

Project: Promoting Hong Kong as a Venue to Mediate International Trade Disputes and Enhancing the Effectiveness of Mediation as an Alternative Dispute Resolution Method

**Research Report on
the Receptiveness of Companies in Using Mediation as a Method
to Resolve International Trade Disputes**



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This material/ event is funded by the Professional Services Advancement Support Scheme of the Government of the Hong Kong Special Administrative Region.

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ABSTRACT

The value of mediation as an Alternative Dispute Resolution (ADR) method has been widely recognized by the Government of the Hong Kong Special Administrative Region (HKSAR) and promotion of mediation has been ongoing for many years in Hong Kong.

To examine the views of companies on using mediation as an ADR method, on how the companies resolved local and international commercial disputes through mediation, and how to better promote mediation in local and international trade context, the Joint Mediation Helpline Office (“JMHO”) has conducted a research entitled “the Receptiveness of Companies in Using Mediation as a Method to Resolve International Trade Disputes”.

Empirical study and literature review were conducted to identify key concerns and issues about commercial mediation services. Questionnaire was designed for conducting a survey. 3 interviews were conducted on a voluntary basis as case studies to obtain the companies’ in-depth views on mediation. Analysis and discussion were performed in order to summarise and identify the position of mediation in Hong Kong

The findings show that although the value of mediation as an ADR method has been widely recognized and promoted by the Government of HKSAR, mediation in Hong Kong is yet to be widely understood and used.

In conclusion, discussion and recommendation are included as a reference to readers. It is recommended that more strenuous efforts and increased resources should be deployed to enhance better awareness of mediation, and its wider usage in all fields of activities in the commercial sector, not just for coping with commercial and contractual disputes with external parties, but also for better internal, in-house management. Also, there should be promotion of a wider adoption of mediation clause as a pre-agreed dispute resolution method in local commercial contracts. More efforts should also be devoted to tap into the potential for increasing the use of local mediation services for resolving international disputes.

RESEARCH REPORT

1. Background

The Belt and Road Initiatives encourages new international commercial projects in infrastructure, logistics, etc. Companies need effective means, such as mediation, in resolving disputes in relation to contracts, intellectual properties or other aspects. The value of mediation as an Alternative Dispute Resolution (ADR) method has been widely recognized by the Government of the Hong Kong Special Administrative Region (HKSAR), and promotion of mediation has been ongoing for many years in Hong Kong¹.

Having said that, mediation in Hong Kong is yet to be widely used. According to statistics from the Hong Kong Judiciary, it can be seen that around 3-4% of District Court cases conducted mediation eventually while 17-19% of the High Court cases conducted mediation eventually².

Table 1: Percentage of cases with mediation in District Court

Year	No. of cases with mediation	No. of court cases filed mediation certificate ³	Percentage of cases with mediation
2014	397	9628	4.12%
2015	388	9731	3.99%
2016	361	9439	3.82%

Table 2: Percentage of cases with mediation in High Court

Year	No. of cases with mediation	No. of court cases filed mediation certificate ³	Percentage of cases with mediation
2014	632	3271	19.32%
2015	645	3668	17.58%
2016	666	3623	18.38%

Yet, the data could not indicate the view of companies on using mediation as a means in resolving commercial disputes.

¹ In 2010, the Secretary of Justice has set up one of the Mediation Task Force, which is assisted in its work by three groups working specifically on regulatory framework, accreditation and training and public education and publicity, and has organized various mediation campaigns and pilot scheme since then. Department of Justice, "Dispute Resolution (Mediation)", <http://bit.ly/2WbCGB6> accessed on June 2019

² Hong Kong Judiciary - Mediation, "Mediation Figures and Statistics", <http://bit.ly/2Zte2hA> accessed on June 2019

³ Filing mediation certificate to the court means parties expressed consents to mediate

The Joint Mediation Helpline Office (“JMHO”)⁴ has been funded under the Professional Services Advancement Support Scheme (“PASS”)⁵ to implement a project entitled “Promoting Hong Kong as a Venue to Mediate International Trade Disputes and Enhancing the Effectiveness of Mediation as an Alternative Dispute Resolution Method” from 1 November 2017 to 30 June 2019.

The present research is one of the deliverables of this project to examine the view of corporations on using mediation as an ADR method, the view on how to resolve cross-border disputes through mediation and how to better promote mediation in international trade contests.

2. Objectives

The research aims at identifying the factors affecting parties’ use of mediation to resolve international trade disputes, in particular in relation to the following areas:

- I. The level of awareness of using mediation to resolve disputes (both locally and internationally);
- II. For those who used mediation, the major types of disputes involved;
- III. For those who did not use mediation, the main reasons for not using mediation to resolve disputes; and
- IV. The level of satisfaction about mediation services conducted internationally and locally.

The present research is conducted so as to:

- I. Identify areas of improvement of mediation services provided in Hong Kong against the benchmark of international mediation services;
- II. Identify common concerns of corporations on using mediation in these contexts, and ways to improve; and
- III. Identify the level of awareness among corporations of using mediation to resolve international disputes, and obtain suggestions to improve such promotion.

⁴ The JMHO is a non-profit-making, charitable organisation that aims at promoting the use of mediation as a means of dispute resolution in Hong Kong. It was founded in 2010 jointly by 8 reputable organisations, namely, the Hong Kong Mediation Council, the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong Institute of Arbitrators, Chartered Institute of Arbitrators (East Asia Branch), the Hong Kong Institute of Architects, the Hong Kong Institute of Surveyors and the Hong Kong Mediation Centre.

⁵ The PASS provides funding support for non-profit-making projects aimed at increasing the exchanges and co-operation of Hong Kong’s professional services with counterparts in external markets; promoting relevant publicity activities; and enhancing the standards and external competitiveness of Hong Kong’s professional services.

3. Methodology

This study involves three stages.

First, empirical study and literature review were conducted to identify key concerns and issues about commercial mediation services. These provided an overall picture about perception and use of mediation in conflict management in the commercial sector in Hong Kong, and set the background and reference materials for designing a questionnaire for interviewing corporations with local presence in Hong Kong on issues concerning their receptiveness in using mediation in resolving commercial conflicts.

Second, a survey was conducted from 7 September 2018 to 31 March 2019. A questionnaire was designed with the inputs and assistance of the Department of Management of the Hong Kong University of Science and Technology (HKUST) to ensure the design of the questions can reflect the project objectives and collect the appropriate data for proper analysis.

Research findings are analysed to study prevalent awareness of mediation as a method of dispute resolution in Hong Kong, and to identify any area can be improved to enhance the commercial sector's awareness and use of mediation. Also, data collected about the disputes types and the satisfaction levels of mediation users can help to identify areas for improvement of Hong Kong mediation practice.

Research subjects are local or overseas companies which had experienced disputes in the past. Interviewees involved staff of these companies at all ranks who are involved in disputes resolution matters.

Last but not least, 3 interviews as case studies were conducted on a voluntary basis to obtain their view on mediation. Interview subjects are individual corporations/ companies which have used mediation previously to resolve business disputes. A non-disclosure agreement has been signed with the companies to ensure confidentiality of mediation communication and corporations' information.

4. Research Findings

4.1 Introduction

Mediation is one of the oldest and most common conflict resolution mechanisms in

international conflicts⁶. More and more people are using mediation to settle their disputes. Concurrently, about 80 countries and international organizations have made mediation laws and established mediation service institutions to promote and support the use of mediation to resolve disputes, with a view to satisfying the requirement of the people on the one hand and to dissolve certain negative effects which have been brought about by the other dispute resolution methods, such as litigation and arbitration.

For Hong Kong, the development of mediation can be traced back in the 1980s. One of the milestones of development was the setting up of mediation group in Hong Kong International Arbitration Centre (HKIAC) in 1994 and Hong Kong Mediation Council (HKMC) in 1999. These paved way for a number of pilot mediation schemes designed to resolve conflicts in specific areas of law.

A significant step was the Civil Justice Reform in Hong Kong, with its final report issued in 2004, which confirmed the specific role played by mediation in the local civil justice system. Mediation is a potentially cost-effective means of achieving fair and satisfactory resolution of disputes. Temporary stay and costs sanction became legitimate and proportionate measures to encourage parties to consider the use of mediation.

Further, during 2006 to 2009, there were a number of pilot schemes being conducted in specific areas of law, e.g. construction, building management, company disputes involving shareholders, etc. Mediation Co-ordinators' Offices were set up in the Family Court and the Lands Tribunal. There were also other mediation schemes established, providing mediation services for insurance disputes, personal injuries, etc.

The Practice Direction on Mediation – Practice Direction 31 (PD 31) came into effect on 1 January 2010, which aims to promote the wider use of mediation to facilitate early and satisfactory settlement of disputes. Lawyers and parties are required to assist the court to achieve procedural economy in the process and the facilitation of settlement. Unreasonable refusal to mediate will be penalized by adverse costs order; a party who refuses to attempt mediation bears the burden of providing a reasonable explanation doing⁷ so.

An industry-led accreditation body, which was intended to become the premier accreditation body for mediators in Hong Kong was set up for accreditation and disciplinary matters. This single accreditation body - Hong Kong Mediation Accreditation Association Limited (HKMAAL) was incorporated in the form of a company limited by guarantee on 28 August 2012. Founder members include the Hong Kong Bar Association (HKBA), the Law Society of Hong Kong (LSHK), HKIAC, and the Hong Kong Mediation

⁶ Jacob Bercovitch and Su-Mi Lee, "Mediating International Conflicts: Examining the Effectiveness of Directive Strategies", *The International Journal of Peace Studies*, Vol. 8, No. 1 (International Peace Research Association, Spring/ Summer 2013), pp. 1-17, <http://bit.ly/2UReuYh> accessed on June 2019

⁷ *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* HCA2032/2007 [2010] 3 HKLRD 273

Centre Limited (HKMCL).

The Mediation Ordinance (Cap. 620) came into operation on 1 January 2013. The Mediation Ordinance provides a regulatory framework for the conduct of mediation in Hong Kong. In addition, the Apology Ordinance (Cap. 631) came into operation on 1 December 2017. The objective of this Ordinance is to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution.

We can see that there have been significant steps taken for promoting mediation and more efficient settlements through legislative and industry efforts. One may suppose that, given all these efforts, mediation should have now become more familiar to the public and the commercial sector.

Is this supposition correct? How far we have gone in achieving the goal of promoting mediation widely? Are people, especially the commercial sector, inclined to use mediation to resolve disputes in Hong Kong? What are the factors affecting their choice?

The present study intends to gather more information for understanding the above issues.

4.2 *Literature review*

4.2.1 Use of mediation in the US commercial sector

The present study has made reference to a comparable study in 2011 conducted in US by Stipanowich and Lamare (2013) on Fortune 1000 corporations⁸. The 2011 study was a follow-up study of a similar survey in 1997, to see if there had been any change of use of mediation by US corporations throughout the change of time.

In the 2011 study, it was shown that mediation has become a universal experience for corporations in US. Ninety-eight percent of the respondents indicated their companies had used mediation at least once in the prior three years, which was a 10% jump from the figures obtained in the 1997 study.

Most companies used mediation to resolve disputes in commercial and contract (83.5%) and employment (85%), followed by personal injury (70.5%) and product liability (59.9%). These most popular categories of disputes for using mediation are more or less the same for

⁸ Thomas J. Stipanowich and J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, Legal Studies Research Paper Series, Paper Number 2013/6 (Cambridge: Harvard Negotiation Law Review and Pepperdine University Legal Studies Research, 2013), <http://bit.ly/2V5QAZ2> accessed on June 2019

both 1997 and 2011 studies⁹.

When asked how frequently they use mediation voluntarily (i.e. in the absence of court mandate) in corporate and commercial disputes, nearly half of those responding said they employed mediation “frequently” or “always”. Only 15% said they used mediation “rarely” or “never”¹⁰.

As to prediction of future use of mediation, almost 86% of respondents said their companies would be “likely” or “very likely” to use mediation instead of litigation for future corporate/ commercial disputes¹¹.

The reason why many corporations used mediation was mainly pursuant to a provision in a contract. It seems that mediation clause was one of the main reasons procuring the parties to resort to mediation at some stage in the dispute resolution process¹².

The authors concluded, among others, that “nearly all companies have recent experience with mediation, which is now employed more extensively across the broad swath of civil conflict and the great majority of companies foresee its use in the future”¹³. Mediation’s success has also contributed to the marked fall-off in the use of binding arbitration, which has been perceived increasingly as less cost and time saving.

4.2.2 Adoption of Mediation Clause in US

As Stipanowich and Lamare (2013) noted in their studies, the reason why many corporations used mediation was mainly pursuant to a provision in a contract. As such, the existence of a mediation clause was one of the main reasons procuring the parties to resort to mediation at some stage in the dispute resolution process.

It is noted that many commercial contracts in recent years tend to have an embedded dispute resolution clause.

Mediation clauses are regarded by some commentators as “pre-dispute mediation agreements” - because they dictate that if a dispute should arise, it will be resolved through mediation¹⁴. The most basic mediation clause generally provides that the parties shall apply mediation to their dispute which arises out of or relates to a contractual or other legal relationship.

⁹ op cite, page 44

¹⁰ op cite, page 46

¹¹ op cite, page 49

¹² op cite, page 62

¹³ op cite, page 67

¹⁴ Egle Atutiene, “Business Dispute Mediation Agreements”, *Social Transformations in Contemporary Society*, (Lithuania: Mykolas Romeris University, 2016 (4) ISSN 2345-0126), page 5 to 17, <http://bit.ly/2wf3HZb> accessed on June 2019

It has been noted that, it is almost a common practice in the US to include in every business contract a mediation clause¹⁵.

In this respect, the situation in Hong Kong is yet to be explored systematically. Whether Hong Kong business corporations have routinely or prevalently included any mediation clause in their contracts (thus procuring them to use mediation at a certain stage of dispute resolution process), and whether the business sector is receptive of a mediation clause in their contracts, are still yet to be found out in a research study.

4.3 *Research*

A research was conducted during the period from 7 September 2018 to 31 March 2019, by way of distribution of a questionnaire ([Appendix A](#)). The questionnaire was designed with the inputs and assistance of the Department of Management of the HKUST to ensure the design of the questions can reflect the project objectives and collect the appropriate data for proper analysis.

The questionnaire was distributed to staff of corporations through diversified channels. These include distribution during commercial exhibitions in Hong Kong, Mainland China and foreign countries, and other workshops and seminars in Hong Kong. eDM and email circulation had also been conducted to promote and distribute the questionnaire to corporations in Hong Kong.

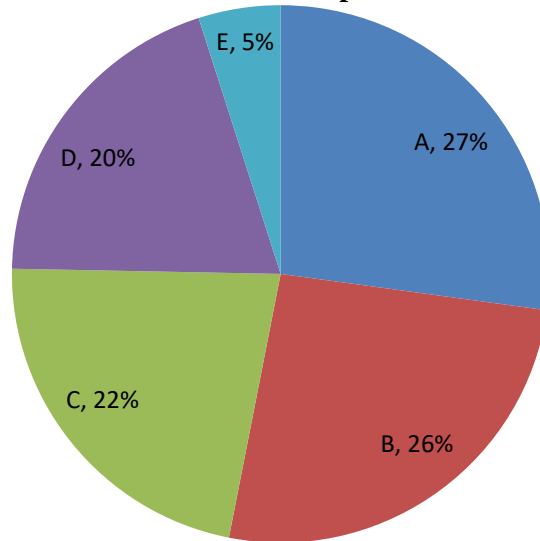
Findings of the current report are based on all returned questionnaires conducted during exhibitions on face-to-face interviews. Interviewees were randomly selected for conducting the interviews.

Return rate was around 25% (a total of 400 hard copies of the questionnaire were distributed and 99 returned). Yet, 10 questionnaires were excluded from the report since the questionnaires were incomplete and illegible. Thus, the eligible return rate was 22%.

The respondents were divided into 4 levels. Amongst, 27% of the respondents were managers and senior technical professionals of the company, 26% were general managers or owners of the company, 22% were entry to experienced level which has a certain decision-making ability in the company, whereas 20% were directors:

¹⁵ Gary P. Poon, *The Corporate Counsel's Guide to Mediation* (USA: American Bar Association Publishing, 2010)

Breakdown of Level of Respondent's Position



No.	Item
A	Managers and Senior Technical Professionals ¹⁶
B	General Managers/ Owners ¹⁷
C	Entry to Experienced Level ¹⁸
D	Directors ¹⁹
E	Did not disclose

Amongst all the respondents, 70% were from non-manufacturing industries (in which 20% were “Others”, four 13% were “Banking, Insurance and Other Financial Service”, “Import and Export Trade”, “Wholesale and Retail” and “Real Estate”. Details are shown on Table 4), while the remaining were from manufacturing industries (in which 21% were “Electronics and Electrical Product”, 17% were “Food”, three 13% were “Industrial Machinery”, “Printing and Publishing” and “Others”. Details are shown on Table 3).

¹⁶ Work to specific measurable objectives requiring operational planning skill with little direct supervision; have considerable latitude for making decisions within their unit; have involvement in the hiring, development, and related personnel processes; have budgetary responsibilities; and exercise crucial people skills

¹⁷ Give strategic guidance to the units under their control; develop and direct short and near-term goals for their units; exercise broad decision-making latitude within their functional units; have complete budgetary control over the functions under their control; and make use of essential people skills, including the ability to develop subordinates

¹⁸ work under general supervision; have little decision-making ability and have limited/ nominal budgetary responsibility

¹⁹ Work to broad goals for their area of responsibility; have significant latitude for making decisions for their operational or functional units; have hire/ fire authority over team members; have direct expense responsibility for significant departmental or unit budgets; and exercise essential people skills

Industry of Company

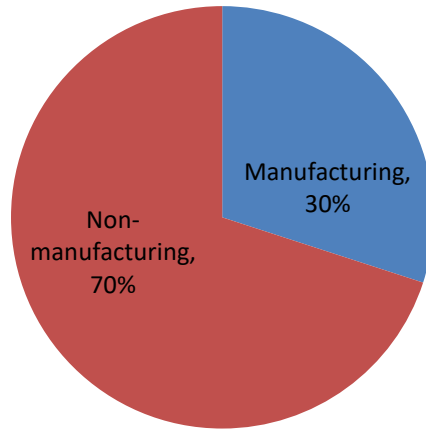


Table 3: Breakdown of responses who selected “Manufacturing”

No.	Item	Percentage
A	Electronics and Electrical Product	21%
B	Food	17%
C	Industrial Machinery	13%
D	Printing and Publishing	13%
E	Others	13%
F	Toy	8%
G	Chemistry and Biotechnology	4%
H	Metal Product	4%
I	Plastic	4%
J	Textile and Garment	4%

Table 4: Breakdown of responses who selected “Non-Manufacturing”

No.	Item	Percentage
A	Others	20%
B	Banking, Insurance and Other Financial Service	13%
C	Import and Export Trade	13%
D	Wholesale and Retail	13%
E	Real Estate	13%
F	Information Technology Service	11%
G	Construction	7%
H	Professional Service	7%
I	Logistics and Transportation	4%

J	Catering and Hotel	2%
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About one-third of the companies have their headquarters located in Hong Kong, followed by Singapore and Mainland China. Almost 50% of the respondents indicated that their companies have branches, in which 30% were located in Mainland China, followed by Hong Kong and Singapore. Breakdowns are shown as follows:

Table 5: Breakdown of respondents' location headquarters

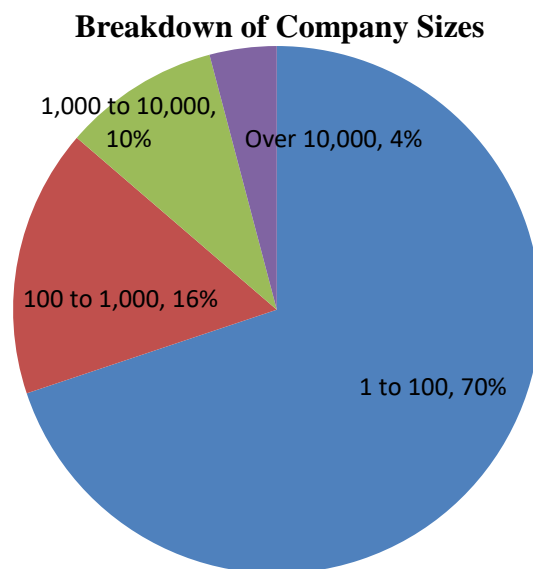
No.	Item	Percentage
A	Hong Kong	32%
B	Singapore	30%
C	Mainland China	16%
D	Malaysia	4%
E	England	4%
F	Taiwan	3%
G	America	3%
H	Nigeria	3%
I	Macau	1%
J	Japan	1%
K	Indonesia	1%
L	Middle East	1%
M	Philippines	1%

Table 6: Breakdown of respondents' location branches

No.	Item	Percentage
A	Mainland China	30%
B	Hong Kong	21%
C	Singapore	16%
D	Malaysia	8%
E	England	2%
F	America	2%
G	Nigeria	2%
H	Germany	2%
I	Dubai	2%
J	Taiwan	1%
K	Macau	1%
L	Japan	1%
M	Indonesia	1%

N	Middle East	1%
O	Australia	1%
P	Korea	1%
Q	Philippines	1%
R	Vietnam	1%
S	Thailand	1%
T	Spain	1%
U	India	1%

The breakdown of the company sizes of respondents are as follow:



Over 76% of company of the respondents conducted business with overseas or Mainland China companies.

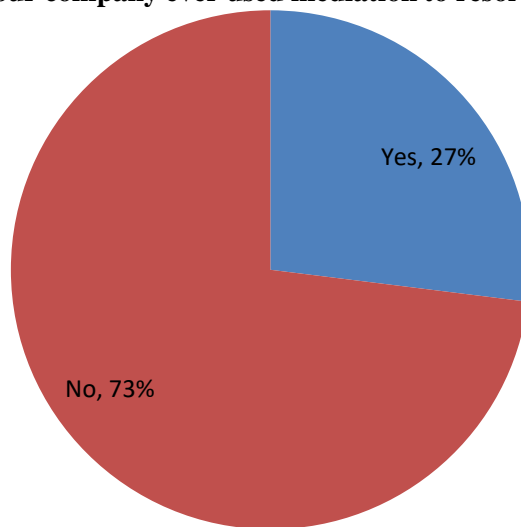
4.4 Findings

Details of the data collected from the questionnaire are summarized as follows.

(1) Mediation is not widely used in resolving disputes in the commercial sector

Despite the wide promotion on the use of mediation as a preferred way of dispute resolution in Hong Kong for a long period of time, 73% of the respondents said that they have not ever used mediation to resolve disputes (Q1).

Q1. Has your company ever used mediation to resolve disputes?

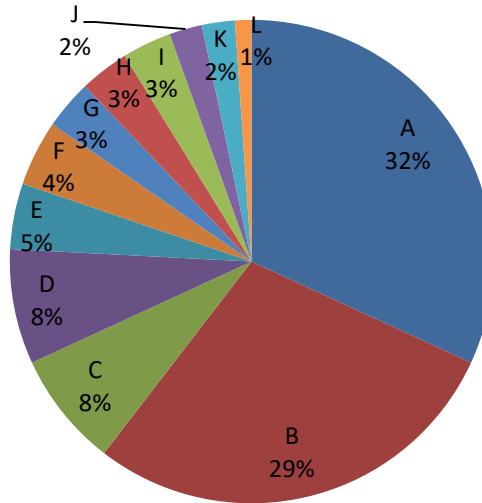


The apparent lagging behind in the practical adoption of mediation despite efforts from the Government, the Judiciary, and mediation services providers raise serious concern about the reason behind this phenomenon. Respondents are then asked to provide the reason for not using mediation.

(2) Low awareness of mediation in Hong Kong compared with litigation

When asked about the reason for not using mediation to resolve a company's disputes (Q2), the majority said that the reason(s) being "The dispute(s) was/ were settled by direct negotiation" (32%) and "Not knowing about mediation" (29%). These were followed by "Prefer resolve through lawyer(s)" (8%) and "Others" reasons (8%).

Q2. What are the reasons for not using mediation to resolve your company's dispute(s)?



No.	Item
A	The dispute(s) was/ were settled by direct negotiation
B	Not knowing about mediation
C	Others
D	Prefer resolve through lawyer(s)
E	The dispute(s) remain(s) unsettled
F	Use of mediation is not supported by the company's policies
G	Disputes are mainly small amount
H	Not knowing how to access mediation services
I	Refusal to mediate by the other party(ies)
J	Prefer to handle the dispute by him/ her self
K	Use of other dispute resolution procedures is required by contract
L	No consensus was reached on the appointment of mediator

The less major reasons for not using mediation to settle disputes included “The dispute(s) remain(s) unsettled” (4%), “Use of mediation is not supported by the company’s policies” (4%), “Disputes are mainly small amount” (3%), “Not knowing how to access mediation services” (3%), “Refusal to mediate by the other party(ies)” (3%), “Prefer to handle the dispute by him/ herself” (2%), “Use of other dispute resolution procedures is required by the contract” (2%), and “No consensus was reached on the appointment of mediator” (1%).

For the respondents who replied other reasons for not using mediation, they specified as follows:

- i) Consider mediation unable to reduce the impact of cultural difference between

East and West;

- ii) Consider the understanding of mediation is limited in the commercial world;
- iii) Consider using mediation as loss face;
- iv) Mediation is not popular in Mainland China;
- v) Prefer litigation;
- vi) Prefer to refer client to seek outside assistance; and
- vii) Prefer using government bodies or chambers of commerce for resolving dispute.

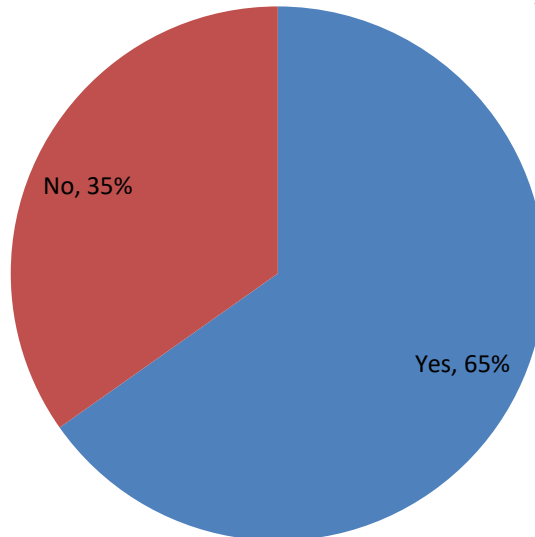
It is noted that 8% of the respondents prefer to handle the disputes through lawyers. There is a hint of possibility that lawyers who handled the disputes for these companies may not have been keen in using (or advising their clients to use) mediation for their clients/ employers to resolve the commercial disputes.

(3) Mediation more commonly used for local than international disputes

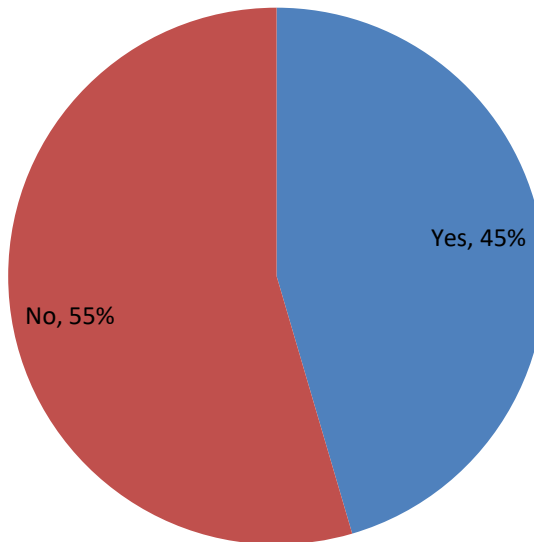
For the respondents who replied that they have used mediation to resolve disputes (27%), it is noted that they mostly used mediation to resolve local disputes than international disputes.

65% said that they have used mediation to resolve local disputes (Q3), while only 45% said that they have used mediation to resolve international disputes (Q9).

Q3. Has mediation been used to resolve local dispute?



Q9. Has mediation been used to resolve international dispute?



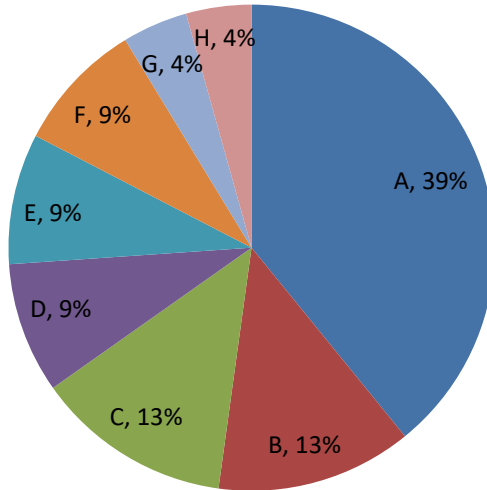
It appears that mediation services in Hong Kong are still primarily used for local commercial disputes, and there is room for development of use of mediation for resolving international commercial disputes.

(4) Mediation commonly used for resolving commercial and contractual disputes both locally and internationally

Respondents said that for both local and international disputes which their companies were involved, mediation was used to resolve mainly commercial and contractual disputes (Q4, Q10).

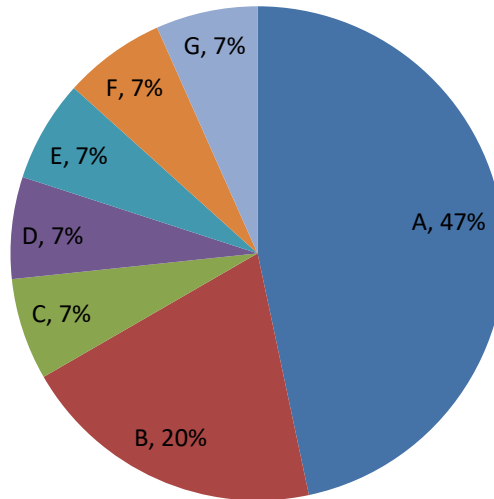
For international disputes, disputes about corporate finance is the second most common type of mediated dispute (Q10), but in Hong Kong, the second most commonly mediated dispute is for consumer disputes and real estate (Q4).

Q4. What kind(s) of local dispute was/ were handled by way of mediation?



No.	Item
A	Commercial/ Contract
B	Consumer
C	Real Estate
D	Construction/ Renovation
E	Personal Injury
F	Product Liability
G	Corporate Finance
H	Intellectual Property
I	Environmental (0%)
J	Others (0%)

Q10. What kind(s) of international dispute was/ were handled by way of mediation?

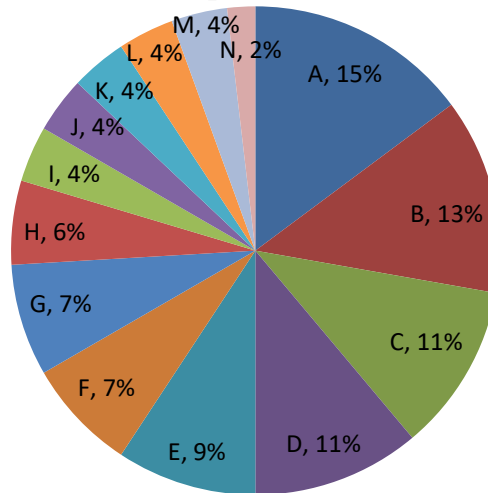


No.	Item
A	Commercial/ Contract
B	Corporate Finance
C	Construction/ Renovation
D	Consumer
E	Intellectual Property
F	Personal Injury
G	Product Liability
H	Environmental (0%)
I	Others (0%)
J	Real Estate (0%)

- (5) **For local disputes, use of mediation is mainly for time and cost saving, and other reasons relating to features of mediation (e.g. preserve relationship, more satisfactory settlement)**

Respondents indicated that the reasons why they chose to use mediation to resolve local disputes include time-saving (15%), cost-saving (13%), preserve relationship (11%), and more satisfactory settlements (11%) (Q5).

Q5. What are the reasons for using mediation to resolve the above dispute(s)?



No.	Item
A	Time-saving
B	Cost-saving
C	Preserve relationships
D	More satisfactory settlements
E	More satisfactory process
F	Parties' control over the outcome of mediation
G	Uses expertise of third party neutral
H	Confidential process
I	Contract provisions
J	Practice Direction on Mediation – Practice Direction 31 ²⁰
K	More durable resolution
L	Avoid establishing legal precedents
M	Others
N	Parties' autonomy in the process
O	Required/ desired by the management of the company (0%)
P	Limited discovery (0%)

For the respondents who selected “Others”, they specified as follows:

- i) Forced to use (i.e. by the court of his/ her country); and

²⁰ Practice Direction on Mediation – Practice Direction 31 assists the Court of HKSAR to encourage the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitate its use. It applies to all civil proceedings in the Court of First Instance and the District Court which have been begun by writ.

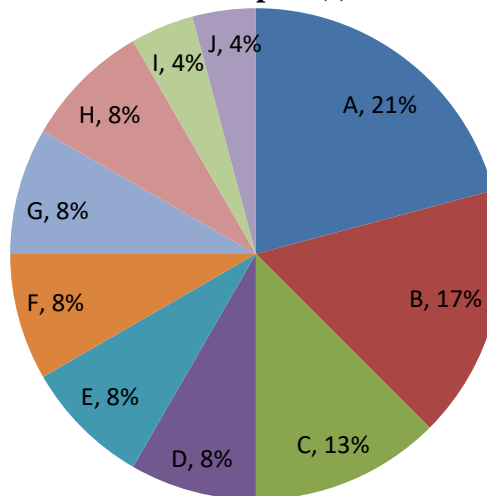
ii) Recommended by lawyers.

(6) For international disputes, use of mediation is mainly due to contract provisions

Respondents said that for resolving international disputes, use of mediation was mainly triggered by contract provisions (e.g. mediation clauses in contract) (21%) (Q11).

Cost saving (17%) and more satisfactory settlements (13%) ranked second and third as reasons for choosing to mediate international disputes.

Q11. What are the reasons for using mediation to resolve the above dispute(s)?



No.	Item
A	Contract provisions
B	Cost-saving
C	More satisfactory settlements
D	Time-saving
E	More satisfactory process
F	Limited discovery
G	Uses expertise of third party neutral
H	Others
I	Preserve relationships
J	Confidential process
K	Practice Direction on Mediation – Practice Direction 31 (0%)
L	Required/ desired by the management of the company (0%)
M	Parties’ autonomy in the process (0%)

N	Parties' control over the outcome of mediation (0%)
O	More durable resolution (0%)
P	Avoid establishing legal precedents (0%)

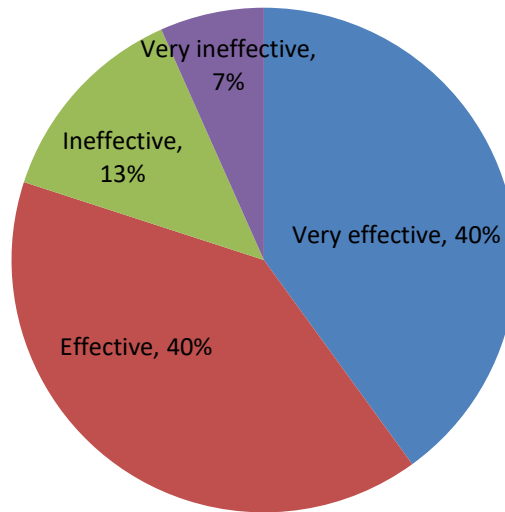
For the respondents who selected "Others", they specified as follows:

- i) Forced to use (i.e. by the court of his/ her country); and
- ii) Recommended by lawyers.

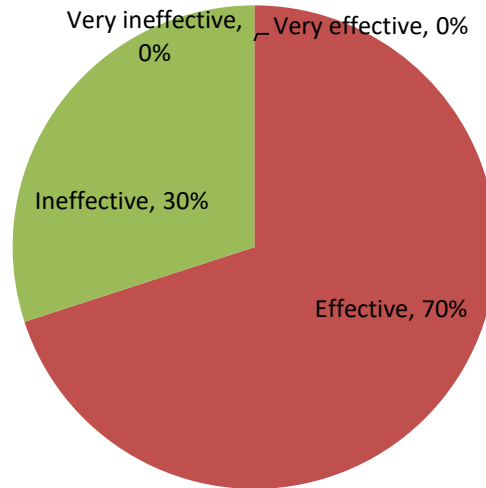
(7) Mediation is considered effective for resolving both local and international disputes

It is noted that respondents gave high ratings for the effectiveness of using mediation for both local (80%) (Q6) and international (70%) (Q12) disputes.

Q6. How would you rate the effectiveness of mediation in resolving the local dispute(s) of your company?

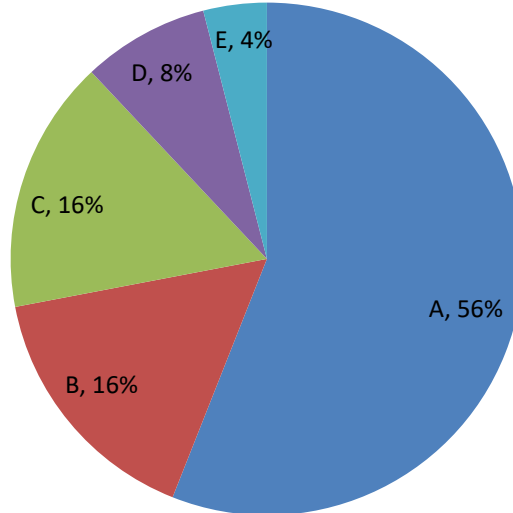


Q12. How would you rate the effectiveness of mediation in resolving the international dispute(s) of your company?



Effectiveness of mediation may be attributed to the early use of mediation for conflict resolution. Most engaged mediation services at an early stage of conflict (56%), i.e when a conflict already occurred (and mediation as a management tool to reduce the negative impacts brought by the conflict) (Q15).

Q15. At which stage of conflict did your company engage mediation services?



No.	Item
A	When conflict already occurred (mediation as a management tool to reduce the negative impacts brought by the conflict)
B	When disagreement arose/ before conflict occurred (mediation as a

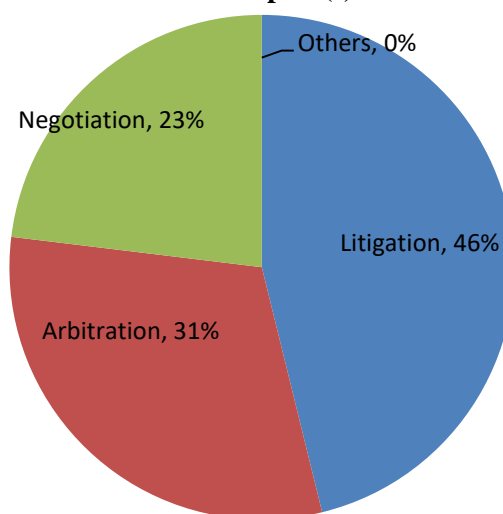
	preventive tool to prevent the disagreement from escalating to conflict/ prevent conflict from happening)
C	When directions to attempt mediation were given by the Court
D	When the conflict was brought to the Court
E	Others

For the respondents who selected “Others”, they did not specify the reason.

(8) For local disputes, litigation is still the primary dispute resolution method; but for international disputes, negotiation is the main approach

Respondents replied that 46% of local disputes were still resolved by litigation, followed by arbitration²¹ (31%) and negotiation (23%). (Q7²²).

Q7. Have other approaches been adopted to settle your company’s local dispute(s)?

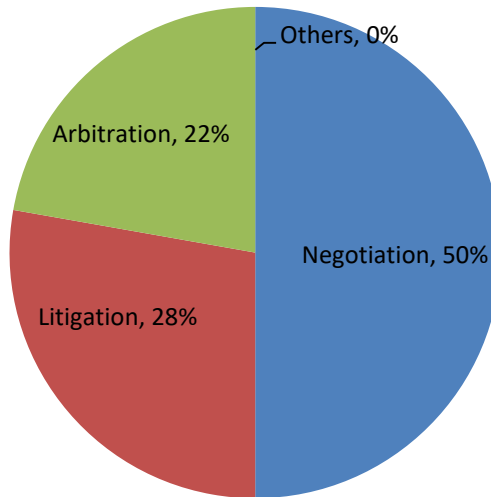


Contrasted to this, negotiation was used heavily (50%) to settle international disputes (Q13).

²¹ The option “Arbitration” is a dispute resolution process alternative to litigation conducted in accordance with the Arbitration Ordinance, Chapter 609, Laws of HKSAR. It is a process where parties agree to submit a dispute to an arbitral tribunal usually composed of one or three independent arbitrators appointed by the parties.

²² 2 replies which selected “Others” were deducted from this question, as specific, they haven’t adopted other means to settle their companies’ local dispute(s).

Q13. Have other approaches been adopted to settle your company's international dispute(s)?

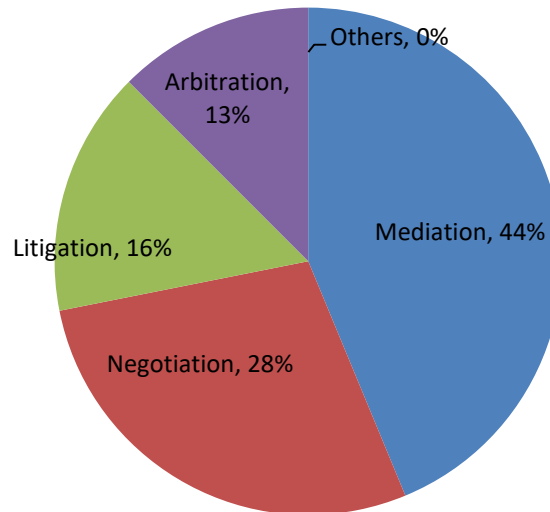


This may be attributed to the substantial cost and complexity in litigating disputes cross borders internationally, and therefore negotiation is preferred to litigation when resolving international disputes.

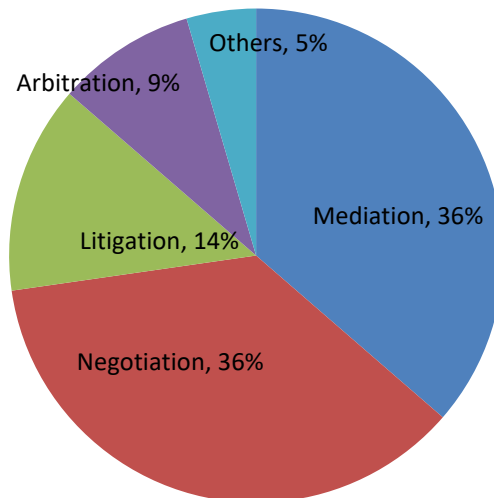
(9) For future disputes, mediation is preferred for local disputes, while both mediation and negotiation are preferred for international disputes

Respondents replied that they would prefer to use mediation (44%) for resolving future local disputes (Q8), and they prefer both mediation and negotiation (both 36%) for resolving future international disputes (Q14).

Q8. Which of the following approaches would likely be adopted if you come across local dispute in the future?



Q.14 Which of the following dispute resolution procedures would likely be adopted if you come across international dispute in the future?



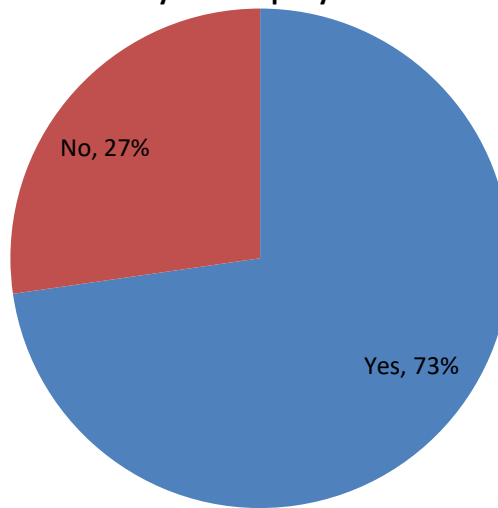
It appears that mediation has a good prospect of development for use in resolving both local and international commercial disputes.

- (10) Mediation clause in contract has been adopted to avoid litigation, but awareness of mediation clause is still low compared to litigation clause**

For commercial contracts, it is common practice to incorporate a dispute resolution clause at the end of the contract so that the parties can agree the way to resolve any disputes arisen from the contract in the first place.

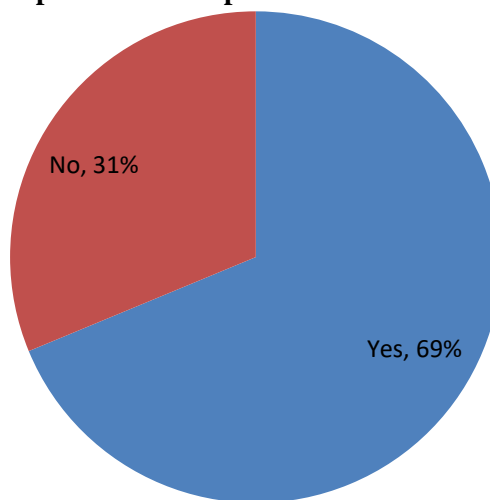
Most respondents replied that there is a dispute resolution clause included in the contracts of their company (73%) (Q16).

Q16. Has a dispute resolution clause been included in the contracts of your company?

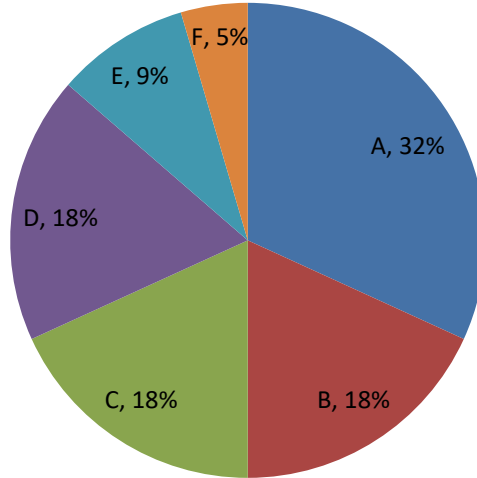


Amongst, many adopted mediation as an ADR procedure to resolve potential disputes in the clause (69%) (Q17). The reason for choosing mediation as the ADR is mainly for avoiding lawsuit (32%) (Q18).

Q17. Is mediation adopted as an ADR procedure to resolve potential disputes in the dispute resolution clause?



Q18. What are the reasons for adopting a dispute resolution clause that specifies mediation as the ADR procedure to resolve potential disputes in your company's contracts?

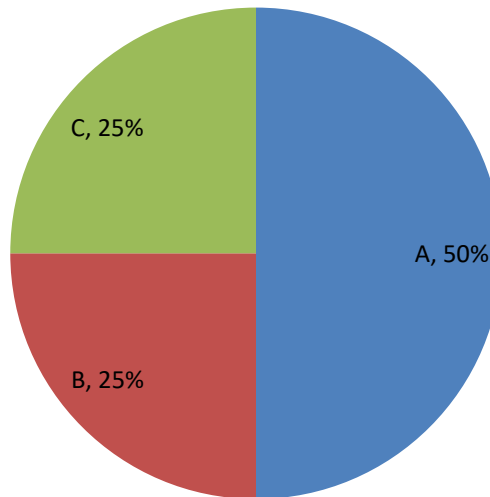


No.	Item
A	Avoid lawsuit
B	Time-saving
C	Cost-saving
D	Preservation of relationships
E	Confidentiality
F	Others
G	Parties' autonomy in the process

For the respondents who selected “Others”, they did not specify the reason.

For those who did not include a dispute resolution clause in their contracts, 50% responded that they did not know about dispute resolution clause (Q.19).

Q19. What are the reasons for not including a dispute resolution clause in your company's contracts?



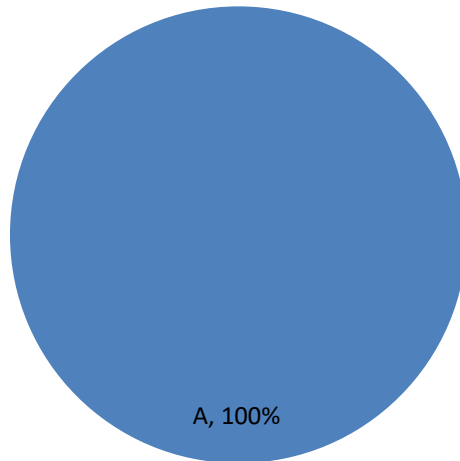
No.	Item
A	Not knowing about dispute resolution clause
B	Lack of knowledge in drafting a dispute resolution clause
C	Others
D	Litigation is a preferred way to settle dispute (0%)

For the respondents who selected “Others”, they specified as follows:

- i) Consider it too complicated for including a dispute resolution clause in company's contracts.

For those who did not choose mediation as the ADR in the dispute resolution clause, respondents were then asked to provide the reason for not using mediation. “Mediation does not guarantee that a settlement is reached”, “A final and binding award is sought”, “Direct communication with the other party(ies) to a dispute is not preferred” and “Others” were given as chooses. All (100%) selected “Others” and specified that they prefer to engaging legal expert to resolve the dispute or follow existing/ usual practice (e.g. litigation or other clauses) (Q20).

Q20. What are the reasons for not choosing mediation as the ADR procedure to resolve potential disputes in the dispute resolution clause in your company's contracts?

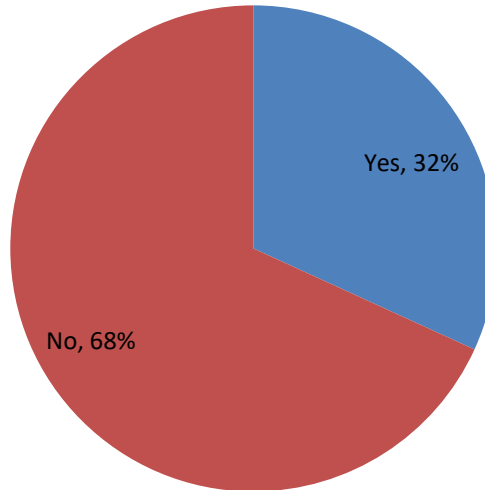


No.	Item
A	Others
B	Mediation does not guarantee that a settlement is reached (0%)
C	A final and binding award is sought (0%)
D	Direct communication with the other party(ies) to a dispute is not preferred (0%)

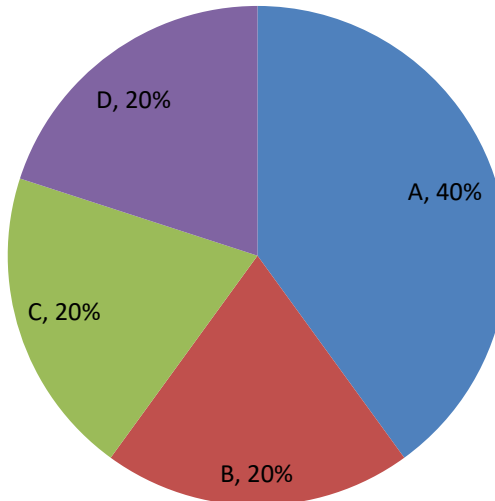
(11) Overseas mediation services have been used for resolving commercial and contractual disputes, and were rated effective

Over 68% of respondents have used overseas mediation services to resolve mainly commercial and contractual disputes (Q21 & 22).

Q21. Has overseas mediation service been engaged to resolve your company's dispute(s)?



Q22. What kind(s) of dispute was/ were handled through engaging overseas mediation service?



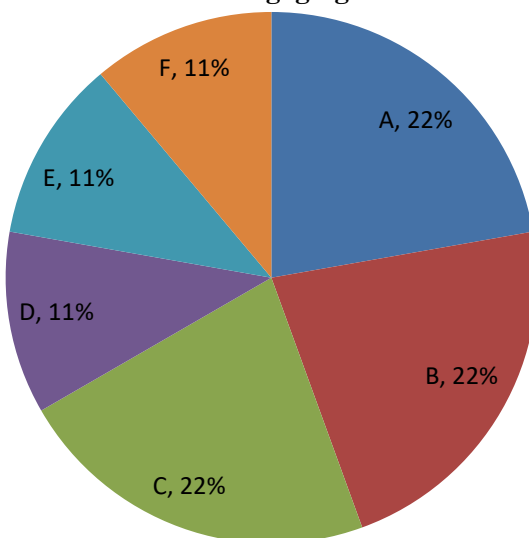
No.	Item
A	Commercial/ Contract
B	Consumer
C	Product Liability
D	Others
E	Corporate Finance (0%)
F	Construction/ Renovation (0%)
G	Intellectual Property (0%)

H	Personal Injury (0%)
I	Environmental (0%)
J	Real Estate (0%)

For the respondents who selected “Others”, they did not specify the reason.

Reasons for using overseas mediation services are time-saving (22%), cost-saving (22%) and involving overseas legal proceedings (22%) (Q23).

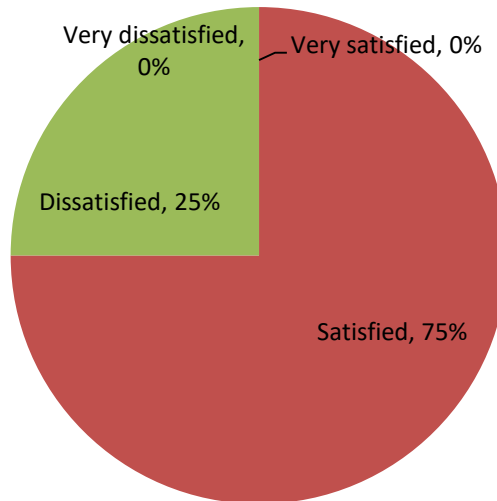
Q23. What are the reasons for engaging overseas mediation service?



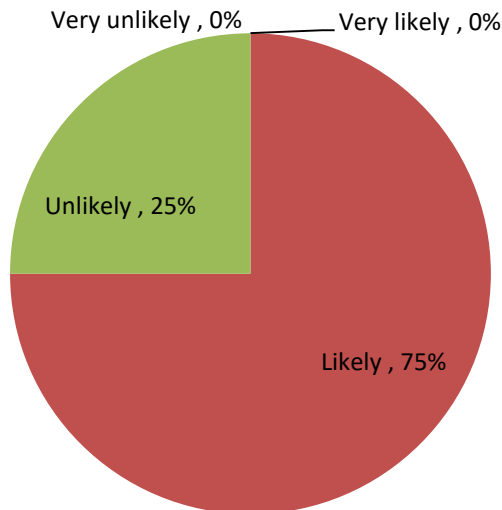
No.	Item
A	Time-saving
B	Cost-saving
C	Involving overseas legal proceedings
D	Contract provisions
E	Required/ desired by the management of the company
F	Recommended by the other party(ies)
G	Mediator’s skills, knowledge and experience in mediation (0%)
H	Mediator’s language skills (0%)
I	Not knowing about mediation service in Hong Kong (0%)
J	Others (0%)

Overseas mediation services were rated 3 out of 4 level of satisfaction, indicating a high level of service satisfaction (Q24). 75% of respondents replied that they would likely engage overseas mediation services in future (Q25).

Q24. How would you rate the level of satisfaction of engaging overseas mediation service?



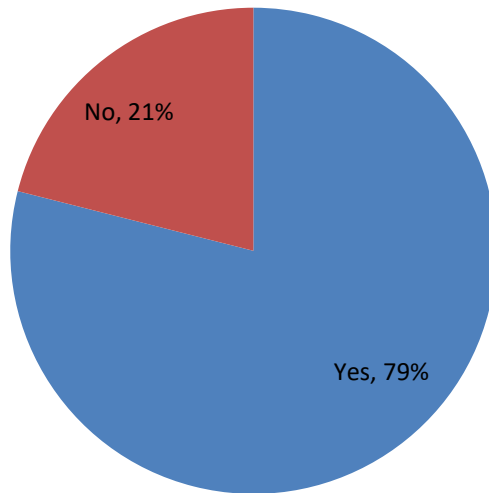
Q25. How likely would you engage overseas mediation service again if you come across international disputes?



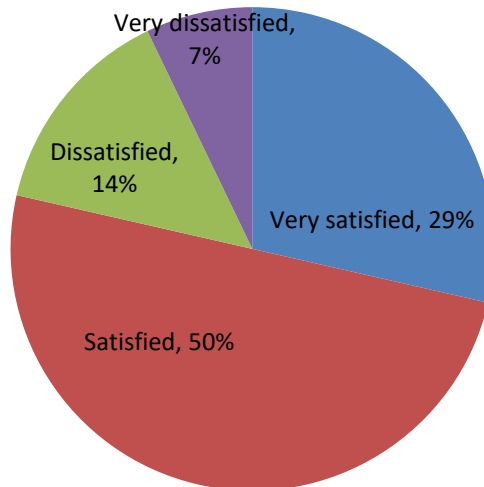
(12) Local mediation services were rated satisfactory, and appointment of mediator was mainly through lawyer's referral

79% of the respondents have used local mediation services (Q26), which said they were satisfied or very satisfied (total 79%) with their services (Q28).

Q26. Has local mediation service been engaged to resolve your company's dispute(s)?

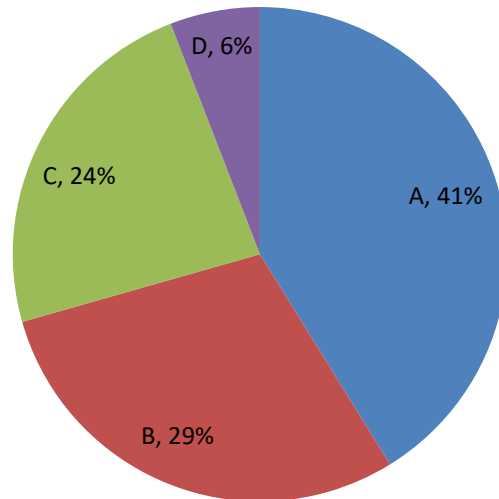


Q28. How would you rate the level of satisfaction of engaging local mediation service to resolve your company's dispute(s)?



Appointment of mediator mainly through lawyer's referral (41%), followed by mediation service provider (such as JMHO) (29%) and the Mediation Coordinator's Office of the Judiciary (24%) (Q27).

Q27. How did you appoint a mediator to resolve your company's dispute(s)?



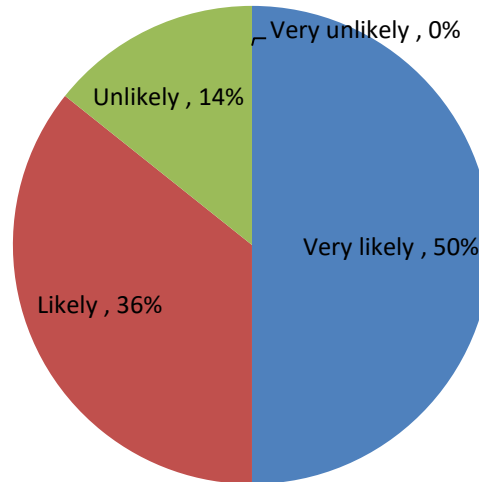
No.	Item
A	Lawyer's referral
B	Mediation service provider (e.g. Joint Mediation Helpline Office, Financial Dispute Resolution Centre)
C	Mediation Co-ordinator's Offices of the Judiciary
D	Others
E	Friend's referral (0%)

For the respondents who selected "Others", they specified as follows:

- i) Proposed by the other party(ies) to a dispute.

Overwhelming majority said they were likely or very likely (total 86%) to engage local mediation services again in future (Q29).

Q29. How likely would you engage local mediation service again if you come across disputes?



5. Results of Case Studies

Apart from collecting data by questionnaires, 3 interviews were conducted on a voluntary basis as case studies to obtain the companies' in-depth views on mediation.

Interview subjects (Companies A, B and C) are individual corporations/ companies who have used mediation previously to resolve business disputes. Company A is a manufacturing company whereas Companies B and C are non-manufacturing; Companies A and C are small and medium enterprises²³ whereas Company B isn't; and Companies A and B had settled a dispute through mediation whereas Company C experienced a mediation with no settlement.

Summaries of the interviews are shown in Appendix B. Issues transpired from the interviews are identified as follows:

5.1 Interviewees have not established a formal conflict management system

All 3 interviewees did not have a formally established internal conflict management

²³ According to the definition stated on Support and Consultation Centre for SMEs of the Trade and Industry Department of the HKSAR(<http://bit.ly/2W82aU4>), manufacturing enterprises with fewer than 100 employees and non-manufacturing enterprises with fewer than 50 employees are regarded as small and medium enterprises (SMEs) in Hong Kong.

system, and have not designated any internal officer or department, such as Legal Department, Human Resources Department or Customer Services Department, to deal with business problems.

Manager of Company A would call for a meeting to discuss the issues and solutions once a dispute occurs every time, even though the types of dispute (i.e. customer dispute regarding the quality of goods and payment) and solution (i.e. to engage a lawyer and claim through the Small Claims Tribunal (SCT)) are simplex. Not until December 2018 when the judge of SCT requested Company A and the other disputant to seek mediation before the trial that mediation was never considered an option to Company A .

Owners of both Companies B and C prefer to handle dispute on their own. Owner of Company B would seek advice and suggestion from lawyer(s) and third parties (i.e. government bodies and/ or organisations that provide dispute resolution services) when a dispute occurs. The difference between Companies B and C is that, the owner of Company C would not only seek advice from law firm and third parties, but also would discuss with her colleagues before making any decision/ direction.

The lack of formal conflict management system has caused substantial uneasiness and discomfort to the management grade of the interviewees and certainly increased their time, cost and effort for resolving a dispute.

5.2 Interviewees have limited understanding about mediation and ADR clauses

Despite the previous experience in participating in mediation, the 3 interviewees have very limited understanding about mediation and ADR clauses. The limited understanding affected their awareness and intention to seek mediation when a dispute occurs.

The manager of Company A showed that he has no concept about an ADR clause, or how and where to find a mediator. Even though his company just went through a mediation 5 months ago, he thought that mediators were similar to loss adjusters. Yet, an adjustor can serve as an inspector to investigate the cause(s) and cost of damage of property or personal injury, while a mediator cannot. A mediator is a neutral person who helps the parties to reach their own negotiated settlement agreement, and he/ she has no power to impose a settlement. His/ her function is to overcome any impasse and encourage the parties to reach an amicable settlement.

The owner of Company B thought that an ADR clause was not applicable for cross-border businesses because the laws governing the residences of the two companies, as well as the training and protocol of the mediators, are different. Therefore, the owner of Company B included an ADR clause only in those contracts with parties coming from the same country.

The owner of Company C showed that she has no idea about ADR clauses, i.e. its usage,

content and details.

5.3 Interviewees are not aware about the kind(s) of business problems which are capable of being resolved by way of mediation

Mediation is suitable for nearly all kinds of disputes²⁴. These include customer disputes, such as refusal of payment, dissatisfaction with the quality of goods and the complaints against an inconsistent description of goods which the manager of Company A often needs to handle; the contractual disputes that Company B is often involved, not only with its suppliers but also with its clients; and the business problems of Company C regarding issues of late payment and amendment of contract, etc. All of the above were potential cases which could be resolved by way of mediation.

Subject to the particular circumstances of the disputes, most business problems are capable of being resolved by way of mediation. Yet, due to the low awareness and lack of understanding of mediation among the interviewees, mediation is less likely to be their first option of dispute resolution method.

5.4 Interviewees are confined to positional and right-based approaches when resolving business problems

Despite the previous experience on mediation, the interviewees are confined to positional and right-based approaches when handling business problems, which limited the interviewees' choice of solution to a dispute.

The manager of Company A believed that the reason given by its client for refusal of payment was just an excuse, and the underlying purpose was to find a way to avoid payment obligations. There was a lack of communication and amicable understanding when the dispute was being dealt with by the manager before he escalated the issue to be resolved by instituting legal action.

The owner of Company B focused on the damage caused by its supplier to the relationship between Company B and its client. Yet the damage has already been done. Focusing on how to claim the loss from the supplier would not be able to assist Company B to restore the relationship between Company B and its client.

For owner of Company C, even though she understood that the late payment of her client was just because of the delay of the transaction of funding, and that she believed that her

²⁴ Hong Kong Judiciary – Mediation, “FAQs on Mediation”, Q5 What cases are suitable for mediation and what are not?, <http://bit.ly/2WuFMUf> accessed on June 2019

client was satisfied with the services of Company C, she insisted on including a clause to the contract that would enable her to engage a debt collector for collecting the overdue payment. She stressed and emphasized “the spirit of contract”, which was about the right to insist strict performance of contractual obligations. It appeared that she has not considered other, more flexible alternatives, such as allowing a more flexible payment timeline to accommodate the client’s practical difficulties so that the contract may be ultimately performed, while at the same time preserve the contract parties’ good faith and relationship.

The positional and right-based approaches also lowered the interviewees’ preference of using of mediation to resolve business conflicts. An example is shown by the owner of Company C, when she placed a higher priority on the “a result of a dispute (no matter win or lose)” than “the self-control of the settlement of dispute”.

5.5 Interviewees have a good impression on mediation, but have less confidence on mediation when it comes to resolving cross-border commercial disputes

Companies A and B showed good impression on mediation. The manager of Company A commented mediation as useful and helpful, and urged that more resources should be given for promoting the use of mediation in Hong Kong. The owner of Company B was certain that mediation could serve the purpose of avoiding confrontation and preserving business relationship.

The owners of both Companies B and C showed less confidence about resolving cross-border commercial disputes via mediation. The owner of Company B was concerned that the geographical, cultural, legal and regulatory differences between the parties could not be resolved via mediation and/ or an ADR clause, therefore believed that mediation and an ADR clause were not applicable for cross-border commercial disputes. The owner of Company C also questioned about the effectiveness of mediating cross-border disputes, and was concerned that she would not be able to protect her best interest during mediation as she was not familiar with other countries’ law and mediation rules.

6. Discussion & Recommendations

6.1 Discussion

6.1.1 Has mediation become a more popular ADR method in the past five years?

Our current research findings show that mediation is still not prevalent for resolving commercial disputes in Hong Kong as at today.

Back in 2014, i.e. 5 years ago, JMHO and HKMC have conducted another survey entitled “Research Study on Hong Kong Mediation Services – Standard Practice and Procedure”. Although the main theme for the 2014 study was about the standard practice and procedures of mediation in Hong Kong, it was found that the public’s awareness of mediation was also low at that time (Amongst 304 respondents, nearly 70% of the respondents had not heard of mediation and 97.7% of the respondents expressed that the publicity of mediation in Hong Kong is not enough)²⁵.

After five years, now in 2019, the present study has not indicated any improvement in the awareness and use of mediation among companies in Hong Kong.

As shown in the findings, 73% of the respondents have not ever used mediation in resolving disputes, and among which, 29% of the respondents said they did not know about mediation and 3% of the respondents said they did not know how to access mediation services.²⁶

It is also shown in our findings that, for majority of the commercial disputes, the respondents still used traditional litigation methods to resolve the disputes. Amongst the respondents that never use mediation in resolving disputes, 8% of which prefer resolving dispute through lawyer. For the respondents that used mediation in resolving disputes before, litigation is still their primary dispute resolution method (46%).²⁷

Another survey conducted by the legal field also echoed similar findings:

“Mediation remains under-utilised in practice in Hong Kong, despite being widely supported and recognised as having the potential to resolve disputes in a quick, cheap and confidential way.”²⁸

It appears that during the past five years, mediation has not been able to develop into a widely utilised ADR method despite the Government and the Judiciary’s various attempts to promote the same in Hong Kong. Apparently, there are more to be done in order to more effectively promote a much wider use of commercial mediation as an ADR method in Hong Kong.

6.1.2 What are the perceived barriers to use of mediations?

Despite the perceived intrinsic benefits of mediation such as saving of time and cost as

²⁵ Hong Kong Mediation Council and Joint Mediation Helpline Office, Research Report on Hong Kong Mediation Services – Standard Practice and Procedure, <http://bit.ly/317Zm8s> accessed on June 2019

²⁶ Findings above at 4.4 (1) & (2).

²⁷ Findings above at 4.4 (2) & (8).

²⁸ Julian Copeman, May Tai, Gareth Thomas and Herbert Smith Freehills, “Client Perspectives: Mediation in Hong Kong Five Years On”, *Hong Kong Lawyer* (Hong Kong: Law Society of Hong Kong & Thomson Reuters, April 2015), <http://bit.ly/2MpJuLf> accessed on June 2019

shown by the findings of the questionnaires and the interviews, it is noted that there are certain barriers to a wider use of mediation to resolve commercial disputes in Hong Kong.

First, there is still a general lack of understanding of the procedures and purposes of mediation as a method of dispute resolution, such that many companies still preferred to resolve their disputes either by litigation or traditional, power-based negotiation.

As noted in the survey conducted by the legal industry quoted²⁸ above,

“Despite wide support (both in the public and private spheres) for mediation, the survey suggests that there is a knowledge gap among the user population.”

“The Hong Kong government and judiciary are supportive of mediation, but further endorsement (about the benefits of mediation, what it entails, and the services available in Hong Kong) is likely required to improve understanding among users.”

To enhance the parties’ understanding of using mediation for commercial matters, it appears that the role of lawyers (in promoting mediation to their clients involved in litigation) is crucial. As noted in the survey mentioned above, “organisations defer in large part to their external lawyers when it comes to considering mediation, when and how to deploy it, and who to appoint as a mediator. This places considerable responsibility on the legal advisor as a stakeholder to mediation success”.²⁸

Yet, as shown in the questionnaire findings, 10 out of 89 respondents came to know about using mediation and the mediator through their lawyers²⁹. The research JMHO conducted on 2014 also shown that, amongst 304 respondents, only around 5% of which engaged in mediation because of lawyers’ suggestions²⁵.

Lawyers play a key role in preparing the parties and choosing the mediator. If the lawyers adopt a positive approach to mediation - instead of litigation - in resolving their clients’ disputes, their clients will be better advised about having mediation as an option, and be able to know more about the procedures and advantages of mediation. They may therefore have a higher willingness to go through mediation rather than continue to pursue litigation in resolving commercial or other types of disputes.

In this regard, perhaps more incentives and more training for lawyers are needed so as to procure their keen and proactive promotion of mediation to disputants who are facing commercial litigation proceedings.

²⁹ Findings above at 4.4 (12).

Second, for cross-border commercial disputes, there is a barrier to use mediation caused by the misunderstanding that mediation may not be applicable for cross-border commercial disputes.

As noted above, some interviewees opined that due to the different legal systems in different jurisdictions, mediation may not be applicable for cross-border commercial disputes. This may be predicated on the scepticism of the enforceability of mediation agreement in a cross-border context. The disputants were not sure whether an agreement reached by the cross-border parties in mediation be enforceable in both parties' places of residence.

As noted in another study, a mediation agreement, which is akin to a private contract in Hong Kong in terms of enforceability, will become more readily enforceable if, for example, it turns to be a consent arbitral award (as in Mainland China, Japan, Austria, Switzerland, Italy, etc.), or when the settlement agreement is reached, the mediator turns to be an arbitrator under the national law and renders a consent award based on the settlement (such as in Hungary, Croatia, the Republic of Korea, etc.).³⁰

The above “change of status” of a mediated settlement agreement - from a simple (mediation) agreement into an enforceable judicial award - can guarantee to the parties a more expeditious step of enforcement. It will no longer require the parties to institute another civil proceeding to enforce a mediated settlement agreement, and could therefore enable more powerful and simple enforcement of the agreement.

To this end, the Singapore Convention on Mediation which is expected to be signed in summer of 2019 may provide a solution. The Convention provides a direct and expedited enforcement of international settlement agreement resulting from mediation of commercial disputes which have been concluded in writing. This will encourage international corporations to mediate cross-border commercial disputes. If the Convention is ratified and applies to Hong Kong in future, international corporations may have more confidence to resolve their cross-border disputes in Hong Kong, as the mediated settlement agreement will be more readily enforceable (just like an arbitral award enforceable under the New York Convention). Hong Kong will then have a better standing to further develop into a key international mediation centre for cross-border commercial disputes.³¹

6.2 Recommendation

6.2.1 More strenuous efforts will need to be taken in increasing the awareness and

³⁰ Tang Houzhi, *Worldwide Use of Mediation*, 2019, <http://bit.ly/2EQILhc> accessed on June 2019

³¹ “The New UN Convention on Mediation (ask the ‘Singapore Convention’) – Why it’s Important for Hong Kong”, *Hong Kong Lawyer* (Hong Kong: Law Society of Hong Kong & Thomson Reuters, April 2019), <http://bit.ly/2WA9B6b> accessed on June 2019

adoption of mediation in particular for the commercial sector

To promote the use of mediation to achieve a fair and efficient resolution of commercial disputes, the traditional adversarial, litigious approach of dispute resolution has to be changed.

A change of this mindset can be brought about by actual satisfactory experience in using mediation to resolve disputes.

It is encouraging to note from our findings that, for those who have attempted mediation for resolving local and international disputes, 80% of the respondents gave high ratings for the effectiveness of using mediation for local and international disputes, 79% of them said they were satisfied or very satisfied with local mediation services, nearly half of them (44%) prefer to use mediation again for resolving future disputes and majority of them said they were likely or very likely (total 86%) to engage local mediation services again in the future³².

In other words, once they tried to resolve the commercial disputes with mediation, they got a good impression and were satisfied by the process and the services, and they would be willing to re-use mediation for future disputes. The issue may therefore become how to increase the initial awareness and use of mediation in the first place, when commercial disputes arise.

Over a decade ago, in 2007, Government of HKSAR formally included the promotion of mediation as part of its policy objectives, which has been continuously reaffirmed by the Government³³. If Hong Kong is to adhere to this goal, and is committed to developing and promoting Hong Kong as a leading centre for dispute resolution in the Asia-Pacific region³⁴, it appears that more strenuous efforts will need to be taken in increasing the awareness and adoption of mediation, in particular for the commercial sector.

6.2.2 To promote wider adoption of mediation clause as a pre-agreed dispute resolution method in local commercial contracts

As Stipanowich and Lamare (2013) noted in their study, one major reason procuring many US corporations to use mediation is the existence of a mediation clause as a provision in a contract. Our research echoes this finding. It was replied that over 68% of the respondents adopted mediation as an alternative dispute resolution procedure to resolve potential disputes in the contract (i.e. a mediation clause or provision³⁵).

³² Findings above at 4.4(7), (9) & (12)

³³ Hong Kong's Information Services Department, "Hong Kong role as mediation hub reaffirmed", Speech by Mr. Rinsky Yuen, Secretary for Justice, 13 May 2016, <http://bit.ly/2VafY08> accessed on June 2019

³⁴ <https://www.doj.gov.hk/eng/public/alternative.html>

³⁵ Findings above at 4.4(10)

It is noted that a pre-agreed mediation clause embodied in a commercial contract has the effect of significantly increasing the use of mediation when disputes arise out of the contract. In order to promote wider use of mediation in resolving commercial disputes, more promotion and education on the use of a mediation clause in local commercial contracts is necessary.

As discussed above³⁶, half of the respondents who did not include a dispute resolution clause in their contracts explained that they did not know about dispute resolution clause or that they simply used legal experts to draft the contracts (which eventually did not draft in a mediation clause).

It is therefore suggested that active advocating on the adoption of a contractual clause to use mediation as a dispute resolution mechanism is regarded as highly necessary, for better promotion of using mediation in settling commercial disputes.

In fact, since 2009, the Department of Justice has launched a campaign called “Mediate First Pledge” to promote the use of mediation to resolve disputes in Hong Kong and to encourage companies and organisations to make a pledge, which is a statement of commitment to prioritize the use mediation when a dispute occurs.³⁷ The department may consider taking the campaign forward by providing a simple template of basic mediation clause which generally provides that the parties shall apply mediation to their dispute which arises out of or relates to the contract for pledgees’ consideration, so as to better and further promote the use of mediation in Hong Kong.

6.2.3 Room for increasing the use of local mediation services for resolving international disputes

For resolution of international commercial disputes, it is noted that alongside with mediation, negotiation has also been widely used³⁸. And negotiation is projected to be a preferred way of dispute resolution for settling future international conflicts³⁹.

There may be reason to believe that many companies employ ad hoc approach in managing all kinds of conflicts, and for long distance conflicts, negotiation is one of the major approaches. There may be room to promote wider use of mediation in lieu of negotiation, given the more intrinsic benefits of mediation (such as having the process conducted by an impartial, third party, therefore easier to achieve fairness and procedural control for settlement of disputes etc.).

³⁶ Findings above at 4.4(10)

³⁷ Department of Justice, “Dispute Resolution (Mediate First Pledge and the Mediate First Pledge Star Logo Award Scheme)”, <http://bit.ly/2EPBJI4> accessed on June 2019

³⁸ Findings above at 4.4(8)

³⁹ Findings above at 4.4(9)

6.2.4 Attempts to enlarge use of mediation by incorporation beyond commercial and contractual areas

For both local disputes and international disputes using mediation, it is noted that the category of commercial and contractual disputes is the predominant type⁴⁰. This is also consistent with the findings of Stipanowich and Lamare (2013).

Commercial and contractual disputes may be the most common type of commercial disputes which the companies face day to day. However, in US, Stipanowich and Lamare (2013) found that employment disputes is also another major category of disputes which corporations tend to use mediation to resolve.

It is suggested that for Hong Kong companies, more promotion and education may be made for use of mediation in areas other than commercial and contract claims, such as employment, or intellectual property etc.

7. Conclusion

Findings from this study have encouraging results showing that use of mediation has returned satisfactory results for the commercial sector, for resolving both local and international disputes. Many corporations also indicated a willingness to continuously adopt mediation as a preferred way of settling their disputes in future.

A useful approach to promote wider use of mediation in the commercial sector will be advocating more prevalent adoption of mediation clause in contracts, i.e. adopting mediation as a pre-agreed dispute resolution method in commercial contracts.

Further efforts and resources should be deployed to enhance better awareness of mediation, and wider usage in all fields of activities in the commercial sector, not just for coping with commercial and contractual disputes with external parties, but also for better internal, in-house management (e.g. employment disputes or internal conflict management within a corporation).

⁴⁰ Findings above at 4.4(4)

APPENDIXES

Appendix A: Questionnaire of the Research on the Receptiveness of Companies in Using Mediation as a Method to Resolve International Trade Disputes

Joint Mediation Helpline Office Research on the Receptiveness of Companies in Using Mediation as a Method to Resolve International Trade Disputes

This material/ event is funded by the Professional Services Advancement Support Scheme of the Government of the Hong Kong Special Administrative Region. Any opinions, findings, conclusions or recommendations expressed in this material/any event organised under this project do not reflect the views of the Government of the Hong Kong Special Administrative Region or the Vetting Committee of the Professional Services Advancement Support Scheme.

Background

The Joint Mediation Helpline Office⁴¹ has been granted funding under the Professional Services Advancement Support Scheme (“PASS”)⁴² to implement a project entitled “Promoting Hong Kong as a Venue to Mediate International Trade Disputes and Enhancing the Effectiveness of Mediation as an Alternative Dispute Resolution Method” from 1 November 2017 to 30 June 2019.

The captioned research is one of the deliverables of the said project. Its objective is to obtain the views from local and overseas individual commercial entities on the use of mediation to resolve international trade disputes in order to:-

1. identify areas of improvement of mediation services provided in Hong Kong against the benchmark of international mediation services;
2. identify common concerns of corporations on using mediation in these contexts, and ways to improve; and
3. identify the level of awareness among corporations of using mediation to resolve international disputes, and obtain suggestions to improve such promotion.

Research subject

Local or overseas companies which have had disputes in the past (staff at all ranks are welcome to complete the questionnaire to the best of their knowledge).

⁴¹ The JMHO is a non-profit-making, charitable organisation that aims at promoting the use of mediation as a means of dispute resolution in Hong Kong. It was founded in 2010 jointly by 8 reputable organisations, namely, the Hong Kong Mediation Council, the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong Institute of Arbitrators, Chartered Institute of Arbitrators (East Asia Branch), the Hong Kong Institute of Architects, the Hong Kong Institute of Surveyors and the Hong Kong Mediation Centre.

⁴² The PASS provides funding support for non-profit-making projects aimed at increasing the exchanges and co-operation of Hong Kong’s professional services with counterparts in external markets; promoting relevant publicity activities; and enhancing the standards and external competitiveness of Hong Kong’s professional services.

Personal information collection statement

The information collected will be used for research purposes only. The personal data obtained (if any) will solely be used for contacting purposes for the research.

Submission of questionnaire

Completion of questionnaire takes about 10 minutes. Please submit the questionnaire to the Joint Mediation Helpline Office by one of the following methods:-

1. by online questionnaire available at <https://goo.gl/rfn1Ta>;
2. by email at email@jointmediationhelpline.org.hk;
3. by fax at (852) 2899 2984; or
4. by mail to Room LG102, LG1/F, High Court Building, 38 Queensway, Admiralty, Hong Kong.

Section A - Use of mediation as a dispute resolution procedure

Instruction

Questions in this section are about using “mediation” as a dispute resolution procedure to resolve disputes. According to the Mediation Ordinance, Chapter 620, Laws of Hong Kong, mediation is a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following –

- (a) identify the issues in dispute;
- (b) explore and generate options;
- (c) communicate with one another;
- (d) reach an agreement regarding the resolution of the whole, or part of the dispute.

Please answer the following questions accordingly.

1. Has your company ever used mediation to resolve disputes?

- ☐ Yes **(Please proceed to Subsection A (I))** ☐ No

2. What are the reasons for not using mediation to resolve your company’s dispute(s)?

(Can select more than one option)

- ☐ Not knowing about mediation
- ☐ The dispute(s) was/ were settled by direct negotiation
- ☐ The dispute(s) remain(s) unsettled
- ☐ Refusal to mediate by the other party(ies)
- ☐ No consensus was reached on the appointment of mediator
- ☐ Use of mediation is not supported by the company’s policies
- ☐ Use of other dispute resolution procedures is required by contract
- ☐ Others, please specified: _____

(Please proceed to Section C)

Subsection A (I) – Local dispute

Instruction

Questions in this subsection are about resolving “local dispute”. Local dispute refers to dispute that all parties involved reside in Hong Kong.

Please answer the following questions accordingly.

3. Has mediation been used to resolve local dispute?

☐ Yes

☐ No **(Please proceed to Subsection A (II))**

4. What kind(s) of local dispute was/ were handled by way of mediation? (Can select more than one option)

☐ Commercial/ Contract

☐ Consumer

☐ Corporate Finance

☐ Environmental

☐ Intellectual Property

☐ Personal Injury

☐ Product Liability

☐ Real Estate

☐ Construction/ Renovation

☐ Others, please specified: _____

5. What are the reasons for using mediation to resolve the above dispute(s)? (Can select more than one option)

- ☐ Contract provisions
- ☐ Practice Direction on mediation – Practice Direction 31⁴³
- ☐ Required/ desired by the management of the company
- ☐ Time-saving
- ☐ Cost-saving
- ☐ Parties’ autonomy in the process
- ☐ More satisfactory process
- ☐ Preserve relationships
- ☐ Limited discovery
- ☐ Confidential process
- ☐ Parties’ control over the outcome of mediation
- ☐ More durable resolution
- ☐ Avoid establishing legal precedents
- ☐ More satisfactory settlements
- ☐ Uses expertise of third party neutral
- ☐ Others, please specified: _____

6. How would you rate the effectiveness of mediation in resolving the local dispute(s) of your company?

Very ineffective	1	2	3	4	Very effective

7. Have other approaches been adopted to settle your company’s local dispute(s)? (Can select more than one option)

- ☐ Arbitration⁴⁴
- ☐ Litigation
- ☐ Negotiation
- ☐ Others, please specified: _____

⁴³ Practice Direction on mediation - Practice Direction 31 assists the Court to encourage the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitate its use. It applies to all civil proceedings in the Court of First Instance and the District Court which have been begun by writ.

⁴⁴ Arbitration is a dispute resolution process alternative to litigation conducted in accordance with the Arbitration Ordinance, Chapter 609, Laws of Hong Kong. It is a process where parties agree to submit a dispute to an arbitral tribunal usually composed of one or three independent arbitrators appointed by the parties.

8. Which of the following approaches would likely be adopted if you come across local dispute in the future? (Can select more than one option)

- | | |
|--|--------------------------------------|
| <input type="checkbox"/> Mediation | <input type="checkbox"/> Arbitration |
| <input type="checkbox"/> Litigation | <input type="checkbox"/> Negotiation |
| <input type="checkbox"/> Others, please specified: _____ | |

Subsection A (II) – International dispute

Instruction

Questions in this subsection are about resolving “international dispute”. International dispute refers to dispute that involves parties from two or more regions, e.g. between companies in Hong Kong and in the mainland, between the headquarters in Hong Kong and the branch in the mainland, etc.

Please answer the following questions accordingly.

9. Has mediation been used to resolve international dispute?

- ☐ Yes ☐ No **(Please proceed to Section B)**

10. What kind(s) of international dispute was/ were handled by way of mediation? (Can select more than one option)

- | | |
|---|--|
| <input type="checkbox"/> Commercial/ Contract | <input type="checkbox"/> Consumer |
| <input type="checkbox"/> Corporate Finance | <input type="checkbox"/> Environmental |
| <input type="checkbox"/> Intellectual Property | <input type="checkbox"/> Personal Injury |
| <input type="checkbox"/> Product Liability | <input type="checkbox"/> Real Estate |
| <input type="checkbox"/> Construction/ Renovation | <input type="checkbox"/> Others, please specified: _____ |

11. What are the reasons for using mediation to resolve the above dispute(s)? (Can select more than one option)

- ☐ Contract provisions
- ☐ Practice Direction on mediation – Practice Direction 31⁴⁵
- ☐ Required/ desired by the management of the company
- ☐ Time-saving
- ☐ Cost-saving
- ☐ Parties’ autonomy in the process
- ☐ More satisfactory process
- ☐ Preserve relationships
- ☐ Limited discovery
- ☐ Confidential process
- ☐ Parties’ control over the outcome of mediation
- ☐ More durable resolution
- ☐ Avoid establishing legal precedents
- ☐ More satisfactory settlements
- ☐ Uses expertise of third party neutral
- ☐ Others, please specified: _____

12. How would you rate the effectiveness of mediation in resolving the international dispute(s) of your company?

Very ineffective	1	2	3	4	Very effective

13. Have other approaches been adopted to settle your company’s international dispute(s)? (Can select more than one option)

- ☐ Arbitration⁴⁶
- ☐ Litigation
- ☐ Negotiation
- ☐ Others, please specified: _____

⁴⁵ Practice Direction on mediation - Practice Direction 31 assists the Court to encourage the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitate its use. It applies to all civil proceedings in the Court of First Instance and the District Court which have been begun by writ.

⁴⁶ Arbitration is a dispute resolution process alternative to litigation conducted in accordance with the Arbitration Ordinance, Chapter 609, Laws of Hong Kong. It is a process where parties agree to submit a dispute to an arbitral tribunal usually composed of one or three independent arbitrators appointed by the parties.

14. Which of the following dispute resolution procedures would likely be adopted if you come across international dispute in the future? (Can select more than one option)

- | | |
|--|--------------------------------------|
| <input type="checkbox"/> Mediation | <input type="checkbox"/> Arbitration |
| <input type="checkbox"/> Litigation | <input type="checkbox"/> Negotiation |
| <input type="checkbox"/> Others, please specified: _____ | |

Section B – Engagement of mediation service

Instruction

Questions in this section are about the attitude and preference towards the engagement of “mediation service”. Mediation service refers to the direct engagement of mediator for mediation or any mediation-related service, including the ascertainment of agreement to mediate from all parties, the nomination and appointment of mediator, etc. provided by organisations, mediators, etc.

Please answer the following questions accordingly.

15. At which stage of conflict did your company engage mediation services?

- ☐ When disagreement arose/ before conflict occurred (mediation as a preventive tool to prevent the disagreement from escalating to conflict/ prevent conflict from happening)
- ☐ When conflict already occurred (mediation as a management tool to reduce the negative impacts brought by the conflict)
- ☐ When the conflict was brought to the Court
- ☐ When directions to attempt mediation were given by the Court
- ☐ Others, please specify: _____

Subsection B (I) – Dispute resolution clause

Instruction

Questions in this subsection are about the attitude towards inclusion of “dispute resolution clause” in business contract. Dispute resolution clause refers to the guidelines set amongst the parties to a contract that specify how potential disputes are resolved. It usually involves alternative dispute resolution (“ADR”) procedures such as mediation, arbitration, negotiation, etc.

Please answer the following questions accordingly.

16. Has a dispute resolution clause been included in the contracts of your company?

☐ Yes

☐ No **(Please answer question 19)**

17. Is mediation adopted as an ADR procedure to resolve potential disputes in the dispute resolution clause?

☐ Yes

☐ No **(Please answer question 20)**

18. What are the reasons for adopting a dispute resolution clause that specifies mediation as the ADR procedure to resolve potential disputes in your company’s contracts? (Can select more than one option)

☐ Time-saving

☐ Cost-saving

☐ Avoid lawsuit

☐ Preservation of relationships

☐ Parties’ autonomy in the process

☐ Confidentiality

☐ Others, please specify: _____

(Please proceed to Subsection B (II))

19. What are the reasons for not including a dispute resolution clause in your company’s contracts? (Can select more than one option)

☐ Not knowing about dispute resolution clause

☐ Lack of knowledge in drafting a dispute resolution clause

☐ Litigation is a preferred way to settle dispute

☐ Others, please specify: _____

(Please proceed to Subsection B (II))

20. What are the reasons for not choosing mediation as the ADR procedure to resolve potential disputes in the dispute resolution clause in your company's contracts? (Can select more than one option)

- ☐ Mediation does not guarantee that a settlement is reached
- ☐ A final and binding award is sought
- ☐ Direct communication with the other party(ies) to a dispute is not preferred
- ☐ Others, please specify: _____

Subsection B (II) – Overseas mediation service

Instruction

Questions in this subsection are about the engagement of “overseas mediation service”. Overseas mediation service refers to the direct engagement of a non-local mediator for mediation or any mediation-related service, including the ascertainment of agreement to mediate from all parties, the nomination and appointment of mediator, etc. provided by non-local organisations, mediators, etc.

Please answer the following questions accordingly.

21. Has overseas mediation service been engaged to resolve your company’s dispute(s)?

☐ Yes ☐ No **(Please proceed to Subsection B (III))**

22. What kind(s) of dispute was/ were handled through engaging overseas mediation service? (Can select more than one option)

☐ Commercial/ Contract ☐ Consumer
☐ Corporate Finance ☐ Environmental
☐ Intellectual Property ☐ Personal Injury
☐ Product Liability ☐ Real Estate
☐ Construction/ Renovation ☐ Others, please specified: _____

23. What are the reasons for engaging overseas mediation service? (Can select more than one option)

☐ Contract provisions
☐ Required/ desired by the management of the company
☐ Time-saving
☐ Cost-saving
☐ Mediator’s skills, knowledge and experience in mediation
☐ Mediator’s language skills
☐ Involving overseas legal proceedings
☐ Recommended by the other party(ies)
☐ Not knowing about mediation service in Hong Kong
☐ Others, please specified: _____

24. How would you rate the level of satisfaction of engaging overseas mediation service?

Very dissatisfied	1	2	3	4	Very satisfied

25. How likely would you engage overseas mediation service again if you come across international disputes?

Very unlikely	1	2	3	4	Very likely

Subsection B (III) – Local mediation service

Instruction

Questions in this subsection are about the engagement of “local mediation service”. Local mediation service refers to the direct engagement of a local mediator for mediation or any mediation-related service, including the ascertainment of agreement to mediate from all parties, the nomination and appointment of mediator, etc. provided by local organisations, mediators, etc.

Please answer the following questions accordingly.

26. Has local mediation service been engaged to resolve your company’s dispute(s)?

☐ Yes ☐ No **(Please proceed to Section C)**

27. How did you appoint a mediator to resolve your company’s dispute(s)? (Can select more than one option)

- ☐ Mediation service provider (e.g. Joint Mediation Helpline Office, Financial Dispute Resolution Centre)
- ☐ Mediation Co-ordinator’s Offices of the Judiciary
- ☐ Friend’s referral
- ☐ Lawyer’s referral
- ☐ Others, please specified: _____

28. How would you rate the level of satisfaction of engaging local mediation service to resolve your company’s dispute(s)?

Very dissatisfied	1	2	3	4	Very satisfied

29. How likely would you engage local mediation service again if you come across disputes?

Very unlikely	1	2	3	4	Very likely

Section C – Company and respondent’s profile

Instruction

Questions in this section aim to collect data on the company and the respondent’s profile to facilitate the analysis of the research result.

Please answer the following questions accordingly.

30. Respondent’s position: _____

31. Industry of company:

- ☐ Manufacturing
- | | |
|--|---|
| <input type="checkbox"/> Chemistry and Biotechnology | <input type="checkbox"/> Electronics and Electrical Product |
| <input type="checkbox"/> Food | <input type="checkbox"/> Industrial Machinery |
| <input type="checkbox"/> Jewellery | <input type="checkbox"/> Metal Product |
| <input type="checkbox"/> Plastic | <input type="checkbox"/> Printing and Publishing |
| <input type="checkbox"/> Textile and Garment | <input type="checkbox"/> Toy |
| <input type="checkbox"/> Watch and Clock | <input type="checkbox"/> Others, please specified: _____ |
- ☐ Non-manufacturing
- | | |
|---|---|
| <input type="checkbox"/> Banking, Insurance and Other Financial Service | <input type="checkbox"/> Construction |
| <input type="checkbox"/> Environmental Protection | <input type="checkbox"/> Movies and Digital Entertainment |
| <input type="checkbox"/> Import and Export Trade | <input type="checkbox"/> Information Technology Service |
| <input type="checkbox"/> Logistics and Transportation | <input type="checkbox"/> Tourism |
| <input type="checkbox"/> Wholesale and Retail | <input type="checkbox"/> Catering and Hotel |
| <input type="checkbox"/> Real Estate | <input type="checkbox"/> Professional Service |
| <input type="checkbox"/> Others, please specified: _____ | |

32. Headquarters’ location: _____

33. Branches’ location (if applicable): _____

34. Does your company conduct business with overseas/ mainland companies? ☐ Yes ☐ No

35. Number of staff: _____

Participants will receive a souvenir pack, which includes a Mediation & Dispute Resolution

Handbook and random selected items such as shopping bag, travel storage bag, A4 file, A5 note book, memo pad, etc. Souvenir packs are limited and are only available while stocks last. Redemption is on a first-come-first-served basis. Joint Mediation Helpline Office reserves the right of final decision on the redemption of souvenir packs. Please fill in the following contact information for verification of identity on the redemption of souvenir packs (Optional).

36. Your organisation/ company: _____

37. Your name: _____

38. Your contact number: _____

39. Your email: _____

End of questionnaire

Appendix B: Interview Summaries for Case Studies

Case 1

Company A is a manufacturing company which produces construction and renovation materials for sales to Hong Kong, Mainland China and oversea markets. The company has been in operation for 4 years with a company size of around 50 staff (not including the staff of the factory in Mainland China).

When being asked about their views on Hong Kong mediation, Mr. Tang, the manager of Company A, stated that “I knew that mediation is a good thing long ago; it’s the same as adjusters”.

Despite disputes often arise, Company A just went through its first mediation on December 2018. “Clients refuse to pay after the goods were delivered to them very often. Reasons like ‘goods were different with the trade descriptions’ were given but those were all excuses. Their ultimate purpose is to cancel the bill.” Tang added, “We don’t have any legal department in our company. When dispute occurs, meeting would be conducted to discuss the solution, i.e. engage a lawyer or claim through the Small Claims Tribunal (SCT)”.

The first attempt of mediation of Company A occurred because of the referral of the SCT. Tang said, “I don’t know much about how and where to find a mediator. Since the judge of the SCT requested, we applied for mediation according to its referral and instruction.” The case achieved a settlement in the mediation.

“That sounds great to include a mediation clause to the contract.” Tang was surprised when talked about including a mediation clause to contracts. Apparently, he and his colleagues of the company never heard of Alternative Dispute Resolution (ADR) clause and he, immediately, requested a template of which. “I would like to include the clause to the contract with our clients if it is applicable.”

Tang suggested that more promotion and education is required to promote mediation in Hong Kong. “Before the SCT referred us to mediate, we didn’t know that there is an organization providing mediation services, such as consultation and appointment of mediators (for disputants). I found that very useful and helpful.” Tang concluded, “Better if the organization or the government could assign more resources on educating students and the public, so that more people would know about what mediation is and how it works.”

Case 2

Company B is a non-manufacturing company which provides purchasing and merchandising services for hotels, restaurants and catering service providers. Company B’s headquarter is located in Mainland China with a branch in Hong Kong. The company has been in operation for twelve years with a company size of 50 to 100 staff.

“Normally, we would include an ADR clause in the contract when trading with companies in Mainland China but not for business partners, suppliers or clients in foreign countries.” Ms. Wong, general manager and owner of Company B, added, “Since the law of Mainland China and its training and protocol of mediators are different with the western countries, we find ADR clause may not be applicable for cross-border businesses.”

Wong was looking for solutions to resolve the contractual dispute between Company B and its suppliers in foreign countries. Company B had ordered some goods from the supplier for its client which is also located in a foreign country. Yet, the goods were not delivered to its client on time and completely. For those goods delivered, the quality was doubtful that Company B had received complaint from its client. Since Company B didn’t have its own legal department or lawyer, Wong has to handle the issue on her own, such as seek legal advice and third parties’ (i.e. government bodies and organizations that provide dispute resolution services) suggestion.

“I engaged a mediator to resolve business dispute years ago and that was very useful. We managed to resolve the dispute before causing any inconveniences to my clients. For the current case, damage already occurred to the relationship between our company and our client. What’s the point to mediate?” Wong doubted.

Wong also questioned the effectiveness of cross-border mediation. “It is difficult to request the owner to attend the mediation in person, especially when we are in different locations. And, as a staff, the representative has to protect the benefit of his/ her company. The room for a settlement is limited.”

Despite the questions raised among mediation, Wong was certain that mediation could avoid confrontation and preserve business relationship. Thus, she was hesitating between litigation and mediation as the means to resolve the contractual dispute mentioned above.

Case 3

Company C is a non-manufacturing company which provides information technology (IT) service. The Headquarter of the company is located in Singapore with branches in Hong Kong and Mainland China. The company has been in operation for a decade with a company size of around 50 staff.

Ms. Chan, the owner of Company C, was going to renew the contract with her client, a university in Hong Kong. “I would like to include a clause that allows me to engage a debt collector when the client fails to pay the service fee on time”, Chan said.

Company C has been providing service to that university for years. “The contract required that the service fee should be settled monthly but the university failed for many times and the bills of the past half year are still not yet paid.” Chan insisted on the “debt collector clause” and stressed on “contract spirit” several times.

“As the university is working on an IT project and we serve an important role in it”, Chan was confident that the university was not going to replace her company nor was not satisfied with her service. “The overdue of payment may be just because of the delay of the transaction of funding”, Chan added.

When being asked about using a mediation clause instead of a “debt collector clause”, Chan questioned the effectiveness of mediation, “Mediation could be ended with no result, unlike litigation or arbitration; either win or lose, at least there is an end.”

She also asked if mediation is applicable for cross-border business dispute and questioned that as a foreigner, how she could protect her benefit during the mediation if the mediation was based on the law of Hong Kong which she was not familiar with.

Since the university straightly rejected Chan’s proposal of including a “debt collector clause” to the new contract, Chan said she would consider adding a mediation clause as an alternative. Yet, she had no idea about the content of the clause, i.e. the details of engaging mediation services. A template and more information were requested.

When dispute occurred, Chan used to seek advice from law firm and dispute resolution service providers and discuss with her staffs before making any decision/ direction as Company C didn’t have its own legal department or lawyer.

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