



THE
LAW SOCIETY
OF HONG KONG
香港律師會

Peace and Prosperity *on the Belt and Road*

International Summit 2023
in celebration of the 10th Anniversary
of the Belt and Road Initiative



Mediation, Adjudication and/or Arbitration

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Topics

1. How effective is mediation in resolving commercial disputes?
2. Insights on Writing a Well-crafted mediated settlement
3. Enforcing Mediated Settlements
4. Status of the Mediation Convention
5. Practical mediation skills that are applicable not only to mediators but also to everyday life situations
6. Impact of sanctions on ADRs
7. Cryptocurrency related disputes
8. Use of ODR and other technology in resolving disputes
9. Use of mediation and arbitration for Belt and Road projects

1. How effective is mediation in resolving commercial disputes?

- Why mediation?
- Legislation in HK:
 - (1) **Practice Direction 31** of the High Court of the HKSAR, effective from 12 February 2009 – one of the underlying objectives of the Civil Justice Reforms is to facilitate the settlement of disputes
 - (2) **Mediation Ordinance (Cap. 620)**, effective from 1 January 2013
 - (3) **Apology Ordinance (Cap. 631)**, effective from 1 December 2017

Some mediation organizations in HK:

- Hong Kong Mediation Council, established in January 1994
- Financial Dispute Resolution Centre (“FDRC”), established in June 2012 – customer can file a complaint against a Hong Kong financial institution for claims up to the value of HK\$1 million and/or within the 24 months limitation period from the date on which the customer first had knowledge of the loss (Standard Eligible Disputes) and subject to the parties’ consent, the FDRC may handle cases with a claim exceeding HK\$1,000,000 and/or beyond the 24 months limitation period (Extended Eligible Disputes)
- Hong Kong Mediation Accreditation Association Limited (HKMAAL) – established in August 2012

1. How effective is mediation in resolving commercial disputes?

Pros:

1. Pre-action mediation v post-action mediation
2. Pre-action: parties are still willing to mediate after negotiations fail
3. Pre-action: litigation costs will outweigh the perceived advantages of commencing legal proceedings
4. Post-action: parties foresee that the litigation costs will outweigh the perceived advantages
5. An independent third person acts as a mediator to keep both parties calm to reconsider merits of the cases
6. Business efficiency dictates speedy solutions for resolving the disputes
7. Maintaining ongoing business relationship with the counterparty
8. Reducing costs and time, cf. litigation and arbitration

Cons:

1. If the issues in dispute are too technical or legal which might need to engage specialists, that will increase time and costs of mediation
2. If interim relief or emergency relief is required, mediation cannot help to obtaining those
3. Party's or parties' clear intention that they don't want to mediate
4. Not suitable if criminal element is involved (see mediators' ethics code)
5. A party might want the case to be heard in open court to attract attention or put pressure on the counterparty

2. Insights on Writing a Well-crafted mediated settlement

- Complete agreement v partial agreement
- Agreement will be formalised - preferable to draw up and sign document during the mediation
- Preferred to be drawn up by lawyers acting for the parties > mediator > parties
 - concise, clear, enforceable and consistent language
 - most effective arrangement
 - standard form mediation agreements specify agreement not binding until written agreement **signed** by all parties. E.g. CEDR Asia Pacific:
 - *No terms of settlement reached at the Mediation will be legally binding until set out in writing and signed by or on behalf of each of the Parties.*
 - Ensure agreement covers manner in which litigation to be disposed of (*Brown v Rice* [2007] EWHC 625 Ch)

2. Insights on Writing a Well-crafted mediated settlement

- Privity of contract → whether to exclude Contracts (Rights of Third Parties) Ordinance (Cap. 623)
- If it is a cross-border dispute, ensure the jurisdictional constraints are tackled with

3. Enforcing Mediated Settlements

- The settlement must be enforceable
- Elements of unenforceability:
 - (1) the absence of contractual certainty to bind the disputing parties
 - (2) rescission on account of an unjust factor
 - (3) undue influence duress and coercion
 - (4) unconscionability
 - (5) incompetence or incapacity
 - (6) lack of authority
 - (7) fraud and mistake
- Singapore Convention for enforcing international mediated settlement agreements

4. Status of the Mediation Convention

- **The United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention)**
- Adopted on 20 December 2018
- As of today, 56 number of signatories to the Convention
- Uruguay the most recent country to ratify the Convention
- 11 countries that have ratified the Convention
- PRC signed on 7 August 2019 but has not ratified the Convention
- How about HK?

5. Practical mediation skills that are applicable not only to mediators but also to everyday life situations

- Active listening
- Excellent communication skills
- Excellent paraphrasing and summarizing skills
- Excellent emotional intelligence
- Observation
- Conflict resolution
- Empathy
- Patience
- Preparation, preparation and preparation
- Impartiality
- Problem-solving
- Be creative to suggest solutions/options to parties
- Credibility and trustworthy

6. Impact of sanctions on ADRs

- Sanctions – domestic law v international law
- Practical Considerations:
 - (1) Arbitral institutions may refuse to administer cases from the sanctioned entities or individuals
 - (2) Arbitral institutions or their banks may refuse to accept payments from sanctioned entities or individuals
 - (3) Arbitrators may refuse to accept appointments or to continue to act in pending proceedings → can substitutes of arbitrators (with the same/similar level of expertise) be found in time?
 - (4) Tribunals may also reject claims or reduce quantum because of sanctions
 - (5) Enforcement - debtors can't make payments to sanctioned award creditors; Sanctioned award debtors may be precluded from paying with their frozen funds

7. Cryptocurrency related disputes

- Laws involved: contract, intellectual property, criminal and many more...

Between Investors/Lenders/Third Parties and the Cryptocurrency Platforms

1. Investment (e.g. shareholders' agreements disputes arising out of the seed capital, venture capital and private equity etc.)
2. Failure for the cryptocurrency platforms to pay outstanding debts to lenders
3. Misappropriation of funds (e.g. FTX lent its funds to its Alameda Research)

Between Traders and the Cryptocurrency Platforms

1. Financial transactions (e.g. margin calls against traders; forced close-outs; crypto platforms not returning the non-fungible tokens ('NFTs') or crypto collaterals)
2. Supply of services (e.g. Binance's service outage in May 2021)
3. Misrepresentations and frauds (e.g. the recent JPEX incident in HK)

Others

1. Intellectual property (e.g. NFTs might infringe copyright of the original copyright owner)
2. Sale of goods (e.g. selling defective bitcoin mining machines)
3. The stealing of bitcoin mining machines

8. Use of ODR and other technology in resolving disputes

- Online Dispute Resolution (ODR)
- **UNCITRAL Technical Notes on Online Dispute Resolution** adopted by the United Nations Commission on International Trade Law in 2016:

“2. One such mechanism is online dispute resolution (“ODR”), which can assist the parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing. ODR encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others), and the potential for hybrid processes comprising both online and offline elements. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries.”

UNCITRAL UNITED NATIONS
COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL
Technical Notes on
Online Dispute Resolution



8. Use of ODR and other technology in resolving disputes

- In HK,
 - (1) Electronic Business Related Arbitration and Mediation (eBRAM) Platform
 - (2) eBRAM's Asia-Pacific Economic Cooperation (APEC) Online Dispute Resolution Platform and eBRAM APEC Rules in May 2022 which adopts the APEC Collaborative Framework for Online Dispute Resolution of Cross-Border Business-to-Business Disputes (**APEC ODR Framework**) - serving the APEC region (especially for Micro, Small and Medium-size Enterprises (MSMEs)); listed by the APEC as the first and only ODR provider from HK, arbitral awards rendered in HK are enforceable in more than 170 jurisdictions, including in the PRC
 - (3) Asian African Legal Consultative Organization (AALCO) Hong Kong Regional Arbitration Centre (**AALCO HK Centre**) – the HK Centre was established in 2021, providing ODR and serving the Asian and African regions
- Also used by private online companies such as Taobao, eBay and PayPal

8. Use of ODR and other technology in resolving disputes

Pros:

1. Lower costs (including legal costs and travel costs)
2. Time-saving, e.g. in a multitiered dispute resolution mechanism (negotiation → mediation → arbitration), each tier can be conducted within a limited time (e.g. calculated in calendar days/month(s)), aiming to solve the disputes within few weeks
3. Simplified procedures
4. Overcoming geographical barriers
5. Suitable for low value/high in volume/cross-border transactions
6. Can be set up for special purposes, e.g. the “eBRAM COVID-19 ODR Scheme” for:
 - (i) disputes arising out of or in relation to COVID-19 directly or indirectly,
 - (ii) cases where the claim amount is not more than HK\$500,000 (= ~US\$63,861.45); and
 - (iii) either party to the dispute is a HK resident or company).

Cons:

1. Requiring users to have access to the internet, faster, stable internet connection, unlimited data usage plan (ideally) as video conferences might be required
2. Users need to be tech-savvy
3. The ODR platforms may be subject to unintended data leakage (especially confidential information) or cyber attacks by hackers
4. In cross-border disputes,
 - (i) language differences (to what extent can we fully trust the translation services provided online and by the AI?); and
 - (ii) the enforcement of an ODR decision?

9. Use of mediation and arbitration for Belt and Road projects

- Asian cultural values' preference in mediation v adversarial approach in litigation/arbitration
- BRI projects include the construction of roads, railways, ports, power plants, mining projects and the installation of fibre-optic cables etc.
- **Characteristics** of these projects: high-value, multi-party, multi-jurisdictional and always involve state interests, different cultural, political and investment environments and legal systems
- **Parties** to the disputes:
 - (i) Between commercial parties
 - (ii) Investor and state
 - (iii) State to state
- Enforcement of arbitral awards: New York Convention is preferred if both countries do not have the reciprocity of enforcing judgments

9. Use of mediation and arbitration for Belt and Road projects

- Of the 65 original Belt and Road jurisdictions, only 5 countries (Iraq, the Maldives, Timor-Leste, Turkmenistan and Yemen) have not ratified the New York Convention.



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The background features a complex, abstract design. On the left side, there are vertical, wavy bands of teal and gold, resembling marbled paper or liquid paint. These bands are set against a lighter, ethereal teal background that is filled with soft, out-of-focus bokeh lights and subtle gradients. The overall aesthetic is elegant and celebratory. The text 'Thank You' is centered in the middle of the image, rendered in a bold, dark blue font.

Thank You