings such as known as the Med-Arb approach or Arb-Med approach and the workability of the approach is how it very much depends on the local legislations. In Malaysia, for instance, our arbitration does not provide clear provisions as to how to convert a mediated settlement agreement into a consent award. In that sense because of the possible uncertainty we prepare to practice a more careful and more cautious approach to have mediation agreement and an arbitration agreement simultaneously. In order to enable the change at the head of the mediator and the arbitrator in between the arbitration process. While the combination methods such as Med-Arb/Arb-Med work for now a more appropriate way in encountering these challenge would be to procure the signing of treaties by members countries for mutual recognition of mediator settlement mentioned by one of the speakers earlier about United Nations having a working group to discuss all the treaties. The second challenge is the finding of the cross mediations. In my personal views I always think that a well funded, or well subsidised body proven to have a higher, statistically higher chances of success as to

compared to an independent, non funded mediations. So I personally agree with the funding's of mediation bodies to uphold the qualities and the standards and the professionalism of a mediation body. Even Kim mentioned about a third party mediation, I think is a very good idea to have a legislation framework in support of these findings. The third challenge is the cultural role differences as Adrian, the speaker, has mentioned quite a bit of this, when the cultural differences could be the difference in terms of the models, or in terms of the understanding of mediation process. From my experience, for instance in Thailand their understanding of the mediation is the evaluative mediation, probably they do that in the intellectual property court where it is more technical and evaluative mediation is more appropriate. But our understanding in Malaysia for the mediation is facilitated mediations. Right. So these differences have to be addressed among the mediation, the core mediators or the parties in order to smooth out the mediation process. One of the process is getting us to improve in the mediations process, core mediation process, is to have more cross border training dialogues and to have more of these kinds of conferences or to have a practical core mediations more often so that we understand the differences. And maybe the languages can be, can be addressed by I mean mediators being appointed from different countries. Here in the Belt & Road system, Hong Kong I would say definitely have competitive advantage in the longstanding and well established common law system which they could offer to Belt Road initiative. In Malaysia we have been gaining the status, and again have a competitive advantage in the Islamic finance area. And given our similarities, our commonalities in the common law system as well as our networking overseas Chinese I will foresee Malaysia and Hong Kong would be on a good partnership in giving the service to the Belt Road initiative. That's about it. Thank you.

跨境商事調解與風險管理

Ms Christine Khor (許妙薇律師)[1]

(Article of Ms Christine Khor)

自 2013 年倡議開展以來，「一帶一路」作為中國對外區域發展的重要策略，主軸以大型基礎設施建設推動沿線各國發展，促進區域經濟，可惜隨著最近一些「一帶一路」沿線國家出現了民主政權交迭以後，不少新接任的政府選擇了重新審查其國內「一帶一路」下資助的基建項目，對不少「一帶一路」早已簽訂的各種協議和條約構成影響。

可以預見的是，「一帶一路」合約糾紛開始顯現。如今或許是面對「一帶一路」前期檢討的重要時刻，檢驗這些建設工程招標及投標，工程和合約管理，以及各項項目融資，還有其對於解決爭議服務的要求和挑戰。

商業風險

所謂商業風險既是在商業活動中，由於各種不確定因素引起的，給商業主體帶來獲利或損失的機會或可能性的一切客觀經濟現象。現實中的商業風險無處不在，一般可分為 ：

1．戰略風險 (競爭者)
2．財務風險 (匯率、利率或信貸)
3．市場風險 (市場供需變化)
4．運營風險 (運營人才、機器、技術)
5．法律風險 (法律和規章)
6．環境風險 (地理、氣候、人文)

目前，正是「一帶一路」各方檢驗執行這些大型區域基建專案的風險預防、規避和管理。其中，合約各方是否足夠瞭解不同地域投資和行業風險，對合作關係的掌握。同時，合約各方（尤其是外國方）對在地文化和習慣有否衝突，以及對在地相關法例和限制瞭解和管控。

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[1] 馬來西亞律師公會替代委員理事，馬中商業調解中心秘書長

馬來西亞「一帶一路」基建專案爭議近況

隨著 2018 年 5 月 9 日，馬來西亞迎來 60 年第一次的政權輪替，首相馬哈迪領導的新政府對前朝擬定的「一帶一路」基建專案做出檢討。其 中，最受人關注的是取消已經開展的東海岸鐵路計畫 (East Coast Rail Link，ECRL) 價值約 USD 135 億(RM550 億)和兩條價值約 USD23 億(RM 94 億)石化管道 [2]（MPP）。這兩項價值龐大，涉及中國融資和承建的基建項目爭議，可為各方作為前期檢討的好樣板，尤其是下來要討論的蘇裡亞天然氣輸送管計畫 SSER。

除此之外，未招標的馬新高速鐵路 (Malaysia-Singapore High Speed Rail) 價值超過 USD 200 億（超過 RM 800 億），可是更為複雜的涉及多方合作協定（Multi Lateral Contract），非常值得 ADR 界關注。當然，大家也不妨通過瞭解小至關丹馬中產業園 (Malaysia-China Kuantan Industrial Park) 圍牆事件 [3]來瞭解「一帶一路」與在地法規的衝突。

案例： 蘇裡亞石化管道計畫 SSER 醜聞事件 [4]

此工程由中國進出口銀行（China Exim Bank）融資，工程授方為馬來西亞財政部機構（Ministry of Finance Corporation, MOF Inc.）屬下的蘇裡亞策略能源資源有限公司（Suria Strategic Energy Resources Sdn Bhd ，SSER) ，工程頒給中國石油天然氣局（CPPB）承建。這項工程總值為 USD 23 億(RM 94 億)，包括是鋪設一條位於西馬來半島南到北 600 公里的多元石化管道（MPP），以及一條位於東馬沙巴州 662 公里的泛沙巴州天然氣管道（TSGP）。

主要工程爭議 [5]是當工程進度只完成 13%，確已支付了 88% 或 USD 20 億（RM 83 億）。其工程付款是以按時間表發放，並不符合一般以工程進度付款的國際標準如 FIDIC 建築合約。而有關合約詳情被前朝政府首

[2] The Edge，“ECRL, SSER projects ordered to cease work”， July 05, 2018, <http://www.theedgemarkets.com/article/ecrl-sser-projects-ordered-cease-work>
[3] 南洋商報，“馬哈迪環繞馬中產業園-要求拆關丹中國長城”, 23 August 2018, 《https://www.enanyang.my/news/》
[4] The Edge “SSER failed to secure rights, land to lay pipes — MoF”, 12 June 2018, <http://www.theedgemarkets.com/article/sser-failed-secure-rights-land-lay-pipes-%E2%80%94-mof>
[5] 星洲日報，“林冠英：94 億天然氣管工程爆醜聞．“13 工程竟付款 88%”, June 2018, 《http://www.sinchew.com.my》

相署列為官方機密，以首相隱藏性內閣檔或是紅色內閣會議記錄保存起來。

作為一位 ADR 專業，此類型複雜的“政府對政府”又涉及國家機要的合約糾紛，需要靈活的跨境商事調解方式來處理取消工程後所餘下來的合約糾紛。事關很多有關於合約外配套、特有的合約條款與工程賠償等事項都有公正與機密成分，非一般法庭訴訟和國際仲裁適合處理。

跨境商事調解作為優先爭議解決條款和風險管理

有別於法庭訴訟和國際仲裁，跨境商事調解的先天優勢在於高效省時、保密靈活、不傷和氣與費用低廉，非常適合於調解更複雜的跨境「一帶一路」項目的商業糾紛，由於不少「一帶一路」合約糾紛，涉及非常複雜的跨境雙方或多方，還是政府對政府（Government to Government, G-G）或政府對商業企業（Government to Business, G-B） 的合約糾紛，非一般在地或中立地司法資源可以公正與有效地處理的。因此在「一帶一路」專案合約，設定跨境商事調解作為優先爭議解決條款是迫切需要的風險管理措施， 通過整理常見的爭議類型，為「一帶一路」各方累計寶貴經驗，優化策略和執行，相信在可以預見的將來，「一帶一路」跨境商事調解將會變得越來越重要，並成為解決跨境涉外商事糾紛的主要方式。就讓「一帶一路」倡議與跨境商事調解一起成長，為沿線各國和區域發展，帶來優質的經濟貢獻。

What role mediators and mediation can play in resolving the disputes in developing the two initiatives?

Ms Wang Fang (王芳)[1]

(Transcript)

Dear distinguished guests, ladies and gentleman, good morning. I'm extremely honoured to stand here to share my view point on this session. First of all I extend my sincerest thanks to the Department of Justice SAR and also to Ada Chen which has done a lot of work to promote mediation, the most effective commercial and investment dispute resolution method in the world. Though it is the second time for me to stand here I would like to make a very brief introduction of myself and also my organisation named CCPIT/CCOIC Mediation Centre. My name is Wang Fang, I come from the Mediation Centre of China Council for the Promotion of International Trade/China Chamber of International Commerce, of course of which is really very long name to all of you. The abbreviation of our organisation is CCPIT/CCOIC Mediation Centre. CCPIT, the biggest promotional organisation of trade and investment in China. CCOIC is the biggest national chamber of commerce in China. Sometimes these names were mistakenly spelt, yeah. The mediation centre is under the name of both the CCPIT and the CCOIC. As you know there is an arbitration organisation under the CCPIT which handles disputes through arbitration, so you can say that CCPIT/CCOIC Mediation Centre is a mediational organisation under the CCPIT, handles disputes by mediation. The CCPIT/CCOIC Mediation Centre was established in 1987, so you can see it was a long history. The earliest established mediation organisation in China which handles the international trade and investment disputes by mediation. Due to the influences of CCPIT and CCOIC, CCPIT and CCOIC Mediation Centre is known by more and more people around the world.

Today the theme of the mediation conference is mediator first, explore a new horizon. I think it's a very good theme which also has a very good Chinese

[1] Deputy Secretary-General, China Council for the Promotion of International Trade / China Chamber of International Commerce Mediation Center ("CCPIT/CCOIC Mediation Centre")

version 調解為先，共創新天. It is very a good translation, as you say, you know, in this thing there are method and target. The method is to mediate first. The target is to explore new horizons. So today I would like to talk about the topic as follows. Mediation should first be adopted method when disputes arise among the participating parties in Belt & Road and Guangdong-Hong Kong-Macao Bay area development areas initiatives. Today I would like to draw your attention to the following seven questions, perhaps you think it is too much, too many, doesn't matter, answer well be followed. The first is what is the goal of the Belt & Road initiative? What is the goal of Guangdong-Hong Kong-Macao Bay area development initiative? I draw this questions to you. In my understanding a long goal of the Belt & Road initiative is to promote economic enemas to flow orderly, resources can be allocated efficiently and economic bodies will be deeply integrated. Regional cooperation can be realised at a higher level and wider level. The countries along Belt & Road will become more open, inclusive, balanced and beneficial from the initiative. The goal of the Belt & Road initiative is to strengthen the interconnection and interworking. The goal of Guangdong-Hong Kong-Macao Bay area development initiative is to deepen the communication and cooperation between the mainland, Hong Kong and Macao to promote the mutually beneficial and win-win relationship and make the Bay area become more dynamic economic zone, high quality living circle, and demonstration area of deeper cooperation between the mainland and Hong Kong and Macau. The world class Bay area and world class urban agglomeration.

The second question is what are the key words of the two initiatives? As I mentioned in the first questions it's clear that they key words of the two initiatives are communication, cooperation, mutual respect, mutually beneficial and win-win relationship. The next question is what are the features of mediation? Of course in the morning session I heard that the other speaker has mentioned this, today here all of you attend this mediation conference some of you know mediation very well, some of you love mediation very much. Some of you are devoted to the mediation work. All of us are connected with mediation, different people have their own idea of a mediation but we share

the same opinion of the characteristics or features of mediation. It is a kind of an amicable, flexible, effective and confidential dispute resolution method. Mediation encourages conversation, communication, and cooperation, and mutual respect, and finally reaches mutually beneficial with a win-win relationship. The value of mediation besides its advantages, is adaptability. All of you know that it can be used as a standalone process or can form part of a step dispute resolution procedure, preceding bilateral negotiations and preceded arbitration litigation. Also when we are faced with this large, multi-party, complex cases a mediator can also act as a facilitator of early negotiations between parties allowing for the exchange and management of documents. Narrowing and understanding of issues and constructive engagement before progressing to mediation. Okay, the fourth question is, what is the relationship between mediation and the two initiatives? As we have explored in question two and three, now we conclude that. What's the relationship between mediation and two initiatives? They share the totally identical method and target. So we discuss what kind of role mediation should play in the two initiatives. In my opinion mediation should play a very significant role in realising the two initiatives.

The fifth question is, what can we do to contribute to the two initiatives? As we say, different people should play their own roles in realising the two initiatives. As a mediation organisation we know clearly that mediation is a very useful tool and should play a very important role in promoting the two initiatives to come true. What can we do to contribute to the two initiatives? Firstly we should have a panel of professional mediators who should be well trained professionals. Actually since the Silk Road was not built in 21st Century Maritime Silk Road was put forward in 2013 most people have not considered what they could do to the Belt & Road initiative. Nearly five years past more and more people begin to realise the changes and the Belt & Road initiative has brought and will bring to them. When we talk about mediation, especially when mediation is compared with arbitration and to litigation it is regarded as simple, easy, under-level by some people who know little of mediation. Actually the real mediation should be professional. Mediators need the

professional training and only a lot of practice can polish a well-trained mediator. Just this morning the Secretary for Justice, Ms Teresa Cheng GBS SBJP, mentioned that the CEPA mediators training. As you know, CCPIT Mediation Centre is a mediation centre, mediation organisation, in the mainland who was appointed as the mediation organisation to handle the cases connected with the CEPA. So I think that in this point perhaps we can do the core mediation training together. We also find that as the economy develops people want to be respected more than before, they want to have their own say on their own issues, such as the dispute resolution problem solving. During the mediation process disputants will be respected and professional, well training mediators will help the disputants to know more about the disputes from broader angles and find the solution accepted by all the disputants. On these conditions a set of well-tailored mediation jurors is very necessary, considering the kind of other dispute resolution approaches we have to learn to borrow the power. For example, I've just settled agreement that is reached with the help of well-trained mediators under the mediation jurors of some mediation organisations a judicial recognition and enforcement of mediator settled agreement can be used.

This next question is what kind of help do we need in order to protect the rights and interests of the disputants as a mediation provider? A good for business environment is badly needed for those commercial disputes, mediation should be the first choice, which should be mandatory. First choice does not mean mandatory, but disputants should take careful consideration of mediation when the disputes arise which needs the legislation or relevant regulations from the legislative body. Usually when disputes arise most of the parties were still apply for mediation together. It's a fact. We handle the cases like this, many. So it's necessary that mediation law should be enacted that two disputants have to go to mediation if they have a mediation clause in their contract, otherwise the credits of the disputants will be decreased, or other issues. I learned that some people don't agree that mediation law ought to be enacted because they feel that there's a mediation law then the mediation would not be flexible at all. I believe that other people might have

different opinions on the issues on whether mediation law should be enacted or not. Usually, only when there is a law can mediation be regarded as important as it should be. More and more people become aware of the importance of mediation and mediation can really be a useful tool to resolve the issues.

The last question, the seventh question is, what can we do to promote the use of mediation in the two initiatives? CCPIT/CCOIC Mediation Centre is willing to work with all of you, with all these mediation professionals and mediation lovers, to promote the use of mediation. Mediation is very useful, but how to make people know the advantages of mediation when the disputes arise? That is our job. As a mediation service provider we need to make people know what kind of disputes should try mediation first. No tool is fit for all. So we have the much more dispute resolution mechanism reform in the mainland to meet the much more demands of the disputes. We do not expect all the disputants would choose mediation, but for those who are in bad need of a mediation they should easily seek help from our professional work. So in order to make people know the mediation provided, in 2018 CCPIT/ CCOIC Mediation Centre is going to work on the following two issues. The first is international mediation summit 2018 is to be held on September the 12th and 13th in Changsha, Hunan province. That is a one and a half day summit discussing that development of alternative dispute resolution all the mediators, arbitrators, judge, legal professionals, companies, you know that is the mediation users will be invited to take part in the summit. Dinner reception will be hosted on the evening of the September the 11th I think, you know, that is a big day. The other is international mediation competition to be held in the mainland China from July to September. Two different groups will be invited to take part in the event, one is the university students, the other is mediators. I hope that all of you or some of you will join us. Just, I found on the brochure that I see that Hong Kong will hold an ICC international commercial mediation competition in this October, so I think that maybe we can cooperate on these mediation competition. Okay, ladies and gentlemen, CCPIT/ CCOIC Mediation Centre is waiting to work with all of you to promote

mediation and provide the best mediation service to the people who need it. So I would be welcome some of you to apply for being the mediators of a CCPIT mediation centre, we will stick to the principle of co-consultation, co-constructing, and co-sharing. You know, this April when I was in the United States of America I talked on the ABA session, that is the American Bar Association, I was told that the 21st perhaps is the time for China, so now I should say the 21st is the time for mediation. Mediation should and will have a bright future, I do believe that. Thank you.

Dispute Resolution under the Belt and Road Initiative: Constructing an Effective Mediation Regime in the Guangdong-Hong Kong-Macau Bay Area

Professor Lin Feng[1]
Co-presenting with **Dr Peter Chan**[2]

1. Introduction: the Nature of Mediation

Mediation offers flexible dispute resolution options that take into account the interests of parties. Unlike adjudication (in its various forms), which is a zero-sum game, mediation is concerned about helping parties to reach common ground and not so much about winning or losing. The discussion on how to construct an effective mediation regime in the Guangdong-Hong Kong-Macao Bay Area (**GMH Bay Area**) must begin by thoroughly understanding the nature of mediation.

It is generally accepted that mediation is a process that possesses certain core attributes: "Mediation is a procedure based on the voluntary participation of the parties, in which an intermediary (or multiple intermediaries) with no adjudicatory powers systematically facilitate(s) communication between the parties with the aim of enabling the parties themselves to take responsibility for resolving their disputes."[3] To define mediation from a comparative perspective, Hopt and Steffek have identified that there is "a broad consensus in terms of (1) dispute, (2) voluntary nature, (3) systematic promotion of communication between the parties and (4) resolution for which the parties bear responsibility and where there is no decision-making power on the part of the intermediary".[4] There seems to be consensus that mediation cannot work well unless it is a predominantly voluntary process. While certain

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[3] Hopt, K.J & Steffek, F., 'Mediation: Comparison of Laws, Regulatory Models Fundamental Issues', in: K.J. Hopt & F. Steffek (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford: Oxford University Press, 2013, p. 3-130, at p.11.
[4] See n. 1 above, p.13.

jurisdictions tend to limit the voluntary nature of mediation (by enacting rules that makes mediation mandatory prior to the commencement of proceedings, e.g. in Italy),[5] voluntariness remains "an essential element in mediation".[6] On the core attribute of systematic promotion of communication, it is observed that "mediation is characterized by a conscious and expert support of communication between the parties rather than a spontaneous or arbitrary approach".[7] This view coincides with what Jagtenberg and de Roo describe as "modern mediation":

"By modern mediation we mean mediation as a professional activity. Mediators need to be able to demonstrate that they have mastered a new body of expert knowledge; they must be certified (at least in some countries); and they are expected to know how to navigate through a negotiation on the basis of their expertise. This sets modern mediation apart from generic or traditional mediation, where anyone could assume a mediatory role as a side-activity, operating on the basis of intuition, authority or one's life experience."[8]

While there are varying degrees to which the mediator may intervene with the process, there is consensus that the mediator should not be given substantive decision-making powers.[9] Settling a dispute is ultimately the business of the parties, not the mediator.[10] If the mediator is too interventionist and directive, the settlement may not be completely voluntary or genuine. Andrews has provided perhaps one of the most succinct summaries of a mediator's role: "The mediator's role is to act as an independent and disinterested third party and encourage the parties to talk and to move

[5] De Palo, G. & Keller, L., 'Mediation in Italy: Alternative Dispute Resolution for All', in: K.J. Hopt & F. Steffek (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford: Oxford University Press, 2013, p. 667-696, at p. 673.
[6] See n. 1 above, p.12.
[7] See n. 1 above, p.13.
[8] Jagtenberg, R. & de Roo, A., 'Frame for a Dutch portrait of mediation', Customized conflict resolution: Court-connected Mediation in the Netherlands 1999-2009, *The Judiciary Quarterly*, 2011, p. 7-23, at p. 7.
[9] See n. 1 above, p.12.
[10] See n. 1 above, p.12.

towards a possible agreed settlement".[11]

Another common trait identified in the comparative survey of Hopt and Steffek was that "the strength of mediation lies in the very way it primarily targets social conflict, and that the legal resolution merely has an auxiliary function".[12] The realization of mediation's strength in resolving social disputes must not, however, overshadow its function in the formal legal order, e.g. alleviating the caseload of the court by channeling disputes.

In addition to the above four common core attributes, it is submitted that mediation confidentiality is absolutely essential for upholding the integrity of the process and allowing parties to freely exchange views in a conciliatory setting.

2. Overview of the Regulatory Aspects of Mediation in the GMH Bay Area

2.1 Underdevelopment of Mediation Regulations in Macau

While Macau's legal community is pushing hard to promote mediation, Macau has yet to enact a "Mediation Act". Mediation is currently regulated under different administrative instruments, depending on the nature of the underlying proceedings. For example, Article 1 of the Regulation of the Centre of Arbitration for Consumer Conflicts (*Regulamento do Centro de Arbitragem de Conflitos de Consumo*) states that consumer conflicts within MOP 50,000 shall be solved through conciliatory means of dispute resolution, namely arbitration, conciliation, and mediation.[13] The government of Macau

[11] Andrews, N., *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (Ius Gentium: Comparative Perspectives on Law and Justice, Vol. 10), Dordrecht, Heidelberg, London, New York: Springer, 2012, p. 189.

[12] See n. 1 above, p.12.

[13] Also see Regulation of the Centre of Arbitration for Insurance and Private Pensions Fund Conflicts (*Regulamento do Centro de Arbitragem de Conflitos em Seguros e Fundos Privados de Pensões*); Regulation of World Trade Center — Macau, SARL (art. 3); Regulation of the Centre of Arbitration of Buildings Administration of 2011 (Regulamento do Centro de Arbitragem de Administração Predial). The Law of Internal Arbitration Act (Decree Law n. º 29/96/M) has some legal regulations on quasi-mandatory conciliation (arts. 23).

is scheduled to push for a mediation bill that encompasses all aspects of mediation very soon. No one knows what exactly is in the bill, but some practitioners are hoping that the bill will adopt the salient features of the Hong Kong Mediation Ordinance (Cap 620).

2.2 Regulation of Mediation in Hong Kong

Mediations in Hong Kong are generally carried out by parties appointing an accredited mediator (an impartial third party) on the panel of the accrediting institution (Hong Kong Mediation Accreditation Association Limited (**HKMAAL**)). Mediation practiced by HKMAAL accredited mediators is facilitative in nature. The process neatly fits into the definition of "modern mediation". It is an "underlying objective" under Hong Kong's civil procedure to facilitate the settlement of disputes.[14] The court, as part of its active case management, has the duty to encourage parties to settle using mediatory procedures. It also has the duty to help parties to settle their case. The parties and their legal representatives have the duty of assisting the Court to discharge the duty in question.[15] Practice Direction 31 (**PD 31**) was introduced to help the court in discharging this duty. Under PD 31, there will be adverse costs consequences if it can be established by admissible materials that there was any unreasonable failure of a party to engage in mediation.[16] The court will not make any adverse costs order against a party on the ground of unreasonable failure to engage in mediation where the party has engaged in mediation to the minimum level of participation agreed to by the parties or as directed by the Court prior to the mediation, or where a party has a reasonable explanation for not engaging in mediation.[17]

2.3 Regulation of Mediation in Mainland China

There are different types of mediation in China. Under the Civil Procedure

[14] RHC O. 1A, r. 1(e).
[15] PD 31 (para. 1).
[16] PD 31 (para. 4).
[17] PD 31 (para. 5).

Law, court-facilitated mediation must be conducted on a voluntary basis. However, the principle of voluntariness is not always followed in practice due to various reasons.[18] Courts may refer a case to an "outside organization" (usually a people's mediation committee) for mediation. A settlement reached under such mediation is enforceable when it is confirmed by the court under its judicial confirmation proceedings. Mediation by the courts or by people's mediation committees is evaluative in nature.

There are institutions in China established for resolving commercial disputes by private mediation charging an administrative fee. The most influential institution is the China Council for the Promotion of International Trade/China Chamber of International Commerce (**CCPIT/CCOIC**), which operates a mediation centre with national coverage (**CCPIT/CCOIC Mediation Centre**). Established in 1987, the Mediation Centre maintains a nationwide network of over 40 sub-council (local) mediation centres in provinces, municipalities and autonomous regions. CCPIT/CCOIC has an enormous presence in China.[19] The mediation is facilitative in nature.

3. Existing Joint Mediation Initiatives in the GMH Bay Area

The GMH Bay Area is one of the fastest growing economic regions in the world. Macau plays the role of the entertainment (gaming), conference and tourism hub. Hong Kong remains a steadfast and robust international financial center and service hub, still ranking high in terms of the level of rule of law. Guangdong, with star cities like Shenzhen, is home to some of the fastest growing high-tech and internet enterprises in China. This remarkable growth is characterized by rapidly expanding inter-regional commerce. Parties need inexpensive and effective dispute resolution options for complex cross-border disputes. As a result of this trend, a number of pilot programs have been

[18] Chan, P.C.H., *Mediation in Contemporary Chinese Civil Justice: A Proceduralist Diachronic Perspective,* Leiden & Boston: Brill Martinus Nijhoff Publishers, 2017.

[19] See brief overview of the CCPIT/CCOIC Mediation Centre at: http://lad.ccpit.org/second/index.aspx?nodeid=3 (last visited: 3 April 2018).

introduced to better calibrate the existing mediation systems of these regions to the mounting commercial needs.

3.1 The Mainland-Hong Kong Joint Mediation Centre

To date, there is only one cross-border mediation center that deals with disputes connected to both Hong Kong and Mainland China. The Mainland-Hong Kong Joint Mediation Center (**MHJMC**) was set up in 2015 by the CCPIT/CCOIC Mediation Center and the Hong Kong Mediation Centre.

Among its various objectives, the MHJMC aims to provide a platform to settle cross-border commercial disputes between Mainland Chinese, Hong Kong and foreign enterprises. It also aims to provide a unified accreditation system for (and assist in the training of) cross-border mediators. Individuals who have taken the Certificate Course on Cross-Border Mediator Training and passed the relevant accreditation assessment may apply to become an International Accredited Professional Mediator of MHJMC. The certificate course targets Hong Kong accredited mediators who are looking to mediate cross-border commercial disputes. In the course, participants learn the mediation model for cross-border commercial disputes and get familiarized with Mainland China's dispute resolution system.

Parties who settle their disputes under the Cross-Border Dispute Resolution Mechanism will be able to convert their settlement agreement into an arbitral award. The MHJMC recommends the following Mediation Clause be inserted in any contract: "Any dispute arising from or in connection with this contract shall be submitted to Mainland-Hong Kong Joint Mediation Center for mediation and arbitration which shall be conducted in accordance with the Center's Mediation Rules in effect at the time of mediation."

Mediation at MHJMC is facilitative in nature.[20] This has proven to be much

[20] Article 8 of the MHJMC, "The mediator shall adopt the Hong Kong International Mediation model and communicate with parties through meetings, written or oral correspondence(s) which he/she shall think fit. The mediator can conduct mediation in manners he/she considers appropriate. If the

more effective that the evaluative approach that is commonly used in conciliation procedures practiced in Mainland China.

The Cross-Border Dispute Resolution Mechanism under the Joint Mediation Centre is cost effective.[21]

3.2 The Qianhai Experience

Three regions in Guangdong deserve specific attention when one speaks of innovation in commercial disputes resolution. These are the three Free-Trade Zones in Guangdong (Qianhai-Shekou, Nansha and Hengqin).

The ADR innovations of the Shenzhen Qianhai Cooperation Zone People's Court (**Qianhai Court**) (a basic-level court serving the Qiangai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone) are worth particular attention.[22] A special characteristic of the Qianhai Court is its jurisdiction to hear all commercial cases in Shenzhen with a foreign, Hong Kong, Macau or Taiwanese element provided the claim is within RMB 50 million. To deal with its ever-increasing foreign-related caseload, Qianhai Court maintains a pre-litigation mediation procedure where its panel of mediators are legal practitioner (with at least five years of post-qualification experience) from Shenzhen, Hong Kong and other regions. The cross-border composition of the panel of mediators allows efficient handling of overseas-related cases. If a case involves Hong Kong, the court will refer it to a Hong Kong mediator (if the

mediator deems it necessary, and agreed by the parties, professionals of the related industry can be invited to assist and participate in the mediation, which the costs shall be borne by all parties."

[21] See Budget Reference at https://mhjmc.org/en/Page_Format_6.php?fmd=28 (last visited: 3 April 2018).

[22] The court structure of Qianhai Court is unconventional in that the usual court divisions were disbanded and replaced with 'adjudication teams'. The removal of the court divisions was intended to take away the administrative layer in adjudication. In all other Chinese courts today, trial judges still report to the division heads. The division head may still exercise indirect influence over how a judge decides a case in one form or another. The removal of the usual court division as an administrative unit means that the trial judge is given much greater autonomy and flexibility in adjudication. Under this new system, cases registered by the docketing team will be forwarded directly to the responsible judge who will be hearing the case, without the need to go through an administrative layer at the various court divisions. Qianhai judges are supposed to be elite judges as they were selected from the intermediate and basic-level courts of Shenzhen under a rigorous selection process.

parties agree).[23] The application of technology to mediation is also worth noting. Qianghai Court mediators may use online platforms (such as Wechat) to prepare for the mediation and conduct the actual mediation (e.g. using video conferencing capabilities).

Qianhai Court has also responded quickly to the rapid rise in international disputes arising from the Belt and Road Initiative. The Belt and Road International Commercial Litigation-Mediation Connecting Centre of Qianhai (前海一带一路国际商事诉调对接中心) was established with 40 mediators from different countries (**Qianhai Centre**). The Qianhai Centre serves a number of objectives: (1) to provide a more effective interface between overseas arbitral proceedings and enforcement proceedings in China (Shenzhen); (2) to maintain a panel of overseas mediators to deal with multi-national commercial disputes; (3) to implement the latest technologies such that mediators from around the world can conduct mediation at the Qianhai Centre without the need be physically present; and (4) to maintain close ties with different arbitration and mediation organizations around the world.

The Qianhai Court is also one of the first in China to apply Hong Kong law in deciding commercial disputes where parties have selected Hong Kong law as the governing law in their contract.

According to the latest policy opinion of the Party, the Supreme People's Court is set to establish three international commercial courts (in Beijing, Xian and Shenzhen) primarily to meet the dispute resolution challenges brought about by the Belt and Road Initiative.[24]

3.3 The Nansha Experience

[23] It appears that mediators are given powers beyond one would find in a facilitative mediator in that a Qianhai mediator may actually resolve disputes by referring to laws of Hong Kong, Macau and other regions.

[24] See the policy opinion polished by the Central Leading Commission for Comprehensively Deepening the Reforms following its second meeting on 23 January 2018: 《关于建立"一带一路"争端解决机制和机构的意见》

Similar to the Qianhai Court, the Nansha District Court maintains a pre-litigation mediation procedure.

A noteworthy innovation was the creation of an on-line commercial mediation app. The app has proved to be very effective in promoting communication in pre-mediation exchange and in the actual mediation process, especially in cross-border disputes. Similar to the Qianhai Court, the Nansha District Court has a panel of Hong Kong mediators who assist in cross-border commercial mediations involving Hong Kong. The Hong Kong mediators are free to use their own mediation methods (which are much more facilitative than their mainland counterparts). Hong Kong parties generally prefer the facilitative mediation method. The deployment of Hong Kong mediators and allowing them to follow their usual practice produced very positive results.[25]

Another noteworthy development is the creation of a "Belt and Road Initiative Legal Committee" within the Nansha District Court to promote the use of mediation in handling disputes relating to the Belt and Road Initiative. The committee has also compiled Documents of Adjudication Decisions ("DADs") that are relevant to the Belt and Road Initiative. The committee has also summoned a research team to study legal issues relating to the Belt and Road Initiative.

3.4 The Hengqin Experience

Due to its proximity with Macau, the Hengqin New Area Court handles a large proportion of Macau-related cases in Guangdong Province. Many of these cases went to mediation. Between 2014 and 2016, 124 cases were settled through mediation at the Hengqin New Area Court (out of a total of 652 Macau-related commercial cases during that period).

[25] For an example of Hong Kong mediators at work, see http://www.legaldaily.com.cn/index_article/content/2017-03/30/content_7073752.htm?node=5955 (last visited: 3 April 2018)

Since 2017, Hengqin New Area Court appointed 26 specialist mediators to handle cross-border disputes.

4. Looking into the Future: The Possibility of Constructing a Mega Mediation Centre for the GMH Bay Area

While existing mechanisms help integrate the various mediation systems in the GMH Bay Area, more can be done to improve uniformity and efficiency in the mediation of cross-border disputes.

4.1 Re-calibrating the pre-litigation mediation procedure for cross-border disputes in Chinese courts

The pre-litigation mediation procedure for cross-border disputes (e.g. in Qianhai Court) looks promising on paper. But in reality, "overseas" mediators are seldom called to take on cases.[26] It appears that courts in general are still reluctant to refer a case completely to an "overseas" individual without any supervision from the court. This is contrasted with the Hong Kong lay assessor program in these courts where the Hong Kong lay assessor is only one of the three adjudicators of a case. Going forward, there has to be a breakthrough in this mentality.

4.2 Extending the pre-litigation mediation procedure for all cross-border disputes in Guangdong

Currently, the pre-litigation mediation procedure for cross-border disputes (in which a specialist panel of mediators is maintained) is only available at courts in the three Free-Trade Zones. This procedure, if implemented properly, has the advantage of matching the parties with mediators of similar background. For instance, many of the Hong Kong parties prefer Hong Kong mediators,

[26] Based on an interview with a Hong Kong mediator at the one of the courts in the FTZs in Guangdong (2 April 2018).

even though the dispute resolution forum is in the mainland. It is therefore advisable to extend this procedure to all courts in Guangdong with steady and substantial cross-border caseloads.

4.3 Extending MHJMC to cover Macau and/or the Establishment of a GMH Bay Area Mediation Centre/Association

Currently, the MHJMC encompasses only the mainland and Hong Kong. It is suggested that the MHJMC be extended to cover Macau (and even Taiwan). In addition, other mediation institutions in the mainland and Hong Kong could also participate in this mega-cross-border mediation center.

With extended coverage and the participation of other mediation organizations, the future "GMH Bay Area Mediation Centre" could take on more complex cases involving multiple jurisdictions.

4.4 Unified Protocols in the Future GMH Bay Area Mediation Centre

Participating mediation institutions of the future GMH Bay Area Mediation Centre should agree on a set of joint protocols in the appointment of mediators. Obviously, different panels of mediators will have to be maintained given the variety of cross-border cases that the center is likely to take on in the future.

The mediator accreditation regime for cross border disputes should be jointly administered by the participating mediation institutions. Training courses should include Chinese law elements as most of the time one of the parties to the dispute would be a mainland party.

Based on the existing mediation rules of the MHJMC, the participating mediation institutions should devise a set of Model Mediation Rules tailored to the needs of cross-border cases in this part of the world.

4.5 Steering Committee for Mediation in the GMH Bay Area

As an immediate step, a steering committee for mediation should be set up to review the current system and propose changes. The committee should include members of the judiciary and the legal profession in each jurisdiction, as well as representatives of the various mediation institutions. ADR experts may sit as advisors.

5. Dispute Resolution Needs under the Belt and Road Initiative

The Belt and Road Initiative ("BRI") is an unprecedented attempt of economic integration, encompassing more than 68 countries. The economic activities generated by the BRI are likely to give rise to disputes that cover three main areas: (1) investment disputes between private investors and the states; (2) investment disputes among states; and (3) the usual commercial and investment disputes between private parties.[27] The cross-jurisdictional nature of these disputes (coupled with their infrastructure/heavy industry focus) gives parties limited dispute resolution options as the national court is generally not the ideal forum. Mediation demonstrates its strength as it is not based on any particular set of national rules.[28] So long as parties agree on a basic mediation framework, the dispute resolution process can be as flexible and inclusive as parties want it to be. This fits particular well with BRI disputes, which usually involve many different states and private parties.

The future GMH Bay Area Mediation Centre should adopt a common set of BRI mediation rules. The BRI mediation system should that take into account: (a) the special nature of BRI disputes (as discussed above); (b) the fact that many of these disputes relate to foreign states, hence the need to ensure that the mechanism is internationally recognized; (c) the cultural differences of the parties (i.e. the need to train mediators on even the most subtle etiquette);

[27] Wang, G.G., Lee, Y.L. & Leung, M.F. (eds.), Dispute Resolution Mechanism for the Belt and Road Initiative, Hangzhou: Zhejiang University Press, 2017, p. 348.
[28] *Ibid*., p. 346.

and (d) the need for finality – i.e. the system must ensure the settlement agreement is converted into a arbitral award in a timely and cost-effective manner.

Given China's leadership position in BRI, it is recommended that a "BRI Mediation Association" be established (and seated in China). The association should actively invite relevant mediation and arbitration centers in other BRI countries to join. The association can play the role of unifying ADR norms in BRI disputes and promoting policies that are conducive to BRI disputes resolution.

The New Handshake: Online Dispute Resolution and the Future of Consumer Protection

Professor Amy Schmitz[1]

(Transcript)

So I begin by saying thank you, thank you so much for having me here. It's just been lovely since I got here, which hasn't been very long. In fact, it's 13 hours behind, according to my time, so I figure I have 13 hours and 10 minutes to present, so I hope that you're all very comfortable because it'll take a while. So I'm going to just read the book for you, the new handshake, and in fact this is what I'm going to be talking about. So where this came from, it was an outgrowth really from a collaboration with Colin Rule in our work with UNCITRAL Working Group III. So we've heard some about this UNCITRAL trial and Working Group III was focused on creating a working group for development of a model procedural law that may be contractually chosen for resolving low value disputes. The working group ended in 2016 for failing to reach consensus on key issues, including enforcement of free dispute arbitration clauses. Its final statement proposes that deliberations continue in hopes that eventually global ODR will be developed. Track one proposed a set of procedures adding in binding arbitration. Track two proposed processes with two possible final outcomes, one an outcome terminating in a facilitated settlement stage where a final settlement cannot be reached and two, when you can then look for a non-binding decision by a third party neutral. In other words stage one was essentially proposing pre-dispute arbitration in the online world for business to consumer small dollar claims. Track two was essentially proposing mediation. Very different issues. And in fact it brought up political issues on an international stage because different nations have different feelings about enforcement of pre-dispute arbitration clauses in consumer cases. It was very interesting for me, sort of as a fly on the wall, in that I was one of four experts that were part of, kind of the meeting with the secretariat and coming up with different procedural rules. What was sort of funny really was that we had this group together and we met and we came up with these great rules and everyone's going to love our rules, and it's got to be good for companies, it's good for consumers, we're going to have online dispute resolution on a global stage. Well, I of course had much rose-coloured glasses.

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[1] Professor, University of Missouri School of Law

You get in there then for the rest of it, well we all know what happened, there were different concerns, there were big fights about track one versus track two.

At the same time that UNCITRAL Working Group III was happening there was also development of the online dispute resolution platform in the EU and in other places where they were kind of thinking more in terms of trade within different regions. So where did that leave us? No consensus could be reached regarding online arbitration or uniform procedures for what is fair. I mean fairness is in the eye of the beholder, right. We all have different feeling about what is fair. Instead, working group three, though it did recognise that there is a need for advancement there's a need to think about how do we build the trust in e-commerce? How do we help both companies and consumers in order to promote economic development throughout the world and protect consumers? So Colin Rule and I, he worked with eBay creating the dispute resolution systems for eBay and then branched out with a start-up company, some of you may have heard about, Modria, which is now been acquired by Tyler. Well, I actually flew out there to Silicon Valley and I learned everything I could about the different processes, and we began working on essentially a blueprint more or less, which is what the book is and what I'm talking about today, for creating an online dispute resolution system at a global level. It's an exciting time. There are so many different things happening right now. There's also the national centre for technology and dispute resolution. I'm a fellow of that centre because we are focusing on different procedure that could help out consumers and companies on a global level.

Again, we are talking about e-commerce and smaller dollar claims. That's the new handshake. So I grew up in the middle of the United States we call the Midwest, and it's very rural, and there's a lot of farmers and I grew up near a lot of farms and, you know, I could ride my bike down to the farmer station, buy corn, look the guy in the eye, shake his hand, and know that I was going to have good corn. If I got home and there were worms in the corn, I could go get some new corn. There was that trust. It was built on a handshake, the idea that you look people in the eye, you know you can be treated fairly. In e-commerce we don't look people in the eye, we don't know who's at the other end of that transaction, and more and more those transactions are global. The world is getting smaller. We have a global economy. So how do we translate that handshake, that sense of trust in an online system? So I went to

my research, because that's what I do, I'm a professor, it's in my blood. So I went and I looked at consumer law and thinking about consumer rights. And what my research indicated was really nothing new, it's what we already know. In the real world sometimes merchants can make it tough for consumers to get solutions. What's really developed is the squeaky wheel system. So in the United States we talk about the squeaky wheel gets the grease. What that actually means is simply those that complain the loudest, those that fight the hardest, those with more economic power, in some cases, there's also such a thing as consumer scores that companies may use to treat different individuals differently. And it's those people with more power, with more insight, with more ability to argue their case that get the resolutions. There's also social pressures not to pursue redress. In fact, empirical research show that different individuals by their personality, by their culture, by their gender, may not fight hard for resolutions when they need them. There's also a digital divide that still does exist and therefore when we think about dispute system design we have to make it mobile friendly, because mobile phones, and mobile access to the internet is changing and narrowing the digital divide. Everywhere you go in the world, everybody's on their cell phone.

Class actions, that's an issue in the United States. They make it easier for individuals to group together to bring small dollar claims, but those are being cut off by binding arbitration clauses. So I also went in and I looked at eBay and worked with Colin to get different research hand finding out in particular what consumers want. Again, this is no surprise, you all know this, they want fast and easy resolutions. They don't want to have to pick up the phone, they don't really care about perks and giveaways, they don't want to have to negotiate about being treated fairly, they just want to be treated fairly on a consistent basis, so different people aren't getting different deals.

Privacy. We all know how important that is. Facebook. I mean, there's a lot of issues there. So we think about what consumers want, but what do businesses want? Well you want to increase traffic to your website. If you are an online merchant and buyers increase their activity and they do more buying, that's good for you. Well, you build goodwill by creating fair systems. And this was the data, the data actually showed, and this is from eBay's research. What's interesting here is if you look at that bar there to the left, the dark bar, those were the consumers who had no claims and launched no claims, okay, and you're looking at their percentage of increase of use on the internet. Notice all

those who had claims, even if they lost it increased their usage of eBay, they bought more. So eBay thought do we give people disputes, maybe they'll be happier, they'll buy more stuff. So how do you design that system, that global system? And the blueprint is laid out in more particulars in the book, but some of the things you have to think about it combating the asymmetries, thinking about binding versus non-binding. If you make it a fair and consistent system it doesn't matter whether it's binding or non-binding, it'll be self-enforcing. We're going to hear more about self-enforcing later in this panel which I'm really looking forward to. Also we think about ethics and trust marks, automation, and using artificial intelligence to improve the process. The new handshake, and the blue print is actually set out in terms of a single platform, embeddable button at both of the point of sale and at other platforms to make it easy and free for consumers, scalable for merchants so that they can use this to integrate with their own customer service provisions in order to actually save dispute resolution costs and bring in more traffic to their websites because they're increasing goodwill. Visibility for auditors and consumer agencies throughout the world. Highly automated again and scalable. You see that word scalable, very important in consumer dispute resolution, again synthesizing the design criteria. Fast, free and fair. Scalable, there you see it again. I like that word. Secure. Amicably toned. In using research form psychology in the words that you use in the communication flows in your online dispute resolution. What questions do you ask? Picture as you go through and you're clicking with a few clicks you can resolve a dispute and having the right tone of the language actually changes your ability to win, win and come to yes. Consistent, again that trust mark.

What am I talking about with the trustmark? I'm going to scale ahead here since I only have a couple of minutes and talk a little bit about iCoder. I welcome you to go to the website and to look at some of these principles. iCoder is a group that I'm working with the national centre for technology and dispute resolution and what we're doing is we're developing these standards, and the idea is if you fulfil these standards then you will get the trustmark, and if you get the trustmark you increase flow to your website. It was really encouraging and exciting. I was at a conference last summer and we were coming up with principles at Stanford University in California and there were people, merchants, large merchants including Wal-Mart, including very large companies who had sent representatives there thinking about ways that they can also help their customer service to become better by following some of

these different procedures. A lot of this I will lend to the slides, with lack of a lot of information, but I mean we look here and believe an ethical ODR must be accessible, easy for all the parties to find. The more accessible you make it, it combats asymmetries, accountable, continuously accountable for institutions, legal frameworks and the communities they serve. Competent, it has to be run by those with relevant expertise. Confidential, again very important. Equal. Respect for all participants. For example, when you create an online dispute resolution system, I go back to earlier, I said it must be mobile friendly. This is very important because you don't want it such that only consumers who have a robust laptop and a home internet connection cannot be the only individuals that are only about to get a remedy. Fair. Impartial. Neutral. Legal. Secure. Transparent. Again, I welcome and invite you to go iCoder.org to find out more about these principles.

In conclusion I can tell you I've actually been working on an online dispute resolution for 10 years which seems funny in all of the iterations and what we've all sort of been through, and the one thing I've definitely learned, is it's not simple. It is not simple, the design and build a global ODR system that can handle high volumes, cross cultures, and continuously improve. Key debates still exist around asymmetries, score, consent, class claims, and trust. This stymies the development of UNCITRAL Working Group Three, but it does not have the stymie further development. There are ways to design an ODR system that will be effective over the long term. The new handshake aims to crystallise these key considerations and lay out design criteria to create a foundation for the system. So I challenge you all to come up with different ideas and to work together. I think the rest of my esteemed panellists I'm really looking forward to listening to what they have to say because I just think we're at the beginning. I love working in this area, I love working with individuals who are thinking about law and technology and how these things converge with dispute resolution and theory and practice come together for the good of everybody involved. So I truly thank you and for those that are interested, you can go to my website and go to look at some of my other papers, and at newhandshake.org, and there will also be a webinar that I'm doing with Colin Rule that will be available internationally, and that's coming up at the end of May. So at any rate I thank you very much.

A Blueprint for Online Dispute Resolution System Design[1]

Professor Amy Schmitz[2]

(Article of Professor Amy Schmitz)

A great deal of discussion focuses on how arbitration and similar private dispute resolution harms consumers, and how businesses seek ways to avoid helping consumers.[3] It is often assumed that companies and consumers are on opposing "teams." In reality, however, consumers and companies enjoy more commonalities than contradictions. Both benefit when deals go well and disputes are resolved quickly and cheaply.

The problem is that face-to-face dispute resolution can be costly in terms of time and money. Furthermore, getting lawyers involved may inspire gamesmanship and adversarial antics aimed to protect one's reputation for staying "strong" and refusing to settle or admit wrongdoing. The solution is a well-designed online dispute resolution (ODR) system that harnesses business and consumer commonalities, and creates a win-win for all stakeholders in eCommerce disputes.[4]

That is not to say that ODR is the "end-all-be-all" for eCommerce disputes. All ODR is not fair and efficient. In fact, it is tempting to slip into cynicism about ODR and the fate of consumers on the Internet. Consumers assume that

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[1] Global ODR essay of Amy J. Schmitz - An edited version has been published in the Journal of Internet Law at 21 Journal of Internet Law 3-11 (Jan. 2018).

[2] Amy J. Schmitz is the Elwood L. Thomas Missouri Endowed Professor of Law at the University of Missouri-Columbia School of Law. I thank Colin Rule for his collaboration on ODR projects over the years, which contributed greatly to this essay that is adapted from concepts in our book, Amy J. Schmitz & Colin Rule, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION (2017). I also thank Rachel Mitchell for her comments.

[3] Consumer Financial Protection Bureau, Final Rule, Arbitration, Nov. 1, 2017, at *https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/arbitration-agreements*. On Nov. 1, 2017, the President signed a joint resolution passed by Congress disapproving the Arbitration Agreements Rule under the Congressional Review Act (CRA). This essentially overturned the CFPB's proposed rule that would have precluded enforcement of predispute arbitration clauses in consumer financial product and service agreements where it would hinder class actions.

[4] *See generally,* Amy J. Schmitz & Colin Rule, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION (2017). Again, the ideas in this essay are further distilled and explored in this book.

businesses will always have the power —as if bad consumer experiences are inevitable. Some also assume that merchants who provide internal ODR systems for solving eCommerce claims must have a hidden agenda, or unfair disadvantage.

Such assumed negativity regarding ODR is wrong. The Internet undoubtedly generates vulnerabilities for consumers, but it also creates opportunities for consumer empowerment. The time is right to take advantage of those opportunities. Merchants, payments providers, consumer groups, regulators, and other policymakers must join forces in addressing this challenge by creating a unified ODR system that provides fast and fair resolutions worldwide. Aiming to catalyze this effort, this essay will address design caveats and provide criteria for creating a just ODR system.

Addressing Asymmetries

There are many considerations for designing a just ODR system. The first is to address asymmetries that tilt the playing field in favor of merchants. Often commentators and policymakers discuss these asymmetries in terms of "repeat player advantages," which have been documented and debated for quite some time with respect to arbitration, for example. This focuses on the fact that merchants generally are repeat players in dispute resolution processes, and thus gather information that gives them an advantage in resolving disputes toward their favor. Furthermore, these repeat player merchants usually have greater legal and financial resources than consumers, again causing the system to tilt in the merchants' favor.

Said another way, merchants and consumers fare differently due to the volume asymmetry. Consider that most consumers only experience one or two problems with their eCommerce purchases in a given year, and rarely (if ever) do consumers experience problems with the same merchant. That means that even if a consumer experiences multiple purchase problems, it is likely that the consumer will have to navigate different complaints processes for each

store or merchant. They may call some companies seeking remedies, file claims with ODR systems where possible, write emails to other companies, etc. Consumers therefore gain no repeat player advantages with any one complaint system.

In contrast, sellers experience problems on approximately 1 to 3 percent of their overall sales volume. If a seller sells 100 items a month, that means 12 to 36 disputes a year. If they sell 1000 items a month, that is 120 to 360 disputes a year. As sales volume increases, so do disputes. This volume asymmetry gives the seller a significant advantage. Sellers are the proverbial "repeat player." The merchants learn the system, and can afford to hire the requisite legal assistance to help them navigate complaints toward their favor.

This relates to the information asymmetry. The seller (or the customer service employees working for the seller) quickly develops a lot of expertise about how the resolution process works. Sellers know what policies govern the outcomes rendered by the process, and they know what evidence will likely sway a decisionmaker. The consumer likely enters the process with no awareness of how it works, while the merchant enters the process with a long track record of lessons learned. That also means that the consumer must learn the rules as they navigate the process, while the seller already knows how everything is going to proceed.

The third asymmetry is the resource asymmetry. Sellers have the resources to support a long and extended resolution process, while consumers do not. Sellers also have the funds to retain counsel to deal with larger claims, and to apply policies for "paying off" the squeaky wheels, or highly valued consumers due to their zip codes or history for large purchases. However, such policies may harm those with the lowest incomes—essentially the consumer "have-nots."[5] These consumers are on their own in navigating remedy processes and seeking any sort of relief. That means that a well-designed and

[5] Amy J. Schmitz, Secret Consumer Scores and Segmentations: Separating Consumer "Haves" from "Have-Nots," 2014 *Mich. St. L. Rev*. 1411-1473 (2015).

fair redress process must be built for any user, regardless of education or resources. It must require no legal representation, understanding of policies and precedents, or presentation of evidence.

Accordingly, there is danger that volume, information and resource asymmetries will converge to tilt any ODR processes to favor merchants. However, we can design a resolution process that simultaneously compensates for the repeat player advantage and the three types of asymmetry. The solution is to give consumers control, while providing extensive help content and algorithmic support to counteract the information asymmetry that sellers enjoy. Control comes from simplicity. Consumers gain a sense of empowerment and control when they can easily navigate a resolution process without need for legal assistance or advanced education. In other words, online consumer redress processes must be very simple and straightforward for the consumer so that consumers are not disadvantaged by their lack of prior experience.

Furthermore, algorithmic support addresses the information asymmetry by digesting data from prior cases and complaints, and suggesting fair resolutions. A well designed ODR system must therefore leverage information drawn from the experiences of thousands of other buyers. Armed with data regarding prior cases and resolutions, consumers will not be left “in the dark” navigating their way toward a resolution. Furthermore, system monitoring and external auditing of the ODR process and any algorithms used should be added to catch repeat player problems when they arise. Indeed, it is easier to test ODR fairness than traditional processes due to the ease of system data collection and use of data auditing techniques.

Setting a Dollar Limit

One of the major debates regarding UNCITRAL Working Group III on ODR focused on the intended scope of a global ODR system and the definition of Business-to-Consumer (B2C) verses Business-to-Business (B2B) cases.

Determing whether a buyer is a consumer or a buisness is not a simple matter. Some businesses go online to buy large amounts of goods to stock their brick-and-mortar stores, while other sole proprietors make very few small dollar purchases and feel like “little guys” in eCommerce. It also is difficult to tell whether a seller is a professional or a hobbyist. If a seller is posting homemade mittens out of her kitchen, is she a consumer or a professional seller? At what point does one switch from being a consumer to being a merchant, and should it matter for determining the scope of a global ODR system?

Accordingly, it seems wise to bypass the debate regarding what qualifies as a “business” to define scope for a global ODR system. Instead, the best way to handle the issue is to simply set a dollar limit for the system, and include all transactions under that limit regardless of whether one would view them as B2C or B2B. This value may be different in different geographies, and it will change over time. Of course, the meaning of “low value” claims comes with its own difficulties, but it is much easier to tackle. It is nonetheless possible to set an amount, such as $1,000 and other currency equivalents, as a starting point. The amount could rise to $5,000 and currency equivalents, as $5,000 often is used for small claims courts in the United States. This would be a better starting point than getting hung up on the question of how to effectively triage cases into B2C and B2B buckets.

Bypassing the Binding vs. Non-Binding Debate

The question of whether ODR systems should deliver binding outcomes has complicated many of the discussions around consumer redress. Indeed, dissention remains regarding the legitimacy of any binding ODR for resolution of B2C claims. There are strong arguments for evaluative approaches: Evaluative outcomes can provide 100 percent closure and can be extremely efficient to deliver at volume. Some parties also desire an evaluative determination in order to know whether they are “right.” Furthermore, parties gain assured access to remedies from final determinations. This gives

disputants an incentive to put forth all their evidence, not holding facts back for future litigation, as may occur in non-binding facilitative processes.

That said, policymakers, scholars, and consumer representatives have criticized binding arbitration in face-to-face consumer processes. They argue that pre-dispute binding arbitration clauses undermine valid consent and the enforcement of statutory consumer protections and other public rights. Many legal jurisdictions in Europe, for example, forbid the use of pre-dispute binding arbitration clauses in consumer transactions. They often reserve evaluative decision making only for public bodies, such as Ombuds Offices or Consumer Courts. In these geographies, it would not be legal to require ODR outcomes to be binding on consumers.

It should be noted that there are ways to deliver evaluative outcomes in a manner that abides by due process and fairness standards. For example, increasing transparency and adding external audits assist fairness of binding processes. Evaluative determinations could be published on a central portal after appropriate redaction of private information. This portal could be easily searchable, and allow consumers and consumer advocates to learn about recently resolved cases. Although some companies may be uncomfortable with such transparency, others would welcome opportunity to garner goodwill and competitive differentiation by complying with consumer protections and providing remedies to deserving consumers.

Ultimately, however, consumers should have free choice. They should not be compelled to abide by a binding private resolution without full information to weigh the benefits and costs. Consumers should retain the right to seek public redress. Therefore, ODR systems should not block access to the courts for consumers. But if the systems are well designed, they will resolve 99.99 percent of consumer cases without need for judicial redress. Moreover, the process would expand access to any remedies, since most low dollar consumer claims would never go to court anyway. Consumers often are simply left with no recourse because the costs of pursuing claims outweigh any likely redress.

7A free or cheap ODR process would therefore open avenues to remedies, and advance consumer protection.

Dealing with Mass Claims

Isolating claims in private redress systems prevents the public from learning about major consumer protection issues. That is a major criticism of arbitration as it currently operates. If every matter is viewed as a single case, the onus always is on the complainant to report the incident in order to get their particular situation addressed. Complainants often do not have the full picture, as they only know their particular experience. This makes it very difficult to connect the dots to identify more systemic problems.

Advocates for mass claim processes such as class actions argue that resolution processes that require each aggrieved consumer to file an individual case will inevitably under-report problems because some percentage of consumers will not bother to report their issues. This means that the full extent of the situation will not be remedied. Class actions, they argue, are the only means for bringing justice to individuals with low dollar claims and shedding light on the full scope of the problem to be resolved.

These criticisms have merit, and class actions can be very powerful. Effective ODR design, however, can address transparency and allow for new means of consumer protection without the costs and drawbacks of class actions. One potential approach can be drawn from Consumer Ombuds offices in the European Union. European countries do not have class actions as we do in the United States; but they are committed to providing strong consumer protection. A global ODR system can borrow from their design by including a tripwire-like mechanism. The tripwire is triggered when a certain number of cases are filed that fit the same fact pattern.

To some extent, this is happening in the United States with the Consumer Financial Protection Bureau (CFPB). As consumers report issues in the CFPB's

complaint portal, staffers with the CFPB look for patterns in the reports. If enough similar reports are filed, the tripwire is activated, and the CFPB will notify the business and require them to do an investigation to see how many consumers might have been similarly affected.

It would be very easy to build in such a tripwire for a global ODR system. Resolutions always should start at the individual case level, but effective data collection can enable pattern detection algorithms that make it easier to detect more systemic issues. Some companies may dislike this idea, as it allows regulators to “catch” bad actors, but companies should embrace this idea. It would allow them to learn of issues before they escalate into costly class claims. Moreover, the “good guys” benefit when the regulators and consumers become aware of the “bad guy” practices and products. Next generation consumer redress systems must therefore provide resolutions that scale from single issues to mass claims within the same platform if they are to be truly effective.

Building an ODR Trustmark

Merchant and sales platforms have been designed to rely heavily on seals or badges to indicate that a merchant is a trustworthy and reliable transaction partner. In many environments, these trustmarks, such as the Better Business Bureau “BBB” seal, or the TRUSTe logo, are a valuable tool for businesses looking to establish their legitimacy online. When an eCommerce merchant first enters a market or region, the consumers in that region may have no idea whether it is trustworthy. Trustmarks, particularly those issued by a well-respected organization or public agency, can help new customers feel that merchant is safe and competent.

Trustmarks are especially important for new merchants in providing consumers with some means to trust and make purchases. New merchants do not have ratings or track records. Accordingly, it would help consumers to feel comfortable buying from new or smaller vendors if these vendors have earned

the right to post an ODR trustmark that signifies the vendor's commitment to an ODR protocol for providing a fair redress mechanism for consumers to obtain remedies if purchases go awry. Furthermore, this trustmark would go beyond unmonitored review sites and clear a way toward justice in eCommerce.

That is not to say all trustmarks have value. It can be extremely difficult for the organizations that issue the trustmarks to manually monitor the behavior of all of the organizations who have opted into the trustmark program. Even the BBB has been criticized for not sufficiently monitoring businesses under its seal. In addition, other organizations may create fake or less stringent trustmarks, thereby impairing the value of all trustmarks and causing confusion as to which trustmarks are trustworthy. Eventually trustmarks lose meaning and consumers no longer care about their existence when deciding where and how to make purchases.

At the same time, some argue that trustmarks are unnecessary due to review sites such as Yelp and TripAdvisor, and purchaser reviews on merchant sites such as Amazon. The argument is that because these sites aggregate information from thousands of users, the four or five star rating of a merchant can be trusted as a good indicator of their reliability. The problem is that these sites also have lost credibility due to "flogging," or posting fake blogs and reviews lauding products and services. Merchants also hire individuals to post fake reviews touting their own businesses and/or criticizing competitors. Furthermore, these reviews generally are unmonitored and their veracity is suspect. Deciphering reviews also is difficult because they rely on the subjective thoughts of the poster. This makes reviews a poor stand-in for more thorough external performance auditing, leaving consumers even more vulnerable to misleading information and bad experiences.

Accordingly, a well-conceived and monitored trustmark system would be beneficial for building an ODR system. There could be one unifying trustmark that earns respect through proper creation. Private entities could work in

collaboration with government regulators and other external auditors to ensure that the trustmark system is ethically administered. Specifically, merchants would earn the right to post the trustmark by agreeing to follow prescribed ODR standards of speed, fairness, and accountability. A public/private consortium would then monitor the system. A certain amount of this work could be done digitally with algorithms that catch patterns or lack of response, but there also would be some costs from human monitoring. Small subscription fees could help cover these costs.

Synthesizing Design Criteria

The challenge now is to take these observations and distill them into a plan of action. The following is a nutshell meant to catalyze discussion and development.[6] Indeed, the time is ripe to bring global ODR to fruition.
H2Fast, Free and Fair

First and foremost, we know that consumers want fast and easy resolutions. Individuals have no desire or time to pick up the phone and wait on hold or waste time haggling over a fair solution. Consumers have endured that pain for far too long. Consumers also will run from any fees for using a process for simply getting what they were promised. ODR, therefore, must be simple to access, free to consumers, and easy to understand.

This also means that the initiation for the process should reside in exactly the same location where the transaction originally took place: on the merchant's Web site. The consumer should be easily able to report an issue, and should get a solution as quickly as possible. Instant determinations would be best; failing that, however, a resolution in hours or days instead of weeks or months.

Online guides and wizards should be available to enable consumers to easily educate themselves about their rights, evidentiary obligations, procedural steps, and likely outcomes. Consumers must know exactly what they are

[6] These ideas are further explored in my book with Colin Rule, *supra* n.4.

getting into when they initiate the process. They must never feel surprised or misled by a procedural development that they did not know about prior to filing the case.

Furthermore, consumers using the system should not fear retribution for filing a claim. Data collected should be scrubbed of personally identifying information, and merchants should be prohibited from "punishing" consumers for filing to seek redress. The consumers that will use this process are likely to feel that they have been treated unfairly once, and that is the reason why they decided to try ODR. We must do everything in our power to ensure that they do not feel doubly mistreated by this redress design, and that it is as easy and straightforward as it can be, in order to ensure the consumer feels the process was fast and fair.

H2Highly Scalable

This global ODR system should not simply benefit consumers. It also must benefit merchants or they will never "sign on" and adopt the system. Scalability is therefore a must. Scalability makes ODR a problem-solver for merchants across the globe.

Merchants face an incredible volume of disputes through eCommerce (projected to be more than 1 billion disputes per year in 2017 and beyond). This volume of disputes simply cannot be resolved through human powered resolution procedures. It is much too expensive for merchants to hire sufficient customer service representatives and lawyers to deal with all the disputes eCommerce generates. This makes algorithms incredibly effective and efficient for resolving eCommerce disputes. For example, algorithms using data regarding similar disputes could help generate quick remedies and settlements.

Critics of algorithms argue that computers should never decide disputes because they eliminate the compassion and empathy of in-person interactions.

However, that ignores the fact eCommerce is generated online and over the Internet—by and through computers. Most, if not all, purchasers and merchants over the Internet do not care about personal connections. They simply want swift transactions and remedies when purchases go wrong. Algorithms that are carefully constructed and closely monitored have the power to provide the type of fast and fair resolutions consumers crave.

That said, not every case can be effectively resolved by algorithm. The ODR system must work like a filter, where algorithmic resolutions handle the easily resolvable cases. This would leave a much smaller volume that requires human attention. That means that algorithms will use data to suggest settlements, thereby leading to resolutions of nearly all cases. Nonetheless, online mediators and arbitrators could handle the few cases left unresolved. Telephone and in-person assistance also could be available as a last resort.

This approach is the only way to make the system sustainable. Consider that most eCommerce purchases are under $100. It is very hard to imagine a human-powered resolution process that will be able to handle cases at that price point on a cost-effective basis. Companies would have to spend exponential amounts to build up customer service, along with an abundance of mediators and arbitrators to resolve all of these claims. An ODR process that handles most issues through algorithms would therefore save companies costs in dealing with complaints. Moreover, such ODR would be built to scale, thus helping solve the customer service problem and assisting merchants to retain happy and loyal customers.

H2Secure

The daily news is filled with stories of scams and data privacy disasters. Consumers nonetheless are eager to continue making purchases online. In the process, however, they want to be sure that their privacy is respected. Consumers want to receive exactly what they were told they were going to get when they agreed to the transaction, and they do not want to be stuck with things without consent. They certainly do not want to learn that their data has

been sold and used in improper ways.

This brings in security and privacy. Part of being treated with respect is a commitment to maintaining consumer privacy. Consumers know that businesses are tracking when they make online purchases, use store loyalty cards, or pay for goods or services using their credit and debit cards. Data brokers track spending habits, how long one lingers on a Web site, consumers' online searching histories, family information, and even postings on social sites such as Facebook. Consumers may tolerate this data collection if it is used to improve their shopping experience, but they are intolerant of businesses treating their private data like another product to be bought and sold.

This is especially true when seeking remedies and settlement. A global ODR process must therefore respect privacy and preclude any sale of collected data. Some data about claims and issues may be collected, but it only should be used *to improve the process and assist in predicting proper remedies* based on similar cases. Again, that data must be scrubbed of personally identifying information. Moreover, data security must be a central component of the system. The ODR platform must be encrypted—and certainly much safer than email.

Amicably Toned

Tone is incredibly important. A global ODR system must set the right tone or it will fail at the outset. This is especially true given the variety of cultures and backgrounds of its users. Therefore, systems built under the presumption that all reported issues are fraud will generate frustration and inspire claims. The data shows that problems are inevitable, and the majority of them are resolvable through direct communication. Consumers and merchants want to have successful transactions, and they can be trusted to do the right thing most of the time.

This means that an ODR system should provide guided communication flows

that provide a proper mindset. If the language used within a redress flow presumes ill intent (*e.g.*, filing a "fraud alert" instead of "reporting a problem") then the users within that system similarly will assume that the other side is a bad actor that needs to be punished. The better approach is to provide simple flows starting with "item not received" or "item not as promised." Factual flows from these basic starting points keep the communications focused on finding a solution in good faith.

Ultimately, it is best when consumers and merchants can resolve a matter through mutual agreement and direct communication. That is the best outcome for a reported problem. This brings us back to the binding/non-binding debate regarding arbitration noted above. When evaluative systems impose a punitive, victim-offender narrative on problems at the outset, one party always will leave the case feeling frustrated. Accordingly, ODR guided flows focused on facts and not judgment lead to the highest satisfaction.

H2Consistent

An immediate concern regarding ODR is that it eventually will skew toward the repeat players, as noted above. Of course, as soon as a redress system is launched, potential users immediately test it. They may generate a barrage of cases and try out the different scenarios to see if they can find a seam in the design that they can exploit. Consider the individual who continually tries different scenarios in Turbotax hoping to lower one's taxes.

Accordingly, it is of utmost importance that the global ODR system be designed to combat this type of gaming. When vulnerabilities or perverse incentives are discovered in the flow, they must be addressed quickly. As the system matures, and designers re-code, reconsider, and redraft policies, new opportunities emerge for the delicate power balance between participants to be negatively affected. This is especially problematic when the profit motive comes into play. Good intentions at launch can come unstuck over the years if the systems

administrators pay too much attention to maximizing the revenue stream. This is a challenge for all redress systems, public or private, but private interests may be even more susceptible.

That is not to say that private companies should not play a vital role in creating ODR processes. Indeed, they are essential because only they are able to stay abreast of rapidly evolving developments in technology and the global eCommerce marketplace. But independent evaluators should play a role in ensuring the fairness of these privately created processes.

This can begin with tripwires that notify public regulators and non-profit oversight organizations not only of large volumes of claims regarding the same products, but also when it appears that outcomes have become skewed. Once filings cross the specified threshold or indicate that outcomes may be skewed to favor a certain merchant, regulators may be automatically notified of possible grounds for an investigation or enforcement action. Also, these tripwires may result in an automatic public notification to inform other consumers of a potential recurring problem. This type of automated action could be important especially to catch “gamers” and to alert the public of health or safety issues are at stake.

These automated notification systems also could ease companies’ overall dispute resolution costs by making the entire redress process more cost effective and efficient. The trust benefit obtained by participating businesses would provide more than enough economic benefit to justify participation. Furthermore, companies’ participation in the ODR process should help them avoid any potential enforcement actions and class claims, and the courts should view participation in externally audited third party resolution systems as a strong signal that companies are committed to treating their customers fairly.

Beneficial Trustmark

As noted above, building a trustmark for ODR could be beneficial to companies and consumers. This trustmark should (a) communicate to buyers that this system is a safe and effective place for them to resolve purchase problems; (b) earn positive notoriety to set it apart from the morass of other redress schemes promoted across the Internet; and (c) be cross-culturally valid and appropriate in a wide variety of geographies.

Ideally the trustmark should create an affiliative halo from participation if respected public and private entities contribute their reputations to the administration and management of the system. Quality merchants will be eager to associate themselves with leading consumer protection and advocacy organizations, even if participation does generate additional responsibilities. The goal is to build a reliable resolution process that consumers will come to understand and utilize, and businesses will realize a trust benefit from their participation.

Such an ODR trustmark should not be a goal in itself. Instead, it should be valuable to both consumers and merchants. It should be the backbone of a new ODR opt-in mechanism to provide buyers a tool that they can utilize should a purchase go wrong. At the same time, it should give merchants credibility, and help them obtain and retain loyal customers. Accordingly, the program must include mechanisms to throw out underperforming merchants from the program. The credibility of the system is dependent on strict enforcement of the merchant guidelines. If businesses repeatedly flout the rules and do not resolve buyer complaints, yet remain in the system, the trustworthiness of the overall program may be irreparably damaged.

Enforceable

Any ODR system that leaves merchants free to ignore resolutions is useless. Currently, some online marketplaces have not done the work required to enable effective enforcement of outcomes. For example, some classified sites do not enable buyers and sellers to hold their transaction partners

accountable for performance once the transaction is complete. Users may have no fixed username or account, and no concrete way of getting a remedy once payment is made. The consumer may know nothing tangible about the merchant, and may be unable to contact them with any questions or problems.

For example, if an online marketplace provides only a disposable forwarding email address for a transaction partner, and the parties make a cash deal in person, there is no way to resolve a later problem. Consider the buyer who pays $500 in cash for a laptop, meeting the seller in a parking lot, and then later discovers the laptop is completely non-functional. The buyer has no way to contact the seller to ask a question, and there is no way to reverse the payment made in cash.

In contrast, an ODR system must be built to allow for tracking and enforcement. Delivering resolutions to consumers that must then find ways to enforce is not an effective design. Enforcement should be automated, effective, and integrated into the transaction from inception. Merchant contacts must be tested and tracking must be part of the ODR system. Furthermore, merchants who fail to abide by resolutions and settlements must lose ability to post the trustmark. Ultimately, they must be eliminated from the program, thus harming their ability to gather and retain customers.

Adaptable

One of the key attributes of ODR is its adaptability. Any computer coder or software designer will tell you that no solution is perfect on the first try. No matter how much research, planning, and testing one does in advance of bringing a system live, adjustments always are required. Furthermore, regardless of whether a system seems to be working at launch, conditions always are changing, which requires any platform to be able to evolve and adjust if it is to remain effective over the longer term.

A global ODR system must therefore be ready to adapt and change. This will be fueled by scalability, and the high volume caseloads in eCommerce disputes. The system itself will generate a lot of data, and effective systems designers will then be able to analyze the data to learn from that flow and continuously improve the system over time. ODR systems also have the advantage of being able to engage problems much earlier in the lifecycle of the issue, and early resolutions are the most effective. ODR systems also can offer valuable insights upstream of disputes, so that the transaction environment itself may be able to adjust to prevent later misunderstandings that can turn into problems and disputes. This discipline of continuous improvement and learning should be integrated into the ODR system's design from inception to ensure continued relevance and effectiveness.

Conclusion

It is not simple to design and build a global ODR system that can handle high volumes, cross cultures, and continuously improve. Key debates around asymmetries, scope, consent, class claims, and trust have stymied development of such a system since UNCITRAL Working Group III ended in 2016. These debates, however, can be addressed. There are ways to design an ODR system that will be effective over the long term. This article aimed to crystalize key considerations and lay out design criteria to create a foundation for this system. The challenge now is to engage private and public entities to take the lead and work with merchants and consumers on a global level to take these observations and craft a systems design that integrates them into an implementable ODR solution for global eCommerce claims.

Resolving Disputes in the Digital World

Mr Nick Chan, MH[1]

(Transcript)

Thank you, thank you Norris. Good afternoon ladies and gentlemen. It's my pleasure to be with you here today. I'm really, like Amy said, I'm here to learn from you all, we're a humble mind. I represent eBRAM centre today. eBRAM, the acronym is Electronic Belt and Road Arbitration Mediation. In essence, what we see in Hong Kong is by working with all of you we could contribute to the Belt & Roach initiative. Billions of dollars brought into building the Belt & Road, rolling it out, expanding it, lots of commercial opportunities. There are bound to be disputes along the way and we're here to help. I know there are a lot of experts in the room representing different arbitration centres and mediation centres, we are here, eBRAM is here, to work with you and to learn from you and to see how together we can collaborate. We are here to build a best in class with security features in mind, as Amy mentioned. So we will have an online dispute resolution platform that hopefully will be as easy as pluck and play, we can work with your centres, together we can contribute and we can all provide excellent customer experience as you'll learn from Zhang Hao (張院長) in a bit. So, let's see, the clicker. I also wanted to mention that the Law Society of Hong Kong, how many are members? Solicitors in the room? Quite a few thanks very much, thank you for your support. I hope you are one of our members who have downloaded the Law Society App. So I was fortunate as a young lawyer, I came up with this crazy idea and was very lucky to have the council support, so we push it out now. We've 13,000 members we have about 8000, 9000 downloads with over 10,000 clicks every month. So compared to most of you in the room I definitely am no expert in arbitration mediation, but I do have computer science degree having done artificial intelligence, hoping to work with you.

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[1] Chairman, eBRAM Centre; Vice Chairman of The Law Society of Hong Kong's InnoTech Committee and Belt and Road Committee

On our committee we have representatives from a steering committee, we have representatives from the Department of Justice. Most of you already know it's not a cereal, you will have heard from our Secretary for Justice this morning about eBRAM. It's an important initiative we're trying to push out in Hong Kong. We also have representatives from the Privacy Commissioner's Office, so we want to make sure your personal data and you know customers and consumers data are kept safe. We have very strong technical support from the government LSCM office. They do a lot of great work on logistics and other IT systems. So together we want to build something great. We have representatives from the Law Society and the Bar Association. Yes, we work a lot together.

Now, I borrowed this slide from APEC research. I think a lot of you would agree there are quite a few challenges when it comes to if you have a dispute, a cross border dispute, when and whether where to spend the money to invest in resolving it by acutely going through the dispute resolution process. So as you can see here a lot of people think, nah, it will take too long, too expensive, not worth the time, just a waste of money. You know, the options are not clear for so many different ways of resolving dispute what is better so they're uncertain about the outcome. And people are asked, would you like to have the option of using ODR for resolving disputes. Resounding yes, 74%. So ODR, what kind of disputes are most suited for ODR? You know, when I think about it it's not obvious but you hear initially a lot of them are low value things. I understand from APEC research that a lot of disputes are about on average 50,000USD, roughly, so you know, a lot of you used to dealing with must bigger disputes. So this isn't going to eat your lunch so to speak. For practitioners in the room if you're normally used to in the profession of charging for expensive, more expensive relatively speaking, dispute resolution, this is complimentary, I think. Over time we can all work together, so it might be in the back of your head, yes we will have a panel, you will be inclusive rather than exclusive, we will try to open the market up to people who are otherwise not getting case assignments. Of course we still need to keep a very good standard to ensure cases are well handled. So apart from being the low value, so called lower value, but think about it that's the bulk of it, cross border disputes over the 65

countries we're expecting.

So on this slide I want to share with you a summary from an APEC survey question, whether people think ODR mechanisms are important for the growth. So anyway, majority 62.3 plus 22.2, so 24.5% of people, respondents around the world, believes that ODR is very important for the growth of the digital economy. So online mediation what do we need? These are some characteristics we have in mind. Just like recently a lot of you would have talked about or heard about the GDPR in the EU, they have previously by design, as the key concept. Same thing. We have confidentiality by design in as we go through and all these other things to. All these other characteristics are important to you and to your clients, consumers. Flexibility, it doesn't have to be too stuffy, too formal. You know, I look forward to listening to judge's talk later on. He shared with us a little bit, so I will leave it with him. Exciting. It doesn't have to be very formal. Almost anytime, anywhere. So same here. Confidentiality, time and cost saving. So it's not just about helping you to scan documents you're submitting to our eBRAM centre we will do much more than that. There are people from different countries in this room, we might not all speak the same native tongue, but we eBRAM we're hoping to have some amazing technology that can help us all communicate a lot faster and you wouldn't necessarily need to be in the same room to resolve dispute. Secretary for Justice also today talked about Hong Kong being deal maker. We also plan to deploy block chain and other artificial intelligence and big data to help with deal making and also in dispute resolution. A lot of problems sometimes people have is if you have online dispute resolution people submit you scanned documents, what if they're not authentic? How do you question that? How do you check it? We have a solution but we might leave the cat in the bag for the time being. We will go live next year, part of us will be looking for the building with you anyway.

Without further ado I just want to quickly go through, as you know 65 countries and more, and counting, let's work together. Hong Kong is a very neutral place for dispute resolution. As a practitioner myself, a lawyer, who spent more time on the commercial side of things I found sometimes, you

know, on the way up people ask me which country do you spend more time in. You know, isn't that true, you follow the money, follow the opportunity where it goes, so with Belt & Road money's being spent, being invested in many places, and somewhat fair to say a lot of money are coming out of China, and probably again fair to say if you have the money to invest you probably have some way of dating the dispute resolution mechanism, including the choice of dispute resolution rules and the place of civil arbitration or mediation. So we are not limiting ourselves to just arbitration or a particular form of mediation. We're welcome to work with you. We will have robust data security protection as I mentioned earlier. China as you know have announced and implemented cyber security laws, so there's a data residency requirement, such that residents of China their data have to be kept and stored in data centres in China. So what did you do ODR in other places in the world? Many centres already have really good ODR, but we have a natural advantage. Could be that your personal data or your customers' disputed parties, say personal data of those residents in China what if they kept in Hong Kong under a tier four, you know, data centre and protected with oversight by, you know, people from different walks of life. I think that would be a good thing. So I encourage you to work with us. We're here to learn from you and I hope eBRAM will no longer be confused with cereal and we can work together for the common good. Thank you very much.

杭州互聯網法院線上爭議解決實踐

章浩先生 (Mr Zhang Hao)[1]

2017 年 8 月 18 日，杭州互聯網法院正式掛牌成立，揭開了我國涉網案件集中管轄、專業審判、線上解決爭議的新篇章。一年以來（去年 5 月 1 日對杭州地區五類涉互聯網民事案件開始進行集中管轄試點），共收到涉網糾紛立案申請 17620 件。我院以“全業務網上辦理、全流程依法公開、全方位智慧服務”的智慧法院建設要求為目標，積極推進網路時代線上爭議解決實踐，為實現互聯網與司法深度融合提供了互聯網法院的獨特樣本。

一、背景與實踐

近年來，資訊技術日新月異，中國乃至全球電子商務、互聯網金融等資訊經濟快速發展。杭州，是互聯網經濟發展重地，網路龍頭企業高度聚集，雲計算、大資料、移動支付、智慧物流等領域的產業發展達到很高水準，被稱為“電子商務之都”“移動支付之城”。全國 85%的網路零售、70%的跨境電子商務、60%的企業間電商交易依託杭州的電商平臺完成。但隨著互聯網產業的發展，涉網糾紛數量增速迅猛，主要集中在網路交易、網路金融、智慧財產權侵權等領域，而當事人遍佈全球各地，為爭議的解決帶來了難度。2015 年 4 月，浙江省高級人民法院在杭州市中級人民法院及三家基層法院設立“電子商務網上法庭”，集中審理以上三類案件。兩年多的試點工作反映出大眾對訴訟規則的科學合理性、司法服務的便捷高效性有更新、更高的要求，杭州互聯網法院應運而生。

經最高人民法院授權，我院集中管轄杭州地區五類涉線民商事案件，即互聯網購物、服務、小額金融借款等合同糾紛；互聯網著作權權屬、侵權糾紛；利用互聯網侵害他人人格權糾紛；互聯網購物產品責任侵權糾紛；互聯網功能變數名稱糾紛。工作內容和模式可以概括為一句話，即“網上糾紛網上審”。我院利用涉網糾紛與網路主體間的天然關係，將線上方式作為化解網路爭議的主要手段。具體而言：

“一個平臺”。開發、應用杭州互聯網法院訴訟平臺（www.netcourt.gov.cn），實

[1] 杭州互聯網法院副院長 (Vice President, Hangzhou Internet Court)

現起訴、調解、立案、舉證、質證、庭審、宣判、送達等環節全程網路化，當事人無需踏進法院，即可完成訴訟全程。

“兩條路徑”。在立案前，預設 15 天調解期，引導當事人進行線上調解。調解成功，當事人可通過平臺直接向法院提交申請，法官線上瞭解案情，即時審查資料，一鍵生成文書，實現涉網糾紛“起訴—引調—司法確認”的一體化對接；調解不成，即進入訴訟環節，由法官助理、法官進行全程調解及最終裁判，確保調解和訴訟成為化解糾紛、保障權益的兩個重要手段。

“三管齊下”。利用訴前調解機制在分流案件上的功能優勢，重新設計涉網糾紛前行處置通道，形成了並行共進的三股力量。**一是互聯網企業。**已實現與部分電商平臺的對接，相關糾紛調解室也已在我院落地。凡是涉互聯網企業平臺案件，均將向平臺投訴作為前置程式，充分發揮平臺自我淨化、約束、規範的功能，緩解訴訟壓力。**二是專職調解員。**人民調解委員會、中國互聯網協會調解中心等組織在我院駐點，委派專職調解員開展線上和線下的涉網案件調解工作。**三是特邀調解員。**邀請各領域的專業人士，包括學者、律師和社會公益人員組成特邀調解員隊伍，對較為疑難、複雜和新類型的糾紛進行調解。

二、特點與成效

（一）智慧與便民相結合

依託網上訴訟平臺，將網路技術和智慧科技全面融入辦案流程，為當事人提供“網購”般便利的全流程線上司法服務。**首推智慧立案系統。**設計智慧提取資料、自動標注問題等模組，達到簡案自動審查立案、難案推送法官立案等目標，配合系統自主學習修正，實現了法院立案流程的智慧升級。**實現智慧“電子簽章”。**支援在特定位置批量精准用章，自動規範和約束公章的使用，將用印的整個過程記錄在案，確保簽章可控可查，實現“讓審理者裁判、由裁判者負責”。**推出功能全面的“移動法院”。**依託網上訴訟平臺的支撐，當事人在手機端自助立案、舉證質證，流程進度即時推送，開庭時進行多方即時交互，語音辨識在手機端即時顯示筆錄。通過智慧技術的充分應用，複雜的流程、繁瑣的程式、專業的要求，在“勾勾選選點點”的模組化設計之下，成為了當事人“一看就懂、一用就會”的簡易操作。

（二）創制與規制相結合

為滿足網路時代大眾多元訴訟需求，我院**首創“非同步審理模式”**。陳述訴狀、答辯、舉證、質證、發問、辯論等環節均在網上訴訟平臺非同步實施，自動提醒當事人完成每一環節的時間節點，指引當事人在資訊對稱情況下非同步完成庭審全過程。為使該模式運行順暢，專門制定《涉網案件非同步審理規程》，統一流程步驟，明確程式節點，大大提升了審理質效。**打造大資料深度運用電子送達平臺。**該平臺通過自動檢索、深度挖掘、智慧比對、智慧彈屏等功能，快速獲取和定位當事人的有效聯繫方式，一鍵多通道同時有效送達，及時推送和告知當事人訴訟文書和資訊。為充分發揮電子送達的作用，保障當事人合法權益，制定《司法文書電子送達規程》，明確了電子位址獲取、送達生效條件等具體要求，極大程度地解決了網路時代的法院送達難題。

（三）審理與治理相結合

注重利用杭州豐富的涉網案件形態，發揮集中管轄、專業審判優勢，對“職業索賠”“海外代購”“炒信”“平臺打假”等行為及現象進行了深入的研究，分析個案特徵，挖掘類案裁判規律，並提煉典型案例 30 餘件，促進網路空間依法治理。**推進線上多元化解糾紛機制建設**，強化訴訟平臺協同化解糾紛的主體責任，加強與線上矛盾糾紛多元化解平臺的對接與運用，指導電商企業、互聯網協會等主體利用其自身優勢和便利過濾電子商務糾紛，形成漏斗型糾紛解決模式。**切實發揮好司法建議的功能。**通過對涉網糾紛形勢、樣態和原因的分析，為網路主體提供建議。如針對以銀行為貸方的小額借貸糾紛線上起訴難等問題，在約定電子送達、庭審方式等方面向中信銀行發出司法建議；針對部分網店經營者和網購平臺管理不規範、維權不到位的問題，向淘寶、京東等發出司法建議。**發佈智慧財產權、電子商務審判“白皮書”**。深入分析智慧財產權糾紛和電子商務案件情況，厘清法律關係，解決審判難題，並就實踐中發現的問題向相關主體提出建議。近期，杭州互聯網法院成功入選首屆數字中國建設年度最佳實踐成果。

三、啟示與展望

經過一年的實踐，我院“調解與審判並行、法官與社會力量協力、技術與人力共進”的線上爭議解決機制，取得了一定的成效，但奮進之路漫漫，偉大的時代為我們提供了無限可能，也給予我們無盡的啟迪與思考：

（一）如何進一步實現工具的“智慧化”。目前，我院的線上爭議調解依賴於訴訟平臺來完成，存在方式單一、功能受限、智慧化程度不高等問題，下一步，我們將緊密結合線上調解工作的特點，打造可與訴訟平臺無縫對接的調解平臺，力爭實現兩方面功能：一是對調解程式、內容、結果等要素化、結構化，並直接引入訴訟程式，實現兩個程式資料的對接、切換，為智慧審判提供素材；二是根據糾紛內容、特點等，為調解員推送調解方案，並提供訴訟結果的預測。

（二）如何進一步實現力量的“多元化”。充分化解矛盾糾紛，必須依靠社會公眾共同參與，形成化解矛盾的整體合力。我院現有以律師、學者為主的特邀調解員隊伍，以線上方式在訴前化解了大量涉網糾紛，節約了大量司法資源，積累了許多寶貴經驗。由此，給我們以啟示：雖然因為網路空間的特殊性、便利性，在人與人之間新增了線下世界所沒有的糾紛，但也同樣是因為線上方式的便利性，為我們最大程度地開拓解紛資源、發動各界力量參與調解提供了條件。我們設想，招募、培訓高校法律專業學生——這批既懂法又懂網、時間上又相對靈活充裕的網路大軍中的優質力量——參與到特邀調解員隊伍中來，相信一定會為推動線上爭議解決提供源源不斷的生力軍。

（三）如何進一步實現結果的“實效化”。爭議解決的成效絕不應該只是停留在解紛本身，通過糾紛調處實現當事人“雙贏”以及公共利益的增進，才是此項工作價值的最充分體現。比如著作權侵權類糾紛，我們在調處時，加入了促合思路，由原來單純的“侵權人賠償”轉化為“侵權人與被侵權人合作”，在雙方合意的前提下，侵權人的行為得以追認，被侵權人的權利得以彰顯，公眾的福祉得以促進。爭議真正解決的標誌在於義務的履行和執行上。除積極督促義務人自動履行案件以外，我院也嘗試著針對涉網案件的特性，借助對網路支付工具的查封、凍結等手段，提高司法威懾力，提升線上爭議解決的實效性。

各位來賓，作為全球首家互聯網法院，我們將以全面推進依法治網的大視野，秉持開放的發展觀、協同的治理觀、融合共生的共用觀，謀劃、深耕互聯網法院建設，既要做互聯網與司法深度融合的先行者，又要主動發揮司法能動性，做我國網路空間主權與安全的維護者。與在座的各位攜手共進，一同開啟美好明天的智慧之門！

Online Dispute Resolution

Mr Yang Peng (楊鵬)[1]

(Transcript)

Good afternoon ladies and gentlemen. It's my honour to be here to share with you some of our experience, you know, managing ODR in Alibaba. So as just introduced, I'm Yang Peng from Alibaba in charge of customer experience and the website that I'm now in charge of Alibaba.com. This is the first website Alibaba established, it's the international B2C website. So let's quickly move on.

Just now Professor shared some figures about eBay. I'm now going to share with you some figures about Alibaba. So first of all Alibaba was established in 1999, so after 18 years of development you can see we have developed from core commerce into some other industries. For example, in core commerce we have domestic B2C, B2B and we have international B2B, B2C like aliexperience.com, alibaba.com. We have now also moved into some other industries like cloud computing, which is alibabacloud. And we also have some other business unit, for example like in digital media and entertainment you have Youku, you have Tudou, you have Alisports, you have Alimusic, you have Damai, you know a lot of some other business units which are nowadays helping all of us to live a better life. And now we just talk about the first 18 years of Alibaba's development. Then let's look at, in 2017 how we progress our journey.

According to our fiscal report, fiscal year report, one year growth revenue achieved 58% of increase, you know, 2017 comparing to 2016. And in this rapid growth we have already seen 60% of one year growth from our e-commerce revenue. According to our forecast, in the next fiscal year the e-commerce revenue will continue to grow and our estimated one year growth of e-commerce would be more than 60% of increase comparing to the

[1] Director, Head of Customer Experience for alibaba.com

previous fiscal year.

Let me talk about how e-commerce is transforming the traditional B2B, especially in customer experience. In traditional B2B we focus a lot on commodity economy, so we focus on the availability of all the commodities and now when we move from commodity economy into experience economy, especially driven by e-commerce, we can see some characteristics. For example, like, search online, buy online. So this is our ambition. We are going to build the Alibaba.com into global guy, global sell platform, and we are now moving from global sourcing into global trading. If we can search online, buy online, then we have multiple channels for customers to use. For example, like, customer can use PC, customer can use laptop, customer can use mobile phone, and mobile phone is our new trend. Customer can use web, customer can also use app. And then, all this digital infrastructure has been, a great push to all our customers to move online. For example, like, how we promote our, you know, online payment. And also when we talk about B2B we move stuff from place A to place B. Then we talk about N2N logistic solutions. Also in e-commerce N2N solutions have a lot to do with, you know, the experience economy. And then let me talk about Alibaba. In the past we say Alibaba is an e-commerce platform. Then we say, Alibaba is a technology company. Nowadays we define ourselves as a data company, which allows us to use, you know, algorithms and also allow us to do a lot of personalisation for our customers.

As for today we are going to talk about ODR. ODR is also a very important part in, you know, improving our customer's experience. So moving on I'm going to share with you how Alibaba is now doing in terms of ODR, how we are using, AI, how we adjust our ODR mechanisms based on the trend that we see in online B2B business. Comparing online business, online B2B business to offline traditional B2B business we see a lot of characteristics, a lot of trends. For example, smaller orders, so you can see a lot of orders, their size, or their amount become smaller. High products variety. On the website you have a lot of types or categories of products that you can source. Also the sourcing

frequency increase a lot. So we see frequent souring as one of the trend, and also some customers they don't have a high focus on quality control so we see less quality control before, you know, cargo actually shipped or depart from China.

Another characteristic is diversified by a group. We see a lot of medium size, smaller size customers. This is quite different comparing to traditional B2B. Then, let's talk about the traits of only B2B ODR. Smaller, older amount than low ODR costs. High products variety it beings high complexity of the products of the ODR that we are managing and also customers expect quick resolution and when they don't have a high focus on quality control before receiving we see very slow response to defects, and also all the customer want diversified and comprehensive solutions.

Then I'm going to explain to you how we are now using AI technology to help our customers to prevent and resolve some online B2B disputes. So talking about AI technologies based on big data, in the dispute "initiate" period we use our AI technologies to predict potential disputes. During the negotiation phase, we have our AI based evidence system that can show our customers what kind of evidence is needed for this sort of dispute or what is the typical document that you need to prepare. Also during the mediation process, we have our AI based examination and approval and also during the last arbitration process we have our authoritative judgements. Based on what we have implemented so far we see all the dispute has been reduced by 55% and also the evidence of approval rates reached 90% and also the case resolution reached 85%. So AI technology does help a lot in terms of how Alibaba is managing ODR online.

Then I'm going to share with you two case studies. First of all let's look at the buyer, and the buyer is one season offline distributor of Christmas decorations. He's very experienced of offline business but he doesn't have a lot of online business experience. Then we have a seller who is a trading company. They sell seasonal home décor products and the buyer sourced 500 sets of Christmas

decorations from this seller and then according to the process the products did ship on time while the buying claimed that most probably she could not receive the products on time. So she required refund and return of products. Based on our AI technology we identified, you know the shipments departs on time, well according to the transit time it may arrive at destination a little bit late. So the buyer does not have enough time to sell the Christmas decorations stuff. Then we offer this intelligence to both buyer and seller then according to this information the buyer and seller agree and the seller agree to partial refund and then the buyer can receive the products and then sell before Christmas.

Let's move on to case number two. We have a buyer who is a seasoned online sourcing distributor and one seller, manufacturing and trading company, very experienced, international trade experience, specialising in electronic balancing scooters, which is quite popular in mainland China and some other countries, and the buyer bought 10 electronic balancing scooters. Well, he found some of the scooters could not be charged. Then the buyer provided evidence to show the charging issues, while the seller claimed that this is not the product issue this is because the buyer he did not know how to properly charge it. Then based on our AI technology, based on the past record, based on the historical record we identify that, you know, there were sort of issues of the chargers and the evidence shown by the buyers are valid. So this case successfully resolved by agreement between seller and buyer based on the AI technology provided by Alibaba.

So this is all I have already prepared for this conference and just to let you know AI technology, big data, has been a great help in terms of how Alibaba manages the ODR online and hopefully, we as the mediation group we can learn more about how we can better use data, how we can use AI technology, how we can better prevent those disputes from happening and ultimately create better customer experience. Thank you for your time. Thank you.

Establishing Matters of Fact in 'Just Tap It' Trade
Immutable Evidence for Online Dispute Resolution
Using the Belt and Road Blockchain

Mr Pindar Wong (黃平達)[1]

(Transcript)

Thank you. Thank you so much. So what I would like to use the time this afternoon is to talk about automated enforcement effectively of consensus decisions without prejudice. I think that's kind of what you guys do. But specifically this is probably the most important slide, which is that right now in the shadow of tit for tat tariffs and trade wars. This whole notion of international trade at least in the trade of tangibles, things we put in containers, has been there is a sort of question mark over that. And the opportunity that we have is to recognise that on the horizon, again new horizon, is both a risk and an opportunity. And so far what we've heard this afternoon is literally summarised in terms of ABC, right. AI, Blockchain and cloud, but really what the change here is in automation.

In Hangzhou where I will be next Tuesday, they are investing about 10 billion RMB, 1.6 billion USD, in Blockchain technologies, and so that's what I'll focus on this afternoon, is on the Belt & Road Blockchain and how that actually relates to your mediation work, specifically with respect to automated enforcement of non-prejudicial decisions, in that specific instance. So one week from now, at least online, there is going to be a fundamental change, at least in Europe, with the activation of the UDRP, and that's going to be an example of a larger change which one of the chief problems that we have faced since the early days of the internet in 1993 was this fundamental tension between sort of, geography, right, sovereigns, the rule of laws are basically sovereign and topology, the network, like the internet that didn't see borders. And so if you look back this fundamental assumption that we have, in the case of the Belt & Road, 68 different economies each which are sovereign and that was one of the risks that was mentioned, I think by Christine, is that there is this tension in our technology right, which is all online. One of the fundamental common things that we have identified in the Belt & Road Blockchain Consortium is the need for identity. And that's the thing that we didn't address very well, and what was missing in the bio was that we established in the late 90s, in fact one year before

[1] Chairman of VeriFi (Hong Kong) Limited; Founder and Chief Architect of the Belt and Road Blockchain Consortium

Alibaba, in 1998, a group called ICANN, the Internet Corporation for Assigned Names and Numbers, and I was the first vice chairman of the board of ICANN actually, back in the day, and we established through the World Intellectual Property Organization something called the UDRP, the Uniform Domain Resolution Policy. That's probably the best example I can think of the benefits of ODR. Why? Because in 1997 if you were called Alibaba.com and I wanted to become Alibaba.co in the US, UK for example, co.uk, there would be potential tension, because there could only be one domain name. And so we had to create this dispute resolution process which reduced the cost of having a dispute, which on average cost 100,000 US dollars per domain name dispute in 1998 to a few thousand dollars after ICANN established. Right. So I'm very proud of my association with ICANN as one of the first living examples, very narrow use case, of the benefits of taking dispute resolution and the cost of having a dispute, 100,000 dollars to a few thousand dollars.

I'm going to be in Hangzhou next Tuesday, you heard the court, since the beginning of the court there are 17,000 cases. Very small amounts. So the difference with online digital its volume, right, and cases are resolved in minutes over days, but not months over years. And that's going to be good for business, right. Not just for small, but for large. But here's the challenge, because this notion of sovereignty goes back to 1648, after Thirty Years War, right, there's the peace that was failure, right. The whole Westphalia view. And I think that Hong Kong, the reason why I'm trying to help the Belt & Road build the soft infrastructure, not the ports, not the air, not the factories, not the railways, is that Hong Kong's role has a very unique role. We have a the free and open internet, which I helped introduce here, class four data centres, but we also have a use by date for our law, 2047. 50 年不變, 50 years no change. So in 1997 to 2047. So in that period if Hong Kong can position itself as the number one place for ODR, online dispute resolution, and mediation services through being based in Hong Kong, I think we're going to have a very bright future, and what I call, I call this EastPhalia, right, not Westphalia, EastPhalia of 2047. This picture here is a 3D printer. And if we look at the horizon, the horizon risk is when we have a change in technology which changes assumptions, so what are those assumptions? Are we still thinking that global trade is putting things in physical containers, or 20kg packages and shipping it? I would say no. Why? Because it takes too long. Mr Yang was mentioned, he was talking that he is now gone from an e-commerce provider, right, to basically data, right, it's all about data. So what happens when we start shipping designs along the Belt & Road, intangible property, and we print it out using a 3D printer, right? Then trade happens at the speed of light. When we start shipping bits, not atoms.

So I just came back this morning from New York where I had a conference of 8000 people at the CoinDesk consensus conference and I wrote an essay, an essay which is now online, it's called *Making Trade Wars Obsolete.* And the reason why I think they're obsolete is because the nature of trade is going to change. And so what I'm going to do is I'm going to take you through that horizon risk journey so that we can start a discussion in the next stage. So what we have here is traditional notions of the rule of law which are based on sovereignty and there's this notion of legal certainty, right, that justice must not just be done, it must be seen to be done. So what does digital justice look like? Right, how do we adjudicate when the data is flying at the speed of light? What is digital justice look like? What does digital justice seem to look like? Well I would say that we have a balance here between the rule of law and the rule of code, and with a Blockchain what we have is basically something what I call cryptographic certainty. So this is a phrase "cryptographic locks". Now if I lock something and I give the key to Amy she now effectively controls this access to this device. With cryptography you don't have nine tenths of the law, you actually have ten tenths of the law, and so what's different here is the interface in terms of mediation when you have where's your data for evidence going to come from? And I would argue that it would come from a belt and road Blockchain where the evidence itself is imitable, it cannot be changed, because that's what a Blockchain is. So if we have a Blockchain which registers change of state legal liability, which is what the Belt & Road Blockchain does, we have that as access to data that lowers the cost of establishing fact. Now whether or not that fact is going to have without prejudice or with prejudice, where you to Med-Arb or Arb-Med, it doesn't really matter because you have a new tool in the toolbox. What's different is that you have an automated program that should you make a judgement it can automatically enforce, because that's what a Blockchain does, and more interestingly, it can automatically compensate, right, that's how we remit things, for example Bitcoin. Now that's a really big fundamental technology that you as mediators really need to be aware of. There's a new tool in your toolbox, not necessarily because your discussions are without prejudice, right, that they're not admissible in terms of courts of law, but you have another tool now where you can do this cross border across 65 or more jurisdictions. That's a huge competitive advantage for mediation as you use ODR to scale down, right, to automate. Why? Because these AI engines will be able to use the big data gathered to make judgements.

But there's a problem with that, which is what I call the fake data problem. How do you know the AI has been trained with good data? We as human beings we hear

about fake news, right, but it's very difficult for computers to know what's fake and what's not. And that example I gave where I transferred the key to Amy, if you were all computers, right, if I was to change your reality I would have to hack you, you, and each and every one of you as you all participate in the Blockchain. The reason why this is interesting is that if you had centralised that in one database, in one system you become a huge target. So I think the opportunity that Blockchain technologies, ABC, AI, Blockchain and cloud, is to find and have a discussion about where the interface is going to be between the rule of law, legal certainty and the rule of code cryptographic certainty, and where the balance between the two should lie. Thank you.

Mediation of International Commercial Disputes
Commercial issues beneath the surface

Mr Christopher Miers[1]

(Transcript)

Thank you, Danny. And I should say firstly thank, and an honor to be here today. Thank you to the Department of Justice and in particular to the Mediation Team as well.

My perspective as an architect and also trained in law is looking at the commercial issues of how we can make mediation more attractive in the commercial world. My background particularly, of course, is in the construction field and, as you know, the construction field is endemic with conflict and disputes and, in fact, funnily enough, one of my first involvements in business in Hong Kong was actually on this building in the mid 1990s when it was under construction, and my firm from London was involved in dealing with some of the issues that were arising that I'm glad to say were all resolved and the building was delivered appropriately on time.

But before I start on my theme, I wanted just to ask you, we have many people here who are mediators, many people here who are party representatives, and when you think about the obstacles in achieving settlement, I wondered whether these words sound familiar to you in how you might describe your clients: stubbornness, intransigence, excessive pride, are these issues for us? Because the reason I raise that is I recognize these for many of the issues that we face and we have a report in fact published two days ago as a result of a whole series of conferences around the world, the Global Pound Conference Series, which is an extraordinary undertaking, where, through 28 conferences and several thousand people consulted, you'll find when you see the report, hopefully you'll see it and read it, that there are some very pertinent matters for us to focus on in the world of dispute resolution and mediation. And one of these I've just picked out here is, internationally, these are word clouds from users in various conferences about the reasons for impediments to resolving disputes. And you can see, internationally, not only Hong Kong but elsewhere; Paris, London, San Francisco, the international issues which are arising in terms of key obstacles to achieving settlement.

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[1] Founder and Managing Director, Probyn Miers

And this is one of the things that we often see also which is that, certainly in the commercial world, providing more confidence to people that there is value in mediating and that the claim or the dispute has the potential to be settled, because what we see as mediators, of course, is that a lot of the difficulty is actually getting people to the table in the first place, actually raising confidence in the value of mediation, the chance of mediation to deliver either a resolution or alternatively a narrowing of the issues which itself is sufficient value frequently to justify the effort. So this is one of the areas that we really, in my view, need to focus on. And I want to talk about three points very briefly today.

The first is the context, the commercial context. The second is this process of building more confidence within the commercial world. And the third is in relation to a task force which is currently actively dealing with what we call multimode dispute resolution. So this is how we can connect the non-adjudicative processes, like mediation, with the adjudicative processes like arbitration and litigation, for example.

So if we think about that context firstly, out in the commercial world, of course, we draft our contracts, we draft our clauses and we implement, or we don't implement, various of those aspects. What I see regularly is despite our best endeavors in drafting particular procedures, the parties, in practice, do not always put them into operation. So we collectively use our wisdom to frame contracts in such a way that we maximize the chance for resolving things as they go. But the parties, unless they really understand the value of that process, do not necessarily implement it. I think there's a process there of adding knowledge, training, education to that. And, for example, Danny was mentioning the ICC Competition coming up here in October. That, I think, is an immensely valuable thing for young lawyers. I've been involved in the Paris event for the past 10 years or so. That's the kind of thing that brings the knowledge of mediation through our whole industry.

I've also mentioned here the position of the funding organization because many large complex projects, of course, the finance may be coming from the Asian Development Bank, the World Bank, some of the other major funders and they also have a potential role. And what we see is some of those agencies will, for example, finance part of the dispute avoidance function on a contract. They'll see that as part of the management of the project. And, of course, Hong Kong took a lead from back in the 90s with the dispute resolution advisor role on major construction contracts and that's still running. It was operative on this building here, on the Convention Centre.

I mean I should mention our friend now passed, Colin Wall, of course, he was a major implementer in this movement, sadly no longer with us.

So continuing on this theme of the context, we want to consider: does mediation fit at a certain stage of a dispute or do we need to have it available at multiple stages; early, late, in parallel to other processes and sequence. My view is that we need commercially is complete flexibility, we need to be able to understand and bring it in at any stage where it may add value. Because what it does for us in the commercial world is it helps parties keep control of the outcome of the dispute and that is fundamental. I always emphasize this to my clients, which is, of course, if they can keep control of the resolution they're in a position of power. As soon as they give that control away to a third party such as an adjudicator or a judge or an arbitral tribunal, then of course they've lost that power. So keeping control is vital. One way we do that, of course, is in achieving a stepped dispute resolution process which I find very practical, very powerful, moving the dispute up from the people who have that perhaps issues of loss of face around it to directors at a senior level to see whether it can be resolved.

So where does the institute fit into this? One of the things I noticed today, importantly, that was mentioned by Ms Wang of the CCPIT, the role in the institute in helping bring the parties to the table. I think Danny may also agree. I know CEDR's role, certainly from what I understand, is often very much bringing the parties through, helping the parties understand the mediation process to then allow the mediator to conduct the mediation process effectively through the prior stage and the mediation and closing it out.

But we don't see that universally accepted and I've highlighted here, for example, the FIDIC Professional Services contract where I was sad to see when it was reissued about a year ago, in the contract they took out the contractual obligation to mediate. And I think the reason they took it out was because the users were not perceiving the value in it. They saw it as an obstacle, it simply gave a time period between the dispute and being able to proceed with arbitration.

There are questions of enforceability, of course, and it will depend upon jurisdictional issues as to whether you can enforce that. Certainly in the UK, for example, there are cases going both ways on enforceability of contractual provisions to adjudicate depending on how precisely the mediation process is defined.

And what we've also seen is that timing is important commercially and in 2009 there was a very extensive survey in the UK of several hundred users of the court process which found that there were four key stages at which use of mediation was most likely to deliver results in resolution or narrowing of issues.

Importantly, we also need to understand the limitations of scope of authority, and this we see in many parts of the world, and particularly I see it in public sector, public asset investment where the team assigned to the project has difficulty being able to make a decision which binds the government or binds the public entity. And this may be simply to do with scope of authority but it's also to do with concerns for allegations later on. And what I've highlighted here is Transparency International's Corruption Perceptions Index which is something which affects us in many parts of the world where the public sector official in being able to make a decision has to be able to protect it from the later risk of being accused of accepting an agreement which was not in the best interests of the public at the time. And so, of course, we may not be aware of that. How can the mediator become aware of that? It's something that they need to be conscious of. In many parts of the world this is a fundamental issue that is an obstacle to reaching agreement that the public sector employee is unable to conclude a decision because of concerns that later they will be accused of a corrupt decision.

So we have to create the right conditions for the decision. One thing we also need to be aware of from the other side of the fence is, on the contracting organization, unless the mediation timing is relevant to the construction company's cash flow, for example, we may have an extra obstacle because in many parts of the world the contractor can enter the claim value on their financial accounts and it's seen as a benefit. The motivation to settle the claim may be quite limited until their financial year is at a certain point of the year. Again, these things need to be understood both by the mediator and by the mediating parties as well.

Finally, I just wanted to mention that there is currently a taskforce which is addressing one of the particular issues which has been highlighted in the Global Pound Conference series. This is one of four key global themes coming out of the conference and this is in the use of pre-dispute protocols and mixed-mode dispute resolution combining adjudicative and non-adjudicative processes. The objective of the taskforce is, and this is what we've been working on this for the last sort of year and a half or so, is to look through very widespread international consultation through a widespread international working group at practical guidelines for using

mixed-mode dispute resolution, bringing mediation in as a key tool both before and alongside other dispute resolution processes, considering, for example, what interaction should there be between the mediator and the arbitrator where they are different people and looking at developing guidelines and a protocol which, coming back to my original theme, can help reinforce the understanding of the benefit of mediation.

On that note, what I would add to that is my own experience also in making mediation attractive, and I found this, for example, with my teaching here in Peking University in mediation skills as Danny has said, the students have said to me, 'What's the value in mediating if we cannot enforce the settlement agreement?' Now, I think in practice we're going to hear more about that but in practice the issue enforcement, in my experience, seldom has to be called upon, and in many jurisdictions, of course, we can rely on contracts, but that issue is a vital issue. And, on that note, it leads naturally into our next speakers who are going to be talking exactly on that topic. Thank you.

The ABC of Enforcement of Mediated Settlement Agreement (MSA)

Mr Vod KS Chan, Barrister[1]

(Transcript)

Thank you very much, Danny. Good afternoon, dear honorable guests, distinguished speakers, ladies and gentlemen, it's my pleasure to have a chance to speak on this topic on this occasion. Well, I would like to start with sharing with you a piece of ground-breaking news that my third child just arrived recently. Thank you so much.

In particular, I'd like to express my sincere and heartfelt gratitude to DOJ. They offered me a very special celebration for the arrival of my newly born baby girl. The celebration is special because they invite me to speak or otherwise be involved in pretty much the whole period of Mediation Week, of course, which is honorably unpaid. Of course, as a father of three, my wife is a bit concerned about this particular time period and, of course, if my boss is unhappy I think my life is quite doomed.

Okay, let's move on. As Danny mentioned earlier, my task is to set the scene before the next two speakers to cover more of a rather technical topic, especially for those non-lawyers. And even for lawyers, if you are not familiar with this area there may be some good information for you.

These few areas I'd like to cover. First of all, I'd like to discuss the current situation of what we call mediated settlement agreements enforcement. Well, of course, mediation is very efficient, very cost effective. However, the legal status of mediated settlement agreement enforcement, in fact, is not better than any ordinary contract.

Well, if such a contract is not honored, well, of course, the upset party can go after the so-called defaulting party before a court, of course, which is still better than litigating the whole matter again. Of course, that would be very unsatisfactory in terms of costs, in terms of time etc. And, of course, MSA enforcement, in fact, in terms of options, there are not too much outside the home jurisdiction.

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[1] Chairperson, Hong Kong Mediation Council, Hong Kong International Arbitration Centre

Let me cover some of these jurisdictions, they have a form of legislation to help so-called MSA enforcement, for example, in Switzerland. Back in 2011 they have this Swiss Code of Civil Procedure into place. This particular Article 217 reads: the parties may jointly request that the agreement reached through mediation be approved. An approved agreement has the same effect as a legal binding decision. That is, of course, quite forthcoming in the mediation role there.

Of course, the parties can invite a court approving this, of course, settlement agreement so reached through mediation and would have the same effect of an enforcement and enforceable judgement.

Another example is Italy. Back in 2010, the Legislative Decree 28 of 2010. It has the effect of the following: If an amicable settlement among the parties is reached, the mediator compiles the mediation minutes to which the text of the mediation agreement is attached. That means the mediator in Italy, he or she, has to do some formalities to make the settlement agreement to be complied with a set of formalities. So this one, basically, I laid down the so-called formalities. The request of enforceability is possible, a document, the mediator has to draw up signed by the mediator as well as the parties and which is called mediation minutes, quite different from our mediation minutes.

Well, that is not the end of the story yet. A party may request enforceability of the mediation minute before the president of the tribunal of the place which the mediation took place and the request must be made by depositing the mediation minutes and the attached settlement agreement.

A judge will then verify whether the formalities have been reached and whether or not contrary to any so-called public policy etc. And following this grant of enforceability, then the mediation minutes will be enforceable and will have a similar effect as a judgment.

Another jurisdiction I'd like to share with you, California. Californian Code of Civil Procedures, this particular provision 664.6, I just don't want to read the whole thing, suffice for me to read the last sentence. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement. As you can see, this is quite different from our Tomlin orders in Hong Kong.

Still, even though these jurisdiction have a form of so-called legislation to help mediation settlement agreement enforcement, but still it will face the same or similar difficulties when this enforcement takes place elsewhere.

Now, I move on to discuss a mediation settlement agreement, it can be turned into what we call consent award under the New York Convention.

A mediator settlement agreement can be turned into a consent award under arbitration under the New York Convention. So basically what it means is that such an agreement is reached after the commencement of arbitration process and the arbitrators be invited by the parties by consent to put that down to issue a consent award based on the mediator settlement agreement.

Just for those who may not be so familiar with the New York Convention, basically the New York Convention is an international treaty signed by about 160 signatories, that means 160 jurisdictions or states, under which the arbitral awards can be enforced around the group, in all those 160 jurisdictions. That means this piece of international treaty can encourage parties to have a, what we call, a more convenient way to enforce somewhere else, not necessarily in the home jurisdiction. And for your information, New York Convention has been in force for 60 years. And I would say it's the most successful one under the United Nations, if I'm correct, in that respect.

Well, the UNCITRAL model, of course, also covers that the part, I think the next two speakers will cover more in that respect and I don't want to read this through because it's a bit more legalistic in that respect.

However, there's a technical issue of New York Convention in relation to Article 1 of this New York Convention, suffice for me to say that there should be a difference between the party before or at the time of the appointment of arbitrators. So that means if there is a mediator settlement agreement, no more disputes between or among the parties. If that's the case no dispute at the time of their appointment. So if that's the case that means New York Convention, well, may not be applicable in that respect.

So that's why I put down here, the question is whether this method helps parties who didn't think of commencing, starting arbitral proceedings at the outset or otherwise before reaching a so-called mediator settlement agreement. Of course it would be

questionable as to the enforceability of a consent award which is turned from a mediation settlement agreement where arbitrators are so appointed after such a settlement agreement is reached.

Well, of course, there is a way perhaps to deal with this technical issue. One may use what we call arb-med-arb process. Basically what it means is parties may start arbitration and then the arbitral proceedings can then be started and mediation and take place. Well, if the mediator can help parties reach a settlement agreement, well then that can go back to the arbitral proceedings and parties by consent can invite arbitrators to turn that into a consent award. Otherwise if there are still some perhaps remaining issues to be resolved, then the arbitrators can adjudicate them. And this approach is generally regarded as valid in the eyes of New York Convention.

Well, however, one may be wondering as to why there is such a legitimate foundation to differentiate a consent award between so-called mediation settlement agreement reached before and one reached after so-called appointment of arbitrators. And, of course, there have attracted some criticism against this approach because that would just circumvent the otherwise unenforceable consent under the New York Convention.

The way forward. Well, I think this is a very big topic. Of course, one simple way is that each state, each jurisdiction may have some form of reciprocal recognition of mediation settlement agreement between states, between jurisdictions. However, I think internal political issues, different legal system, civil, common-law systems, etc., or even diplomatic issues between states, between jurisdictions.

Even assuming that there might be a domestic legislation of reciprocal recognizing local and international mediation settlement agreements, there are still some issues to be resolved. Well, in addition to those I mentioned already; politics, different legal systems etc., and receptiveness by different states may be another problem. And one, I would say, more subtle problem is this; I would say some rather technical issues. Basically, well, for those who don't like algebra or logics, sorry, I have to express in that way. Basically, what I'm trying to put forward is that a judgment issued by state A's court can be enforceable in state B, for example. And likewise, even if a judgment issued by state B's court can be enforceable in state C. However, it does not necessarily mean that a judgment issued by state A's court can be enforceable in state C because a judgment enforceable in another state does not necessarily make it equivalent to a judgment of that in another state.

So I guess by now I have said enough to set the scene. In this respect, I regard myself now being in a concert of a superstar. I am not a superstar, of course, but I regard myself as a dancer or otherwise to set the scene, to prepare the audience to watch the superstar's performance. Of course, perhaps I'm a *de facto* moderator to prepare the audience as well. So thank you so much. That concludes my speech. I think my boss would be happy because I can get back to my business. Thank you so much.

Mediation of international commercial disputes and enforcement of mediated settlement agreements

Professor Khory McCormick[1]

(Transcript)

Thank you very much. Distinguished guests, ladies and gentlemen, it's a great pleasure to speak to you this afternoon about a thing which is a topic of great excitement and pleasure to me and I think for anyone who's older than 30 years of age will be the most exciting thing that you will see in your professional life in the space of mediation. And that is the current work of the Working Group in respect of a convention and model law in draft form for the enforcement of international settlement agreements resulting from mediation.

I propose to speak to you today in a personal capacity, although both my friend Jaemin Lee and myself are authorized by UNCITRAL to do so, but notwithstanding that fact and the fact that I was the Australian delegate, you should take my comments to be personal except to the extent that they're said to be very supportive of the work and the possibility of the Convention going forward.

The other speakers have set the context very effectively for the discussion which I want to have and which with Jaemin will follow up concerning the work of the Convention, but let me say that it has been described by UNCITRAL itself to be ground breaking and it has been described by some very high-profile delegates to be in fact revolutionary. The reason that it is so revolutionary is that, just as the New York Convention has for 60 years been the most successful instrument of the United Nations, the draft Convention model law which will go to the General Assembly of UNCITRAL on 25 June of this year and then if adopted there proceed to the United Nations to be available to come into force as an international instrument, is likely to be the most significant event for changing the way cross-border dispute resolution is globally practiced. Even if you're not a lawyer or if you're not a person who practices in that domain and you say, for example, one of the excluded categories not covered by the Convention, that is to say consumer provisions to take up the question to Mr Wang earlier, it does not cover that or family matters. It nevertheless will be the case that the process by which the Convention will advance mediation generally will see a fundamental change in the way in which mediation is

[1] Member, UNCITRAL Working Group II

acknowledged and respected as a global dispute resolution system. If one looks at the preambles to the Convention, and I'll use the references to the Convention, when I talk to slides, of course, it's most convenient, the model law in the draft form being an amendment to the earlier 2002 conciliation model rules, one sees that there is recognition of the fact that mediation is increasingly being used in the noting provision preamble, and in the preamble that's introduced by the consideration provision, and that's the language of it, a recognition that it will be something which will drive both the enhancement of mediation but also the development of world trade by the elimination of disputation.

I intend to make my comments to you, if I can control the button, under three headings. Why is it that this instrument is so new and different? How is it different and whether it will succeed.

The reason this instrument is so ground breaking is it represents a seismic change in the way that mediation outcomes are looked at and their enforceability. I will not put on the screen, because I'll encourage you to go and look at it on the website, Article 3 of the Draft Convention which in effective terms says this: that when you have a settlement caused by facilitated process defined as mediation within the instrument then subject to the conditions set out in the instrument and the domestic procedural laws of a State then that settlement will be given enforcement within the jurisdiction. If you think about that, what that means is, unlike an arbitral award which is a product of adjudicative processes, it is a cross-border recognition and enforcement of a contract without an intermediate review step by the local judiciary other than on procedural grounds or for the limited facts set out in the Convention. That is ground breaking. It's interesting too that the UNCITRAL work reflected appreciation that although mediation is practiced differently both domestic and internationally, it is a concept which is becoming better understood and for that reason two things occurred. One is in the early stages of the process the work of the Working Group changed from arbitration and conciliation to dispute resolution and the subject matter of the draft instruments themselves changed from conciliation to mediation being the defined topic and subject matters. This is a very contemporary instrument to reflect what mediation is.

The other thing is to say that it is not a structured definition. For those familiar with the New York Convention you'll know that although it's been very efficacious, it lacks a lot of definitions because it leaves the content open to flexibility. For a process which has an inherent characteristic of flexibility like mediation, it is essential that the

definition reflect that. Attempts to contain a structured concept within the definition were rejected and also the definition is sufficiently broad, for example, to catch evaluative or, as the speaker earlier said, not evaluative mediations but mediations which have an evaluative element, it is an open-ended definition to reflect domestic variances and practices.

The other thing that is important to understand is why it's revolutionary, and people like Jaemin and myself were instrumental in this, is that the New York Convention contains a core proposition which is part of the autonomy that is the right of parties to choose the processes. Perhaps the most core element of that is the right for them to choose the law applicable to them. Now, we won't go in particularly for non-lawyers into the complex questions in relation to those issues but the point I want to make is that when we look at the draft Convention, we see that that element has been preserved by having that appear in the defense provisions that when you come to look at the defenses the starting point is whether the party's chose a law to govern their position.

Can I say using the word in a very appropriate sense, the draft convention and model law are pregnant with possibilities all for the good in the sense that what you see is an attempt to ensure that the instrument covers the greatest range of circumstances. We could speak for some days about all its provisions, and I'll come back to defenses in the short period I have, but that presence of that provision guarantees that this is not a second-class instrument, a weaker or lesser sibling or child to the New York Convention, it is in conformity with the Department of Justice here's view that it provides an equal and flexible alternative or a range of available remedies to parties.

The other thing is that the Convention prevents a party forum-shopping by going to an arbitrated settlement, and Vod mentioned the question about consent awards which we can't deal with now but is an interesting point, all for a result of a settlement that might be mediated but otherwise sanctioned in some jurisdictions by courts, as in the case of some countries. That also ensures that the Convention is not a thing which people flop in and out of as they see fit. It's a process which one chooses with some consequences. That will have some consequences for med-arb structures and perhaps things like considered rules, even things like consent awards, but definitely for jurisdictions that practice the current model of international courts premised on those processes.

In terms of what then is new, you could say that those things that I spoke to you

about were new but I think they set more the core characteristics that this is an instrument of merit and equality with the New York Convention. But when you go into the instrument itself and look at more day-to-day things, the first thing to see is that the scope of this instrument is extremely broad. If you look through the matrix of the scope provision which deals with what instruments are caught, and for example, particularly with what's there in B2 by way of example, you could have a mediated agreement in respect of a subject matter that was in a third or fourth or a fifth jurisdiction and the instrument would still catch that settlement.

Article 2 (1) then goes on to give even further breadth to that provision. When you look at the requirements for authentication, that is simply proving up the instrument as you do with an arbitral award, you can see the great flexibility of this instrument. The hierarchical structure in that provision, for example, reflects the need to accommodate jurisdictions like Israel where authentication is required by judges to be in hierarchical form. You could compress that provision into a very simple proposition but its physicality reflects the need for this instrument to meet the jurisprudence of up to 60 member States who sit within UNCITRAL under the UN.

You also see that if you look, and this is probably most importantly for practicing practitioners here because trends that develop in this space on the defenses are likely to have a domestic consequence. There was a move by bodies like International Mediation Institute to have standards incorporated in the Convention. That was resisted. There were moves by the European Union to have their standards imposed as the applicable standards. They were resisted. This actually comes from the previous model law, not on arbitration but on conciliation, which started with a fair treatment concept. The relevance of that would be that a defense to the enforceability of an instrument would be the conduct of the mediator in the course of that process. That was repelled. It went through various iterations. It went from that proposition to the proposition that the mediator might have been involved in gross impropriety. It went to a common-law influence concept of a reasonable person test and it finally found its way into what appears in paragraph E here, that the applicable question that arises if an instrument of settlement or agreement of settlement is to be not enforced because of the process of mediation, it will be if the mediator failed to meet an applicable standard applicable to that mediator at the time. As that plays out in the cases it's highly likely that it'll cause to a focus what should be mediator standards.

I move now to the question and I've only given those really as examples. As I say, I

spoke on Wednesday night here for the Mediation Centre for about an hour and a half and touched on these things briefly but it would take a number of days to go through it in entirety. But I want to turn to the question of whether the instrument is likely to succeed.

The first proposition to note is that the threshold for it coming into force is three States. There was a lot of argument about that and States sought to make that number higher, particularly States who did not want to see the Convention succeed, in the sense not that they wished to see the process fail but they favored model law, the European Union might be a body that would have a preference, say, for a model law because of its directive and other considerations. But in terms of the process, this was the first time, I think, to the knowledge of UNCITRAL that it worked simultaneously on two forms of instrument and so all the nations were kept in the tent, so to speak, in the process.

It also is an important thing to understand that within the context of UNCITRAL it's necessary to have this instrument be long living, just like the New York Convention. It's structured today in general words that cover six languages and 60 jurisprudence systems and jurisdictions but is intended to last forever. So this provision is present to ensure that if instruments come into play that are more beneficial to a party, the party gets the benefit of them. This is particularly influenced in the UNCITRAL context because of the work being done in The Hague in choice of courts and enforcement of judgments.

Another key factor which will affect the success of the instrument is the attitude of States, States have to sign up. Three are likely to sign up so by this time next year this instrument is likely to be a legally enforceable instrument as between States. But, of course, there are the usual reservation provisions. These two provisions are important. In 1A and B [of Article 7], it's important to read the first part, the party to the convention may declare that and to realize that is talking about a State. A lot of people read that provision and misinterpret it. What it is saying is the States will determine on a State-by-State basis the extent to which government utilities are subject to this convention. It will have an impact across Working Group III and ICSID and potentially in State-investor disputes.

The other thing is that the question is whether the instrument should be an opt-in or opt-out provision. Importantly, for parties and party advisors, that is the question of whether a party who undertakes a mediation settlement should become bound by

this Convention without having knowledge of its existence. The way that was dealt with rather than to crack the nut, so to speak, on that issue was to give to the State, the capital-P Party, the right to determine whether the small-P parties, namely the parties to the dispute, would be bound by that Convention. So the State will determine the effect of this Convention on the citizens of its State or parties to which it would have a jurisdiction in enforcement terms.

The final thing I want to do is to make a general observational comment. As Danny said, I chair an Infrastructure Fund which in the context of that means the government gives me six pages of paper and five criteria and five billion dollars in the bank and then under political pressures says, 'Give it to people on concessional terms up to 38 years of tenure.' So I approach these issues from a perspective of not just a service provider but also a user. It's often said, and this picks up what Madam Wang Fang said earlier, the question of, you know, what is the true appetite for this instrument, States will determine whether the instrument is successful but the more likely driver is users. This is a page, as you can see, from the most recent Queen Mary's University and White and Case Survey on the Evolution of International Arbitration. If you looked at that survey in 2015 and accepted there were some arguable flaws in the methodology, both in geography and sample for the survey, the user sample, you would find that it would assert that not more than about 50%-54% of surveyed persons would have thought that an instrument such as the one I've talked about would be of much utility.

The position is that what this tells you is three years on, and probably with a slightly better pitched survey methodology, more people would favour ADR and other forms with arbitration than would favour it without. In fact if you take that statistic and go to the methodology for the sample sectors, you'll find that the difference between suppliers of mediation service users, namely people who pay companies and clients, that it's even further weighted in favour of such instruments. So having rose to the podium to talk about something that excites me, I can leave it in the knowledge that the reality is that the market will make this instrument change the way cross-border disputes are done. And it will change the way mediators conduct practice even if they sit at home in their home jurisdiction, even in a single city, because it will change the way mediation is seen and the expectations of how it's conducted.

Enforcement of International Mediation Outcome - UNCITRAL's Introduction of a New Convention and Its Future Implication

Professor Jaemin Lee[1]

(Transcript)

Thank you. Danny, thank you very much. Good afternoon. I'll be very brief. I'll basically follow up what Professor McCormick just explained about UNCITRAL's most recent work and I think the recent work of UNCITRAL is really an innovative attempt to expand mediation globally and practically and in a way that can sell mediation, advertise mediation in a way the 1958 New York Convention has done so far. So I think this is very ground-breaking work and it will impact on many jurisdictions in a significant way including many countries in the Asia-Pacific region. So in that respect I think UNCITRAL's most recent work deserves more careful attention.

It started in 2014, so the commission mandated Working Group II to discuss this matter and explore the possibility of adopting Convention and model law in the enforcement of international commercial settlement agreements, and it worked out. There have been difficulties, of course, obstacles and differing views, but somehow it worked out. And for three years of negotiations, starting from 2015, 2016, 2017 and now the final deal has been made. So right now, about 99% of the work has been done. What's remaining now is that this coming June, June 2018, the UNCITRAL, the Commission itself, will endorse and approve the final outcome of the discussion, the Convention and model law. After which, in October 2018, the 6th Committee of the United Nations General Assembly will then endorse, they will endorse the instruments. And finally, this December, the UN General Assembly will now officially adopt the Convention. And then it will be open for signature early next year, 2019. And according to the Convention when the Convention receives three ratification, very low, three ratifications, then it will go into effect. And then hopefully perhaps many countries will accede to the convention and it will expand from there. So this is the plan and this is where we stand in terms of international enforcement, UN Convention on the enforcement of the mediation outcome which is a new development in this area.

I think mediation is now surging in many respects. Interestingly, commercial mediation, not only commercial mediation but also mediation is getting attention in

[1] Member, UNCITRAL Working Group II

two-State dispute as well as Madam Secretary for Justice, Teresa Cheng, mentioned this morning in her keynote speech, the mediation is getting new attention in investment dispute settlement procedures and mediation is a key vehicle in resolving disputes for trade issues as well, mainly for NTBs, non-tariff barriers, so I think mediation is getting attention from many, many stakeholders because of its unique aspects and benefits as solving despites amicably. So in that respect the mediation for international commercial disputes is also getting new attention and the work from UNCITRAL will help develop, advance and spread the mediation further globally. On that note, let me briefly move on to the next slides.

Yes, the benchmark, the 1958 New York Convention has been regarded as a successful outcome and, combined with the increasing attention to mediation, there is a growing consensus that perhaps something similar to 1958 Convention will work for the mediation enforcement as well. So this is the starting point. And UNCITRAL started from 2014 and now three years of work and we are now getting there. And here, again, dual-instruments approach, so not only the Convention but also the model law is also adopted.

So states now have two choices; some of them might want to adopt the UNCITRAL Convention, Enforcement Convention. Others may want to start with model law and then try to see how other countries are doing and how the new Convention might impact on their domestic legal system and then they may join the Convention afterwards. So for now, as a result of the compromise approach, there are two options for states and we will see how things develop. As I mentioned earlier, the threshold for the Convention's entry to force is set very low, just three state's ratification is required.

And now these are the provisions of the Convention. There are 15 provisions for the Convention, and Khory just explained about the most important provision which is Article 5, which is grounds for refusing to grant relief, so even though there's a settlement agreement, the court may decide not to enforce a particular settlement agreement if there is a problem or if there is an issue or if there is something which affects the validity of the settlement agreement. So this issue is very controversial. This issue has been quite controversial because it may defeat the very idea of the Convention, so there were lots of discussions and a compromised deal was accepted for this particular provision of Article 5. Other than that there are 15 provisions for the Convention and it will be adopted by the end of this year.

At the same time, this is model law. 2002 model law is now going to be amended as a 2018 model law on mediation, the enforcement of mediations outcome. And now the model law will be restructured as we see here. Now, there will be three sections; sections one, two and three. And the third section is a new one. So it will be a mirror provision. There will be mirror provisions for the Convention to be included in the model law as well.

Now, let me briefly talk about some remaining questions and challenges. Well, basically, this is a first attempt and increasingly there are many question marks about the meaning and the scope of those 15 provisions, particularly about the key provisions, about the scope in Article 1 and the defences in Article 5, so there is a little bit of ambiguity for these provisions. So hopefully those ambiguities will be cleared as we move forward and then we'll find better ways to implement the provisions of the Convention. But still there are ambiguities and there is a question mark and maybe that's one of the reasons why some countries prefer to go to the path of model law first and then try to see how the provisions of the Convention is elaborated and interpreted and implemented by the starting states. So there are a little bit of ambiguities.

And another issue here is a little bit of philosophical dichotomy, so to speak, the best of benefits, as I understand, from mediation is the party autonomous nature and the flexibility. But while there is a Convention, while there are negotiations for Convention is going forward, a lot of efforts for Convention here is to monitor and evaluate and discern the nature of a particular mediation. So there are a little bit of oversight, the monitoring of the mediation procedure and the conduct and behaviour of mediators. So those formalistic approaches included in the Convention might have a little bit of conflict with the very idea of a mediation. So that's also one area to be looked at, looked upon in the implementation of the Convention.

Also it's not entirely clear how different legal systems in Europe, in the United States, in Asian countries, in China, in Korea, in Japan, how those different legal systems may implement, may incorporate and may apply those provisions domestically. In the arbitration area, the questions are clear and there is a reliable jurisprudence so we know what we are talking about when there is a particular issue. But for this particular instrument this is the first novel attempt to adopt a document in this nature, so we'll have to see how, not only the provision itself of the Convention but also how respective domestic systems will interpret and apply the systems internally and that's something that we will have to look at going forward.

But, all in all, I think this is a great stride from the perspective of UNCITRAL and it will help facilitate and spread mediation globally, so this will increase more opportunities for mediation institutions and mediators globally to have more mediation cases and to help settle disputes more amicably in the future. So this is an important stride and helpful stride for mediation and mediation communities generally. So this is something that we will have to look at.

I think the best word that captures the idea and initiative of UNCITRAL is the title of today's conference which is Mediate First - Exploring New Horizons. I think that's what UNCITRAL is doing at the moment. With that, let me conclude. Thank you.

Closing Remarks for the Mediation Week 2018
"Mediate First – Exploring New Horizons"

The Hon Mr Justice Johnson Lam, VP[1]

I am honoured to be invited to give the closing remarks of the Mediation Week 2018. The development of mediation in Hong Kong in the past decade speaks volume for the utility of this process as an alternative means to resolve dispute as well as the readiness of our community to adopt such a process. It also bears witness to the versatility and resourcefulness of the relevant stakeholders in this city to bring about and embrace the changes which are necessary to sustain Hong Kong as a world class dispute resolution hub.

At the Mediation Conference of December 2007, the theme was "The Way Forward". In the Opening Address by the then Chief Justice Andrew Li, noting that Hong Kong still had a long road ahead before mediation reaches a satisfactory level of maturity, he also gave this sage advice,

"Ultimately, the success of mediation will depend on wide acceptance by the legal profession, by other professions, the business community and the public at large. To achieve this, all concerned and the public must gain and enhance their understanding of mediation and its advantages. To this end, training programmes need to be increased and public education is necessary. This should include the young at the school level so that they gain a good understanding of mediation at an early age."

The Chief Justice also expressed the wish at the end of his remarks that all the stakeholders would work towards the common goal for bringing the benefit of mediation to our community.

We are now more than 10 years down the road. Mediation has indeed gained considerable and well-deserved popularity in Hong Kong. The Judiciary, the Department of Justice, together with the other stakeholders, have been making concerted efforts in facilitating and encouraging settlement of disputes by mediation. By now, those in the legal profession are familiar with the process of mediation and its advantages. Many of them have received training on mediation skills as well as skills for acting as lawyers in mediation. Through the efforts of all the stakeholders,

[1] Vice-President of the Court of Appeal of the High Court

members of the public are aware of the option of mediation and confidence on mediation as a process has been established. In this connection, based on feedbacks received by the Judiciary, most litigants who have gone through mediation found the process helpful and satisfying irrespective of the outcome. In matrimonial cases (where very often the parties were burdened with hurt and anger), family mediators were able to bring peace and amicable settlements which offer much better solution for the overall good of everyone in the family, including children. I would like to take this opportunity to pay tribute to those mediators (many of them worked on pro bono basis in schemes administered by our NGOs).

The number of accredited mediators in Hong Kong has grown from a few hundred in 2007 to almost 2,500 in 2018. Professionalism for mediators is reinforced by proper accreditation system, the Hong Kong Mediation Code and the concerted efforts of stakeholders from all quarters in the establishment of the Hong Kong Mediation Accreditation Association Limited. The enactment of the Mediation Ordinance and the Apology Ordinance, together with Practice Direction 31 give statutory recognition to the role of mediation in Hong Kong as well as strengthening the legal framework to facilitate the process.

The number of court cases which has gone through mediations has increased over the years. In 2017, based on reports filed with the court, there were 1,381 cases in the courts of various levels in which parties have attended mediations. Some were able to achieve settlement through mediation and some were not. However, we have strong statistical evidence (published on our Judiciary website) to support our belief that mediation is a more costs and time effective way to resolve dispute as compared with litigation.

The mediation culture has indeed taken root in Hong Kong. At the same time, I also believe that there is room for greater use of mediation at different walks in life. There are still far too many cases where the parties would have been much better served by making attempts in good faith to mediate their differences than spending disproportionate and (sometimes unaffordable) legal costs on litigation. It is befitting that the theme of the Mediation Conference this year is “Mediate First --- Exploring New Horizons”. One of the beauty of mediation is its inherent flexibility and adaptability in providing suitable and acceptable options to resolve dispute which meet the needs and interests of the parties. Likewise, there is no limit to the new ideas and measures that we can adopt to promote the effective and proper use of mediation. Hong Kong is a vibrant city famous for the innovative spirit of its people.

We should have foresight and broad horizon in the development of mediation in the future. This is an opportune occasion for me to share with you some thoughts which may provide some directions for potential future development.

The Hong Kong Judiciary has always taken the line that judges are not mediators and mediation services should be undertaken by independent mediators. Hence even though many of our judges have received mediation training, serving judicial officers would not act as mediators. However, it does not mean that litigation cannot be complimentary to mediation.

To further facilitate settlement of disputes, the District Court implements a pilot scheme engaging some experienced mediators cum lawyers to sit as Deputy Masters. These masters exercised case management power. In addition to the usual function of a master hearing case management summonses, they are also tasked to take appropriate steps to encourage parties to use alternative dispute resolution procedure and to assist the parties to narrow the issues in the dispute and to identify efficient means to obtain a court's ruling on issues that cannot be resolved by negotiation or mediation. It is hoped that through the experience gathered by these masters, a greater synergy can be achieved between the two processes.

Recently, the Mediation Information Office at the High Court Building was moved to the District Court. That office and the Family Mediation Co-ordinator's office were merged to become the new Integrated Mediation Office. That move also marked the 18th anniversary of the Judiciary's work on promotion of family mediation, starting with the Pilot Scheme on Family Mediation in May 2000. 18 is the age of majority in Hong Kong. Family mediation has come a long way since 2000. Yet our family justice system is facing many challenges with ever increasing case volume and proliferation of issues in family disputes. Judges in the Family Court are already playing substantial roles in the settlement process through Finance Dispute Resolution and Children Dispute Resolution hearings. I can also see potentials for greater synergy between mediation and litigation in the Family Court which should be explored.

All in all, we should continue with our efforts in the promotion of making good and proper use of mediation.

Last but not least, on behalf of the Secretary for Justice's Steering Committee on Mediation, I would like to express our gratitude to all co-organizers of the Mediation Week 2018. I must also thank the very distinguished speakers at today's conference

as well as other events in the Mediation Week, both overseas and local, who have given us much food for thoughts and insights regarding the future development of mediation in Hong Kong.

Appendix 1

Mediation Week 2018
"Mediate First – Exploring New Horizons"
11 – 19 May 2018

Programme for Mediation Week 2018

Date/Time/ Venue	Sector	Topic
11 May 2018 (Fri) 14:15 – 17:30 Justice Place	Legal Insurance	Use of Mediation to Settle Disputes of Employees' Compensation Claims (Language: Cantonese)
12 May 2018 (Sat) 14:00 – 17:15 Justice Place	Education	Mediation Education and Career Life Planning (Language: Cantonese)
13 May 2018 (Sun) 14:30 – 16:30 West Kowloon Mediation Centre	Community	Mediation Carnival (Language: Cantonese (supplemented by English))
14 May 2018 (Mon) 14:00 – 17:15 Justice Place	Medical	"What Can Apology Legislation Bring to the Healthcare Sector?" (Language: Cantonese)
15 May 2018 (Tue) 14:30 – 18:30 Justice Place	Arts & Entertainment	Mediation and the Entertainment Industry (Language: Cantonese)
16 May 2018 (Wed) 14:00 – 17:20 Auditorium, Customs Headquarters Building	Commercial: Cross-border	Seminar on The Trend of Cross-border Commercial Dispute Resolution and the Belt and Road Initiatives (Language: Cantonese & Putonghua)
17 May 2018 (Thu) 09:30 – 12:30 Justice Place	Commercial/ Intellectual property	Use of Evaluation in Mediation (Language: English)

17 May 2018 (Thu) 14:30 – 18:00 Justice Place	**Commercial**	**Unleashing Power in the Workplace: Using Mediation Skills to Enhance Conflict Management Competence (Language: Cantonese)**
18 May 2018 (Fri) 09:00 – 17:45 Venue: Hong Kong Convention and Exhibition Centre		**Mediation Conference (Language: English & Putonghua)**
19 May 2018 (Sat) 09:15 – 17:15 Venue: Justice Place	**Commercial**	**Development, Opportunities and Future of Mediation in Hong Kong, Mainland and the Belt and Road Regions cum the 4th Shanghai-Hong Kong Commercial Mediation Forum (Language: English, Cantonese & Putonghua)**

2018 年調解周
“調解為先 -- 共創新天”
2018 年 5 月 11 至 19 日

2018 年調解周節目表

日期 / 時間 / 地點	界別	主題 / 活動
2018 年 5 月 11 日 (星期五) 14:15 – 17:30 律政中心	法律 保險	以調解解決僱員補償索償的爭議 (以粵語進行)
2018 年 5 月 12 日 (星期六) 14:00 – 17:15 律政中心	教育	調解的教育與職業生涯規劃 (以粵語進行)
2018 年 5 月 13 日 (星期日) 14:30 – 16:30 西九龍調解中心	社區	“調解創新天” 同樂日 (以粵語進行(以英語補充）)
2018 年 5 月 14 日 (星期一) 14:00 – 17:15 律政中心	醫療	“《道歉條例》可帶給醫療界些甚麼?” (以粵語進行)
2018 年 5 月 15 日 (星期二) 14:30 – 18:30 律政中心	藝術及娛樂	如何以調解解決娛樂行業的相關糾紛 (以粵語進行)

2018 年 5 月 16 日 (星期三) 14:00 – 17:20 海關總部大樓 演講廳	商界：跨境調解	「一帶一路倡議及跨境商業爭議解決發展趨勢」研討會 (以粵語及普通話進行)
2018 年 5 月 17 日 (星期四) 09:30 – 12:30 律政中心	商界 / 知識產權	在調解中使用評估 (以英語進行)
2018 年 5 月 17 日 (星期四) 14:30 – 18:00 律政中心	商界	運用調解提昇企業領袖的才能 (以粵語進行)
2018 年 5 月 18 日 (星期五) 09:00 – 17:45 香港會議展覽中心		2018 年調解會議 (以英語及普通話進行)
2018 年 5 月 19 日 (星期六) 09:15 – 17:45 律政中心	商界	調解於一帶一路地區、內地及香港的發展、機遇與未來暨第四屆滬港商事調解論壇 (以英語、粵語及普通話進行)

Appendix 2

Mediation Conference 2018
"Mediate First - Exploring New Horizons"
Hong Kong Convention and Exhibition Centre

Conference Programme 2018

18 May 2018 (Language of Conference: English & Putonghua)	
08:30 - 09:00	**Registration**
09:00 - 09:15	**Keynote speech** **Ms Teresa Cheng, GBS, SC, JP** Secretary for Justice, HKSARG
09:15 - 09:30	**Keynote speech** **Professor Robyn Carroll** Professor, University of Western Australia Law School Co-founder, International Network for Law & Apology Research (INLAR)
09:30 - 10:55	**Session 1: Recent developments of mediation in Hong Kong: Apology Ordinance, Evaluative Mediation and Third Party Funding** A review of recent developments in mediation: the introduction of the Apologies Ordinance to encourage timely apologies, and the legislative changes in 2017 to allow third party funding for mediation. Speakers will also share their views and insights on using evaluation in mediation in Hong Kong, which is being considered by a special committee formed under the Steering Committee on Mediation. **Moderator:** **Mr C K Kwong, JP** - Vice-chairman, Special Committee on Evaluative Mediation of the Steering Committee on Mediation **Speakers:** **Apology Ordinance** **Professor Robyn Carroll** - Professor, University of Western Australia Law School / Co-founder, International Network for Law & Apology Research (INLAR)

	Ms Connie Lau, JP - The Ombudsman, HKSAR **Use of Evaluation in Mediation** **Mr Robert Fisher, QC** - Fellow, Arbitrators and Mediators Institute of New Zealand / Former Judge, High Court of New Zealand **Professor TK Iu, MH** - Chairman, Special Committee on Evaluative Mediation of the Steering Committee on Mediation **Third Party Funding** **Ms Kim Rooney, Barrister** - Chair, Sub-committee on Third Party Funding for Arbitration of the Law Reform Commission
10:55 – 11:05	**Q&A**
11:05 – 11:15	**Break**
11:15 - 12:25	**Session 2: Belt & Road and Guangdong-Hong Kong-Macao Bay Area Development Initiatives** The Belt & Road and Bay Area Development Initiatives open up immense business opportunities. Participating enterprises will require extensive legal support in mitigating legal risks and resolving commercial disputes that may arise. Speakers will share their views on what role mediators and mediation can play in resolving such disputes. **Moderator:** **Professor Raymond Leung** - Founding President, Hong Kong Mediation Centre - Honorary President of the Hong Kong Mediation Alliance **Speakers:** **Mr Adrian Hughes, QC** - Barrister and International Arbitrator; UK Bar Council China Committee **Ms Christine Khor** - Member, Alternative Dispute Resolution Committee of the Malaysian Bar Council **Ms Wang Fang (王芳)** - Deputy Secretary-General, China Council for the Promotion of

	International Trade / China Chamber of International Commerce Mediation Center **Professor Lin Feng** - Associate Dean, School of Law, City University of Hong Kong; Member, Research Centre for Sustainable Hong Kong, City University of Hong Kong Co-presenting with **Dr Peter Chan** - Assistant Professor, School of Law, City University of Hong Kong
12:25 – 12:40	**Q&A**
12:40 - 14:10	**Lunch**
14:10 – 14:20	**Registration**
14:20 - 15:45	**Session 3 : Online dispute resolution in the digital world** Online dispute resolution (ODR) harnesses technology to facilitate dispute resolution between parties. It is increasingly used to resolve e-commerce disputes, particularly in cases where businesses and consumers may be located in different parts of the world. Speakers will explore how ODR offers a more efficient way to resolve cross-border disputes compared to traditional means of dispute resolution. **Moderator:** **Mr Norris Yang** - Chairman, Communications and Publicity Committee, Hong Kong Mediation Accreditation Association Limited **Speakers:** **Professor Amy Schmitz** - Professor, University of Missouri School of Law **Mr Nick Chan, MH** - Chairman, eBRAM Centre, Vice Chairman of The Law Society of Hong Kong's InnoTech Committee and Belt and Road Committee **Mr Zhang Hao (章浩)** - Vice President, Hangzhou Internet Court (杭州互聯網法院副院長) **Mr Yang Peng (楊鵬)** - Director, Head of Customer Experience for alibaba.com **Mr Pindar Wong** (黃平達) - Chairman of VeriFi (Hong Kong) Limited; Founder and Chief Architect of the Belt and Road Blockchain Consortium

15:45 – 16:00	**Q&A**
16:00 - 16:10	**Break**
16:10 - 17:20	**Session 4: Mediation of international commercial disputes and enforcement of mediated settlement agreements** Speakers will share their insights on how mediation of multi-jurisdictional commercial disputes can help to save time and costs and preserve commercial relationships. UNCITRAL Working Group II's recent preparation of instruments to facilitate the enforcement of international mediated settlement agreements will also be discussed. **Moderator:** **Mr Danny McFadden** - CEDR Regional Representative **Speakers:** **Mr Vod K S Chan, Barrister** - Chairperson, Hong Kong Mediation Council, Hong Kong International Arbitration Centre **Mr Christopher Miers** - Founder and Managing Director, Probyn Miers **Professor Khory McCormick** - Member, UNCITRAL Working Group II **Professor Jaemin Lee** - Member, UNCITRAL Working Group II
17:20 - 17:30	**Q&A**
17:30 - 17:45	**Closing Remarks** **Hon Justice Johnson Lam, V-P** - Vice-President of the Court of Appeal of the High Court

2018 年調解研討會
「調解為先 -- 共創新天」
香港會議展覽中心

研討會議程

2018 年 5 月 18 日 (會議語言: 英語及普通話)	
08:30 - 09:00	**登記**
09:00 - 09:15	**主旨發言** **鄭若驊女士, GBS, SC, JP** - 香港律政司司長
09:15 - 09:30	**主旨發言** **Robyn Carroll 教授** - 西澳大利亞大學法學系教授 - International Network for Law & Apology Research (INLAR) 共同創始人
09:30 - 10:55	**第一環節: 調解於香港的近期發展：道歉條例、評估式調解及第三者資助調解** 回顧香港調解界的近期發展：引入道歉條例鼓勵適時道歉，以及 2017 年通過修訂相關法例允許第三者資助調解。此外，演講者將就調解督導委員會下成立的評估式調解特別委員會所研究的，關於香港使用評估式調解的事宜分享他們的意見及見解。 **主持人:** **鄺志強律師，JP** - 調解督導委員會評估式調解特別委員會副主席

	演講者: **道歉條例** **Robyn Carroll 教授** - 西澳大利亞大學法學系教授 - International Network for Law & Apology Research (INLAR) 共同創始人 **劉燕卿女士, JP** - 香港特別行政區申訴專員 **評估式調解** **Robert Fisher, QC** - Arbitrators and Mediators Institute of New Zealand 會員 - 前新西蘭高等法院法官 **姚定國律師, MH** - 調解督導委員會評估式調解特別委員會主席 **第三者資助調解** **Kim Rooney 大律師** - 法律改革委員會第三方資助仲裁小組委員會主席
10:55 - 11:05	**問答環節**
11:05 - 11:15	**茶歇**
11:15 - 12:25	**第二環節: 一帶一路及粵港澳大灣區發展倡議** 一帶一路及粵港澳大灣區發展倡議帶來龐大的商機。參與的企業將需要廣泛的法律支援以減輕可能產生的法律風險及商業糾紛。演講者將分享調解員及調解如何能在解決上述爭議中扮演重要的角色。

	主持人： **梁海明教授** - 香港和解中心創始主席 - 香港調解聯盟名譽會長 **演講者:** **Adrian Hughes 先生, QC** - 大律師及國際仲裁員, UK Bar Council China Committee **許妙薇律師** - 馬來西亞大律師公會之馬來西亞調解中心委員會會員 **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 **林峰教授** - 香港城市大學法律學院副院長, 香港持續發展研究中心成員 **(與陳志軒助理教授共同演講)** - 香港城市大學法學系助理教授
12:25 - 12:40	**問答環節**
12:40 - 14:10	**午膳**
14:10 - 14:20	**登記**
14:20 - 15:45	**第三環節: 數碼時代的在綫爭議解決** 在綫爭議解決利用科技方便爭議各方解決糾紛。使用在綫爭議解決以處理電子商務爭議越來越受歡迎，尤其在企業與消費者處於世界不同角落的個案中。演講者將探討在綫爭議解決如何能比傳統爭議解決方式更有效地解決糾紛。

	主持人: **楊洪鈞律師** - 香港調解資歷評審協會有限公司之傳訊及宣傳委員會主席 **演講者:** **Amy Schmitz 教授** - 美國密蘇里大學法學系教授 **陳曉峰律師, MH** - eBRAM 中心主席, 香港律師公會創新科技委員會及一帶一路委員會副主席 **章浩副院長** - 杭州互聯網法院副院長 **楊鵬先生** - 阿里巴巴集團客戶體驗事業群服務總監 **黃平達先生** - VeriFi (Hong Kong) Limited 主席; 一帶一路一鏈創辦人及首席架構師
15:45 - 16:00	**問答環節**
16:00 - 16:10	**茶歇**
16:10 - 17:20	**環節 4:國際商務爭議的調解及強制執行通過調解達致的和解協議** 演講者將分享調解如何能在跨境商務爭議中幫助爭議各方節省時間與金錢，同時保持各方之間的商業關係。演講者也會討論聯合國貿易法委員會第二工作組近期為方便強制執行國際通過調解達致的和解協議而準備的文書。

	主持人: **Danny McFadden 先生** - CEDR 太平中心區域代表 **演講者:** **陳家成大律師** - 香港調解會主席 **Christopher Miers 先生** - Probyn Miers 創辦人及總經理 **Khory McCormick 教授** - 貿易法委員會第二工作組成員 **Jaemin Lee 教授** - 貿易法委員會第二工作組成員
17:20 - 17:30	**問答環節**
17:30 - 17:45	**閉幕詞** **林文瀚副庭長** - 香港高等法院上訴法庭副庭長

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