

# “Mediate First Moving Forward” 2017年 “調解為先 邁步向前”

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Seminar on Mediation – 調解研討會

Panel I – Commercial Disputes

IP Disputes and Mediation (including Evaluative Mediation)

專題會議 – 商事爭議

知識產權爭議與調解 (包括評估式調解)

Tuesday, 13<sup>th</sup> June 2017

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## A. Background to the trend for ADR in IP Disputes

### 用另類排解糾紛方法處理知識產權爭議趨勢的背景

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- International trade & commerce  
(multi-parties/subject matters/disputes)  
國際商貿(多方/多項目/多爭議)
- Different laws & legal systems  
多國不同法律和法律制度
- Technical (not often dealt with by court)  
涉及科技事物分析(法院不常處理)
- IP has limited life of protection  
有限保護期
- Confidentiality is important  
保密的重要
- Time, costs, abuse  
時間, 費用, 濫用
- New York Convention has 157 contracting states, requires contracting states to enforce valid arbitration agreements and arbitral awards  
《1958年紐約公約》至今共有157締約國同意承認及執行外國仲裁的裁決

## B. Relevant laws

### 有關的法例

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- The law governing the ADR agreement/ clause  
(規管解決爭議協議/條款之法律)
- The law of the seat of arbitration/local procedural laws  
(規管仲裁地之法律/受制本土的法律程序)
- Law governing the merits (subject matter) of the case (e.g. laws in the place of registration)  
(規管案件標的物對實體判決, 例如知識產權註冊地的法律)
- The law of the parties domicile  
(有關方面國家戶籍的法律)
- The law of the place of enforcement  
(執行地的法律)

## C. General Environment

### 大氣候

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- Knowledge based to intellectual property based economy  
知識型到知識產權型的經濟
- Different forms of IP: trademarks, patents, copyrights, designs, plant variety rights, trade secrets/confidential information  
各類的知識產權：商標、專利、版權、外觀、植物品種、商業秘密
- Similar rights: domain names, company names, geographical indications  
類似權益：域名、公司名稱、地方標記
- More intellectual property rights – more awareness – more such disputes  
更多知識產權 – 更多認知 – 更多糾紛
- Different settings require different skills  
不同的情況需要不同的技巧

## D. Arbitration simply described

### 仲裁簡述

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“a private process<sup>1</sup> in which parties agree<sup>2</sup>, to have their dispute decided for them<sup>3</sup> by a 3rd party arbitrator<sup>4</sup> resulting in a binding decision imposed<sup>5</sup> upon them by the arbitrator, which can be enforced by law.”

「由合約方同意由第三者仲裁員為他們作出裁決的私人程序，此由仲裁員強加於他們的裁決是可以根據法律強行執行的。」

[Notes: Alternate use and interplay between arbitration and mediation]

[註：仲裁與調解的交替使用和相互作用]

## E. Mediation simply described

### 調解簡述

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“a private, non-binding, third party mediator facilitated process for parties to reach their own binding agreement to settle a dispute”

「透過無約束的，由第三者調解員協助合約方達致他們同意有法律約束力的協議，來解決糾紛的私人程序。」

Mediator: not a judge, arbitrator or legal adviser

調解員的角色：並非法官，仲裁員或法律顧問

Aim: not to determine who is right or wrong

目標：並非決定誰是誰非

A highly specialized form of negotiation with the assistance of 3<sup>rd</sup> party neutral.

一種十分專業的和借助獨立第三者協調的談判

## F. Advantages of Arbitration / Mediation

### 調解/仲裁的好處

- ❑ One single solution (with choice of law/agreement by the parties instead of multiple proceedings in different jurisdictions)  
單一裁決/協議的安排 (由雙方選擇適用法律/協議, 代替在不同法域進行的多個法律程序)
- ❑ A neutral arbitrator/mediator (to avoid actual or perceived home court advantage)  
中立仲裁員/調解員 (可避免實際或潛在的主場優勢)
- ❑ Choice of arbitrators/mediator with relevant expertise.  
有權選擇賦有相關專長的仲裁員/調解員
- ❑ Expedited procedures parties control  
雙方可控制加快程序
- ❑ Limited rights of appeal/or finality of agreement to facilitate finality  
有限度的上訴權或決議的終局性有助終結糾紛
- ❑ Privacy (avoid leakage of trade secrets and risk to reputation)  
保存私隱 (避免商業秘密洩漏及損害聲譽之風險)

## G. Samples of IP disputes suitable for ADR

### 適合仲裁和調解的知識產權糾紛

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Not all are suitable. Some suitable samples:  
不是所有的知識產權糾紛都適合調解。合適的例子:

1. Patent, knowhow and trademark licenses (專利、技術及商標使用許可);
2. Franchises (專營權);
3. Computer contracts (電腦合同);
4. Multi-media contracts (多媒體合同);
5. Distribution contracts (經銷合同);
6. Joint ventures (聯營);
7. Research and development contracts (研究發展合同);
8. Technology-sensitive employment contracts (對科技敏感的僱傭合同);
9. Merger and acquisition where intellectual property assets assume importance (合併收購而知識產權在其中具有相當重要性的);
10. Sports marketing agreement (體育營銷合同);
11. Publishing, music and film contract (出版/音樂/影片合同);



## H. Types of Mediation - Facilitative/evaluative/hybrid? 調解的主要方式 (促進式/評估式/混合式?)

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- (1) Facilitative mediation 促進式調解
  - Mediator will not give legal or other professional advice to any party  
調解員對個案爭議內容不作評論或提供法律及專業意見
  - An interest based mediation  
利益導向之調解
  - Parties' self-determination  
由當事人自主解決紛爭
  - Sample agreement - Joint Mediation Helpline Office  
聯合調解專線辦事處 - 調解合約的樣本  
<http://www.jointmediationhelpline.org.hk/pdf/pdf4.pdf>  
<http://www.jointmediationhelpline.org.hk/pdf/pdf4-t.pdf>

# H. Types of Mediation

## 調解的主要方式

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### (2) Role of the Mediator 調解員的角色

- 2. The Mediator will be neutral and impartial. The Mediator will assist the Parties to attempt to resolve the Dispute by helping them to:

調解員將保持中立和公正，並藉下列方法協助調解各方嘗試解決他們的爭議

- (a) systematically isolate the issues in dispute;

有系統地把爭議事項分開處理

- (b) develop options for the resolution of these issues; and

就這些爭議促展解決方案；以及

- (c) explore the usefulness of these options to meet their interests and needs.

探討這些解決方案在符合調解各方的利益和需要方面是否有用

# H. Types of Mediation

## 調解的主要方式

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### Role of the Mediator 調解員的角色

- 3. The Mediator may meet with the Parties together or separately  
調解員可與調解各方共同或分開會面
  
- 4. The Mediator will not:  
調解員不會：
  - (a) give legal or other professional advice to any Party; or  
為任何一方提供法律或其他專業意見；或
  
  - (b) impose a result on any Party; or  
把某個結果強加於任何一方之上；或
  
  - (c) make decisions for any Party.  
為任何一方作出決定

# H. Types of Mediation

## 調解的主要方式

Hong Kong Law Society sample mediation agreement

香港律師公會調解協議範本

[http://www.hklawsoc.org.hk/pub\\_e/mas/agreement.asp](http://www.hklawsoc.org.hk/pub_e/mas/agreement.asp)

### 4. Role of the mediator 調解員的角色

- 4.1 The Mediator will facilitate discussions between the parties to assist them to reach their own agreement and will not impose an agreement upon the parties.  
調解員會促進雙方的討論，以幫助他們達成協議，但不會自行把任何協議加諸於雙方身上
- 4.2 The Mediator will conduct himself without bias toward or against any party.  
調解員會以不偏不倚的方式進行調解，不會針對任何一方
- 4.6 The Mediator will not make decisions for the parties  
調解員不會代表雙方作出決定

## H. Types of Mediation

### 調解的主要方式

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- 4.7 Although the parties acknowledge by signing this Agreement that they are aware that the Mediator has professional qualifications as a lawyer, the parties specifically acknowledge that it is no part of the function of the Mediator: -

雖然雙方在簽署本協議時，明白調解員擁有律師的專業資格，但亦同時明白，調解員的角色並非

(a) to give professional advice to either of the parties or  
向任何一方提供專業意見，或

(b) to make decisions for or on behalf of a party to resolve a dispute.  
代表任何一方作出決定，以解決爭議

# H. Types of Mediation

## 調解的主要方式

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### □ (3) Evaluative Mediation 評估式調解

- Mediator gives an assessment on the merits (strength and weaknesses) of the parties' case, judge on the correctness of each party's views and predict what will happen in court or other quorum

調解員可以就雙方理據強弱作出評估，評論每方觀點的準確性/對與錯及預測法庭或仲裁庭的審判結果

- Rights-based mediation

法律權利導向調解

- Depending on the mediator and circumstances, he may or may not further direct the parties towards certain solutions

視乎調解員的風格和情況而定，可能直接給予當事人建議和解方案

[Notes: Evaluative intervention may either be directive or non-directive]

[備註：評估式參與可以包括或不包括提供和解方案的指引]

## H. Types of Mediation

### 調解的主要方式

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- (4) WIPO (World Intellectual Property Organization) Mediation Rules Article 13 (Role of the Mediator) 世界知識產權調解規則第13條

□ 13(a) The mediator shall promote the settlement of the issues in dispute between the parties in any manner that the mediator believes to be appropriate, but shall have no authority to impose a settlement on the parties.

調解員可以按照其認為適當的任何方式協助解決當事人之間的爭議問題，但無權將解決辦法強加給當事人

# H. Types of Mediation

## 調解的主要方式

- (b) Where the mediator believes that any issues in dispute between the parties are not susceptible to resolution through mediation, the mediator may propose, for the consideration of the parties, procedures or means for resolving those issues which the mediator considers are most likely, having regard to the circumstances of the dispute and any business relationship between the parties, to lead to the most efficient, least costly and most productive settlement of those issues. In particular, the mediator may so propose:

調解員認為當事人之間的任何爭議問題難以通過調解解決時，可以根據爭議的情形和當事人之間的任何商業關係，提出其認為最有利于以最高的效率、最低的費用和最好的結果解決這些問題的程序或辦法，供當事人考慮。調解員尤其可以提出

- (i) an expert determination of one or more particular issues

對具體問題進行專家鑒定；

- (ii) arbitration

進行仲裁；

- (iii) the submission of last offers of settlement by each party and, in the absence of a settlement through mediation, arbitration conducted on the basis of those last offers pursuant to an arbitral procedure in which the mission of the arbitral tribunal is confined to determining which of the last offers shall prevail

由各方當事人提出最後的解決方案，并在無法通過調解解決時，以這些最後方案為基礎進行仲裁，仲裁庭在仲裁程序中的任務限于決定采用哪一種最後方案。



# I. Different views

## 不同的角度

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- (1) Should facilitative and evaluative mediations be mutually exclusive

促進式調解及評估式調解，兩者之間是否不能並用或是排他性的

- Reference:

Understanding Mediators' Orientations, Strategies, And Techniques: A Grid For The Perplexed by Leonard Riskin

[https://www.mediate.com/pdf/riskinL2\\_Cfm.pdf](https://www.mediate.com/pdf/riskinL2_Cfm.pdf)

# I. Different views

## 不同的角度

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### □ (2) What about hybrid? 混合式又如何?

#### □ What happens in reality 實際情況

- Parties' perspective

當事人的角度

- (i) Parties will naturally consider their legal position after a dispute has arisen and will seek advice (whether from lawyers or others)

在發生爭議之後，當事人自然想知道其法律責任及地位（向律師或他人查詢及評估）

- (i) Parties should not completely ignore the potential legal consequences if a settlement cannot be reached

當事人也不可完全忽視在不能達到和解協議時，其將可能會面對的法律後果

# I. Different views

## 不同的角度

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- Mediator's perspective  
調解員的角度

To help parties to negotiate and reach a settlement agreement on an informed basis, the mediator needs to have his own views on the merits of the case and the other options (or what will happen) if a settlement cannot be reached in addition to analyzing and understanding the underlying interests and needs of the parties

除了對當事人的基本利益和實際需要作出分析及了解，為協助當事人能夠知情地作出和解的決定，調解員本身也需要對該案情及雙方理據的強弱，與及在不能達到和解時，其他可能或沒有的選擇有相當了解

# I. Different views

## 不同的角度

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- (3) Against evaluative mediation 評估式調解的主要顧慮
  - Neutrality of the mediator and parties' trust in him will be affected once he gives an opinion which may favour one party over the other  
當調解員表達某些意見，可能對一方有利時，當事人對他的中立性和信任，將會受到影響
  - When mediator directs the parties to a settlement with his recommendations, parties may lose autonomy in self-determination  
若調解員直接給予當事人提出和解方案建議，將會失去由當事人自行提出解決方案的基本原則
- (4) Possible Benefits 可能好處
  - May reduce risk of misjudgment  
可能減低錯判風險

# I. Different views

## 不同的角度

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- (5) Best of both worlds? 兩者兼得?
  - Basic requirement 基本條件
    - Evaluation only given upon the request and agreement of the parties  
只有在雙方要求及同意下，才作出評估
    - Parties are entitled to accept or reject the evaluation  
當事人可以選擇接受或拒絕調解員作出的評估
    - Non-indirective or even if directive, it should not deprive or substitute the parties' autonomy in self-determination of the settlement they want. Mediator should not impose pressure on one party to accept certain terms and conditions  
不作出指引，或甚至作出指引時，不會向某方造成壓力，令其接受調解員所建議的和解條款，也不應剝奪或取代當事人自決的根基

# J. Techniques

## 技巧

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- Progressive: +/- Facilitative. Assessment at a later stage of the mediation after hearing out the parties and developing a better understanding of the case. This will give time for the parties to communicate and understand each others' interests and needs and avoid positioning at an early stage.

漸進式: +/-促進式. 調解員可以在調解過程的後期, 聽取了雙方的意見及對案情有更深入的了解後, 才作出評估。這樣可以給予雙方溝通, 了解大家的立場及利益的機會, 也避免雙方過早有既定立場

- Private reality test 在私人會面時作出現實測試
- Probing questions 探測性問題
- Discuss similar precedent cases 討論有關案例

# J. Techniques

## 技巧

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- Technique 技巧
  - Point out there is no jurisprudence on the issue  
指出某些法律問題是並無先例可援的
  - Present a range of possible outcomes including best and worst case scenario  
提出一系列的可能性包括最好及最壞的情況
  - Reminding the parties that any assessment is only be based on the limited understanding of the case within a limited time as presented by the parties and the materials available at the time of assessment. These may not be same as those presented or available at the full hearing  
提醒當事人任何評估只可基於當事人在有限時間內，所表達的情況及提供的有限資料，作出.此等陳述及資料，在充份聽證時未必一樣的

# J. Techniques

## 技巧

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- Main idea 要訣
  - Being neutral, fair, knowledgeable, sensible and reasonable will never go out of style  
是中立，公平，實際，有見識及合理的處理方法，是永不過時的



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# Thank You!

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