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MEDIATION CONFERENCE 2020

"Mediate First - More Than You Can Imagine"

6 NOVEMBER 2020

Mediation Conference 2020

2020 年調解研討會

"Mediate First –
More Than You Can Imagine"

「調解為先 超越所想」

6 November 2020

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Keynote Speech

Ms Anna Joubin-Bret[1]

(Transcript)

Good morning and greetings from Vienna. The Honorable Madam Secretary for Justice, Ms. Teresa Cheng, distinguished speakers, moderators and guests, ladies and gentlemen. On behalf of the United Nations Commission on International Trade Law, UNCITRAL, I would like to extend my warm welcome to all the distinguished guests of the Mediation Conference 2020 organized by the Department of Justice of the Hong Kong Special Administrative Region, hosted for the first time in a virtual setting in light of today's unprecedented circumstances.

It is with great pleasure and honor that I'm able to discuss the statutes of mediation and its importance in the current legal landscape. I'm pleased to highlight that this conference takes place at a particularly timely moment as the United Nations Convention on International Settlement Agreements resulting from Mediation or simply known as the Singapore Convention on Mediation, entered into force on the 12th of September, 2020. The Singapore Convention on Mediation provides an effective mechanism for the enforcement of international settlement agreements resulting from mediation.

By doing so, the Convention contributes to the facilitation of international trade and the promotion of mediation as a credible alternative and an effective method of resolving commercial disputes. This noble convention opened for signature in Singapore on 7th of August of last year and on the opening day alone, 46 States signed the Convention, making it one of the most successful conventions developed by UNCITRAL thus far in terms of signatures obtained on the opening day. Since then, 53 States in total have signed the convention and there are now six parties with Ecuador as the last one that has deposited its instrument of ratification on 9th September 2020.

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[1] Secretary, United Nations Commission on International Trade Law

It's our hope and expectation that the Singapore Convention on Mediation will rise to the position and the importance that the New York Convention has achieved for arbitration. We stand today with this great conviction that it is by no means an unrealistic hope. The Singapore Convention on Mediation closes the loop of the existing mediation landscape by providing an effective enforcement mechanism to international settlement agreements resulting from mediation to build certainty and trust in the international mediation process. We are therefore hopeful that mediation will continue to be a useful tool that makes international dispute settlement more cost-efficient and effective.

While the success achieved by the Singapore Convention on Mediation is truly extraordinary, it's equally worth noting that our work here is by far not finished. For the Convention to reach its full potential and effect, we must continue our efforts and invite more States and regional economic integration organizations to participate actively in adopting, ratifying, and exceeding the Convention.

With this respect, we deeply appreciate the level of attention and interest that the Department of Justice of the Hong Kong Special Administrative Region has already given to the promotion and the development of its mediation system. It's our sincere hope that this level of interest in Hong Kong continues to increase and that more members of the international community will commit to the goal of strengthening the enforceability of settlement agreements resulting from mediation.

Which will further in our view, of course, strengthen the rule of law, the development of international trade, and the prosperity of world economy. We've come a long way for such innovative mechanisms that allow for enforcement of mediated settlement agreements to reach this stage and we would like to invite even more participation and engagement to keep the momentum going.

With the understanding that there is a need for unification of mediation regulation, UNCITRAL began its work in mediation as early as in the '80s and

reached several milestones with the substantive contribution of States, inter-governmental and non-governmental organizations and experts, as is always the case in UNCITRAL Working Groups. In 1980, UNCITRAL adopted the UNCITRAL Conciliation Rules 1980, which were the first international steps taken to harmonize rules for mediation. Over the years, however, it became apparent that contractual solutions alone do not meet the needs of the parties.

UNCITRAL adopted a model law on international commercial conciliation in 2002. The model law sought to strike a balance between the protection of the integrity and the flexibility of the mediation process. Then in 2018, UNCITRAL developed two instruments in parallel, in an effort to further promote mediation as an effective dispute resolution method. A convention providing for the uniform and efficient framework for the enforcement of international settlement agreements resulting from mediation and an update of the model law of 2002. Such a multi-lateral law-making process provides States with the flexibility to adopt either the convention or the model law as a standalone text or both the convention and the model law as complementary instruments for a comprehensive legal framework on mediation.

While the Singapore Convention on Mediation and the 2018 Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation - This is a long title, constitutes significant milestones, there is still work to be done. Currently, UNCITRAL is in the process of updating the UNCITRAL Conciliation Rules and turns them into mediation rules to reflect current practice and ensure consistency with the Singapore Convention on Mediation and the Model Law of 2018.

Also, we are developing draft notes on mediation which will provide the users with some guidance on the mediation procedure. Both the draft rules and the draft notes on mediation were on the agenda for this year's commission session but in consideration of concerns surrounding the hybrid nature of this year's session and its efficient use for legislative developments, they will be discussed and hopefully adopted next year if and we hope so we can meet in person.

In terms of the role of mediation in ISDS, several recommendations have been made by Working Group III. The Working Group in UNCITRAL that is tasked or that is mandated to work on the reform of the investor-State dispute settlement system when considering this topic at its session last month. In an effort to continue work on mediation, the Working Group has provided guidance and identified preferences and way forward so that work can be undertaken to develop guidelines, rules, and model clauses to be used in investment treaties.

In addition, we deeply appreciate the generous offer of the government of the Hong Kong Special Administrative Region to host an intercessional meeting, to facilitate the sharing of information and mediation on mediation in the investor-state context, and contribute further to the discussion of Working Group III.

While this meeting was postponed to 2021, we looked forward to a pre-intercessional meeting on the 9th of November, which would provide a forum to contemplate a range of important topics such as overcoming challenges to the of ISDS, a multi-tiered dispute resolution process, hybrid models of arbitration and mediation, and the way forward on mediation as a reform option for the ISDS framework. We very much welcome this event that is in line with UNCITRAL's mission and works, including the promotion of the Singapore Convention on Mediation as well as mediation and ISDS.

With the current circumstances brought by the ongoing COVID-19 pandemic, collaboration and agreement prove to be more critical than ever. The mediated settlements of commercial disputes, which establish agreement as a core basis for facilitating ongoing and long-lasting commercial relationships, possess significant advantages and potential to support sustainable recovery in today's challenging circumstances.

The United Nations General Assembly has recognized that the use of mediation results in significant benefits such as reducing the instances where disputes lead to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the

administration of justice by states.

Promoting the use of mediation in international trade and investment therefore facilitates solving conflicts without going through more formal and sometimes lengthy and costly adjudication processes. Furthermore, compared to arbitration, mediation can be carried out in a more flexible way and in a cost and time efficient manner that would permit to mitigate undue risks and enhance access to justice.

For example, flexibility is preserved for states and parties even in the Singapore Convention on Mediation. First, the Convention focuses on the enforcement of the settlement agreement instead of the rules for the mediation process. Second, the Convention only contains limited formal requirements for settlement agreements to facilitate their expedited enforcement. Third, the Convention respects different methods for achieving expedited enforcement of settlement agreement and it allows contracting states to enforce settlement agreements in accordance with their own procedural rules.

The relevance of mediation especially in the pandemic era was also emphasized in our Virtual Panel Series: UNCITRAL Texts and COVID-19 Response and Recovery held in conjunction with the CS Commission session. On the final day of the series, the panelist explore how UNCITRAL's tools can help promote pro-women and gender responsive policies in a post COVID-19 environment and specifically the role of mediation in encouraging a constructive and managed dialogue in a safe environment could be especially beneficial to women and children.

The importance of mediation including online mediation as well the importance of the Singapore Convention on Mediation, cannot be sufficiently underscored in the uncertainties surrounding the pandemic and there is much value in the level of flexibility and efficiency that mediation provides. With the rise of online dispute resolution as an emerging worldwide trend, UNCITRAL is also ready to tackle today's ever- changing and quickly evolving legal landscape.

With the draft rules on mediation as an update to the 1980 conciliation rules, although it does not explicitly contain the mentioned virtual or online dispute resolution, the draft notes on mediation mention online mediation. Another tool worth mentioning are UNCITRAL Technical Notes on Online Dispute Resolution which was finalized and adopted in 2016. As its title suggests, it's particularly dedicated to online dispute resolution. Ultimately, such syntactical technicalities could be overcome by flexibility of the UNCITRAL Texts.

We are pleased that there is a panel dedicated to online dispute resolution today and it is our belief that UNCITRAL's instruments translate well over the topic and can adapt to an online setting. Our texts are sufficiently generic and flexible to accommodate and address these types of disputes. As previously mentioned, there is an ongoing effort to work on the specific language of the draft rules and the draft notes on mediation.

Now, with special thanks to the Department of Justice of the Hong Kong Special Administrative Region for their tireless support to make this event possible, I would like to now invite everyone to engage in the three panel session under the theme, Mediate First - More Than You Can Imagine. I've full confidence that all participants will find the session informative, soul-provoking and I wish all panelists and guests a fruitful and meaningful conference. Thank you very much for the kind attention and best of wishes.

United Nations Mediation Convention** – Challenges for mediators

Professor Nadja Alexander[1]

(Transcript)

Thank you, TK. Wonderful colleague and good friend for the very generous introduction.

Hi, everyone. It's a pleasure to be kicking off this panel and talking a little bit about the still new Mediation Convention. Anna has very kindly provided some of the background to the Mediation Convention and so I will adjust my comments accordingly in the time that I have today.

Before I get into an overview of the provisions, I think it's useful to note just geographically and regionally who has signed or which countries have signed and ratified the Convention. If you look at this slide, there's a great geographical spread and also a lot of some of the biggest economies in the world, but also quite a lot of small States. I think it's important to ask yourself, "Why?" We know we have an unprecedented number of countries having signed this at the opening ceremony, countries are still signing on and countries are ratifying. I think the answer is in large part because mediation makes a lot of business sense and I'll get back to that later as well.

We have the three -- based on data from 2019, three of the world's largest economies that have signed on and in Asia, which is where most of us I think participating are, three of Asia's largest economies have signed on and five ASEAN countries.

I think Anna has covered the 53 countries have signed and to date 6 countries have approved. Now I'm really going to talk about, what was the intention and motivation behind this, and what are the main provisions of it?

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[1] Professor of Law (Practice), Singapore Management University (SMU); Director, Singapore International Dispute Resolution Academy (SIDRA) of SMU

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I want to start with the question, which is, why bother? Why did we bother with a convention? Why did we bother with the convention when people often say, "Well, anecdotally, mediation has a high compliance rate." That means that when people sign on to a mediation settlement, mostly they stick to it. Sometimes they don't of course. Why do we want a mediation convention when there's an increasing use of hybrid or mixed mode processes where you can use mediation within, for example, an arbitration process and get a consent award.

I think the answer to this was very present in the minds of the drafters of this convention. It really is that this is about-- In a narrow and a very important sense, it's about direct enforcement of mediated outcomes, mediated settlement agreements internationally. In a bigger deeper sense, it's about the visibility, it's about the credibility, and it's about the legitimacy of mediation in cross-border settings as a standalone dispute resolution process in its own right.

I think given the number of sign-ons, given how we've seen arbitration move from its inception with the New York Convention 60 years ago and seeing how that's developed, we're going to see the same thing happen with mediation, facilitating international trade in commerce by managing disputes, but we're going to see it a lot faster because of a whole lot of reasons, some of which I'll get to later.

All right. I want to show you some figures. This is from a survey that we conducted at SIDRA, which shows not surprisingly, we asked people who used international dispute resolution, "What do you use and where does mediation fit in?" Not surprisingly, most of the users, lawyers and commercial users said, "We use arbitration mainly." If you look at mediation, which seems to come in fourth place here, but if you add in mediation as a standalone and mediation within a hybrid dispute resolution process, which came in third, it actually comes in second place. Mediation is being used a lot more already than we think, but it's being used a lot in hybrid processes as well.

Why is it being used in hybrid processes? I won't show you the slide for that, but

what our research showed is that users say, "We use a hybrid and or rather than straight arbitration because preservation of the business relationship is important to us and somebody either the lawyer or one of the parties is a little bit worried about compliance, is a little bit nervous and using a hybrid gives us more confidence, but actually it's often mediation that we're after."

This slide shows the gold are the corporate decision makers and the purple bar are the lawyer users. The client users if you like, and the lawyer users. If you look at that, you'll see that the difference between using arbitration and using mediation when it comes to the actual corporate decision-makers is much smaller. I guess the focus on arbitration in international dispute resolution, not surprisingly is strongly embraced by our lawyers because that's been in a practice that I've built up over the years.

The top three factors for choosing a dispute resolution mechanism were enforceability, impartiality and cost. We saw very high satisfaction rates with mediation when it was used and high satisfaction with cost, high satisfaction with impartial principled mediators and direct enforceability was the piece that was missing.

What the convention seeks to do, I guess, in terms of the international dispute resolution landscape, is create a landscape of appropriate dispute resolution, where we have the New York Convention for direct enforcement of foreign arbitral awards, arbitration outcomes where we have if you look straight to the bottom and the Hague Convention on foreign judgments, which is also very new for direct enforcement of foreign judgements and for mediation, the Mediation Convention for direct enforcement of international mediated settlement agreements.

How does it work? This is what we're all here for. This is a snapshot summary. Article 3, I think is one of the key articles in it. Article 3 basically says that the convention can be used as a sword or a shield. What does that mean? It means it can be used if you want to go and directly enforce a mediated settlement

agreement. That's a sword.

It can also be used as a shield which means that if you have a mediated settlement agreement and the other party goes for example, to arbitration or to litigation and tries to for example, litigate the issues that have already been settled in your mediated outcome, then you can take your mediated settlement agreement under the convention and hold it up and it will be-- subject of course to some appropriate exceptions, it will be a complete defense. It will be a shield. It operates both as a sword and a shield and effectively it offers recognition although the word recognition is not used for reasons that were required by some legal systems, but functionally it offers recognition of mediated settlement agreements, international ones, and recognition and enforcement.

What do you need to show that you've got a mediated settled agreement that falls under the convention? Really two main pieces of evidence, and this is in Article 4. You need to have the documented or recorded mediated settlement agreement signed by both parties. That can also be in electronic form and the conventions specifically expressly recognizes that mediated settlements can be recorded digitally, might be contained in emails and that's also an implicit recognition of the growing practice of ODR.

You need that recorded mediated settlement agreement document, and you need some sort of proof that the settlement agreement has resulted from a mediation. That can come from a mediation institution, for example, giving a certificate, attesting to this spec, or it could be in jurisdictions where this is the practice that a mediator might sign on the settlement agreement itself. Not to endorse its contents, but rather to say, "Yes, this settlement agreement was a result of the mediation I conducted."

All right, which mediated settlement agreements, MSAs are and which aren't. They need to be international and they need to be commercial and I won't go into the definitions of those, but what's important is that consumer, family, inheritance and employment matters, those are not covered by the convention

and there are good reasons for that. The shortest reason being that it's not within UNCITRAL's mandate, and also it's harder to get agreement on internationally. It's about commercial disputes, which also potentially includes investor-State disputes depending on their particular character. There's a lot of scope, I think for investor-state mediation under this convention.

Now there are a bunch of exceptions in Article 5 and some commentators have jumped up and down and said, "Oh, look at all these exceptions", but actually, there are exceptions that exist in any country where mediation practice is developed and so they are conventions, which relate to parties capacity, relate to, for example, the mediated settlement being reached at all based on some fraudulent conduct. The second point in relation to the mediated settlement agreement or not being complete in relation to the mediation procedure. There's been some, for example, breach of mediator standards and it's a very high bar to prove that the mediator hasn't complied with standards, so I think mediators are safe, yet quality is required and of course there may be public policy reasons as well.

In terms of existing law, the convention also says, if you would prefer to use some existing mechanism to enforce your mediated settlement agreement, rather than the convention, you can do that.

Basically, the last thing I want to say, is that the convention is an opt-out convention, so that if countries sign on without any reservations, then parties who seek to enforce a mediated settlement agreement in the country, which has signed onto the convention will automatically be bound by the terms of the convention unless they've expressly opted out in their mediation settlement agreement.

However, there is the possibility for countries when signing on or thereafter signatories to make reservations. There's two reservations that can be made. One of them basically says that, well, you can make a reservation if the government's a party to a mediated settlement agreement, they're not bound

by the convention. The second reservation is effectively that a country can sign on and make the convention an opt-in convention. The default procedure is it's an opt-out convention. You need to express the opt-out, but there is a reservation and I think only one country has made that reservation to date, I think, but the majority, it looks like are not, which I think is a good thing, because that will very much help mediation moving into the international mainstream. Thank you very much.

United Nations Mediation Convention** – Challenges for mediators

Mr Bill Marsh[1]

(Transcript)

TK, thank you very much indeed. Good morning everybody. It's actually a quarter past two in the morning here in London. It's a particular joy to be joining you all. It's, actually, genuinely a real pleasure and an honor to be here. Wish I could be with you in person and one day that will be possible again.

I want to talk about the Convention, really looking at it through my lens, which is primarily as a practicing mediator, as TK kindly said, I mediate a lot in international context. Since I come across the question of enforcement a good deal in practice, both in the product commercial world and also in investor-state mediations. Let me make three points in the time allotted to me about the Convention.

One is a point about the impact of the Convention. The second is to pick up one area of risk in relation to the Convention potentially and the third is to look at it from a policy consideration, which I think all of us need to bear in mind going forward. The first point is simply to note and to welcome the impact of the Convention as a promotional force for mediation and I want to pay credit to UNCITRAL here for its leadership and work on this.

When I began in this field which was 1991 we could not have dreamed of this level of credibility and stature of international recognition in the field of mediation that the Convention provides. I come across a lot of discussions at national policy levels in particular about the Convention and all these things are indicators of the way in which the Convention has pushed mediation up the agenda both in policy terms and also in commercial terms where the credibility lent by the mere presence of an international convention has been a significant boost to the mediation process.

I think the starting point is to say, this is enormously welcomed. It's something we couldn't have dreamed of 30 years ago when I started in this field and whatever the usage levels of the Convention in terms of parties seeking enforcement, the symbolic and the stature, if you like, that is lent to mediation through this through the symbolic value of the Convention cannot be understated. I give that a huge

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[1] International Mediator, Independent Mediators, UK

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welcome, particularly from my point of view, as a practicing mediator, to where of course the credibility of the process is in the eyes of the parties is crucial.

One area of risk that I see and my good friend, Nadja, in her excellent marks and thank you for those, Nadja, touched on this as well. It's too early to tell how much of a risk this will be, but let me set out the possibilities. My concern is the risk of abuse of Article 5, leading to heavily contested enforcement proceedings, which undermined the reputation of mediation as a low risk informal user-friendly process. Article 5 provides, and Professor Alexander touched on, there's various ways and quite proper ways, quite absolutely acceptable ways in which enforcement of a mediated settlement agreement can be challenged.

The one I want to pick up on is where there is a serious breach by the mediator of mediator standards. You have to bear in mind, of course, the context of which all this will be being looked at. Challenges to enforcement are necessarily going to be contested, otherwise, there wouldn't be a challenge. We're talking about a situation where one party to a mediated settlement agreement is seeking enforcement of it. By definition, the other is resisting enforcement of it. In that context, I think it's fair to say that parties resisting enforcement will cast around at whatever grounds they can find to resist enforcement.

One of the obvious areas they may choose is criticism of a mediator under Article 5(c). The kind of questions that raise, of course, we have yet to find out because these haven't happened yet. Let me just highlight some areas potentially challenged. How can a mediator's conduct best be judged if that's what the court whose judgment is sought about whether a mediated settlement can be enforced?

What, for example, if a mediator is seeking to break an impasse between parties by adopting an approach to mediation, which some mediators would find acceptable and others not? Are commercial parties, presumably not trained in mediation themselves able to make informed judgment calls about mediator conduct? Are judges able to make those calls? This is the heart of the concern, I think. Since the disputes in question are by definition international, it's likely that parties will have different cultural norms and practices for mediation. What if the mediator's conduct is regarded as completely acceptable in one context and completely unacceptable in another cultural context?

The question I'm thinking of here particularly might be a reality testing. Some

mediating cultures find a robust approach of a mediator completely acceptable. Others would potentially regard it as unacceptably aggressive. Whose evidence will be relied on? Would it be evidence given by the parties, the mediator, and does that have an impact on the parties, confidence in confidentiality?

Finally, will any of this have an impact on the mediator's performance and conduct? I could tell you when I'm meditating in the domestic or international context, one feels entirely free on the whole to adopt whatever one thinks is the appropriate mediating approach. I don't know whether mediators might become more cautious perhaps in an attempt to fend off any possible reference by the parties of your conduct as a basis to upset an agreement.

I don't mean to present a picture which is negative at all. None of this means that the Convention won't work. What it does mean is there is a challenge there for all of us to reflect on about the way in which mediator conduct is judged in the international context in the context of enforcement proceedings. One of the consequences of all that is I think parties and mediators would be wise to not lose sight of the emphasis on self- reinforcing mechanisms. Prior to the Convention, that's largely all the parties had. Traditionally, that's been of great use in mediation process. The use of escrow agreements, the timing of payments, title not passing until full payment is made, security guarantees, et cetera.

All that's been built in settlement agreements as a kind of self-enforcing process and my plea, I guess, to parties and mediators, and so on, is not simply to lose sight of those self-reinforcing mechanisms, just because of the presence of an external enforcement mechanism. It might be the Convention at its best enforcement under the Convention and self- enforcement mechanisms will operate very effectively hand in hand.

Let me come briefly to my final point, which is a wider policy consideration. Mediation and the law, to me, are like an old couple. Everybody knows-- I've been married for 28 years, that old couples understand that they both need each other, but they also need to give each other space in which to operate in front. So it is with mediation and the law.

They absolutely need each other and this Convention is a good example. Another example would be the legal framework relating to confidentiality. That might perhaps be a paradigm example of how much the mediation and the law need each

other. They also need to give each other space. Mediation needs to operate as effectively as possible without the assistance or involvement of the law in order to retain its inherently flexible strengths and its freedom from becoming enrolled in legal challenge.

I think it's important for us to recognize that the Convention itself is an important shift in this balance. What it seeks to do is enable parties to achieve by legally enforceable rights that which they previously had to achieve by consensus and commercial creativity. There's nothing wrong with that at all, but we need to recognize it's quite a big step and be conscious of its potential effects. It is I think part of a more fundamental question, which is to what extent mediation should be formalized and as it were increasingly part of the legal sphere. One sees this in many areas, not just in relation to enforcement, but also the training and accreditation of mediators' requirement to carry professional indemnity insurances and so on.

Looking around the world and I've worked with many governments on these issues, there is a widespread trend, I think in favor of a greater connection between mediation and the law. I'm not against it. I would acknowledge that it's not where we began. If I compare the informality of where we began to where we are now, we've now reached a point where the mere fact of entering into the mediation process, itself changes the parties' substantive rights, and obligations under the law. For example, the mere fact of entering into mediation entitles them to enforcement processes under the Convention and the mere fact of entering into a mediation entitles them in some jurisdictions to the suspension of limitational prescription periods.

I'm not against this relationship at all, but I do bear in mind, the old couple, mediation and the law, they do need each other, absolutely, and they also need space. If I can finish on this note, our job is to make sure that we give both of them, mediation and the law, the right balance in their relationship, so that the old couple hopefully will continue to thrive for many more years to come. Thank you very much.

United Nations Mediation Convention** – Challenges for mediators

Ms Winnie Tam, SC, SBS, JP[1]

(Transcript)

Thank you very much, TK, for a very kind introduction. Today I have the great displeasure in talking about the Singapore Convention or what I will refer to as the Mediation Convention from an international arbitrator's point of view. I must profess that I am not a mediation expert, and I have not even a fraction of the experience that Professor Iu, and Professor Alexander and Bill Marsh have. I would just look at it from the point of view of an arbitrator, from my understanding of mediation as an accredited mediator.

Now, how would the Mediation Convention impact on arbitrations? I think this is a question which many arbitrators would be interested in, because they will be able to envisage themselves, being put in a position where parties desire the interruption of the arbitration process, and to go into mediation.

Then, what will they do? Will they be able to fulfil the role and switch hats, and then perform the role of the mediator?

Nadja has just talked about what makes arbitration the most preferred alternative means of commercial dispute resolution. She pointed out that foremost is the impartiality, enforceability, and the costs issues. These would be in the forefront of the party's mind. For international enforceability, arbitration is not an issue because you have the New York Convention, which is widely accepted. Whereas for a settlement agreement, that's another question because settlement agreements, at the moment, you can try to enforce it as a judgment, or as an arbitral Award.

If it is a mediated settlement before the Mediation Convention, it is not possible to enforce it internationally. Will the Mediation Convention be a success given

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[1] Barrister, international arbitrator and mediator, Des Voeux Chambers

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its very prominent start? It came into force on the 12th of September, 2020, and then we see 53 countries signing up to it as of now, and 6 countries having ratified the Convention. As I see it, it is a very promising start, but whether it will be a success, it remains to be seen. It will depend on widespread adoption, in order to see its success.

A ready comparison is with the New York Convention, which is very widely adopted, 166 state parties with 162 out of 193 of the UN member states. Another comparison to make is the UNCITRAL Model Law on international commercial conciliation, which is adopted by 33 states in 45 jurisdictions. That is also considered to be-- or there is some promise to it, but we can't say that it has achieved great success. My view as an arbitrator is that the Mediation Convention is a very positive development, indeed, with a lot of potential in the popularization of mediation. As the two previous speakers have pointed out, it has pushed mediation up the agenda and made international prominence, and that is a very positive development indeed.

Then, three questions arise, will there be adverse competition with arbitration? In my view, I don't think so but I think there is going to be synergy between mediation and arbitration. I would foresee more parties considering mediation as an alternative to arbitration. In time, they will learn that they can combine various modes of dispute resolution means, and achieve the purpose desired. Will it be enemy of the third-party funders? I do not know enough of third-party funding at the moment because in Hong Kong, it's still in its very, very early stage.

I can see that third-party funders would rather there be a proper arbitration, than a mediated settlement in which case they may see themselves being excluded from the process. At the moment, it remains to be seen as to whether third-party funders will find this something which is against their interest. Well, as I said earlier, as I can see it, mediation and arbitration will synergize with one another, and we will see at the end of the day a bigger pie for all, and it will be a very preferred means of dispute resolution. Particularly, when combined with other means of dispute resolution in the event that mediation is not successful.

The beauty of the combined adjudicative and non-adjudicative process can be seen in the following points. Now, we all know about these multi- tiered arbitration clauses. These arbitral mechanisms sometimes it's called "up-made" or "made-up", or "up-make", but at the moment, we can see also difficulties. Particularly, in jurisdictions where there is no legislative infrastructure for the combined process, although in places like Hong Kong, Canada, Malaysia, Singapore, Australia and China, there has already been in place a legislative framework for these to be carried out.

In order to maximize the use of combined processes, and achieve a synergy between mediation and arbitration, it is important also to have updating of institutional rules, and provisions of model clauses. Now, I will provide some examples on the legislative framework and institutional rules. For example, in the ICC rules, there is no set modes, or particular formulation of the combination of dispute resolution, but it gives enough liberty for the parties to choose to have these combined processes. Under Article 19, it says where the rules are silent, the process can be carried out by any rules which the parties, or the arbitral tribunal may settle on.

Then, Article 21 also provides that the arbitral tribunal upon the agreement of the parties can perform the role of an amiable compositor. A more definite framework, a more well-defined framework under the Arbitration Ordinance provides that if the parties consent in writing, then an arbitrator may act as a mediator, but the consent in writing is very, very important. Then, it also provides that in the event that the arbitrator turns the procedure into a mediation procedure, it must first stay the arbitral proceedings before it proceeds to mediate.

It also provides an arbitrator who is acting as a mediator must treat the information obtained by the arbitrator from a party as confidential unless otherwise agreed by the parties, or unless Subsection IV applies. I'll discuss confidentiality and Subsection IV of this provision in the latest stage of this presentation. Now, under the HKIAC rules, the Hong Kong International

Arbitration Center arbitration rules of 2018, there is again clear provision for a combined process, where the parties agree to pursue other means of settling their dispute after the arbitration commences.

HKIAC, the arbitral tribunal or the emergency arbitrator may, at the request of any party, suspend the arbitration or emergency arbitrator procedure as applicable on such terms as it considers appropriate. The arbitration or emergency arbitrator procedure will resume at the request of any party to HKIAC, the arbitral tribunal, or emergency arbitrator. It is a particular procedure whereby the process can only be changed into a mediation process, or outside the arbitration by both parties agreeing to it. However, the arbitration can resume upon any party's initiation.

Next, I would like to discuss the risk and challenges. The risks and challenges of the combined process. One of the most discussed issues about the combined process is the arbitral tribunal switching hats. Under Section 33(5) of the arbitrations ordinance, it says that “no objection may be made against the conduct of the arbitral proceedings by an arbitrator solely on the ground that the arbitrator had acted previously as a mediator in accordance with this section.” However, as I understand it, it is generally regarded as treacherous for the same arbitrator to then put on a different hat as a mediator because of difficult treatment as to confidential information and sometimes doubts as to impartiality as I pointed out. Some lawyers have also pointed out that with the Singapore Convention, it may well be the case that parties will just opt for pure mediation and dispense with arb-med-arb at all.

The risks and challenges of the combined procedure -- About confidentiality in med-arb, under Section 33(4) as I have previously covered but haven't specifically referred to this particular provision, the arbitrator must before resuming the arbitration proceedings after switching it to mediation disclose to all other parties as much of that information as the arbitrator considers as material to the arbitral proceedings.

Parties choosing to use a combined process in order to take benefit from the Singapore Convention to get a mediated award must be aware of the fact that if there were confidential information disclosed in the process of mediation and it is this arbitrator conducting the mediation, then the arbitrator will have to disclose the confidential information to the parties so long as those information is material to the arbitral process.

To conclude, I consider the expression of the Chief Justice of Singapore in a speech given in 2016, appropriate. He says that ADR should now stand for Appropriate Dispute Resolution. It is not alternative but appropriate with flexible use of different modes in combination and choosing the correct and appropriate process for the parties for the dispute.

Looking forward, I would see that it will improve access to justice through flexible, diversified, and appropriate employment of different modes of dispute resolution. It will be a choice for the parties with knowledgeable professional advice, and we need to pay attention to capacity building and sharing of experience of otherwise confidential proceedings. Thank you very much.

United Nations Mediation Convention** – Challenges for mediators

Judge Deng Yu[1]

(Transcript)

女士們、先生們、各位嘉賓、各位朋友，上午好。我們非常榮幸受香港律政司的邀請，在全球齊心協力抗擊新冠肺炎疫情之際，以在線方式參加此次調解會議。這次會議也將是我們踏進 5G 智慧新時代一次很好的實踐體驗，也說明提供高效一站式這種跨境糾紛解決服務，應該是未來發展的趨勢。今天，我有幸在這裡和各位嘉賓分享交流的主題是，參與全球多元解紛機制建設的司法實踐與發展。

中國共產黨第十八屆四中全會將完善多元化糾紛解決機制上升到國家治理層面。2019 年，習近平主席提出將非訴訟糾紛解決機制挺在前面。中華人民共和國首席大法官、最高人民法院院長在今年 9 月 2 號，在全國高級法院院長座談會上也指出，堅持以習近平新時代中國特色社會主義思想為指導，深入貫徹政法領域，全面深化改革推進會的精神。並全面推進一站式多元解紛和訴訟服務體系建設，不斷提升新時代人民法院化解矛盾糾紛及服務人民群眾的能力和水平，加快形成符合中國實際、中國國情，滿足人民期待，體現司法規律，引領時代潮流的中國特色糾紛解決和訴訟服務模式，促進服務大局，司法為民，公正司法，更好地服務、統籌推進常態化疫情防控和經濟社會發展。

在多元化糾紛解決機制這項改革中，內地法院在習近平新時代中國特色社會理法思想的指導下，深刻認識到把握司法規律，立足中國國情的重要性，積極吸取古今中外的司法文明優秀的成果，發揮司法在多元化糾紛解決機制改革中的引領、推動和保障作用。按照中國共產黨第十九屆四中全會的部署，又加強和創新社會治理完善黨委領導、政府負責民主協商、社會協同、公眾參與、法制保障、科技支撐的社會治理體系。那麼，推動糾紛解決方式的多元化，也就是我們所說的 ADR 替代性糾紛解決機制，我們從法院角度做了以下幾方面工作。

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[1] Director, Judicial Reform Office, Supreme People's Court of the People's Republic of China

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第一方面就是發揮司法政策的引領作用，提升多元共治的水平。內地法院認真落實中央的改革部署，從推進國家治理體系和治理能力現代化高度出發，將多元化糾紛解決機制改革作為系統性、基礎性、全局性的工作來推動落實。從人民法院第二個五年改革綱要實施以來，一直是將多元化糾紛解決機制改革作為重點的項目持續推進，先後制定、發佈了 30 餘件多元化糾紛解決機制的司法解釋、政策文件。同時與司法部、公安部、婦聯、僑聯、工商聯、證監會、銀保監會等多個部門，聯合發佈 28 個相關的文件，引進律師調解等各類專業、高效、優質的解紛資源，建立多層次、立體化、精細化對接的機制，對接的調解、仲裁、公證等各類解紛機制，將多元解紛的制度優勢轉化為治理效能。

2018 年，最高人民法院印發關於公正債權文書執行若干問題的規定，對經公證賦予強的執行效力的債券文書，可以不經訴訟，直接成為人民法院的執行依據，進一步發揮富強、公證的糾紛預防方面的功能。最高人民法院周強院長將司法改革和信息化建設確定為推動法院工作發展的車之兩輪、鳥之雙翼，提出要雙輪驅動、兩翼齊飛。內地法院積極回應互聯網時代下的多元化司法需求，探索推動審判方式、訴訟制度與互聯網技術的深度融合，取得了舉世矚目的成效。

第二方面就是發揮制度機制的作用，提高多元解紛的能力。內地法院將多元化糾紛解決機制改革和其他的司法改革措施系統集成、協同推進、一體落實，將傳統的和合文化融入新時代社會治理和現代化法制建設，促進訴訟與其他多元解紛機制的高效銜接、協同發展、有效地整合。人民法院不斷地完善特邀調解制度，充分發揮 4.9 萬個特邀調解組織和 11.4 萬名特邀調解員的作用，將特邀調解貫穿到立案、審判、執行的全過程，增強糾紛化解的預見性、快捷性和時效性，綜合運用法律規定、法律、法規、行規、慣例、公序良俗 、公平正義的理念和觀念，推動特邀調解的規範化、專業化、法制化。

在最高法院的指導下，各地也積極推進特邀調解工作，如廣東省高級人民法院出台廣東自貿區跨境商事糾紛調解的規則，規範涉港澳商事糾紛的調解工作。據瞭解，廣州市的南沙區人民法院，珠海的橫琴新區人民法院，包括深圳前海合作區人民法院都公共選聘了 102 名特邀調解員，參與調解

案件的應該是 1898 件，調解成功的達到 840 多件，成功率達到 44.47%。據統計，人民法院通過特邀調解來分流案件，佔一審民商事案件總數的 19%。

第三個方面就是發揮司法的保障作用，提升協議執行的質效。首先就是完善司法確認制度。我們知道中華人民共和(國)人民調解法和民事訴訟法規定了調解協議司法確認制度，支持訴訟外調解的機制、提高強制執行的效力。2019 年 11 月 20 日，最高人民法院、中國人民銀行、中國銀保監會印發了關於全面推進金融糾紛多元化解機制建設的意見，對於金融糾紛的多元化解機制、案件範圍、調解協議的司法確認制度，金融糾紛多元化解機制工作流程都做了明確的規定。那麼，平等的民商事主體之間，因為金融業務產生的合同和侵權責任糾紛，可以向金融糾紛調解組織申請調解。經過金融糾紛調解組織調解員主持調解，達成了調解協議，具有民事合同性質。經過調解員和金融糾紛的調解組織簽字蓋章以後，當事人也可以向有管轄權的人民法院申請司法確認，確認其效力。

近年來，應該人民法院受理的司法確認案件逐年在增長。2019 年，內地法院共受理司法確認案件 34.1 萬件，確認有效的比例達到 94.5%。其次，我們還推行了繁簡分流改革。2020 年，最高人民法院根據全國人大常委會授權決定，在北京、上海等 15 個省、自治區、直轄市納入試點的中級人民法院、基層人民法院和專門法院開展民事訴訟程序的繁簡分流改革試點工作，進一步優化司法確認的程序，完善小額訴訟的程序，簡易程序的規則，擴大獨任制適用的範圍，健全電子訴訟的規則，提升司法的效能，促進司法公正。第三個層面就是推動多元解紛的立法工作，積極推動像廈門市、吉林市、四川等 7 個省市，制定了矛盾糾紛多元化解的促進的條例。

自中國簽訂了新加坡調解公約以來，最高人民法院依託國際商事法庭、互聯網法院也積極推動建立北京、上海等國際商事調解中心，加強國際商事調解的宣傳、交流等工作，完善商事調解規則和訴調對接的程序，不斷將多元解紛的改革成果，向法制層面轉化和提升，推動建立共商共建共享的糾紛解決機制，為多元解紛提供司法保障，也提供中國的經驗。

這是以上我們在座嘉賓的分享和一點體會。最後，多謝大會邀請我參加此次會議，祝此次會議圓滿成功。謝謝。

United Nations Mediation Convention** – Challenges for mediators

Madam Guo Min[1]

(Transcript)

有幸能夠參加這個 2020 年調解會議。下面我主要圍繞內地人民法院在線矛盾糾紛多元化解平台的建設情況和發展構思，向各位進行介紹。2019 年，為貫徹落實習近平主席堅持把非訴訟糾紛解決機制挺在前面，從源頭上減少訴訟增量的重要簡化精神，最高人民法院提出一站式多元解紛和訴訟服務體系建設的工作部署。一站式多元解紛作為一站式建設的重要組成部分，積極強調走出去，也就是主動發揮人民法院的職能作用，為非訴訟方式解決糾紛提供司法保障，也注重引進在人民法院的訴訟服務中心，建立類型多樣的調解工作室，或者通過人民法院調解平台引入各方的調解力量，為當事人提供多途徑、多層次、多種類的解紛服務。

早在 2013 年，內地人民法院就開始全面推進智慧法院建設。2015 年，為了順應互聯網時代 ODR 發展的大趨勢，內地不少法院就開始探索視頻在線調解工作。2016 年，最高人民法院出台關於人民法院進一步深化多元化糾紛解決機制改革的意見，明確提出要根據互聯網+的時代要求，推廣現代信息技術在多元化糾紛解決機制中的運用。2017 年，最高人民法院開始組織研發在線調解平台，並啓動試點工作。2018 年 2 月，人民法院調解平台正式上線。

人民法院調解平台具備在線的咨詢評估、在線調解、在線申請司法確認、在線申請立案等各項功能，為當事人提供全時空、跨地域的一網解紛服務。截至今年 10 月 3 日，人民法院調解平台已經覆蓋全國 3419 家法院，匯聚了 3.6 萬個調解組織、9.63 萬名調解人員，然後已經匯聚了 1054 萬件調解案件，調解成功率約達到 61%，成為具有中國特色的在線矛盾糾紛解決的新模式、新實踐。

人民法院調解平台並不是法院一家獨舞的平台。為了更廣泛地引入各方調

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[1] Team leader for Diversified Dispute Resolution of the Case Filing Tribunal and Senior Judge Assistant, Supreme People's Court of the People's Republic of China

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解力量，最高人民法院於各中央單位建立總對總在線訴調對接機制。主要做法就是將人民法院調解平台與各中央單位的糾紛調解平台進行對接，或者將各中央單位的調解力量引入到人民法院調解平台，實現資源整合、數據交換和信息共享。目前，人民法院調解平台已經與中國證監會、全國工商聯、中國人民銀行的調解平台實現了對接，下一步還將與中國僑聯、中國銀保監會、全國總工會、國家發改委、價格認證中心等單位的調解平台進行對接，形成解紛的合力，共同參與社會治理。在線訴調對接機制可以實現案件調解全部流程的在線處理。我舉個例子，浙江省在線訴調對接機制可以實現案件調解全部流程的在線處理。比如浙江省某上市公司的一個證券虛假陳述責任糾紛一案，先由浙江省杭州市中級人民法院對先起訴的中小投資者的起訴依法做出判決，明確了賠償標準之後，對於後來起訴的中小投資者在自願接受調解的基礎上，通過人民法院調解平台，將案件在線委派給第三方調解組織及中國證券投資者保護基金公司進行調解。這個調解組織在自己的調解平台，也就是中國投資者網在線接收了調解申請後，根據雙方訴求提出一個合理的、專業化的調解方案供雙方參考。經過多輪調解，最終達成了調解協議，調解金額共計是 20 余萬元。案件調解成功後，雙方當事人通過調解平台，共同向杭州市中級人民法院申請司法確認，該法院依據民事訴訟法的規定，依法對調解協議做出確認。

在線調解還突破了時間和空間上的限制，尤其是疫情期間能夠讓當事人、調解員零接觸、不跑腿，就可以化解糾紛。比如在一例繼承糾紛中，一個大女兒湯某燕想繼承她已經去世的母親李某某的一處房產，但是享有繼承權的二女兒湯某梅已經定居了日本多年，她是很少回國，所以這個房屋始終未能辦理繼承。今年大女兒湯某燕因為經營困難，想盡快地繼承房屋來週轉資金，但是因新冠疫情的影響，二女兒湯某梅更加不便回國，於是大女兒湯某燕向安徽省和縣人民法院提起一個繼承糾紛訴訟。和縣人民法院收案後，將該案通過調解平台，在線委派給和縣的涉僑調解工作站。這個工作站的調解員經過遠程視頻的在線調解後，達成了調解協議。調解員將調解協議通過平台推送到雙方當事人的手機上進行簽字，之後當事人在調解平台上向法院申請司法確認，法院經審查依法做出裁定。

在這裡還要向各位介紹內地專門處理道路交通事故損害賠償糾紛的專業化平台及道交一體化平台。此平台對接了公安交通管理部門、人民調解組

織、保險公司，能夠實現一件調取交通事故責任認定的信息、車輛的承保信息和駕駛員信息，能夠在線調解、在線申請理賠、在線申請司法確認。截至今年 10 月中旬，道交一體化平台已經匯聚了保險行業的調解員是 1.4 萬餘人，申請調解是 34 萬餘件，調解完成 37 萬餘件，調解成功率是達到了 78%，涉及金額是 111 億餘元。

在世界 ODR 迅猛發展的大背景和司法為民宗旨的指導下，我們致力於將人民法院調解平台打造成符合中國國情、體現司法規律、引領時代潮流的多元化、智能化、國際化的在線矛盾糾紛調解平台，具體體現在五個方面：即是化解案件量最多，調解資源最豐富、訴調對接最順暢、智能程度最領先、解紛流程最高效，這是我們給人民法院調解平台規劃的美好前景。

具體發展思路可以概括為以下四點：一是擴大調解主體範圍，培育專業化、行業化的多元調解力量。內地法院將繼續發揮人民調解、行政調解、行業調解、專業調解、律師調解、商會調解等多方解紛主體的作用，建立這種婚姻家庭、勞動爭議、醫療糾紛、銀行保險、證券期貨、知識產權、涉僑涉外等各類專業化的調解工作室，吸引越來越多的社會力量參與到矛盾糾紛的化解工作中。二是提升信息化應用水平，深化在線調解平台的智能化建設，我們將通過人工智能、區塊鏈等技術，進一步完善信息的保密安全、訴訟結果的預測、類案推送等功能，提高平台的應用性和解決糾紛的效率。三是堅持從群眾需求出發，推動在線調解平台效能升級。內地法院將全面推動這個在線調解的這種方式，逐步實現當事人足不出戶就能解決糾紛。四是順應時代潮流，加快推動在線調解平台的國際化進程。隨著一帶一路建設的深入推進，國際商事爭端的有效解決已經成為優化營商環境，推動全球治理法制化的一個必要因素。2019 年 8 月 7 日，中國簽署了新加坡調解公約，為進一步深化在線矛盾糾紛多元化解工作提供了發展機遇。內地法院已經建立了國際商事法庭，並且正在創建一站式國際商事糾紛多元化解平台。同時，我們將廣泛地引入國際調解組織、調解專家參與到國際商事糾紛調解工作中，為境內外提供更加便捷、高效、低成本、可信任的線上多元解紛服務。調解可以緩和矛盾、摩擦、降低解紛成本、兼顧情理法是一種共建共治共享的治理理念，在當今互聯網時代推行 ODR 已經成為國際糾紛解決發展的新趨勢。人民法院調解平台雖然起步較晚，但是發展迅速、覆蓋廣泛、成效明顯。我們相信隨著一站式多元解紛機制建設的深入

推進和在線調解平台的日益完善，我們將創造出多元解紛的中國模式，為世界 ADR 發展貢獻中國智慧、提供中國方案。

謝謝大家。

United Nations Mediation Convention** – Challenges for mediators

Dr James Ding [1]

(Transcript)

Thank you, TK, and thank you for speaking so highly about the social media of the IDAR office. I encourage you all to take a look. Today, I'm going to share with you some of the views from the government, on our perspective on the Mediation Convention and some related development. Actually, there's a not much I can say about the Mediation Convention from the Hong Kong Government's perspective because we are still in the process of studying the conventions.

At this stage, I could share with you some of the preliminary observations about the Convention. First, we know that this Mediation Convention applies to mediations conducted anywhere in the world, not just within jurisdictions that have ratified the conventions. The Convention does not operate on the basis of reciprocity between the contracting states. The absence of this reciprocity can be explained by the lack of the State of Origin of the concept of "Seat of Mediation" under the conventions.

The consensus was reached in the working group discussions about this approach, since it's very practically difficult to identify a seat of mediation and also, there is a broad consensus to leave the mediated settlement agreement to the control at the state of enforcement rather than the state of origins if one can never be determined where's the State of Origin is.

In addition, we also looked at Article 8 of the Convention and now certain reservations to be made by contracting states. In particular, we notice that it may exclude investment mediations involving investor - state disputes. The effectiveness of the conventions very much depends on how frequently the

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[1] Commissioner, Inclusive Dispute Avoidance and Resolution Office, Department of Justice, Hong Kong SAR Government

** United Nations Convention on International Settlement Agreements Resulting from Mediation

contracting states are making use of these kind of exceptions or reservations, and that's something that we need to look further.

These are just some of the preliminary issues that we are currently studying and the possible ramifications under the Convention. As mentioned earlier by the speakers from the mainland China, China's signed the Mediation Convention, and if the Convention is to be applied to Hong Kong in accordance with the Basic Law, there are also some other issues, more local issues that we need to consider for its applications.

The first issue relates to the local legislative framework computations. Currently in Hong Kong, mediation is governed by the Mediation Ordinance which provides for the legislative framework for mediation in Hong Kong. We have to consider if the Convention is to be applied to Hong Kong, whether there's any need to amend our existing legislative framework. In addition, we also need to consider the regulatory framework for mediators for example, as mentioned by some previous speakers, about proof of serious breach of the standard or failure of disclosures by the mediators are required for refusals to grant relief under Article 5 of the Mediation Convention. We are now looking into the current regulatory framework in Hong Kong concerning the center of mediators and the mediation institutions, et cetera. These are also some of the issues that we are considering. In addition, we also have to consider the treatment of mediated settlements, not covered by the conventions.

We are considering if we implements the Convention and that's the mechanism for implementation of the mediated settlement under the Convention, should we adopt the same mechanisms for those mediated settlement not covered by the Convention, for example, between Hong Kong and the mainland of China? Talking about the mediations between Hong Kong and the mainland China now, I'd like to share with you the CEPA Investment Agreement between Hong Kong and the mainland of China.

Under the CEPA Investment Agreement concluded on the 28th of June 2017

between Hong Kong and the mainland. In the Investment Agreement, it provides for investment protections and other privileges and benefits for both sides. In particular, I would like to share with you the mediation mechanism under the CEPA Investment Agreement. Under the CEPA Investment Agreement, there's a detailed mediation mechanism. The parties agree to use mediation to settle disputes arising from an alleged breach of the substantive obligations of the CEPA Investment Agreements by one side, causing loss to the investor of the other side.

The use of mediation has many advantages. In the interest of time, I'm not going to repeat because I think almost all of the speakers have already covered the advantage of mediation. In particular, the use of mediation, in our view, is also very useful for resolving investor - government disputes. Under the CEPA Investment Agreement Mediation Mechanism, both sides have designated their own mediations institutions and mediators. At the moments there are a total of four mediation institutions.

Mediation rules are also adopted by the designated mediation institutions and mediators of Hong Kong. The mediation rules were announced on the 14th of December 2018. I encourage you to take a look at these mediation rules and our Mediation Mechanism which provide for a very comprehensive framework for settlement of investor-State investment disputes under CEPA. Just to highlight a few key features of the mediation rules under the CEPA Investment Agreement, it provides a basic framework for the parties to make use of the rules to resolve their disputes. There's also, at the same time, ample room for customizations of the rules by the parties. The parties can also supplement and make any necessary adaptations to the rules and the rules emphasize on cooperation between the parties and mediators in good faith.

It also requires active participations to enhance the mediation expeditiously and efficiently. We have adopted a default mediation commission comprising of three mediators, this way it gives greater control of the process by the parties. We have also set out a code of conduct for mediators to ensure their

independence and impartialities. Since we have concluded the CEPA Investment Agreement, we have put strong emphasis on the need for capacity building and for training of mediators as well.

As mentioned by some previous speakers, capacity building is very important for CEPA Investment Agreement Mediation Mechanism and also, for the Mediation Convention as well, for their success. I think it's a very important element that we must not forget when we also talk about the Mediation Convention. In Hong Kong, we aim to provide investment dispute resolution skills trainings, with a vision to building a team of investment mediators in Asia to handle international investment disputes.

To this end, DOJ, my department, together with the International Center for Settlement of Investment Disputes and Asia Academy of International Law, we have organized two investment law and investor-State mediator training courses in 2018 and last year. It was the first course ever organized of this kind in Asia's with such reputable institutions joining hands together. We have attracted over 100 participants from different jurisdictions, including legal and dispute resolution practitioners, academic and government officials. We are also planning to organize another training in 2021 and I would very much encourage your participation in the training.

As mentioned by Secretary UNCITRAL Ms. Joubin-Bret, we're also organizing a Working Group III Pre-Intersessional Meeting next Monday, on the 9th of November, which we'll discuss mediations under the ISDS reform context. We will discuss the use of mediation to resolve investment disputes. I also encourage you to participate, and I think that the registration is still open.

Lastly, I will just mention some of the mediation initiatives and developments in the Greater Bay Area. The outline development plan for the Guangdong - Hong Kong - Macao Greater Bay Area supports Hong Kong to establish itself as a center for international legal dispute resolution services in Asia and Pacific region. We consider that these Greater Bay Area initiative provides great

potentials for dispute resolution professionals in Hong Kong and also elsewhere. In particular, mediators. In fact, GBA can be a good testing ground for the enforcement of cross-border commercial mediated settlement agreement.

In Hong Kong, we have already adopted reciprocal arrangements for enforcement of arbitral awards and also for judgment in civil and commercial matters between mainland and Hong Kong, which are modeled on international instruments like the Hague conventions, and maybe the Mediation Convention could also be a model for us to take into account if we had to develop similar reciprocal mechanisms. In fact, we have started discussions on the subject. We have established a GBA legal department Joint conference since last years to facilitate communications among the legal departments in Guangdong, Hong Kong and Macao.

The first joint conference was held last year in September, in Hong Kong and the three legal departments agreed to promote mediations in the Greater Bay Area to further work out the details: including formulating best practices, guiding principles relating to mediations and mediators in the Greater Bay Area, and exploring a mechanism for the reciprocal enforcement of mediated settlement agreement.

There are a lot of developments on mediation in the Greater Bay Area and in the process, we also take into account developments at the international level, including the Mediation Convention. The next meeting will be held in December and we will refer to our developments of the mediation and developments in the GBA. That concludes my presentations. Thank you very much.

Use of online dispute resolution in light of COVID-19

Mr Zbynek Loebl[1]

(Transcript)

Hello, Adrian. Hello, everybody. Welcome and good morning from Prague. I'm glad to be invited to this conference. We all know and predict that the future of the resolution of dissatisfaction or dispute will be predominantly based on data-driven online processes and machine learning or artificial intelligence. Yet at the moment there is a vast asymmetry of power, between what are few super artificial brains located in the cloud. For you or me to feel safe, we need AI to be as smart as the AI of these few giants, either companies or accounting. Well how to do that? We believe that the way to resolve this issue is to voluntary share data between the people and entities who generate the data. This is the core of the concept of Open ODR.

Open ODR is a concept of decentralized online environment for resolving dissatisfactions of people. It proposes a voluntary data-sharing amongst people as data generators for the purposes of providing AI-based public services again for the people. What is the concept of Open ODR? It is that the data generators, which means mainly people, individuals, but also ODR- providers, they'll voluntary share their anonymized ODR-related data to an open digital system, which we call Open ODR environment, which will provide, again, people and other data generators with smart AI support for resolving their dissatisfactions based on all the shared data.

The data generators will be able to share their own data with third parties, including the data aggregators like a huge company, including large internet firms, but not to the general shared data and the services provided by the Open ODR environment. This is, in a nutshell, the concept of Open ODR. They will of course need to be security standard and minimum of self-governance and regulatory supervision.

We envisage that there will be three principal layers of Open ODR. There will be access layer for accessing ODR systems anywhere in the world. There will be integration layer for very flexibly implementing various ODR platforms for different needs. For example, related to COVID issue. There will be the AI layer for providing the public AI-based services trained on voluntarily shared anonymized data shared among and by the data generators.

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[1] Of Counsel, PRK Partners

The access layer, they'll provide three principal functions. First, it will enable access of people to their prepared way of resolving dissatisfaction with any vendor or private or public service provider anywhere in the world. Second, access layer will actually enable its users to pre-transaction verify the vendor's reputation with respect to their track-record of resolving their customer dissatisfactions or in general, dissatisfactions, and also the track-record regarding the privacy-related services.

The access layer will also deal with data exchange or data sharing. It will actually implement the data sharing only based on invitation by the data generators, which is the opposite to what we have at the moment, when people need to consent to something proposed to them. Now, it will be the data generators, mainly people, to propose terms, under which they invite third parties, including the data aggregators, to exchange data with them.

Then there will be an integration layer. An integration layer will be something like a "4D" open model of a standard dispute resolution processes including negotiation, mediation, arbitration, adjudication, online state courts et cetera. We all know that for example in healthcare everything is labeled, everything must be standardized so that a process or medical process or prescription is shared among different healthcare providers or physicians, they all understand each other. Open ODR proposes, with respect to the integration layer, to do something similar with respect to standard ODR processes.

The integration layer will enable to quickly set up ODR systems and platforms, public or private, connect them with other systems and very flexibly modify them for a fraction of the costs which are necessary today for setting up more comprehensive ODR systems. Then there will be the AI layer. AI layer will be an online environment, which we call Open ODR environment, which will provide public services, services in public internet, based on defined ethical rules and machine learning. This is sometimes called the common ODR, so the AI layer will be like an ODR online order arbitrary.

The AI layer at the moment and Open ODR is in the very beginning. It needs a lot of research. Of course, it has many loopholes at the moment et cetera. At the moment we think that there will be only very few services provided by the AI layer and this will be the reputation indexes of vendors or service providers, which as I mentioned, will enable users to select before transaction the most suitable vendor or provider, including provider of public services. Then, actually, there will be something like robo-

support for negotiation. Then, there will be the data exchange, the data- sharing protocol and multi-linguality, AI supported multi-linguality.

What will be the outcomes of Open ODR? The outcome of the access layer will be a new type of communication tool which we call PCTs, personal communication tools. This will be something like smart personal app or agent probably connected with a server, so it will be a combination of an app and let's say a browser app and / or mobile app and a server.

Then, the outcome of the integration layer will be something which we call ODR Machine. It will be really like a machine to produce ODR platforms which will be based on open published specifications and it will enable to use the integration layer as I tried to explain earlier. There will be open published schemes and specifications related to all the outcomes. The concept of Open ODR is very new. I initiated it and I have been thinking of it for the past four years but actually only one year ago, we came together, more of us, from universities and individual experts and we formulated it.

Really, we are publishing this concept of Open ODR right now, this month. We also put together a very extremely informal think tank of experts and institutions which support the concept of Open ODR. We would like to start that project to get funding and develop the community of experts. At the moment, we even do not have our website but it will be soon. If you would like to be the first supporters, both individuals and institutions, at the moment they are from Europe and from the US, I shared with the conference organizer the concept of ODR which is like a paper and at the end of the paper there is a list of the supporters.

Those of you who are interested in the concept just send me an email and we would be very happy to start communicating. Thank you very much.

Open ODR

Mr Zbynek Loebl[1]

(Concept paper of Mr Zbynek Loebl)

It is now certain that online courts will start operating in more and more countries, the process has started and in the first countries online courts has been introduced. Online courts can significantly improve the lives of people through their access to dispute resolution. At the same time online justice poses new serious challenges which need to be addresses from the beginning of the justice transformation, i.e. from now.

The **independence of judges** in the future will require a decentralized control of dispute resolution data. Even at present central control of data in online dispute resolution (ODR) tends to lead to decisions being non-transparent and issued by robots (e.g. in case of customer disputes resolved by large internet companies). Also in at least one country (China) court decisions are being directly monitored and influenced by centrally controlled robojudges before they are issued. This threatens to undermine the principle of the independence of judges/arbitrators/mediators/panelists.

At the same time, the future of online justice will need wide cross-border sharing of large amounts of anonymized dispute resolution (judicial in the broad sense of this term) data in order to implement all the benefits of the forthcoming data-driven judicial processes while at the same time fully preserving the right for a fair trial and improving access of people to justice, with a particular focus on access to justice for vulnerable persons.

At the moment online courts and private ODR platforms all over the world **do not** adequately accommodate **vulnerable persons**. This results in the current distrust of vulnerable persons to online justice, even in countries which has introduced otherwise successful online courts. If this issue is not addressed now, ODR will further deteriorate access to justice rather than improve it. It would clearly be a failure of great opportunity. New forward-looking ODR systems need to start from addressing the needs of vulnerable persons rather than postponing this issue to the future.

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[1] Of Counsel, PRK Partners

Vulnerable people in our understanding include not only people from low income groups or people with disabilities but also people who transact online only if they really have to and who do not trust to transact online (often higher or middle age persons with low or secondary education).

Online dispute resolution systems which will win the trust of vulnerable people will most probably become trustworthy for other persons as well, through the necessary simplicity, explainability and at the same time diversity by design to accommodate varying needs of vulnerable persons. Through prioritising vulnerable persons Open ODR has an ambition to initiate new sectors providing new types of services for the mass market.

Concept:

Open ODR will be a decentralized open environment for online resolution of disputes. It will contain three principle layers: (i) **access layer** for accessing platforms/systems for any type of disputes by the parties; (ii) **integration layer** for developing, adapting and interconnecting ODR platforms and services of various public and private dispute resolution providers, including state courts; and (iii) **AI layer** which will provide data driven services based on machine learning (Services) to the Open ODR users.

Open ODR layers will be realized through the following interconnected outcomes:

(i) Flexible open digital environment called **ODR Machine** capable of generating multiple ODR platforms for wide range of ODR providers, types of disputes and legal procedures;
(ii) Open digital environment for generating new type of personal tools called Personal Communication Tools (**PCTs**) for accessing ODR platforms; and
(iii) Services connecting platforms and apps generated by ODR Machine and PCTs.

ODR Machine and PCTs will enable open diversity of design of online tools which however will be able to interoperate and smoothly exchange data among themselves and with other systems.

Data from Services will be stored in ODR platforms and apps which will implement the integration layer (ODR Machine) and/or in storage and communication tools of the parties (PCTs) which will implement the access layer.

Users of Open ODR will be individuals and entities which generate ODR data through their dispute resolution interactions (data generators). Services will consist in the provision of core data sets (e.g. reputation indexes of vendors incorporating data about resolution of dissatisfactions of that vendor consulted by consumers before they decide to purchase a product/service) or data models (e.g. model for direct negotiation between a consumer and vendor about disputed issues). Each user-data generator will select from available Services those which they consider important for their activities or decisions.

Individual platforms and systems/tools using Open ODR will be independent and will have a form of open or closed platforms/systems based on published open schemes, specifications and protocols. Other systems not based on Open ODR will be able to use the public open schemes and protocols included in Open ODR for smooth interaction with Open ODR based systems. There may be incentives for users to develop additional modules or complementary functionalities, e.g. through online marketplace(s).

Services will be automatically updated and enhanced ("trained") by the **Open ODR environment** based on voluntary sharing of data among the community of data generators. Data generators will share their data with the Open ODR environment rather than directly with other data generators. Open ODR environment will interconnect systems and tools implementing the access and integration layers through data sharing with the Open ODR environment.

Open ODR will not have a central place of administration or control. There will be no obligatory central registration of platforms using Open ODR, there will be no central place where all the information about all platforms and systems using Open ODR will be held. This goal is achievable by combining emerging technologies (e.g. the DID[2]; or Semantic Container[3]) with published open

[2] DID means Decentralized Identifiers; the concept of the DIDs has been developed by W3C: https://www.w3.org/TR/2020/WD-did-core-20200421/
[3] https://www.OwnYourData.eu/semcon

schemes, specifications, data sharing protocols and published transparent organization rules.

Ethical foundation:

Open ODR will be based on **ethical principles**. The goal of Open ODR is to improve access of people to justice, particularly vulnerable people. Ethical principles will be key for all the three layers of Open ODR. Such principles will need to be widely researched, discussed and continuously enhanced.

Ethical principles of Open ODR will be contained in the published Ethical Codex. All platforms, systems and tools implementing Open ODR will need to accept and comply with the Ethical Codex.

Open ODR will also implement concrete best practice measures to facilitate multi-linguality, flexible adaptations and localizations and implement features to assist handicapped persons.
Compliance with ethical terms and organization rules of Open ODR will be realized through system design, cybersecurity measures and minimum built-in and self-declared organization rules in public interest. If the community establish self-governance body or bodies, there might also be random checks by the self-governance body or bodies.

In addition, anybody will be able to complain about non-compliance of a platform/system with the Open ODR terms to a new self-regulatory body; the self-regulatory body will also resolve any suspected non-compliance identified by the automatic random checks by the Open ODR environment.

Data Exchange and self-governance

The new self-regulatory body might need to have a role in **updating** and **maintaining** the data sharing protocols, open schemes and specifications. Reasons for its establishment, its functions, resources and composition will need to be researched. Inspiration and lessons learned might be taken from open-source economic models or the current organization of internet (ICANN etc.).

There are two principle approaches to modeling the self-regulatory body or

bodies of Open ODR and all of them relate to the model of data sharing which is key concept behind Open ODR:

(i) Decentralized model of self-governance

In this model every system, using Open ODR environment, including PCTs, will share anonymized data only with systems with which there is an agreement on data sharing (**invitation** and **consent**); i.e. there is no automatic data sharing among all the systems using Open ODR, there will not even be such theoretical option included in the design of Open ODR.

There is no centralized maintenance or compliance monitoring. Maintenance and self-governance is organized by individual systems or groups of systems based on individual agreements.

Open ODR initiative might establish an online marketplace where tested systems and applications will be available for interested persons. Open ODR initiative may start a voluntary certification scheme with random checks of certified systems. There may be more such online markets and certification schemes.

(ii) Partially centralized model of self-governance

Open ODR may define minimum options for central data sharing among all the systems and applications using Open ODR. Such central automatic data sharing will nevertheless apply only if a user whose anonymized data are to be automatically shared provides its consent with data sharing. Then there will need to be a central self-governance body for maintenance of the minimum automatic data sharing among all the Open ODR systems.

In addition, there might be a minimum set of compliance rules which will be monitored and randomly checked by the central self-governance body.

Costs of such self-governance bodies will need to be covered from various sources.

How it will work:

Data generators will share their generated data but only in anonymized (de-personalized) form with the Open ODR environment which will be pre-defined and structured based on published open schemes and specifications.

Data generators-ODR providers will share statistical data or data sets/subsets regarding the disputes they will be resolving and the types of parties involved. Data generators-the parties will share their statistics as well and also possibly additional subjective data related to their "feelings" – this is to be researched. Even these subjective data will be anonymized (de-personalized) before sharing with the Open ODR environment, without the possibility to connect them to a particular person.

Open ODR environment will provide Services to the data generators in exchange for such data sharing. The structure of data/data sets/subsets shared by data generators with the Open ODR environment may or may not be different than the structure of data/data sets/subsets shared as part of the Services. The content of the Services will be based on all the data shared by the data generators – i.e. through the Services, data generators will benefit from general data from the Open ODR environment, enhanced by the respective community or communities of data generators.

Regarding the parties, they will set up their own preferences and in addition note/collect also their emotions and other **subjective data** elements related to the resolution of their dissatisfactions. Even these data and data sets/subsets should have standard structures, with room for flexibility though. This issue needs to be researched. Subjective data influences people's actions and indirectly will also be shared with the Open ODR environment in the form of data sets/subsets derived from such people's actions, after their anonymization.

ODR providers will publish some of the general data sets generated by the Open ODR environment together with some of their own data to present to the public how the ODR provider performs. We need to research which such data sets indicating the quality of performance of ODR providers should be.

Some of the data sets generated from the Open ODR environment might also

be published by the Open ODR community in order to indicate current trends. We need to research what such data sets should be.

Services will be available for free for data generators who agree to share their anonymized data with other data generators also for free within the Open ODR environment. For other data generators, Services will be provided for a market price.

Data generators will be able to share some or all of **their own** data, but **not** data received as part of the Services also with third parties including data aggregators, on **terms data generators will control** through specific online **invitations** which any party will need to receive to get access to the data to be shared by the data generator. This feature will be provided by the access layer.

Through the access layer, people and entities will be able to easily set-up with whomever they want to communicate, in their own language. This information will be „visible“ in a standard format defined by the access layer implemented in online tools of individual users or websites of ODR providers where it can be read by systems of third parties; existing people-focused systems like browsers, mobile apps or anti-virus tools will also be able to work with such information.

Open ODR will facilitate designing and implementing complementary modules, language localizations and services which will be sold or made available for free according to their producers.

Measures to prevent the risk of transforming Open ODR into a „Matrix“-like system

System of Open ODR will be designed to ensure that daecentralization of data control and maximum openness and flexibility of the design of ODR interface cannot be misused into creating the opposite – i.e. increased centralized control of judicial data and processes. Proposed measures are the following:

- All schemes and specifications of Open ODR including Services will be published and available for free to anybody to develop the same or similar systems/online environments;

- Machine Learning models and other data-based services will be distributed: they will be created based on data from multiple data generators, and will be owned and run by multiple entities in the system; core models and services will be available for free to all the data generators who will share their anonymized data;
- Data sharing between Open ODR environment and data generators will be voluntary, based on open published data sharing protocols and:
    - Data generators will share with Open ODR environment only their anonymized (de-personalized) data, not their personal data;
    - Data generators will be able to share with third parties (including data aggregators) only their own anonymized (de-personalized) data and **not** the general data from Open ODR environment;
    - Open ODR environment will implement technical measures to prevent potential „gaming“ of the system by some data generators through requesting inadequate excessive amounts of general anonymized data through Services; such measures need to be researched;
- Open ODR will be protected by best practice cyber-security measures against misuse;
- Open ODR systems will be constantly monitored by their operators and, if established, there might be a transparent self-regulatory body which will also provide random checking and similar measures;
- The self-regulatory body (if established) will not have any access to the data shared within the Open ODR; the self-regulatory body will be transparent and subject to public oversight.

Scope of the Services:

We propose that Services include (i) reputation index(es); (ii) negotiation module(s) (both mentioned in the description of the concept of Open ODR above); (iii) test modules to verify/monitor compliance of an ODR provider with ethical principles of Open ODR; (iv) data sets to provide feedback to management of ODR providers regarding their ODR services[4]; and (v) comparison of selected data between all the ODR providers (e.g. average length of proceedings). Services may be interlinked with each other. As an example, swift implementation of agreed resolution of an issue between a

[4] Using existing standard ODR data structures and creating new ones

consumer and service provider will result in improved reputation index of that provider.

The AI layer will use game theory to construct Services-related incentives for entities to compete in features empowering people (e.g. resolution of dissatisfactions and privacy).

Services will use standard open data sharing protocols which need to be researched and developed.

Example of a use case:

An individual user, based on her/his data, including her/his subjective data, will get a recommendation/index. The Services will provide an objective view which will enhance the subjective (limited) recommendation/data of the user. In this way the user will be able to decide taking into consideration both her/his data and also general objective view resulting from data sharing from other users. After the user decides and makes an action, her/his action will generate new anonymized (de-personalized) data which will be shared with the Open ODR environment.

In this way, i.e. indirectly, the Open ODR environment will also capture subjective data of the individual users, while protecting them fully for the respective users - data subjects.

The Services will automatically update some of the data sets of the users (e.g. the reputation indexes), while other Services will require instant interaction between access and integration layers or more precisely between systems and tools implementing each of the access and integration layers, as explained under Technology section below. For example negotiation of a concrete issue will trigger a Service which will provide a recommendation to a party what her/his next offer in a concrete situation might be in order to get to a settlement.

As mentioned above, the focus of Open ODR will be on vulnerable people. The Services need to be exciting especially for vulnerable people in order to initiate wide user adoption by vulnerable people as well as by other users. Growing **user adoption** will generate industry adoption driven by activated new users

from so far neglected user groups because Open ODR should lead to increased willingness of vulnerable persons to transact online through their increased trust.

Focus on vulnerable people means that Open ODR will need to adopt the following design principles:

(i) **diversity by design** in order to accommodate broadly varying needs of vulnerable persons; diversity by design will be achieved by designing and implementing maximum possible open flexibility based on open standards and schemes of Open ODR; and

(ii) wide **participation of vulnerable people** in designing Open ODR; this will be achieved by a number of user pilots from the start of the design process; Open ODR is in its core a **frugal innovation**.

Technology:

Existing technology should be tested for the purposes of securing control of access to data by data generators. The potential use of the DID concept and other existing alternatives including **Semantic Container** needs to be researched[5].
For example, **every data storage in Open ODR may be defined as a DID**. Access to any such DID or its part will require an invitation from the respective data generator who controls the DID-storage. The invitation to access the DID could be one-time only or more general and also it could cover all the data of the respective user related to the Services or only some of them. Regarding the parties' tools (PCTs), the DID should apply not just to ODR data but also to data from other areas of interest of the users, e.g. privacy or healthcare.

[5] Questions include the following:

- Can the concept be used for Open ODR as described above?
- Is it possible to structure the concept in a standard way so that it would be possible to „open" access of a third party only to some parts of each data sets?
- Is there already a standard „labeling" of data sets from different sectors for the purposes of the concept (e.g. for privacy, healthcare or ODR) which would enable systems to invite and access the correct part of the data set only? If not, is this sg. which can be further explored in connection with the concept?

Also we need to research possible usage of other existing technologies for other aspects of the PCTs[6].

Open ODR technology will implement concrete cyber-security best practices.

Open ODR will follow a low-code approach. An application developer will build an application by selecting from existing modules, connecting them to create graphical structures called constellations. Constellations will be represented and edited visually following a low code approach, abstracting them from specific programming languages. Constellations represent a new approach designed for the purposes of Open ODR which potentially has applications beyond the ODR field. Constellations will enable designers of ODR platforms to automatically recognize similar structures and coding in systems from different fields, and to reuse them with minimal effort.

Cross-domain:

Open ODR will be one of the pioneers in the cross-domain implementation of decentralized open online environments in which data are controlled by data generators, primarily people, with regulatory oversight and effective public enforcement. Such new online environments will need to interact and support each other. This must be taken into account during the architecture and design stages. These cross-domain opportunities need to be researched.

Main innovation:

1. The difference between Open ODR and large data aggregators like Google is crucial: who controls the data. In Open ODR data are controlled by the whole community of those who generate the data as opposed to a central entity which aggregates data. This is key to ensure maintaining all the rights of fair trial and independence of judges/panelists in the future online justice.
2. Open ODR will implement ethical standards of justice in a concrete application of AI and data-driven processes in order to improve access of people to justice, including for vulnerable people.

[6] E.g. Microsoft cloud technology and their Identity hub, i.e. MS Identity Experience Framework in Azure Active Directory

3. Open ODR will include a new type of online tools for people (personal communication tools or PCTs) for access to empowering data driven services making use of **collective** sharing of data among people in a secure online environment with transparent governance. The services will start with resolution of dissatisfactions (Open ODR) and will expand into other areas (e.g. healthcare, etc.).
4. Open ODR will implement cross-domain structures of such decentralized open online environments.
5. Open ODR will prepare standard „labeling“ of ODR processes and their component parts which will enable easier interaction and compatibility of any ODR platform, whether based on Open ODR or not.

How to do it:

Design and development of Open ODR requires the following principal tasks:

- Public discussion of ethical principles and how they will be transformed into Open ODR architecture;
- Preparation and public discussion of the architecture of the three layers of Open ODR;
- Preparation and public discussion of the initial open schemes and specifications of Open ODR;
- Development of the first PCT-type tool and its first live pilots;
- Development of direct negotiation module of ODR Machine which will support the market introduction of PCTs;
- Developing online training modules for judiciary and roll-out of such training;
- Full development of ODR Machine;
- First pilot projects of ODR Machine;
- Research, public discussion and establishment of the new regulatory entity; and
- Many other research, development, dissemination and other tasks.

Open ODR is a long-term goal which will require several years and establishment of active community of interested experts.

What we already have:

- Initial discussions on the ethical principles of Open ODR;
- Initial reference material on the architecture and contents of the access layer;
- Initial reference material on the architecture and contents of the integration layer;
- Initial discussions of the AI layer;
- Initial reference material on the concept of constellations; and
- Initial discussion of the online training modules for users of Open ODR including judges, the parties, court admins etc.

About Open ODR Organization (www.openodr.org[7]):

Open ODR Organization is an informal think-tank of people and institutions interested in implementing Open ODR. Open ODR Organization will coordinate discussions of draft documents, encourage creating working groups and support applications for grants or other ways to obtain funding for developing Open ODR. Open ODR also plans public research projects focusing on mapping current desires of people regarding resolution of their issues and dissatisfactions online.

Supporting experts: Zbynek Loebl (PRK); Davide Rua Carneiro (Polytechnic of Porto, School of Management and Technology); Patrick T. Smith (Twente University); Brigitte Krenn, Tristan Miller (both Austrian Research Institute for AI (OFAI); Michal Araszkiewicz (Jagellon University); Radim Polcak, Madalina Bianca Moraru, Jakub Harasta, Pavel Loutocky (all Institute of Law and Technology, Masaryk University); Adrian Gropper (Patient Privacy Rights); Hadrian Zbarcea; Leah Wing (National Center for Technology and Dispute Resolution (NCTDR), USA)

[7] Website is currently under construction; you can email to Zbynek Loebl: zbynek.loebl@prkpartners.com

Use of online dispute resolution in light of COVID-19

Mr James South[1]

(Transcript)

Thank you, Adrian. Good morning, good afternoon or good evening everybody, wherever you might be in the world. As Adrian said in his introduction of me, I've been to Hong Kong recently working with the institute and it's a shame that I haven't been back to Hong Kong yet because of the pandemic. I guess that highlights to me the change that we've seen in the last nine months because of the pandemic. Normally we would do this type of conference completely face-to-face. I would go on a plane and come to Hong Kong. Now I'm doing it from my study on a computer with you all.

That trend has been seen also in relation to mediation, so the topic that I will look at is the learning that CEDR and our mediators have had from doing online mediations in the last nine months. I think what we've seen as a general trend is, although online mediation, and when I say online mediation, I want to be clear, I'm talking about mediation done via this type of platforms. I'm not talking about for some of the stuff further on in development but talking about traditional mediation done via Zoom or Teams or Skype or whatever.

The pace of change has been accelerated by the pandemic because of necessity and I think the skepticism of the mediation community, mediators and lawyers involved and even the clients, perhaps has begun to be addressed because the question was always, "Can this really work?" I think the last nine months have shown undoubtedly that it really can work. I want to start maybe, with some statistics from out center in London. We do thousands of mediations a year, normally face- to-face, and these two statistics really highlight the change in nine months.

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[1] Managing Director, Centre for Effective Dispute Resolution; Mediator

If you had have asked me in February, "How much virtual mediation do you do" I would have said, "Basically none. Maybe sometimes the mediator will have a Zoom conference or conference before in preparation, but full mediation online? The answer was pretty much zero and on the average" Well, it was done face-to-face and our average settlement rate was 70-75", which is in line with the international standards of settlement for mediation.

If you look at the picture now, I got the current statistics, we're now mediating 30 to 40 cases online a month. It's a slight drop of what our monthly average is but it's coming back up to where normal levels are. We've now done hundreds of mediations over the last nine months and the really interesting thing to me is that the settlement rate is 10% higher on average. Whether that is because of the pandemic and people just wanting to get stuff sorted, we don't know, but it does show that in terms of efficacy, in terms of outcomes, that it is completely possible to settle cases in a virtual environment.

That's the quantitative aspect. The qualitative aspect of one of the things that I'm going to go on to talk about today, what is it the learning that mediators have had from doing this process now in the last nine months? We've all been pleasantly surprised. Any doubters out there, and there were quite a lot of them from the mediator community, have all really gone 180 degrees in their view, and said from going, "No, this is not possible. You can't develop rapport," to saying, "Yes, this is possible and I can develop rapport and I can settle cases."

Things have really changed. What are our key learnings? I want to talk about differences. They may be advantages, there may be some disadvantages or obstacles. Then at the end, I just want to focus mainly on my views about what the future might hold.

When we were thinking about what were the differences, we thought, we start with our basic map of what a mediation looks like. Those of you who have are CEDR-accredited or gone through any mediation training, this five-stage model will not be unfamiliar to you.

You start with preparation, then you open, you do exploration, you bargain and negotiate and you reach conclusion. Now, normally, that model was talked about in context of a day mediation. The same phase model broadly holds, we've found, in the virtual world but there are some key differences. This slide highlights some of them. I'm not going to talk through all of them on this slide, because many of them I'm going to talk about later, but just a couple I wanted to pick up. I think it is really important if you're going to appoint a mediator to do an online mediation, that they have some experience of it, because it is different: It does require an extra level of knowledge about how to deal with the platforms, you would expect the mediators just at least to be trained in the platform they're using, and preferably that all the mediators have some training in online delivery of mediation.

We've put all our mediators on our panel through a fast track program to make sure that they're up to speed with how the techniques are different. I think that's an important point when you're thinking about appointing a mediator. Obviously, the documentation, ground mediation agreement has been altered to account for the virtual environment and the issues that get raised. That's really important, you can't just use a standard mediation agreement, because it doesn't quite work, so you have to adjust the documentation.

That also relates to the end of the process. You have to think about how you're going to do the settlement agreement and do the drafting jointly. I'll put some of those points up later and get the signing off, so some of those logistic points are different as well. As an overview, the model holds true, the process is broadly the same. It's just how you move within each phase, and how you move through the phases towards settlement, I think is slightly different.

One of the things I wanted to highlight is actually it's important for mediators and lawyers, I think particularly representing clients with their own lawyers to think about designing the right process. The move to online mediation allows mediators and parties to break free from what in the UK at least is a traditional one-day model. You come and you turn up, you come on, and you stay there in

a room or rooms until the mediation is settled. The virtual environment doesn't need to operate like that. It gives mediators and parties more flexibility to consider the process that will work best for the parties.

There are things taken to account, the technical capabilities of the parties you're working with, time available, so you can if you need to check, break it down into chunks. I think the other important thing is, as we all know, as we get Zoomed out or Teamed out or conferenced out, is to be clear about screen fatigue and how much time people can still spend in front of the computer. If you're really asking people to sit in front of the computer for some time, 10, 11, 12 longer hours a day, that's a lot of time. Thinking about how you might break the day up and do it in different chunks is a really reasonable way to do it. We're used to working like that now, so working with the parties to be creative about how you design the process and manage these is really important.

I've seen some really innovative ways that mediators are doing, for example, medical negligence cases, we deal with a lot of medical negligence, clinical negligence cases, at CEDR. Those are being done in different ways, not just all in one day, broken into chunks. The same thing with employment and workplace cases. You're doing virtual Skype, Zoom calls with parties, individually over a series of days, and then bringing together perhaps at a later point. Thinking about the process, the model of the phases holds true and the same, the way you might deliver it will be different. I think mediators are getting good at being flexible and creative along those lines.

Other than designing the process, what are some of the key differences? There were many, so I've just tried to pull out the key ones. What we're doing at CEDR, is trying to keep running a list. The mediator are feeding into us the differences, and we're trying to put together all these differences and develop some thought leadership around this. Watch our website for that sort of learning.

One of the key ones and the first one here is, exploration and party engagement starts during preparation. Traditionally, in a commercial mediation, at least, the

mediator would engage with the lawyers. Then, you wouldn't meet really the parties until you come to the mediation day. That has completely changed. Because of the requirement to make sure everybody understands how the process works online and get people familiar with it, mediators have been doing a lot of work with the parties, right in the preparation stage, I meant the parties directly, getting them on Zoom calls, having conversations with them, checking in the connection works. What that allows is for early engagement with the parties in preparation, and that does two things from a mediator's perspective.

One, and importantly, starts to develop the rapport and a working relationship really early. If you can put that in the bank, right in preparation, it changes the dynamic. It means you can move more quickly in the later stages. The second aspect is obviously you begin to have a discussion, even though you're on an informal Zoom call, you begin to have a discussion about the case. Then you begin to get a sense of what's important to the parties really early on, which you just don't normally get in a face-to-face mediation.

One of the mediations I did, we're on a Zoom call, we started having a chat about life, and of course, that segued into what their dispute and the interruption it was having on this business's life. I got the sense of what was really important to them. That was for the first 10 minutes of the preparation call. Normally, that would take me probably an hour or so into early exploration before I got to anything like in a normal face-to-face mediation. For me, I think that is a real key difference.

I think the next point, it does mean though, that mediators are taking more time in the preparation phase, and we do have additional tasks. The providers and or the mediators are having to almost work as logistics managers in terms of the online platform. How does it work? Talking to them about the breakout rooms and everything. We're having to teach parties how to use Zoom. It's not something many of us were familiar with before, but we've got familiar with very quickly. That adds another layer about task in the preparation, but as I said,

I think it adds benefits to the process in terms of engagement and rapport and others begin to understand interests.

The third point there, one of the refrains you often hear is that you can't build rapport online. I think the point is, it's just different. You can build rapport. Even though you're doing it online, background humor, the humor about someone's cat walking in front of the screen, those sort of things you can do online. You do it differently, so you can do it. Then, I think, overall, just because of time, I'm just going to skip some of these points. The process itself will be different. I've found myself using more joint meetings, because I can bring people together quickly and say, what do you want to do? Let's have a chat about this topic, and then break them back into their breakout rooms. I found the process overall can move more quickly, so I can move through exploration more quickly and because I've done some of that exploration work very early on.

Those are some of the key differences. Finally, in my last few minutes to move to the future, if I may. What is the future? I think the Rubicon has well and truly been crossed. There's no going back now. We can't say it doesn't work, online mediation doesn't work. We can't say it's not effective, because the statistics, and the qualitative feedback is the opposite. Parties say they like it, because that's more informal, they can engage and it's easy to engage with someone sitting in your living room, than perhaps in a formal law firm setting. It's here to stay, it will be part of the new normal, whatever the new normal looks like, once we're through this pandemic period. This will, in my view, lead to an expansion of mediation into new areas, and we're all really beginning to see it.

We've started to do a lot of conflict coaching off the back of mediations, because parties have realized, "Oh, there's an issue in my workspace and my workplace." Okay, this mediation is sorted out dispute, but actually, this person can do with some coaching and then we'll offer that. The final point was, it won't be, I don't think, just online mediation. It doesn't mean face-to-face mediation is dead. I think what it means is there's going to be a hybrid, and we're going to have more choices as dispute resolution professionals, as

lawyers, and as disputants, about how we want to do it, and it's probably going to be a mixture. We may do some sessions online and then we may come to face-to-face if that's possible.

I think this new world of online mediation has opened up the possibility for expansion of the use of mediation in a number of different areas. It's an exciting time and I think we need only to see the opportunities that it presents us. Thank you.

Use of online dispute resolution in light of COVID-19

Mr Rhys West[1]

(Transcript)

Thank you very much, Adrian. It's a great pleasure to be here and speaking with you all. Good day to you all and thank you for the opportunity to speak. As I was introduced, I'm Rhys West, I'm the Chief Executive for FairWay Resolution in New Zealand. I'm speaking to you from New Zealand tonight. Here, as you see behind me, it's just starting to get dark. There's been a lot of very important work put into the possible use of ODR within the APEC community to assist in the resolution of MSMEs disputes.

The photo, which you can see on this first slide of mine shows the main authors of the Collaborative Framework, Mr James Ding, who is the Chair of the APEC Economic Committee, Mr Yoshi Hayakawa, the Convener of the APEC Economic Committee Legal Group, and Mr Mike Dennis, who will be joining me as we say tonight, he acts as an ODR expert for the APEC Economic Committee in its work on the Collaborative Framework. Mike will be presenting in a few minutes as well. I'll hand over to him once I've been through a bit of the introductory information.

I was privileged to join the group of people that you see on the screen today in Osaka and also in Santiago last year, as the framework was being formed in that session and through those sessions are brought to those process, the perspective of an ODR provider in the 20 plus years of dispute resolution, excellence and delivery that FairWay Resolution has. It was really, really rewarding to have the APEC ODR Collaborative Framework and Procedural Rules adopted in August 2019 at the Asia Pacific Economic Cooperation in Chile just after the Collaborative Framework was approved.

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[1] Associate Dean, School of Law, City University of Hong Kong; Member, Research Centre for Sustainable Hong Kong, City University of Hong Kong

In this presentation, we'll look at the challenges facing APEC small businesses today and how the APEC ODR Collaborative Framework brings a much needed solution to improve justice and to boost trade.

Let me start with a few facts about APEC because I think it's important just to place that for people. APEC represents about 38% of the world population, 50% of the world's trade and about 68% of the world's GDP. That's 21 member economies include, for example, Australia, Canada, China, Chile, Japan, South Korea, Indonesia, Mexico, New Zealand, Peru, Russia and the United States. Its goals are free trade, regional integration and economic growth. Economic Committee, or EC as it's referred to, is a key pillar of APEC. It engages in the structural reform, including framework. The Economic Committee has studied the use of ODR since about 2016. It follows UNCITRAL's adoption of the ODR Technical Notes. The EC adopted the Collaborative Framework in 2019 and is now working on its implementation, as was mentioned in Mike's introduction.

Here's the outline of the Collaborative Framework. I'm not going to stick through each one of those here, but between Mike and myself, we will go through each of those stages and over the next 10 minutes or so. I'll start with the purpose. This is the text of the Collaborative Framework and section one on purpose. I'm not going to read it all to you but what you do see there from the from paragraph 1.2, is I think an important statement, which is the ODR Framework creates a framework for business, particularly MSMEs in participating economies providing ODR through negotiation, mediation, and arbitration for business to business claims. Of course, negotiation, mediation and arbitration are traditional dispute resolution mechanisms. What the APEC ODR Framework anticipates is the use of technology to automate those traditional dispute resolution methods.

Why ODR? A recent APEC survey of APEC businesses found a lack of dispute resolution to be a major reason why small businesses abandon cross-border trade. It's a major problem for 58% of respondents, and in emerging economies that rate goes up to 74%. It's quite material. Studies also show that the vast

majority of disputes concern payments. Small businesses are particularly vulnerable, of course, to late payments because their cash flow and access to credit lines are typically limited.

I'm not going to go into the detail of each of those slide graphs on there. According to the World Bank's ease of doing business enforcing contracts, it takes on average 440 days to resolve a simple contract dispute involving an MSME in an APEC courts, at a cost that often rivals or exceeds the value of the claim. The problems are worse in cross-border disputes because courts are too tied to geography, jurisdiction and in-person enforcement. Now of course with COVID-19 many courts across APEC are closed or significantly limited in the activities they can undertake.

What about arbitration? Most companies choose in-person arbitration for cross-border trade disputes as the only viable alternative, but that's large companies. Under one recent survey, 97% of the respondents reported that in-person arbitration was preferred method for resolving disputes in cross-border trade, but in-person arbitration is often too costly and slow for MSMEs involved in cross-border disputes. In a related survey, nearly three quarters of respondents favored more simplified procedures for claims under half a million dollars.

Staying with the theme of "Why ODR?" for a moment longer, the simple reason is it's already successful in other contexts across APEC. eBay processes millions of disputes each year using only automation in 90% of the cases. Several other ODR providers offer ODR to resolve disputes, including the World Intellectual Property Organization.

The AAA uses ODR to resolve New York no default insurance disputes. In New Zealand, we have launched ODR for commercial building and construction payment disputes. The platform developed can be easily used in other payment related dispute scenarios. We've kept that nice and generic so that it can be applied to other market segments as well.

Outside of this, within our traditional practice, and similar to what was described by James South in the presentation prior to this, in the past 12 months, we've held about 4000 mediations and hearings via platforms like this to replace typically delivered face-to-face mediations and hearings. I concur with the statement that was made there as well about there being very broad acceptance from the users of the services to move to that type of platform. I don't see that changing back in a big way in the future either. However, none of the initiatives that I described earlier on have provided a solution for APEC small businesses engaged in cross-border commerce. That takes us past my discussion on purpose. I'm now going to look at the remaining elements of the ODR Collaborative Framework, starting with the Procedural Rules and at this point, I'd like to hand you over to Mike Dennis, who as I said in my introduction, has been instrumental in the framework and process evolving to this point. Mike, it's all yours.

Use of online dispute resolution in light of COVID-19

Mr Mike Dennis[1]

(Transcript)

Great. Thanks so much Rhys and hi, everyone. A very early welcome from Washington, D.C. It's a great privilege to be part of such a distinguished panel. As Rhys mentioned, I'd like to continue our discussion of the APEC ODR Procedure Rules and Collaborative Framework. This is an outline of the APEC ODR Procedure Rules. The APEC Economic Committee created the Procedure Rules to ensure that the parties receive the same standard of due process regardless of location. The rules cover all aspects of the ODR process including procedures for the appointment of a neutral and the conduct of ODR proceedings. The rules also contain a model ODR clause that the parties can use to adopt the Procedure Rules and select an ODR provider. Under the Collaborative Framework, ODR providers partnering with APEC agree to follow the Procedural Rules.

The APEC ODR Procedure Rules are based upon two UNCITRAL text, the UNCITRAL Arbitration Rules and the UNCITRAL Technical Notes on ODR. The section III of the Procedural Rules is stages. The Procedure Rules provide for the use of three stages: negotiation, mediation and arbitration. The various stages act as a funnel so that only a few cases need to escalate to an online arbitrator. This way most disputes can be resolved by negotiation or mediation. The negotiation stage is managed entirely by software for speed, efficiency, and cost- effectiveness. If no settlement can be found, the case may escalate to third-party resolution. The ODR provider selects the online neutral from a list of approved neutrals. The neutral provides online mediation and if required, online arbitration, including binding arbitration as a backstop creates a strong incentive for the parties to settle earlier. That concludes the brief overview of the APEC Procedure Rules.

Let's now go back to the ODR Collaborative Framework, starting with the role of the APEC Economic Committee and economies. Economies opt into the Collaborative Framework. There are no binding commitments for economies but it's important for economies to opt into the framework to ensure that their

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[1] Private International Law Consultant, Senior Adviser, Kozolchyk National Law Centre

ODR providers can partner with APEC. Thus far, China, Japan, Hong Kong (China), Singapore, and the US have opted into the Collaborative Framework.

The basic idea is that APEC would partner with ODR providers in offering ODR for business to business disputes involving MSMEs. The Economic Committee will maintain a list of ODR providers on its website that have agreed to process claims through ODR as provided in the Procedure Rules. The Economic Committee and economies will also play a limited role in oversight of ODR providers. If an ODR provider is not in compliance with the rules, the Economic Committee may remove the provider from its list. The Economic Committee is looking to academic institutions for help in evaluating the providers and several institutions have expressed an interest.

ODR requires an online platform for generating sending, receiving, storing, exchanging, and processing communications. The Economic Committee decided that it would partner with ODR providers that are willing to provide their own platforms. Partnering ODR providers are responsible for process issues including fairness, due process, transparency, accountability, neutral appointment and selection, and the performance capabilities of the ODR platform.

The ODR providers would agree to follow the Procedural Rules. They also agreed to charge fees proportionate with the amount in dispute and share basic information about the pilot with APEC and other providers. The Collaborative Framework provides the APEC economies will encourage their businesses, especially MSMEs to use the ODR providers. APEC has a crucial role to play in promoting ODR to MSMEs, governments, and the legal community. Surveys has shown that micro-enterprises tend to work without clear contracts and dispute resolution clauses, which leaves them vulnerable in case of a dispute.

Widespread adoption of ODR would create a culture of contract. In turn, it would make transactions more efficient, driving down risk and making MSMEs more competitive by lowering costs. One of the major goals of the Collaborative Frameworks is to ensure that the relevant rules, procedures, and enforcement of online arbitration awards is harmonized between economies. A strong legal framework already exists in APEC.

All APEC economies have implemented the New York Convention on the

Recognition and Enforcement of Foreign Arbitral Awards, and 18 out of 21 economies have implemented the UNCITRAL Model Law on International Commercial Arbitration. 20 out of 21 APEC economies provide for legal recognition of e-signatures and electronic contracts consistent with the UNCITRAL Model Law on E-Commerce and the UN Convention on the Use of Electronic Communications. The Singapore Convention on Mediation that was discussed earlier is another key convention for APEC economies to consider.

That concludes our brief overview of the Collaborative Framework. The next step is for more economies to opt into the framework, and the Economic Committee will host a workshop in Tokyo in January of 2021 to further promote the framework and address administrative details. ODR e-justice is an essential component of economic growth in APEC. Use of ODR model on the Collaborative Framework promises MSMEs access to commercial justice with tailored procedures that bring down cost, delays, and burdens in proportion with the economic value at stake.

It will benefit the millions of small businesses who do not have access to effective dispute resolution remedies. It will help the most vulnerable MSMEs such as women-led businesses compete and flourish in the global supply chain. ODR is the cornerstone for the next global justice system in APEC. Thank you for listening.

Use of online dispute resolution in light of COVID-19

Mr Daniel Lam, SBS, JP[1]

(Transcript)

Thank you. Good morning, good afternoon, and good evening. The vision of eBRAM, is to facilitate Hong Kong to be a LawTech Center, a deal-making center and a dispute resolution and avoidance center. eBRAM is supported by the Law Society of Hong Kong, the Bar Association, and the Asian Academy of International Law, and the LSCM.

Our Scheme. It's a very quick reaction of Hong Kong government to this COVID pandemic that we've been able to start with a Scheme which is speedy, cost-effective, and it's to resolve disputes, resulting or arising from COVID-19 pandemic. This is a Scheme for micro, small and medium-sized enterprises. There are three conditions that you can come into the Scheme. First of all, it must be COVID-19 related. Secondly, the claim amount is capped at HK$500,000. Thirdly, either one of the parties must be a Hong Kong resident or a Hong Kong company.

The multi-tier process of the Scheme is that it starts with e- Negotiation on the platform, then into Mediation, and if not successful, then we still have the last resort, which is arbitration. The expedited procedure is that for negotiations we have three days. Now, if you cannot settle with negotiation in three-day -time it then goes into mediation. We have also three days for mediation, and if you cannot settle, then it goes into arbitration.

Now for arbitration, is slightly different. There are three days for the parties to agree which arbitrator to appoint and then one month maximum for making all the submissions to the arbitrator and then after receiving all the submissions, there are seven days to render an award. Now, it is a very cost-effective Scheme. Each party will only be required to pay HK$200 as a registration fee.

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[1] Chief Executive Officer, eBRAM International Online Dispute Resolution Centre

The Scheme basically is extremely low-cost, user-friendly technology. It's readily made staggered dispute resolution clause for adoption. We have case managers standing by to assist the parties. The flexible timing and physical travel minimized. It allows cross-border disputes, so long as one party is Hong Kong resident or Hong Kong person. It benefits from cross-border enforcement for arbitral awards made under the Scheme. It also benefited from Mainland China enforcement for arbitral interim measures made under the Scheme, making access to justice real to micro, and small, medium enterprises and individuals.

We have established a dedicated ODR platform for the Scheme, with self-hosted video conference facilities. We have managed to train mediators and arbitrators on how to use it. We have enhanced cyber security and privacy compliance. We rolled out more and more marketing and engagement activities in due course. We have received cases and a number of enquiries. We have at the moment more than 150 mediators and arbitrators on our list ready to take cases.

We will bring more practice opportunities for young arbitrators, mediators, lawyers, and IT practitioners because it is very, very difficult for a young arbitrator and young mediator who has fully qualified to get his first case. We will reinforce Hong Kong's longstanding status as a dispute resolution hub in the Asia-Pacific region. We have been strengthening the partnerships with many organizations, which includes HKIAC, CMAC, Hainan Arbitration Commission, Consumer Council, Insurance Authority, Asian Academy of International Law, et cetera, et cetera. Some of them have already signed an MOU.

Our Platform. We have many features but basically, it's an online platform. We have several facilities. I wouldn't mention all of them. But, for example, we can have online signing of the ODR agreement and online signing of any settlement agreement. This is a picture showing how online signing happens. This is your mobile phone and in the middle is where you can sign it, and then on the system, the signature would be transformed onto the third figure where you see your signature, on the right spot. You can also pay your fees online.

On the selection of mediator, the system, once it goes into mediation mode, the system will randomly generate five names of potential mediators for the choice of both parties. We ask both parties to give a priority on how they rank the five proposed mediators. Now if you click into the name as shown on the screen. Then you see the full CV of that particular mediator. All the party has to do is on their mobile device, they give a priority ranking against that figure. The chosen mediator would be the one that has the highest or lowest whatever you called it, being chosen by the two parties.

The benefits of video conferencing is that the mediation community, globally, can adopt a new way of running meetings using these tools. They can do it anywhere, anytime, with a computer, it's time-saving, cost- effective, as good as being there -that's efficiency and keeps diverse dispersed parties away from each other so you don't have the danger of being contaminated. There are challenges and I won't mention it one by one. Common video conferencing technologies could be either ISDN based, consumer-grade, enterprise-grade or private platform.

We have our own self-hosted platform, it would provide good security and data protection. Our data protection is aimed at, both under the laws of Hong Kong, and also it would satisfy international standards including the European standards. The disadvantage, if you want to call it, would be slightly higher upfront development and investment costs. Our own platform, because it's only for this purpose, therefore, it is in a way limited functionality, but sufficient. The Cloud is hosted in Hong Kong, so it's protected under data privacy law under Hong Kong.

Our Roadmap. Today we are offering cost-effective, cross-platform access, secure payment, and authentication, host the video conferencing platform. We are looking forward tomorrow with more into e-Bundling, deal-making, translation (online and offline), and embracing all popular VC tools. Next. We would use Blockchain, that usual AI, IoT, Smart Contract, which is exception alert to both parties, and the Cloud platform, which is flexibility and scalability.

We place great emphasis on dispute avoidance, not just resolution, also in providing deal-making capability. Languages, at the moment we are using English and Chinese. We are going into Arabic, Russian, Spanish. We are using Neural Machine Translation, which is not just word-by-word translating, but it looks at full sentences. So, this is eBRAM. Thank you very much.

Mediation Advocacy

Ms Elaine Liu, JP[1]

(Transcript)

Mediation advocacy is perhaps relatively new to our legal professions. Now, when we talk about advocate, we know an advocate's role is to present the best case for the client and also assist the clients to resolve their dispute. In court, the advocate argues the law and present the facts to convince the judge that his client is the one who shall win. The parties' rights and remedies are the focus. The judge is their audience.

Many lawyers sees mediations as a litigation strategy or another round of negotiation to bargain for a favorable settlement. Without downplaying the importance of negotiation skill in the mediation, one cannot overlook that, mediation is in fact very different from litigation and calls for a very different mindset in preparation and approaches.

Mediation, in fact, is a very effective means to resolve the parties' dispute by exploring viable options that best suit both parties' needs and also interests. It can also work to narrow down the parties' differences, facilitate their communications, trimming down the resources so that they can focus on the real differences.

Work with the mediator - this is the very first thing I would like to speak to you if you are working as a mediation advocate. Mediator is independent and neutral. He or she is there to assist both parties to resolve their dispute. Therefore, a mediation advocate should work closely with the mediators right from the very beginning, at all stages of the mediation, to maximize the power of the mediation.

Do not expect a mediator will just be a mere messenger. Good mediator would not simply act as a parrot and that would not do good to your mediation, in any

[1] Barrister, Sir Oswald Cheung's Chambers

event. Therefore, a good mediation advocate should start to work with the mediator, as I said, right from the beginning, before the mediation session commences.

In my experience, honest communications and good understanding with the mediator, both on substantive and procedural matters, are key to the success of a mediation. As a mediator, I welcome the participation of the mediation advocate throughout the entire mediation. There could be synergy between the mediator, the mediation advocate, and the parties of both sides that will smooth out and expedite the entire process. Through which desirable result could be achieved for the parties and the power of mediation can be enhanced.

To start with the preparation for the mediation when you are acting as a mediation advocate is to devise a representation plan. Mediation advocate should prepare a representation plan for the mediation; review your client's case and determine the best approach to be adopted in the mediation.

A majority of our mediations uses facilitative model. This proves to be very effective, efficient and economical, but there are cases where the determination of a particular issue of law or even issue on quantum is crucial to your client's case. In that case, you may consider whether evaluative mediation is appropriate. In some cases, an expert report may simply deal with that particular issue and in which case, the parties may wish to agree to have the necessary expert report first and then conduct the mediation in a facilitative manner.

A representation plan designed in the beginning of the mediation will guide the overall approach in the mediation. A number of factors will be relevant in designing the strategy to be adopted. This includes the nature of the case or the dispute, the needs of your client. Is there any known impediments to settlement, whether it is a facilitative or evaluative mediation? And what is the style of the mediator chosen? Whether the parties and the mediators will proceed the issues broadly or narrowly. Even the issues, like is there any cultural concern? Et cetera.

Those are the factors that you may wish to consider when you come up with your representation plan. This plan should be able to advance the client's interest and be able to overcome the impediments that you will face during the mediation. Now, no matter what kind of representation plan you are adopting, let the mediator understand your plan. Also, listen to the mediator's views and the reaction of the other parties as the mediation goes along.

Coming to direct preparation for the mediation. To prepare for mediation, I as a mediator would invariably arrange pre-mediation conferences, with each of the parties and their legal representatives shortly before the mediation session. During the pre-mediation conference, I will explain the process and the detailed arrangement at the mediation session, so that the parties and the advocate knew clearly what to expect during the mediation.

This is also the occasion where I as the mediator will listen to and understand the parties' views and preferences on substantive matters, including even the possible options that can be generated. As the background facts and legal issues involve should have been set out in the pleadings, which I would familiarize myself in advance of the pre- mediation conference. So the discussion at this conference will be focused on the key issues that will be relevant to the mediation.

Mediation advocate should make use of the conferences to communicate with the mediator the concerns and the plans of the parties, which presumably, should be developed after having explored with the parties' the strengths and weaknesses of the case, and the needs of the party. I will also raise questions on areas which I think the parties may consider with their legal representatives before the mediation.

Turning to the logistical arrangements, we will also talk about issues such as who will attend the mediation session. This matter itself can develop into a dispute that calls for a mini-mediation. Parties would like to see the presence of those who can make the final decision. On the other hand, the attendance of strangers, so to speak, for example, a friend just be there to hold their hands for

support- may be rejected by the other side. The mediation advocate should prepare and discuss with the parties on those issues beforehand.

As a mediator, I will often ask the mediation advocate to circulate, at least one day before the mediation or sometimes even earlier, the list of the persons who will attend the mediation for their side. If there's any disagreement on the attendance, I would work with the parties beforehand to avoid any embarrassment on the date of the mediation.

Another matter that should be planned beforehand is the person who will speak at the mediation. In my experience, an opening speech made by the parties themselves, as opposed to the mediation advocates, works much better in the mediation. Some parties would like to make use of both a written statement prepared by the advocate and an oral opening by the client at the mediation.

This may have the benefit of both a written statement that sets out all pertinent issues in writing, and an oral opening that appeals directly to the audience at the mediation. The choice of how to open and conduct your mediation depends very much on the nature of the dispute and the background of the people involved. Again, one should work closely with the mediator to ensure that the messages passed would not be taken wrongly.

Moving on to process. The mediator determines the process. Different mediator has different style. The mediation advocate should, therefore, work closely with the mediator, understand the approach of the mediator and let the mediator understand your approach. Very often, parties or even advocate told me that they do not want joint session for various reasons. For example, parties cannot control his emotion if he meets the other side. It will certainly worsen their situations and create embarrassment if they were made to sit together, or simply they think the joint session is entirely useless and insist in proceeding with caucus only.

While I fully respect parties' views and feelings, I often invite them to reconsider. I explain to them the benefit of having a joint sessions and assure them that I

will control the session appropriately. Often at the time of the mediations, the parties have not met each other for a long time. They only aired their grievances through papers exchanged by the lawyers.

A face-to-face meeting and opportunity to listen to the other side, in my experience, proved to be very constructive to the mediation. So far, all the parties who raise objections to me to see the other side; I had kindly agreed to give it a try, and many of them told me after the joint sessions that they found it useful. This is also the area that mediation advocate can work together with the mediator and help their client to go through all these different stages in mediation.

Caucus section is to be used skillfully and flexibly. It is not just a mere go-between of the two rooms by the mediator to pass messages. Therefore, do work closely with the mediator so that the caucus can be used skillfully, appropriately and skillfully, so as to contribute to the success of the mediation.

Moving on to content. While the content would very much be determined by the parties, I would just raise a few things. Mediation is obviously not a forum for legal argument. However, don't ignore the legal issues if it is a relevant consideration for the parties. Similarly, it is often considered that one should keep a distance from emotion in a mediation. This is true in most of the commercial mediation in particular. However, if emotion and/or relationship is an issue important to the party, don't bury it. Alert the mediator. Emotion and relationship issue can be a real impediment to the resolution of a pure financial and commercial dispute.

Audience. As an advocate, no doubt, you need to know who your audience is. In mediation, your audience are plenty; including the other party, their legal representatives, and the mediators. All of them are your audience. Do plan and target the audience accordingly.

Effective mediation advocacy. Good preparation. Develop your rapport with the mediator. Be frank and be ready to share information with the mediator. The

mediator can help you in a number of ways. For example, to assess the benefit and risk of whether and how certain information is to be shared with the other side, to design a process that can build up the momentum of the mediation, to design a process that can breach impasse and to generate options, et cetera.

An effective mediation advocacy, to me, is one that can enlist the assistance and facilitate the best work of the mediator, engage the other parties and their legal representatives; and therefore, enhance your client's opportunity to achieve a result that best suits your client's needs and interests.

I hope you all enjoy mediation. Thank you.

Mediation Advocacy

Mr Simon Chapman, QC[1]

(Transcript)

Thank you, C.K. It's a pleasure to be part of the conference today and to be able to speak to you all- virtually, on the subject of mediation advocacy. I'm going to focus on the practitioner's perspective on mediation advocacy. I'll touch upon a lot of the same themes that Elaine has just covered, from the mediator's perspective. I'll be talking about tips for lawyers to look out for in the mediation context; how to help your clients who are really going to be the most effective advocates during the mediation process. I'll break the topic down and look at each of the different stages of the mediation and things to bear in mind throughout the process.

If we just start then with laying the groundwork for the mediation; things to be aware of before the mediation gets underway. It's important, as Elaine has also said, to be very alive to what mediation is for and what it is not for. Mediation is not about scoring points, it's not about obtaining justice, and it's not about winning the legal argument. That is what litigation or arbitration, or other more formal forms of dispute resolution processes are about. Mediation is about compromise. It's about finding a settlement- often, a commercial settlement, as opposed to a legal solution. Think very carefully about what the client is ultimately looking for as part of the mediation process. What is it really that they want to achieve as a result of these negotiations with the other side? Very often, you'll be discussing some forms of financial compensation; how much money is to be paid, by whom. Who's going to pay the money? Will it flow from one party to the other or the other way? Is there an element of set-off if both sides have claims?

Is there an element of a continued relationship? Is there a commercial relationship that can be explored? Some way for the parties to put the existing dispute behind them and continue on with their respective businesses- perhaps, to continue with their respective businesses working together in some shape or form. Or are they looking really for an amicable divorce? For example, in a joint venture context, this is really a way of just dissolving the relationship

[1] Partner, Herbert Smith Freehills

in a certain way and finding a commercial solution to the problem that exists.

Very often, the parties are just looking for an acknowledgment that somebody is at fault. There's a real power, often, in an apology. In one recent mediation that I conducted, we were able to make swift progress towards a commercial resolution immediately after the other side had said sorry, had admitted that they had not behaved in the way that they would have liked to have done, and apologized for what had happened. That worked wonders, really, in bringing the two sides together in circumstances where they'd previously been very, very far apart. So think ahead about what it is that the client is looking for in the particular negotiation.

Looking at elements of advanced planning and what you can do to prepare ahead for the mediation. Elaine mentioned earlier that she would always speak to the parties or their legal representatives ahead of any mediation. I think that's absolutely crucial. My personal preference is always to have a one-on-one call with the mediator myself, without necessarily having the clients involved in that early discussion.

It's an opportunity to be completely frank with the mediator about what you know of the dynamics on each side, including what you know about the dynamics within your own client. Is somebody a particularly tough personality? Will it be really important for the mediator to gain the trust of a particular individual within your client's organization?

Being able to have that one-to-one dialogue with the mediator well in advance of the mediation is so crucial, really, in developing trust. Being able to bring the mediator up to speed with some of the finer points of detail in relation to the dispute, but in particular, being able to concentrate on some of the personality issues. Some of the other dynamics that might be involved and that might be relevant to the later discussion.

Undertake a risk assessment of the client's position. This is really crucial. Ideally, this would have been done earlier on if the mediation is happening partway through a particular litigation or arbitration, but it's always a good opportunity just to take stock of where you are and what you know at that stage in the process.

What are the strengths and the weaknesses of your client's position? And be really frank about that. Look very much at what is the potential best- case scenario if they go on to be successful in the particular dispute, but also, what is the worst-case scenario? What's at risk? What do they stand to lose if the dispute resolution process doesn't work out in their favor?

Identify, ultimately, what the client's bottom line is. When you know the strengths and the weaknesses of their case, you are then able to identify what is the bottom line. What really are they going to be prepared to accept by way of a settlement; whether it's some form of financial compensation, or otherwise.

Of course, as part of that risk assessment, you're not only looking at your client's position, you're also going to look at this from the perspective of your counterparty. What do they stand to lose if the arbitration or the litigation doesn't go in their favor, and equally, what is the potential upside for them? Why might they be interested in fighting the dispute all of the way?

In the context of that risk assessment think also about the costs position. That's important, whatever stage of the process you are at. Even if it's the very beginning of the litigation, or if you're very close to the end; how much have you incurred in terms of costs? How much are you likely to incur in the future if the case goes the distance? It's an obvious question that the mediator will ask at some point. Usually, fairly early on in the mediation process. Just make sure that you've looked at the cost position and that the client knows what's at stake if the case is to continue.

Then also plan ahead in terms of a negotiation strategy. Now, this is quite difficult because obviously, in any mediation, just like any negotiation, you've got to be flexible. You can't plan, to the nth degree, how the negotiations are going to pan out because it takes two to negotiate. The strategy that you adopt ultimately, will depend on the approach that your counterparty takes.

Think carefully, for example, about who is going to make the first offer. Should you make the first offer in your position paper, for example? Do you want to open the first plenary session by making an offer, by making some form of gesture to the other side, or do you want to wait for them to make the first move?

It's particularly important to put that into the context of any negotiations that have already taken place. Because most of the time, before you get to the mediation, there will have previously been some form of without- prejudice negotiation between the parties. Even if it's just a simple exchange of letters; who had the last word in that particular exchange? How do you want to take that forward? Who should make the first move this time?

Think creatively about your offer. Is it just going to be the payment of money, or is there some other more commercial proposal that you could put on the table? Even if only in outline terms that might give your counterparty something to think about. Remember also always to think about when you should walk away from the negotiations. Again, this ties back to the analysis of the bottom line. When really will you feel that you're not going to make progress and you should call it a day? Planning in advance for that is so important so that you know if you've reached that particular point in the mediation, there's no point in pressing ahead any further and you should walk away.

Position papers. This is a topic, in and of itself, it's something I feel quite passionately about. I've seen so many poorly written position papers over the years. People treat this, often, almost like it's a skeleton argument in a litigation or an arbitration. A position paper is so important because it's your opportunity to set the tone for the entire mediation, and it's really your opportunity to speak to the other side. To speak to senior management or a senior decision-maker at your opponent.

You're not just talking to the mediator. In fact, an effective position paper isn't really talking to the mediator at all. You're talking to the other side, and you're explaining to them why you feel you're in a strong position. Why you're open to a negotiation, but why you feel that you've really stress-tested your position and that you're coming into this negotiation wanting to get something favorable for your client.

Keep the position paper very short, very easy to read. Remember, you're sending it to the key decision-makers at the other side. They're not going to read it if it's a very dense, very detailed and very lengthy legal submission. Keep it short, and keep it punchy and keep it as commercial as possible. Tell a bit of a story. You're trying to persuade somebody in a management position at your opponent. Tell a bit of a story. Try and sow a few seeds of doubt in your

opponent's mind about why their position might not be as strong as they've been led to believe by their lawyers or by their in-house counsel, and really focus on the risk assessment.

That's why I said earlier, this is so important. Tell them that you've really kicked the tires on your case. You understand what the risks are in proceeding with the litigation, and you're going into the mediation with an open mind as to those risks. Explain also that you've looked at the strengths and weaknesses of their case, and you understand that there's real risk for them if they proceed with the mediation and explain why that is.

Because as a really important point that you will want to focus on in the mediation is the risk-reward analysis for both sides, not just for your client. Some of the most effective position papers that I've seen have been those which do set out the risks for the other side, in a way that they perhaps haven't fully contemplated themselves.

Moving on to the opening and plenary sessions. It isn't always necessary to have a full plenary session with everyone in the room at the start of every mediation. That's usually the starting point for any discussion, but it doesn't have to be. Sometimes in a very heated negotiation, it's better to start with the parties in separate rooms and perhaps work towards some form of plenary.

If you are going to have an opening session, think about who should do the talking at that session. My preference - and I'm echoing, I think, the view that Elaine expressed earlier - is that it's always more effective to have the clients do the talking at this sort of gathering. Perhaps, backed up by a few observations from the lawyers if the legal points really are relevant to the discussion, but it's better to focus on the commercial objectives. I always think that that's better off coming from the clients.

Then turning to caucus sessions, these are really important. This is your opportunity to speak directly with the mediator in a private setting, but plan ahead for this. Think about what you do want to say to the mediator and, perhaps, what you would rather keep back. Because bear in mind that unless you tell the mediator otherwise, things that you say to the mediator are going to be conveyed in some form to the other side. That's part of the mediator’s job is to act as that intermediary between the parties.

Think very carefully about what you do want to say to the mediator and what you want to keep back. Also, if there's something that you want to let the mediator know so that he or she has that in mind, but you don't want them to share that just yet with the other side, be very express about anything that you don't want the mediator to share. It's really important just to plan ahead for those caucus sessions.

Think also about helping the mediator in this setting. Perhaps, it’s a hugely complicated case, with lots of different legal issues and very complicated facts. Think about how you can distill it down to just a few key points to help the mediator really get to the nub of the issue. Maybe 50% of the case isn't really that relevant to the discussion, but there's one particular sticking point that you think if you can unlock that particular problem, it will guide you towards a settlement. So really help the mediator focus on the key issues.

Obviously, be prepared to be creative, be proactive. Try not to get bogged down. This is much easier to say than it is to do, sometimes, in practice. If you find that you've reached a complete impasse on a particular point, try and move on. Try and find another way around it, or take a different perspective on the case and see if you can approach a settlement with that in mind.

Finally, I just wanted to highlight some key takeaways with you, just to summarize everything that I've just said. Really understand your client’s bottom line. Really understand where they're coming from in the context of the mediation. Do invest as much time as you can in the risk assessment for both sides. Look at the strengths and weaknesses of both sides' position. Use your position paper to persuade your opponent. Don't use it necessarily as a platform just to talk to the mediator.

Develop a negotiation strategy in advance, or at least the outline of a strategy, but be prepared to be flexible on the day. Do what you can to enable the mediator to win your client's trust. Use those very early conversations with the mediator, perhaps a one-on-one, so that they understand where your client is coming from. They understand some of the personalities in the case. They will be able to win your clients trust and confidence quickly because that's key to any successful mediation. Then finally, be flexible and be creative. Be prepared to roll with the moment and find creative solutions to problems that may arise as you go along.

I wish you the very best of luck with any mediations that you have coming up. Thank you for your time.

Mediation Advocacy

Ms Manon Schonewille[1]

(Transcript)

Hello. Good afternoon, everybody. It's so amazing that I can join in this great conference from the other side of the world. What I would like to do is to look at the trainer's perspective, and in particular, how an international trainer would look like that.

What I would like to ask you to do is before we start-- Because we, normally, would sit in a room and have some more interaction. I can imagine that you have a lot of questions regarding mediation advocacy training. I would like to ask you just put it in either the chatbox or write it down so that you can submit these questions later. Do it now so that when we have our panel discussion can take in as many questions as possible.

There are actually three things that I would like to discuss with you. I was very impressed with listening to the concise and amazing advice that the two prior speakers gave. In fact, they already have given you a lot of arguments and reasons why it is important to be a professional mediation advocate. I will focus on two more general angles and then, hopefully, make the whole picture round for you.

The other thing I would like to discuss with you, being the Chair of the Task Force of the Mediation Advocacy, part of the International Mediation Institute- is to go through the competence criteria that IMI have developed for a professional mediation advocate. Also, explain a bit why there is a certification for mediation advocates and why it would make sense for you to consider that. Then finally, I will wrap up with discussing what you would ideally learn in a qualified mediation advocacy training. However, also the prior speakers really gave you

[1] Business mediator, Legal Rebel in Rotterdam The Netherlands; Founder, Toolkit Company Academy Mediation & Negotiation

this amazing overview on that.

Let's start with; why do it? Let's start a little bit with a stick and then later on, we will get to the carrot. Actually, there are some risks you can avoid if you are a professional mediation advocate. In 2013, IMI did a survey among corporate users on “What do clients expect?” One of the very clear outcomes of that was more than 80% of the corporate users said, yes, to, "I expect my lawyer to be trained in mediation advocacy." In fact, only 6% disagreed. Meaning that your clients expect you to know what to do, and expect you to be able to give them good advice on whether mediation would make sense or whether you would rather advise your client to go through a different process, and always consider if mediation would be a good process.

Then, there was another question that was being asked: “Are outside lawyers often an impediment to the mediation process”? That is in fact the reason why it's so important that we're dealing with professional mediation advocates. On the question, in my experience, outside lawyers are often an impediment to the mediation process. In fact, nearly half of the commercial party says, "Yes, actually, I experienced this in practice." About 40% is neutral, but only 15.5% disagrees with that meaning that most of the clients did encounter some impediments from outside counsel, which is a pity because, as Elaine and Simon already said, the counsel is so crucial in mediation. They are either the success factor or the factor that can break the mediation.

In 2018, we repeated the similar survey like IMI did in the Netherlands, so now you're seeing some results from the Netherlands and the IMI survey was a worldwide research. In the Netherlands, we asked the question, do you prefer your lawyers to be present at the mediation table? In fact, nearly half said, "No, actually, I don't want that," and about 30% said, "Yes, it depends a little bit." The reason why for this is that they have very mixed experiences with the counsel at the table. In those cases where the counsel are really well, first, in mediation, they know what to do, they know how to help their client, and especially also the lawyers from the other sides, it makes sense. It can really make the

mediation go so much better, so much smoother, and being a very professional process. If that is not the case or if there are lawyers at the table who think it is like winning an argument and about the legal merits of the case, it can really slow down the mediation process.

In the same Dutch survey, we asked, what do you think is the most effective dispute resolution process? Here you see why mediation really makes sense to understand and to know how to represent your client in the mediation process effectively. The green parts are the clients, the blue parts for the lawyers that we asked. In fact, going to court or arbitration that are the first parts in the slides, only between 2% and 4% of the lawyers and companies said, "Yes, I think that is an effective process."

About 1/4 to 1/3 of the lawyers and company said, "We think mediation is the most effective dispute resolution process." Then the interesting thing here is that, in fact, there is something else which is being seen as much more effective than mediation alone and that is combining processes. Passing an advice on let's try mediation, however, let's have a fallback or something similar what Elaine explained, bring in somebody who can do a legal assessment of the case if there are particular legal issues that need to have a decision, and then for the rest, we can negotiate in the mediation. 1/3 to 1/2 thinks that is the best way to go. In order to advise your clients also on combining processes, and obviously, a mediator can also help you with that but in order to do that, you must, know all of these processes and the pros and cons and when to advise which one.

This is, in fact, the roll-off towards the risks and towards the opportunities. It's already a little time ago that a research was being done in the United States on commercial cases with a high financial value and they looked at the last offer that is being made outside of having the judge trial the case, what the plaintiffs and the defendants have been better off taking that offer or didn't make the right decision in going to court.

In fact, the outcome was that about 60% of the plaintiff and 20% of the

defendants made the wrong choice where they should have gone for the negotiated outcome. What is most interesting in this study, though, is the second point, which said that if there was an attorney present during these negotiations who was trained in mediation or in some amicable dispute resolution generally, it led to a reduced decision error rate. Meaning that if you are knowledgeable in these processes and you know how to negotiate with the other side and to do interest-based things, actually, it also improves the outcome with making the right decisions.

Let's look at the opportunities. It's already been discussed a couple of times today that mediation success greatly depends on the mediation advocacy skills of the party representatives, so you can really make or break the outcome of a mediation. In fact, in my experience when I have lawyers attending the mediation who really know the process, these mediations have the best outcomes. It's a very smooth process because you can really discuss the process and the outcome and the substantive things with the lawyers and they can really make the difference in the mediation.

The other thing is the first duty of you as an advocate is your clients' interest. In fact, going for mediation, it provides another opportunity to address interests differently, even taking it a little bit deeper, and it gives you an opportunity to address interest and the outcomes that are not so easily attainable within litigation. It does require different skill style and that's where mediation advocacy and knowing how to do that comes in. Because your clients are really looking at representatives and lawyers who do know everything about litigation and alternative dispute resolution like mediation, it would be good to testify that you are a mediation capable lawyer.

Having done a formal training or putting it in any case on your profile, or having a mediation advocacy certification will help justify that. Last but not least, if you are being trained as a mediation advocate, in fact, you learn some essential negotiation and communication skills. We just learned that decision-making is improved, and you, in general, are better in problem- solving.

There is another development that I would briefly like to go over with you and that is there are new technologies emerging and it goes really, really fast at the moment. Of course, mediation is a social process and it's not very probable that technology will completely replace it very soon; however, there are some new technologies that can really have a deep impact on how a mediation process is being done and can improve the process, or it can be used by the other side, and sometimes even without knowing it. Even if you think, "I don't like to use this kind of things," at least know that it is out there. Of course, the artificial intelligence can help you to analyze and process large amounts of information, and I think that many of you are already using that. It's also great to help with the case triage.

Is it more suitable to go to mediation? Do you need a combination which you need to go to court? That is also where artificial intelligence can help or at least decision trees and things like that. What is a bit more exotic is that psychometric profiles can be made. I don't have to mediate it when you help your client and discuss with the other side who should be your mediator, but also for participants, there is a program called CRYSTAL which you can combine with your LinkedIn profile or LinkedIn profiles of others and you can make an analysis of somebody and she will get tips.

Tips like how to approach them, how to negotiate with them, do you need to be brief or very detailed, what would be a good opening phrase? It really goes quite far, how would they sit in a team if you collaborate? Of course, I did not use it in any mediation, but we did use it for some teamwork that I did with others. I must say it was eerily accurate in most of the cases. Artificial intelligence is developing, so know about these kinds of things that they are there. Just like with virtual or augmented reality, it can be used to diagnose emotions or facial expression. If we would be now on this call, I could have a little screen saying, "Okay, this person who is looking like that is probably thinking that helping me with a much better assessment of what is going on at the table." Please don't get me wrong, I don't say this is all great and you all need to embrace it, but I just want to ensure that you know that it's out there, and if you are being trained

as a mediation advocate, at least use these technologies to know about not use them so much in practice.

Mediation Advocacy Certification, the International Mediation Institute has developed a list with core competencies of mediation advocates that is consisting out of knowledge for more the theory and the skills. It's a very elaborate list, so I'm not going to go through that.

It's about three or four pages. It's really a lot of things you can do or would need to know. However, it is being published on the website of IMI. If you are interested in knowing more, I would suggest go to International Mediation Institute - mediation advocacy certification and you will already get a great list, which you can use when you are preparing for your next mediation. Also, get some criteria for programs to do trainings or for qualifying professionals, and then, of course, is telling when you could get a certification of a mediation advocates.

That is being done through so-called qualified assessment programs, so IMI doesn't do it themselves, but there are several organizations who are able to do an examination and then make sure that those who are passing the exam can become IMI certified mediation advocates. If you go to a training to become a qualified mediation advocate, what would you like to learn? What do you need to look for when you are selecting what training you would do? First of all, I personally think you do need to have the basic knowledge of mediator, so how does the process go, dos and don'ts, what are the roles of those involved, et cetera.

However, you also need some additional knowledge and skills as a mediation advocate. The most important ones are that you need to balance positional claims that the advocate and the client's interests are representing on one hand, the legal stuff and all of these things, and on the other hand, creating value based on interest and how to balance that during the process. You need to learn specific techniques, how you can support both of the parties. You can speak also

to the other clients and how to work with the mediator to get some outcomes that really reflect mutual gain.

Also, that's something what Simon also spoke about, know how to deal with an information strategy, so what information should you share, what information should you keep for yourself, what information do you like to get from the other side. That's also something you may want to consider. We just saw that hybrid processes are interesting, so look for a program that helps you to really design a certain combination processes, know how to keep checks and balances also during the process to see whether mediation is still the most appropriate method at this stage of your case.

Also, you should learn how you can terminate the mediation because once you are in the process, you don't want to get any backlashes by withdrawing very harsh. You really want to make a smooth exit and how to do it. Also, in some jurisdictions, judges look at cases, that the parties did mediation and try to find out who terminated it, et cetera. Of course, they have confidentiality how far these kind of things do play a role. How to initiate mediation, choosing the mediator, et cetera, things like online dispute resolution and the virtual online world, and also integrate and maybe embrace, if that is something that is calling out to you, relevant technologies.

Thank you very much for your attention and for you on a Friday afternoon. It's great that you have had the opportunity to be here with all of you. Once again, if you have any questions, please put them in the chat box or send them in by email and I'll be happy to discussion and answer them later on. Thank you.

Mediation Advocacy

Professor Leung Hing Fung[1]

(Transcript)

Thank you. It's my pleasure here today to share my view on the training and accreditation system, if any, currently in Hong Kong. Now, I can't say I will share the view on the system itself because the situation in Hong Kong as at the moment is somewhat rudimentary. I won't say it's even at the embryonic stage. Whilst I understand that there are mediation practitioners, they discuss enthusiastically about mediation and in the field, we know that there are lawyers who are good mediation advocates, but at this stage, we can hardly talk about any established system about training and accreditation on mediation advocacy.

No doubt, we have to borrow and learn a lot from reputable organizations, such as IMI where Ms. Manon comes from. Moreover, because of my position as the vice-chairperson of the HKMAAL, I need to express that any view I express today is my personal view and am in no way represent the view of HKMAAL. I don't have the mandate to speak on behalf of HKMAAL. What I intend to do is to first give an overview of the current situation of training and accreditation in Hong Kong, and then I will focus on my observations of the training courses and accreditation system of different organizations around the world.

Then maybe I will provide some food for thought for Hong Kong on where we should go, what's should be the direction in terms of training and accreditation in relation to mediation advocacy. Now, overview of training and accreditation, if you are a mediation practitioner, what kind of courses will be accessible to you? At the present, I think, broadly speaking, I can identify some short courses which are CPDs and structured courses. Some of them will lead to some kind of certification, but if you're talking about these short courses, by short I mean the usual CPD courses in the range of one or two hours or sometimes half a day courses.

These courses sometimes may result in a certification that you have attended the course, but they are in no way related to any accreditation. Then we are at the electronic stage, that you can actually purchase some online training courses by paying a fee, and then you get some online course package which you can view at any time.

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[1] Vice- Chairman, Hong Kong Mediation Accreditation Association Limited

Most importantly, of course, will be face training such as those provided by SCMA, that is Standards and Competencies of Media and Advocacy, a UK based organization, and IPDRAA, the International Professional Dispute Resolution Advocates Association, which has actually, through some service providers, run some courses or to train mediation advocates in Hong Kong. That would lead to accreditation onto some panels. It's not our local panel, but it's just courses launched in Hong Kong for the purpose of admission to a panel which is recognized by some other bodies.

For these courses, they are provided by different course providers and broadly speaking, we have, for example, universities, United States Duke University School of Law, it does provide a course of mediation advocacy. By course, I mean it is a course in the program. Law School in the States they are post-graduate in nature and the course at Duke University is a three credit unit course. If you are in the academic field, you may know what does that credit unit means. Basically, it means, well, one credit unit means one instruction hour per week in the term, so if there are 12 weeks in the term, three credit units will be a three hours a week for this whole term for 12 weeks. In total, it will be 36 hours, but it's talking about the instruction time, not the students' study time. If we're talking about students' study time, you expect about 50 hours per credit unit that will end up in 150 hours study time. It's not really a light course like CPD, but you need to spend so many hours if you are a student embarking on such kind of courses.

In my view, now, these course are good for the purpose of training potential mediation advocate because you can hardly spend so much time on a subject if you are practicing, so it would be good to prepare students or prepare someone when they are still at the students-stage. City University of Hong Kong, likewise, has a listed course called negotiation and mediation advocacy. Again, a three credit units course. The assessment is 100% through continuous assessment which I think is good. We are talking about skill-based training, if you're talking about mediations advocacy and the work are not like in exam stage.

Otherwise, other than universities, we have professional bodies or some learned societies providing training courses like IPDRAA I mentioned, SDMA or HKIAC, which has just jointly with Hong Kong Bar Association, run a two day workshop on mediation advocacy and they hire speakers of very high caliber. That's for skill training and knowledge dissemination, but it does not lead to any accreditation.

Also, I would like to mention about the SCMA training courses. They provide training

courses including courses for mediation advocacy and they will last for one day or three evenings. Then they also have training courses for bespoke mediation advocacy for senior practitioners which lasts for six to eight hours. Of course, going through the content like those who have participated in some kind of mediation training in Hong Kong, which is not as formal as this one, the gut reaction from myself and from those who have attended those courses is that most of the skills trained are very much like or are in line with mediators' understanding of the mediation. In effect, the training will be centered upon overall coordination of the mediation, and then the real part about this magic word "advocacy" is slightly touched upon.

Mediation advocacy I think is an art, it's difficult to teach, but until such time, people can identify a group of knowledge that is special and unique to this subject, mediation advocacy. In other words, lawyers will not be trained for that, mediators will not be trained for that, and then that will be appealing to students. I pick up a point that Mr. Chapman when he presented just now, he mentioned that a good position paper would make a big difference for a mediation or to have the mediator and I agree entirely. Moreover, I would say, for example, drafting of position papers should be the kind of unique technique for mediation advocates because lawyers have never been trained on how to draft a position paper, mediators they've not been trained on how to draft a good position paper, so that will be a good subject within that group of knowledge. Perhaps we can identify more if we are going to put up some training for mediation advocacy in Hong Kong. Otherwise, we have some commercial cost providers because, obviously, that is commercial interests. I will not name any of them.

I've gone through most of these or many of these training courses. There is usually a knowledge part, and then a practice part on the skill in these courses. Some of them would have prerequisite of students, because of the course requirement like if you are talking about a course in a program in a university, obviously, to be a student for that university has become a prerequisite for that course. Otherwise, it depends on the course provider and the nature of the course, I think if we are to set up a training course to train mediation advocates who are competent, and that we are setting up to address public interest, prerequisite of students becomes very important.

On training hours, as I've pointed out before, when we look at those formal training leading to accreditation, it will be at least 18 hours, and then up to 40 hours. The variation of the duration to me is probably due to what kind of student you're expecting. If you are talking about a student who is not really experienced in mediation, maybe you need more hours. If you are talking about someone who is really

experienced in mediation who has been an advocate like a lawyer for a long time, maybe you need a shorter duration for the training courses. When the training hours varies according to the nature of the course, I think it is understandable.

About the content, I mentioned the point as I share with someone who has attended those courses, the feeling is that the courses in terms of contents has a lot of overlapping with what mediators are trained. I'm not talking about that is not right, but, well, it all depends on the prerequisite of students. If you are talking about students who are not knowledgeable in mediation, maybe you need to spend a lot of time either to train them of the mediation knowledge or at least to refresh them. That brings us to a point that it is actually important to differentiate the level of students if you are to train mediation advocates.

Mode of assessment, again, varies from one course to another. Some is assessed purely by attendance like 75% or 100%. Sometimes there would be assignment or entirely assignment-based assessment, other times the assessment is based on continuous assessment including participation in discussions, role playing. One interesting point is that I identify one training course which is from the United States that also includes on-job-training under this mediation advocacy program of Eastern District, New York, in which, the students will need to provide pro-bono service in this scheme, but that is limited to specific matters involving employment discrimination or claims arising under a certain act in the States.

Maybe these cases were suitable for training those candidates.

Now, let’s move on to this line, accreditation. I think that goes to the core issue. Now, training, of course, is up to the individual, but when we talk about accreditation meaning a certain kind of training that students cover, assessment will then lead someone to acquire certain qualification or the right to be admitted to certain panels of mediation advocates, for example. The benchmarking for assessment becomes very important. It can’t be done in a haphazard manner. There is some kind of references I can refer to like the SCMAs, mediation advocacy standards. It is a published document. SCMA, the UK standards competencies mediation advocacy has actually assisted IMI in the design criteria for programs qualifying as competent mediation advocates. These criteria are established in order to establish a professional and technical basis such that it will enable the speaking parties to identify suitable mediation advocates when they need that. That is very important. The criteria actually are presented in two broad categories. Obviously, you need to control the input and the output. The criteria relate

to the general requirement for the programs, so that is about how to you train them.

Then the other part is about mediation advocacy practical skill requirements and that goes to the advocate's practical skill. The benchmark is on the training side is very important. Also, I said that SCMA has assisted IMI to set up these standards, and then sometime later, it has up set their own standards, it's set its own jurisdiction. I think if Hong Kong is to develop into a stage where there's a need to address public interest because of the use of mediation advocates, I think we should go along that way. If we're going to provide training and accreditation, we must set up the benchmark like our peers SCMA and IMI have done.

On the internet, it's not difficult to identify that IMI has also a set of competency criteria for mediation advocates and advisors. I quite like the idea adopted by IMI where there are two types of registered mediation professionals. One is called mediation advocates, the other is called mediation advisors. For mediation advocates, they're those who have a qualified legal background. If you're not, then if you're trained and pass the assessment, you're admitted as a registered mediation advisor. I'm not discriminating one group from the other. To me, if you're a mediation advisor, that means that you can provide expertise that lawyers cannot.

I am mindful of the time, so maybe I go to the last part. The way forward in Hong Kong, we need a theoretic support of mediation advocacy. As I said, there are practitioners who discuss enthusiastically about mediation advocacy, but I think we need to have a core knowledge that could be included in a standard training, and then we can have a recognized benchmark to tell what is competent and what is not. The next question is the purpose of setting up HKMAAL, shall we unify the standard, and then shall we have a premier accreditation body in Hong Kong? Thank you.

Closing Remarks

Ms Christina Cheung, JP[1]

(Transcript)

Secretary for Justice, distinguished guests, ladies, and gentlemen, on behalf of the Department of Justice, I thank you all for your participation in the Mediation Conference 2020 as part of the legal week. This is our sixth conference and the first-ever virtual one. Despite the constraints brought by the global pandemic, this conference has been made possible by modern technology, and of course, the unfailing support of our speakers, moderators, guests, and participants from all over the world. I truly appreciate all your contribution to this Conference and the development of mediation in these exceptional times.

Since the Chief Executive's policy address in 2007, the first Mediation Conference was held in the same year, the Department of Justice has worked hard in shaping up Hong Kong as an international mediation hub by providing an environment conducive to mediation in terms of its legislative framework, capacity building, and the cultivation of a mediation culture in the community. The biannual Mediation Conference is one of our many ongoing initiatives. Our aim is twofold. First, on the domestic level, the Conference is our promotional and public educational vehicle for advocating the wider use of mediation in our community. On the international level, we seize the opportunity to bring together renowned experts and practitioners in the area to explore new horizons for the global development of mediation. This year, the theme is mediate first more than you can imagine, 調解為先 超越所想. The discussions of our panellists today have shed light on the many opportunities, potentials, and directions for the development of mediation.

More than 10 years since the Mediation Conference was held in 2007 with the concerted efforts of key stakeholders, mediation has taken a prominent role in dispute resolution in Hong Kong. Various initiatives have materialized.

To name but a few, the launch of Mediate First Pledge campaign and the ongoing work since 2009, promulgation of the Hong Kong Mediation Code in 2010, the setting up of the Hong Kong Mediation Accreditation Association Limited in 2012, the enactment of the Mediation Ordinance in 2012, and the Apology Ordinance in 2017, as well as the

[1] Law Officer (Civil Law), Department of Justice, Hong Kong SAR Government

establishment of the West Kowloon Mediation Center in 2018. We are not stopping here. The question is what next? How can the development of mediation be taken forward in Hong Kong, the Asia Pacific, and worldwide? It is with this question in mind that we organized this year's Conference.

The focus of this year's Conference is what lies ahead on the mediation front. We heard from the panellists today three important aspects in the recent development of mediation.

First, the Mediation Convention. Indeed, this Conference offers a timely discussion on the United Nations Mediation Convention which just came into force in September this year. A salient feature of the Convention lies in the facilitation of expedited enforcement without the need for the enforcing state to go through a ratification procedure. This way, a wider pool of international investors and more parties would be willing to opt for mediation to resolve their international trade disputes.

We heard from some of our speakers today that the Convention is not just about enforcement, but is also about lending credibility to mediation as a standalone process in its own right. We also heard discussion on issues and challenges faced by mediators on the application of the Convention. The mainland and Hong Kong are no mere observers of this global trend of cross border mediation, but have been proactively cultivating the development in this regard.

A mediation mechanism has been devised for cross border trade disputes between mainland enterprises and Hong Kong investors arising from the Closer Economic Partnership arrangement between the Mainland and Hong Kong, that's the CEPA Investment Agreement concluded in 2017.

Now, on the rise or the increasing use of ODR, the pandemic has certainly presented opportunities for transformation. The use of ODR has offered a reliable and effective alternative to the conventional ways of dispute resolution. We heard today the key differences between mediation using online platforms and the conventional face-to-face mode. We also heard about the advantages of mediation using online platform in terms of its flexibility, costs, the engagement process, as well as the building of rapport. In Hong Kong earlier this year, the DOJ launched the COVID-19 online dispute resolution scheme using the online platform of eBRAM. This online multi-tiered dispute resolution mechanism is an innovative way to provide speedy and cost-effective resolution of disputes caused by the pandemic, globally, and locally, especially

for those disputes involving micro, small, and medium-sized enterprises.

Internationally, Hong Kong submitted the proposal on the APEC collaborative framework for ODR of cross-border business-to-business disputes which was endorsed in 2019, and as our panellists suggested, a potential game-changer. It establishes an APEC sponsored initiative to use ODR to help global businesses and to provide technology-assisted dispute resolution. It is hoped that Hong Kong's ODR services will be further promoted to APEC and beyond.

On mediation advocacy and mediator training, which we heard just a few minutes ago, many mediators are practicing solicitors or barristers. They are understandably more used to the adversarial approach in litigation. Notably, the role of a mediator and a mediation advocate is essentially different from that of a litigator requiring different mindset and skills. Not only do they need to prepare themselves to adapt to a collaborative mode, they also need to prepare their clients in terms of their expectations in order to achieve a win-win outcome. All this will need to be acquired through professional training tailor-made for the purpose. As we've heard from the panel discussion, the current mediator training and accreditation framework may require further refinement and expansion to include mediation advocacy training so that our mediation practitioners will become more all-rounded and effective in delivering mediation services.

The Steering Committee on Mediation will continue to give support in this regard. Now going back to the question which I asked a few moments ago of what lies ahead in mediation, we look forward to cultivating the wider use of cross-border mediation in the Greater Bay Area and Belt and Road countries and to further explore the arrangement of reciprocal enforcement of mediated settlement agreement under the CEPA Investment Agreement framework.

In line with DOJ's capacity building initiative, we have a number of upcoming events. We're bringing our Hong Kong brand “Mediate First” outside Hong Kong. After our first international mediator first pledge event in Shanghai in 2019, we're planning now for the next stop in Thailand. DOJ will join hands with the International Center for Settlement of Investment Disputes and the Asia Academy of International Law in organizing a bespoke training course on investment law and investor-state mediation skills with a view to building up a team of investment mediators in Asia. Following the fruitful training we had in 2018 and 2019, we plan to have the next training in the first quarter of 2021.

The Steering Committee on mediation will continue to look into wider use of mediation in resolving disputes in different sectors of the community, such as the medical and healthcare, intellectual property, consumer rights, et cetera. Given the encouraging responses we received on the Sports Dispute Resolution Conference yesterday and the upcoming Olympics in Tokyo and the winter Olympics in Beijing in 2022, we shall continue to explore and unlock the potentials in mediation in the sports sector. We also hold firm a belief that mediation can be utilized in different aspects of our daily lives including schools and amongst peers.

The 2019/2020 ICC International Commercial Mediation Competition Hong Kong will soon take place from the 11th to 14th November. This will be an excellent opportunity for university students from different jurisdictions to compete and learn from each other about mediation advocacy skills. Under our peer mediation initiative, we strive to bring mediation to our youths. Our next event is the school mediation seminar “Mediate Your Way Out of School Disputes” on the 21st November and the Prize Awards Ceremony for the Mediation Essay Competition for secondary school students, teachers, and parents.

To conclude today's Conference, on behalf of the Department of Justice and the Steering Committee on Mediation, I would once again express my gratitude to all of you for your support, participation and contribution to this Conference. I hope that today's discussions will offer food for thought.

Mediation Conference 2020
"Mediate First – More Than You Can Imagine"
6 November 2020

Conference Programme – Morning Session

Language of Conference : English (with Simultaneous Interpretation in both Cantonese and Putonghua)	
Time	**Activity**
09:30 – 09:35	**Launch of the "Mediate First" logo by the Department of Justice, Hong Kong SAR Government**
09:35 – 09:50	**Keynote Speech** **Ms Anna Joubin-Bret** *Secretary,* *United Nations Commission on International Trade Law*
09:50 – 11:20	**Panel Session 1 : United Nations Mediation Convention** – Challenges for Mediators** *Came into force in September 2020, the United Nations Mediation Convention establishes a harmonized legal framework for the right to invoke mediated settlement agreements and their enforcement. The need for enforceability is acute in the context of international commercial mediation, where the parties from different jurisdictions may face various hurdles in securing performance of the settlement reached. This panel session will discuss the application of the Convention and challenges faced by mediators in light of its constraints and exceptions on applicability of the Convention.* **Moderator :** **Professor Ting Kwok Iu, MH** *Consultant, Kwok, Ng & Chan*

	Speakers : **Judge Deng Yu** *Director, Judicial Reform Office,* *Supreme People's Court of the People's Republic of China* **Madam Guo Min** *Team leader for Diversified Dispute Resolution of the Case Filing Tribunal and Senior Judge Assistant, Supreme People's Court of the People's Republic of China* **Ms Winnie Tam, SC, SBS, JP** *Barrister, international arbitrator and mediator, Des Voeux Chambers* **Professor Nadja Alexander** *Professor of Law (Practice), Singapore Management University (SMU); Director, Singapore International Dispute Resolution Academy (SIDRA) of SMU* **Mr Bill Marsh** *International Mediator, Independent Mediators, UK* **Dr James Ding** *Commissioner,* *Inclusive Dispute Avoidance and Resolution Office, Department of Justice, Hong Kong SAR Government* **United Nations Convention on International Settlement Agreements Resulting from Mediation
11:20 – 11:30	**Q & A**

Mediation Conference 2020
"Mediate First – More Than You Can Imagine"
6 November 2020

Conference Programme – Afternoon Session

Language of Conference : English (with Simultaneous Interpretation in both Cantonese and Putonghua)	
Time	**Activity**
15:00 – 16:15	**Panel Session 2 : Use of Online Dispute Resolution in light of COVID-19** *With the advancement of technology, online dispute resolution ("ODR") has been developing rapidly in recent years and the use of ODR has surged in light of the COVID-19 pandemic. In June this year, the Department of Justice of Hong Kong has launched the "COVID-19 Online Dispute Resolution Scheme" which provides an online multi-tiered dispute resolution mechanism. This panel session will discuss the impact of COVID-19 on dispute resolution process in general, the latest development of ODR and the advantages and topical issues surrounding ODR.* **Moderator :** **Mr Adrian Lai** *Deputy Secretary General, Asian Academy of International Law* **Speakers :** **Mr Daniel Lam, SBS, JP** *Chief Executive Officer,* *eBRAM International Online Dispute Resolution Centre* **Mr James South** *Managing Director,* *Centre for Effective Dispute Resolution; Mediator* **Mr Rhys West** *Chief Executive, FairWay Resolution*

	Mr Zbynek Loebl *Of Counsel, PRK Partners*
16:15 – 16:25	**Q & A**
16:25 – 17:35	**Panel Session 3 : Mediation Advocacy** *Mediation advocacy involves a significant shift for lawyers and practitioners from an adversarial mode to a collaborative approach with a focus on the parties during a mediation process. To cope with this shift, it is therefore important that lawyers and other mediation representatives receive specialised training for mediation representation and advocacy. The speakers of this panel session would illustrate with their experience on the importance of mediation advocacy. Further, they would give advice on the skill-set required to adapt to this different role. It is hoped that the awareness of mediation advocacy among users and mediators would be raised.* **Moderator :** **Mr C K Kwong, JP** *Senior Partner, Sit, Fung, Kwong & Shum* **Speakers :** **Mr Simon Chapman, QC** *Partner, Herbert Smith Freehills* **Ms Elaine Liu, JP** *Barrister, Sir Oswald Cheung's Chambers* **Ms Manon Schonewille** *Business mediator, Legal Rebel in Rotterdam The Netherlands; Founder, Toolkit Company Academy Mediation & Negotiation* **Professor Leung Hing Fung** *Vice- Chairman,* *Hong Kong Mediation Accreditation Association Limited*
17:35 – 17:45	**Q & A**