

# Mediation in Mainland China and Hong Kong: Can They Learn from Each Other?

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## I. INTRODUCTION

On July 1, 1997, the United Kingdom (UK) handed sovereignty over Hong Kong to the People's Republic of China (PRC). Under the "one country, two systems" principle, Hong Kong continues to adopt the common law legal system inherited from the UK while Mainland China

maintains its civil law based system.<sup>1</sup> In addition to this continuing legal divergence, the use of mediation also remains different in both the PRC and Hong Kong - a more formal and institutionalized Western approach has heavily influenced Hong Kong since the 1980s.<sup>2</sup>

As Hong Kong is often described as an 'East meets West' city exhibiting both Chinese values as well as Western attitudes inherited from Britain,<sup>3</sup> it is not surprising that Mainland China and Hong Kong share common principles which allow both communities to appreciate mediation as an effective means of settling disputes prior to litigation.<sup>4</sup> Mediation, for instance, is considered in both places as a more expeditious and cost-effective means of dispute resolution which improves access to informal and participatory justice.<sup>5</sup> Moreover, both places regard mediation as a way to restore peace and harmony by mending the discordant relationship between two parties through mutual acknowledgement and responsiveness.<sup>6</sup>

To achieve these objectives, however, the two places have developed and implemented different mediation systems. While there are individual merits to both systems, each system is prone to problems which adversely affect the quality of mediation as a fair and effective means of dispute resolution. For example, in Mainland China, other than the serious problem of compelled mediation, many parties are unwilling to speak freely and openly in mediation for fear that what they say may be used against them in later legal proceedings. Meanwhile, in Hong Kong, many parties and their lawyers have been reluctant to cooperate in the mediation process because of their lack of confidence in mediators and mediation conducted outside the courts. In view of these problems, the mediation systems in both places are in urgent need of reform.

In recent decades, there has been a massive increase in the cooperation and exchanges between Mainland China and Hong Kong in

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<sup>1</sup> NADJA ALEXANDER, *MEDIATION PROCESS AND PRACTICE IN HONG KONG* 245 (2010).

<sup>2</sup> SARAH E. HILMER, *MEDIATION IN THE PEOPLE'S REPUBLIC OF CHINA AND HONG KONG* 4 (2009).

<sup>3</sup> *Id.*

<sup>4</sup> ALEXANDER, *supra* note 1, at 36.

<sup>5</sup> *Id.* at 38; Zeng Xianyi, *Mediation in China – Past and Present*, 17 ASIA PAC. L. REV. 26 (2009).

<sup>6</sup> ALEXANDER, *supra* note 1, at 40; Zeng, *supra* note 5, at 26-28.

trade, investment, and infrastructure development.<sup>7</sup> These efforts speed up economic integration between Hong Kong and Mainland China. Closer cooperation and interactions are not confined to this economic dimension alone; they also extend to the legal systems of both places.<sup>8</sup> In particular, both judiciaries have actively promoted the use of mediation in recent years, as is reflected by the introduction of the Civil Justice Reform in Hong Kong and the People's Mediation Law in Mainland China. Given such a backdrop of cooperation, it is of great interest to explore whether the mediation systems in both places could also mutually benefit from each other through the borrowing of one another's practices and experiences to address their own problems in the hope of ultimately improving the quality of mediation in both places.

In discussing this novel issue, this paper will do three things. First, it will discuss the features of the existing mediation systems in Mainland China and Hong Kong. Second, it will examine the respective problems in the two mediation systems. Finally, it will demonstrate that even though there are certain problems in both mediation systems, they could be rectified by learning and borrowing from each other's good practices and experiences.

## II. MEDIATION SYSTEMS IN MAINLAND CHINA AND HONG KONG

### A. Mainland China's Mediation Systems

With a long history of development in China, mediation has played a significant role in China's dispute resolution process<sup>9</sup> with different kinds of mediation available both inside and outside the legal system.

#### 1. People's Mediation

People's mediation is an important component of the mediation system in the PRC. It refers to the process where civil disputes are mediated by the people's mediation commissions, which are mass-based organizations legally established to settle disputes among the people.<sup>10</sup> While these commissions are usually established by village and

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<sup>7</sup> ALEXANDER, *supra* note 1, at 245.

<sup>8</sup> *Three-way Legal Exchange is Key to Judicial Development*, CHINA DAILY HONG KONG EDITION (Nov. 15, 2004), <http://www.china.org.cn/english/government/112173.htm>.

<sup>9</sup> Vai lo Lo, *Resolution of Civil Disputes in China*, 18 UCLA PAC. BASIN L. J. 130 (2001).

<sup>10</sup> Zhonghua Renmin Gongheguo Renmin Tiaojie Fa [People's Mediation Law of the People's Republic of China] (hereinafter "PML") (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2010, effective Jan. 1, 2011), art. 7, *People's Republic of China People's Mediation Law*, THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, [http://www.npc.gov.cn/npc/xinwen/2010-08/28/content\\_1593344.htm](http://www.npc.gov.cn/npc/xinwen/2010-08/28/content_1593344.htm).

neighborhood committees,<sup>11</sup> they may also be formed by enterprises, institutional units, towns, sub-districts, or social organizations.<sup>12</sup> In settling disputes, the people's mediators will use persuasion and education to explain the relevant laws and state policies to the disputants and ultimately assist disputants in reaching a mutually acceptable agreement consistent with law and policy.<sup>13</sup> In 2008, people's mediation commissions all over the nation handled five million cases, and in 2010, there were more than 800,000 people's mediation commissions and over four million mediators in Mainland China.<sup>14</sup>

The people's mediation system was recently strengthened by the 2011 establishment of the People's Mediation Law (PML) which consolidated and authoritatively codified the principles and rules governing people's mediation.<sup>15</sup> The PML emphasized the parties' free will to engage in people's mediation and fair negotiations during the mediation process.<sup>16</sup> Besides, the PML specifies that people's mediation is provided free of charge<sup>17</sup> pursuant to Article 4 of the PML, which states that people's mediation commissions would not charge fees for the mediation of disputes among the people.<sup>18</sup>

## 2. Administrative Mediation

Another component in the PRC mediation system is administrative mediation, which refers to a process where mediation is conducted by relevant administrative bodies upon the request of the parties to assist them in reaching an agreement on the rights and obligations of each party.<sup>19</sup> For example, the environmental protection agencies, which are administrative bodies, play a significant role in mediating environmental disputes. Article 41 of the Environmental Protection Law of the PRC expressly stipulates that "[a] dispute over the liability to make compensation [for the environmental pollution hazard] or the amount of compensation may, at the request of the parties, be settled by the

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<sup>11</sup> *Id.* at art. 8.

<sup>12</sup> *Id.* at art. 34.

<sup>13</sup> *Id.* at art. 22.

<sup>14</sup> ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 264 (2011).

<sup>15</sup> *Id.* at 261.

<sup>16</sup> PML, *supra* note 10, at art. 2, 3(1), 17, 22, 23(4).

<sup>17</sup> *Id.* at art. 4.

<sup>18</sup> *Id.*

<sup>19</sup> Information Office of the State Council, *Judicial Reform in China*, CHINESE GOVERNMENT'S OFFICIAL WEB PORTAL (Oct. 2012), [http://www.gov.cn/english/official/2012-10/09/content\\_2239981\\_21.htm](http://www.gov.cn/english/official/2012-10/09/content_2239981_21.htm).

competent department of environmental protection administration.”<sup>20</sup> An advantage of administrative mediation is that since the administrative bodies are responsible for enforcing relevant laws and regulations, they have the legal and technical expertise necessary for a more efficient, timely, and proper settlement of disputes.

### 3. Court Mediation

The final and also most controversial element of mediation in Mainland China is court mediation where judges undertake dual roles as both mediator and ultimate adjudicator in the same dispute and are able to switch back and forth between those two roles.<sup>21</sup>

To mediate a dispute, Chinese judges will often meet with the parties separately. They may suggest settlement proposals that they think are just or indicate to the parties the specific weaknesses of their claim or defense so as to give them cause to reevaluate their position’s strength.<sup>22</sup> Mediation efforts by judges to bring about a mutually agreed upon settlement will be made at various points of the civil proceeding regardless of whether the disputants already attempted mediation before an action was brought.<sup>23</sup> Generally, the court invites the parties to attempt mediation at the preparatory stage before trial.<sup>24</sup> If mediation outside the court is unsuccessful, the court will try to mediate again upon the voluntary will of the parties before it makes a judgment.<sup>25</sup> A dispute can be mediated by the court at any level of the litigation process, irrespective of whether it is a first instance trial, an appeal, or a retrial.<sup>26</sup>

#### B. Hong Kong’s Mediation Systems

In contrast to court mediation in Mainland China, mediation in Hong Kong is separate and distinct from court trials, and mediators do not hold any adjudicative authority in the same dispute.<sup>27</sup> A mediator in Hong Kong is purely an impartial and trained third party assisting the disputing

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<sup>20</sup> Environmental Protection Law of the People’s Republic of China (promulgated by Order No. 22 of the President of the People’s Republic of China on Dec. 26, 1989, effective on Dec. 26, 1989) (Lawinfochina) (China), art 41.

<sup>21</sup> HILMER, *supra* note 2, at 159.

<sup>22</sup> Michael T. Colatrella, Jr., *Court-Performed Mediation in the People’s Republic of China: A Proposed Model to Improve the United States Federal District Courts’ Mediation Programs*, 15:2 OHIO ST. J. ON DISP. RESOL. 406 (2000).

<sup>23</sup> CHEN, *supra* note 14, at 287.

<sup>24</sup> HILMER, *supra* note 2, at 132.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 13.

parties in reaching a voluntary agreement.<sup>28</sup> In Hong Kong, disputants can seek mediation through various means which are elaborated as follows:

### 1. Family and Community Mediation

To start with, parties in family and community disputes can seek community mediation through community-based mediation organizations or other non-governmental organizations such as the Hong Kong Mediation Centre and the Hong Kong Family Welfare Society.<sup>29</sup> Mediators are comprised of volunteers, personnel of community mediation organizations, and freelance mediators employed on a contractual basis.<sup>30</sup> Disputants seeking this type of mediation generally do not have to pay for the service or the costs may be fully or partially subsidized by the government in areas where free mediation services are unavailable.<sup>31</sup> Community mediation is often used to resolve disputes between neighbors, family members, co-workers, and other members of groups or organizations.<sup>32</sup>

### 2. Private Sector Mediation

In addition to family and community mediation, which covers only a limited range of practice areas, parties who are in other type(s) of disputes can access private sector mediation in Hong Kong where mediation is offered by a variety of organizations (such as the Hong Kong Mediation Council) and freelance mediators on a fee-for-service basis.<sup>33</sup> These organizations may have a general panel of mediators handling a broad range of practice areas and/or a panel of mediators specializing in one particular area such as family mediation.<sup>34</sup> Mediators from each mediation organization are trained and accredited by their respective organizations and they represent a wide range of professions and qualifications depending on the corresponding accreditation criteria and professional standards of the organizations.<sup>35</sup>

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<sup>28</sup> *Id.* at 14.

<sup>29</sup> ALEXANDER, *supra* note 1, at 235.

<sup>30</sup> *Id.* at 231.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 235.

<sup>33</sup> *Id.* at 231.

<sup>34</sup> *Id.* at 232.

<sup>35</sup> *Id.* at 231-232.

### 3. Court-annexed Mediation When Parties Have Already Resorted to Litigation

When disputants have resorted to litigation, the court-annexed mediation system will come into play. If parties take their dispute to court without attempting mediation, but then later indicate their willingness to mediate after commencing an action, the system allows the court to channel a case to mediation at an early stage of the proceedings.<sup>36</sup> Additionally, such mediation would be outsourced to mediators who are not judicial personnel<sup>37</sup> and conducted only in the shadow of the court.<sup>38</sup> This mediation can be performed by community mediators or any of the private mediation organizations mentioned earlier.

This type of court-annexed mediation has been fully incorporated into Hong Kong's civil justice system by the introduction of Civil Justice Reform (CJR) and a number of supplementary Practice Directions in 2009. Under the CJR, the Order 1A of the Rules of High Court (RHC) and the Rules of District Court (RDC) were amended to make the facilitation of the settlement of disputes as one of the underlying objectives to which the courts have to give effect when exercising their powers.<sup>39</sup> Further, the Order 1A Rule 4(2)(e) of the new RHC and RDC states that the court is under the duty to encourage and facilitate the parties to use the Alternative Dispute Resolution (ADR) procedure if the court considers it appropriate.<sup>40</sup> In order to enable the courts to discharge these new duties and actively manage cases, courts are given new case management powers under Order 1B Rule 1(2)(e) of RHC and RDC to stay the whole or part of any proceedings either generally or until a specified date or event it thinks appropriate<sup>41</sup> in facilitating the parties to attempt mediation and procure settlement of the disputes between them.<sup>42</sup> In short, the new procedural

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<sup>36</sup> CHIEF JUSTICE'S WORKING PARTY ON CIVIL JUSTICE REFORM, CIVIL JUSTICE REFORM - FINAL REPORT 806 (2004), [http://www.civiljustice.gov.hk/cjr/download.jsp?FN=fr/documents/cjr\\_final\\_report.pdf](http://www.civiljustice.gov.hk/cjr/download.jsp?FN=fr/documents/cjr_final_report.pdf).

<sup>37</sup> ALEXANDER, *supra* note 1, at 229.

<sup>38</sup> *Id.* at 235.

<sup>39</sup> The Rules of the High Court, Objectives, (2009) Cap. 4A, Order 1A, Rule 1(e), (H.K.); The Rules of the District Court, Objectives, (2009) Cap. 336H, Order 1A, Rule 1(e), (H.K.).

<sup>40</sup> The Rules of the High Court, Objectives, (2009) Cap. 4A, Order 1A, Rule 4(2)(e), (H.K.); The Rules of the District Court, Objectives, (2009) Cap. 336H, Order 1A, Rule 4(2)(e).

<sup>41</sup> The Rules of the High Court, Case Management, (2009), Cap. 4A, Order 1B, Rule 1(2)(e), (H.K.); The Rules of the District Court, Objectives, (2009) Cap. 336H, Order 1B, Rule 1(2)(e).

<sup>42</sup> Weixia Gu, *Civil Justice Reform in Hong Kong: Challenges and Opportunities for Development of Alternative Dispute Resolution*, 40 HONG KONG L. J. 48 (2009).

rules now enable the courts to intervene in a case and make orders of mediation during the court proceedings, thereby formally annexing and integrating mediation into the civil justice system of Hong Kong.<sup>43</sup>

Although mediation must be voluntary, parties are strongly encouraged to explore the possibility of mediation before going to court. As the Judiciary has been taking a proactive role in encouraging the use of mediation, it introduced the Practice Direction 31 on Mediation (PD 31) in 2009 prescribing that the court may impose adverse cost sanctions against a party that unreasonably refuses to participate in mediation during court proceedings.<sup>44</sup> In addition to discretionary cost sanctions, PD 31 also provides the framework for court-annexed mediation. According to Paragraph 4 of PD 31, legal practitioners are under the duty to advise clients to consider the use of mediation<sup>45</sup> and sign a Mediation Certificate stating that both PD 31 and the availability of mediation have been explained to the client.<sup>46</sup> Clients must also sign onto the Mediation Certificate to the effect that they have understood the explanation.<sup>47</sup> If parties agree to mediate, they are required to coordinate the mediation process by serving a Mediation Notice and a Mediation Response to each other.<sup>48</sup>

Like private sector mediation, the fees for court-annexed mediation are payable by the parties,<sup>49</sup> and disputants are allowed to select their own mediator through the Joint Mediation Helpline Office located in the High Court of Hong Kong.<sup>50</sup>

### III. PROBLEMS OF THE MEDIATION SYSTEM IN MAINLAND CHINA

#### A. Dual Roles of Judges in Court Mediation

As previously mentioned, mediation in Chinese courts is not independent of but part of the adjudication process, and judges extraordinarily serve the dual roles as both mediators and adjudicators on the same dispute. This unique feature, however, raises serious concerns which undermine the fairness and legality of court mediation.

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<sup>43</sup> *Id.*

<sup>44</sup> Faculty of Law of Chinese University of Hong Kong, Practice Direction 31 (hereinafter "PD"), *Practice Direction on Mediation*, <http://legalref.judiciary.gov.hk/lrs/common/pd/pdcontent.jsp?pdn=PD6.1.htm&lang=EN>.

<sup>45</sup> *Id.* at ¶ 4.

<sup>46</sup> ALEXANDER, *supra* note 1, at 272.

<sup>47</sup> *Id.*

<sup>48</sup> Faculty of Law of Chinese University of Hong Kong, *supra* note 44.

<sup>49</sup> ALEXANDER, *supra* note 1, at 229.

<sup>50</sup> *Id.*



### 1. Non-confidentiality of Mediation Affecting Parties' Free Expression

Due to the dual roles of judges, it is not possible to keep mediation confidential since judges, while acting as adjudicators, will unavoidably know the information disclosed during mediation.<sup>51</sup> Thus, while mediation often requires a party to be honest with the mediator regarding the merits of its legal or factual arguments and to reveal its true interests to the mediator in private meetings, many parties are wary of conceding issues or admitting to a weakness in front of a person who has the power to decide the case if settlement cannot be reached.<sup>52</sup> This is because the parties are reasonably afraid that a judge's decision will be significantly influenced by, if not based on, the parties' true interests and attitudes towards their case's merits from mediation rather than the admissible facts and applicable laws.<sup>53</sup> As a result, disputants are often not open to compromise and instead are more inclined to stick to their original legal positions.<sup>54</sup> In this case, the participation of adjudicators in the mediation process caused by the dual roles of judges will adversely affect the parties' free expression and willingness to make concessions during mediation, thereby undermining the chances of a successful mediation.

### 2. Abuse of Authority by Judges during Mediation

In addition to the above problem, the dual roles of court mediators also allow them to take advantage of their positions<sup>55</sup> and easily abuse their judicial authority in order to indirectly coerce the parties to settle the dispute by mediation for a number of personal motives.

To illustrate this, it must first be noted that mediation has been maintaining its dominant position in Mainland China when compared with the number of adjudicated cases.<sup>56</sup> While one could possibly justify this phenomenon by the previous legislative emphasis on mediation, this could actually be better explained by most judges' self-interested preference for mediation.<sup>57</sup> One of the reasons why judges prefer mediation over adjudication is because the former is a much safer type of dispute

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<sup>51</sup> Jianhon Xin, *Court Mediation in China: Time for Reform* (September 2000) (unpublished LLM thesis, University of British Columbia) 76 (on file with author).

<sup>52</sup> Colatrella, *supra* note 22, at 421.

<sup>53</sup> *Id.*

<sup>54</sup> Xin, *supra* note 51, at 75.

<sup>55</sup> *Id.* at 76.

<sup>56</sup> See May Tai & Damien McDonald, *Judicial Mediation in Mainland China Explained*, HERBERT SMITH FREEHILLS ADR NOTES (July 30, 2012, 1:32 PM) <http://hsf-adrnotes.com/2012/07/30/judicial-mediation-in-mainland-china-explained> (In 2010, 65.29% of civil cases were resolved by judicial mediation at the First Instance court level).

<sup>57</sup> Xin, *supra* note 51, at 81.

resolution mechanism.<sup>58</sup> While unsatisfied parties may appeal a decision made through adjudication and a judge's chances for promotion are often affected by the number of cases subsequently reversed or retried,<sup>59</sup> mediation agreements cannot be appealed after being accepted by the parties.<sup>60</sup> Also, judges generally do not possess sufficient professional skills and sound legal knowledge<sup>61</sup> and mediation enables them to avoid making hard decisions on some relatively complicated cases.<sup>62</sup> Moreover, many Chinese courts, adhering to the state policy to encourage court mediation, use the success rate of mediation as a standard to assess judges' performance and decide their promotions.<sup>63</sup> The more cases judges successfully mediate, the more praise they receive.<sup>64</sup> The pressures generated by such a bureaucracy encourage judges to inevitably choose a quicker and safer way to dispose of a high caseload.

Motivated by self-interest, Chinese judges always try their best to encourage the parties to settle the dispute by mediation instead of adjudication. Although the Civil Procedure Law of the PRC stipulates that participation in mediation must be based on the voluntariness of the parties,<sup>65</sup> compelled mediation has long been a widespread problem.<sup>66</sup> As both adjudicators and mediators, judges have even greater opportunity to influence or impose self-serving decisions on parties.

While most judges will not directly coerce parties into mediation or acceptance of proposals unfavorable to them, they often do so indirectly by dropping hints.<sup>67</sup> For instance, judges may repeatedly encourage a party to mediate or think about the solution proposed either by the opposite party or by the judges themselves.<sup>68</sup> Since such persuasion clearly indicates a judge's preference for mediation or a proposed agreement, it often creates pressure on the parties who are afraid of losing the case since refusal to make concessions as suggested by the mediators may

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<sup>58</sup> Liming Wang, *Characteristics of China's Judicial Mediation System*, 17 ASIA PAC. L. REV. 71 (2009).

<sup>59</sup> Xin, *supra* note 51, at 86.

<sup>60</sup> Wang, *supra* note 58.

<sup>61</sup> *Id.* at 70.

<sup>62</sup> Xin, *supra* note 51, at 84.

<sup>63</sup> *Id.* at 81.

<sup>64</sup> *Id.*

<sup>65</sup> [Civil Procedure Law of the People's Republic of China] (promulgated by Order No. 44 of the President of the People's Republic of China, April 9, 1991, effective April 9, 1991), art. 9, <http://www.china.org.cn/english/government/207343.htm>.

<sup>66</sup> Xin, *supra* note 51, at 88.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

consequently lead to an unfavorable decision made by them when acting as adjudicators.<sup>69</sup> Indirectly coerced mediation can also occur when judges deliberately indicate that the case may take much longer to adjudicate if disputants decline to mediate or insist on their claims or when judges indicate that the possible decision reached under adjudication may be more unfavorable to the parties if mediation fails.<sup>70</sup> Given such indications, the disputants, however unwillingly, would have no other option but to follow the judge's suggestions in hopes of avoiding worse results.

Under all these circumstances, the mediation agreement hardly reflects the parties' voluntariness and self-determination. In short, the practical reality of mediation being forced upon the parties simply undermines the original idea to combine mediation with litigation by appreciating social and moral values within a legal framework.<sup>71</sup>

### B. *Poor Quality of People's Mediators*

As for the people's mediation in Mainland China, most urban mediators are retired workers or housewives and are either illiterate or minimally educated.<sup>72</sup> As such, the knowledge and technical skills of people's mediators in general are far from adequate to conduct the mediation work well,<sup>73</sup> which requires an increasingly greater understanding of law than in the past due to the rising complexity of disputes in a rapidly developing society.<sup>74</sup>

As a result, although people's mediators are required under the People's Mediation Law to stick to mediation principles stated therein, make legal reasoning,<sup>75</sup> and explain the relevant laws<sup>76</sup> when assisting the disputants, many of them only aim at settling the dispute and avoiding the burden of investigating either facts or laws as they are incompetent to determine the liability of both parties based on law.<sup>77</sup> This problem, however, is even more serious in some rural areas in China, as most well-

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 89.

<sup>71</sup> HILMER, *supra* note 2, at 134.

<sup>72</sup> Xin, *supra* note 51, at 101.

<sup>73</sup> Huang Yi, *A Rational Thinking of the People's Mediation System of China*, 8:2 CANADIAN SOC. SCI. 141 (2012).

<sup>74</sup> Aaron Halegua, *Reforming the People's Mediation System in Urban China*, 35 *Hong Kong L. J.* 719 (2005).

<sup>75</sup> PML, *supra* note 10, at art. 21.

<sup>76</sup> *Id.* at art. 22.

<sup>77</sup> Huang, *supra* note 73.

educated people leave those areas for better job opportunities while those who remain are rarely qualified for mediation work.<sup>78</sup>

#### IV. HOW THE MEDIATION SYSTEM IN MAINLAND CHINA CAN LEARN FROM HONG KONG'S EXPERIENCE

##### *A. Separating Court Mediation from Adjudication*

As mentioned previously, the court-annexed mediation in Hong Kong is distinct from the adjudication by the courts.<sup>79</sup> The mediator is an independent third party totally unrelated to the dispute and the judge who adjudicates the dispute will not serve as the mediator. Under this setting, the information disclosed during mediation can be kept confidential with the understanding that it cannot later be used in court, which encourages the parties to be more forthcoming during mediation.<sup>80</sup> Besides, as the mediator has no ultimate adjudicative authority over the dispute, parties do not feel unduly pressured into making the mediation agreement.

In hopes of rectifying the problems mediation has caused by the dual roles of judges, Chinese courts should positively borrow Hong Kong's practice and make court mediation an independent process separate from adjudication.

In order to achieve this, a possible suggestion would be that the court procedures be divided into two stages, namely the pre-trial stage and the trial stage. Different court personnel should sit in on different stages and no one should be allowed to sit in on both stages for the same dispute. Court mediation will be conducted at the pre-trial stage where the pre-trial judge will identify the relevant issues of the case and conduct mediation on the basis of parties' voluntariness. If the parties do not reach an agreement to mediate or mediation fails, the pre-trial judge cannot adjudicate the dispute and the case will proceed to the trial stage for adjudication without delay.<sup>81</sup>

At the trial stage, the new trial judge will no longer attempt mediation and will only adjudicate the dispute in accordance with the law. While the arbitrary use of mediation at all stages of the litigation process should be prohibited by amending the Civil Procedure Law in a bid to prevent coerced mediation as mentioned earlier, valid settlement by the parties through negotiation or conciliation without courts' intervention should not be precluded.<sup>82</sup> Meanwhile, in order to eliminate the cause for the pre-trial judges to coerce mediation and ensure parties' voluntariness,

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<sup>78</sup> *Id.*

<sup>79</sup> Philip C.C. Huang, *Court Mediation in China, Past and Present*, 32:3 MOD. CHINA, 1 (2006).

<sup>80</sup> *Id.* at 30.

<sup>81</sup> Xin, *supra* note 51, at 113.

<sup>82</sup> *Id.*

the success rate of mediation should no longer be used to assess their performance and decide their promotions.

As this approach prohibits mediators from further involvement in the adjudicative process, the confidentiality of information disclosed during mediation can be maintained. This ensures that the result of adjudication will not be affected by the mediation process and one party would not be given unfavorable treatment in the judgment simply because that party is unwilling to mediate.<sup>83</sup> It also guarantees that no mediation agreement proposed by one party will be referenced by a judgment.<sup>84</sup> As a result, parties will be willing to engage in more open discussions in accordance with interest-based mediation principles without much hesitation.<sup>85</sup>

Moreover, when the court mediator does not have any adjudicative authority, a judge's potential abuse of authority through coerced mediation can also be indirectly avoided. Parties will no longer feel obliged to accept the mediator's suggestion and their freedom in making the settlement agreement will be guaranteed.

This approach is also consistent with the conditions in Mainland China where there is a large discrepancy in the quality of judges. Before the amendment of the Organic Law of the People's Courts in 1983, judges did not need to have professional legal knowledge and many of them received little education and training.<sup>86</sup> In fact, it is only in recent decades that the quality of judges has begun to improve.<sup>87</sup> Therefore, under the suggested approach, judges who are less capable can be designated to become the pre-trial judges since the standard of knowledge required for this position is lower.<sup>88</sup> They do not have to decide on complicated legal issues and can specialize in identifying the root of the problem and mediating disputes. On the other hand, outstanding and experienced judges with sound legal knowledge can be designated as trial judges to adjudicate disputes and thus specialize in resolving complex legal issues.<sup>89</sup> Since practice makes perfect and practical wisdom comes from experience,<sup>90</sup> different judges specializing in different duties will gradually

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<sup>83</sup> Wang, *supra* note 58, at 74.

<sup>84</sup> *Id.*

<sup>85</sup> Colatrella, *supra* note 22, at 421.

<sup>86</sup> CHEN, *supra* note 14, at 205.

<sup>87</sup> *Id.*

<sup>88</sup> B Chen, *Zhongguo Fayuan Tiaojie Zhidu Yu Meiguo ADR Zhidu De Bijiao Yanjiu* [Comparative Analysis of the Court Mediation System in China and the ADR System in the US], 180:1 XUEXI YU TANSUO (STUDY AND EXPLORATION), 118 (2009).

<sup>89</sup> *Id.*

<sup>90</sup> See Committee for the Evaluation of the Modernisation of the Dutch Judiciary, *Judiciary is Quality* (Dec. 2006),

become experts in their respective work and thereby significantly enhance the quality of the court service and its mediation work in the long run.

*B. Allowing People's Mediators to Charge for Their Services*

In fact, the aforementioned problem of poor quality of people's mediators in Mainland China can largely be attributed to the fact that only low or even no remunerations were paid to people's mediators.<sup>91</sup> While it is intellectually demanding as well as time-consuming to conduct mediation, people's mediators are prohibited to charge for their services<sup>92</sup> and only very outstanding people's mediators may be rewarded by the government.<sup>93</sup> Without sensible financial rewards as a kind of motivation for most mediators, it is very hard to attract talented individuals to the mediation field and to prevent "brain drain"<sup>94</sup> since many capable professionals find running profitable businesses more worthwhile than performing duties relating to dispute resolution.<sup>95</sup>

To address this problem, references can be made to Hong Kong's mediation system in which mediators are allowed to charge for their services. While there are some community mediators in Hong Kong offering mediation services on a pro bono basis, private sector mediators normally charge from USD \$200 to \$600 per hour, depending on their qualifications and experience.<sup>96</sup> Given the favorable financial incentives, professionals from all walks of life, such as lawyers, engineers, surveyors and social workers are all very willing to receive mediation training and become accredited as mediators.<sup>97</sup> Not only does this fully utilize the skilled manpower available in society,<sup>98</sup> it also increases the chance of successful mediation. This is because when mediators who come from different backgrounds assist in mediating different types of disputes relevant to their respective professions (such as social workers or psychologists mediating family disputes, or engineers or surveyors mediating construction disputes), they can accurately identify the crux of

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[http://www.coe.int/t/dghl/cooperation/cepej/quality/JudiciaryQuality\\_nl.pdf](http://www.coe.int/t/dghl/cooperation/cepej/quality/JudiciaryQuality_nl.pdf).

<sup>91</sup> Xin, *supra* note 51, at 101.

<sup>92</sup> PML, *supra* note 10, at art. 4.

<sup>93</sup> *Id.* at art. 6.

<sup>94</sup> Huang, *supra* note 73, at 141.

<sup>95</sup> Xin, *supra* note 51, at 101.

<sup>96</sup> *Why train as a mediator*, HONG KONG PROFESSIONAL MEDIATION ASSOCIATION (2010), <http://www.mediatorassociation.org/en/artcle.asp?id=2#>.

<sup>97</sup> *Id.*

<sup>98</sup> W Chen, *Woguo Fayuan Tiaojie Zhidu De Quexian Ji Wanshan Duice* [Defects and Solutions of the Court Mediation in China] HUNAN YUEYANG CITY INTERMEDIATE PEOPLE'S COURT (2010), <http://hnyyzy.chinacourt.org/article/detail/2010/11/id/925166.shtml>.

the matter and can thus guide the disputants into reaching an amicable solution more easily and efficiently.<sup>99</sup>

As such, in order to improve the quality of people's mediators and attract more professionals to engage in people's mediation work in Mainland China, the excellent experience in Hong Kong should be borrowed by allowing people's mediators in Mainland China to charge for their services. This not only helps to attract new and better qualified mediators such as retired judges, lawyers and other professionals, but also gives incentives for professionals to spare their time to regularly attend mediation trainings as the tuition fee can subsequently be reimbursed by the mediation services they later provide. With more well-established professionals engaging in the mediation field, citizens and entrepreneurs will have greater confidence in the people's mediation system and thus the development of some currently immature mediation sectors in China such as commercial mediation can be impressively boosted.

Meanwhile, while people's mediation organizations in rural areas should continue to provide mediation free of charge to the underprivileged, the government should provide remunerations to these organizations and provide incentives for attending professional training, thereby improving the quality of the mediation services they provide. To make this possible, the people's government should increase the funding allocated to these people's mediation organizations so that a reasonable amount of remunerations can then be given to the people's mediators whenever they conduct the mediation. Not only can this measure attract more talented mediation professionals to join the people's mediation work and persuade existing mediators to receive regular training, this measure can also show the government's efforts to implement the statutory provisions of the People's Mediation Law, which requires the local people's governments to guarantee the funds needed for the people's mediation work<sup>100</sup> and subsidize the people's mediators for loss of working time.<sup>101</sup>

#### V. PROBLEMS OF THE MEDIATION SYSTEM IN HONG KONG

Although the mediation system in Hong Kong has a number of merits from which Mainland China can learn, the current court-annexed mediation system in Hong Kong is, however, inadequate in view of a number of factors.

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<sup>99</sup> Y Yao, *Xianggang Minshi Tiaojie Zhidu Zhi Tedian Ji Ke Jijian Zhichu* [Civil Mediation System in Hong Kong and What China Can Learn] FAZHI GUANGDONG WANG (2011), [http://www.fzgd.org/tszs/201108/t20110811\\_183888.htm](http://www.fzgd.org/tszs/201108/t20110811_183888.htm).

<sup>100</sup> PML, *supra* note 10, at art. 6.

<sup>101</sup> *Id.* at art. 16.

A. *Lack of Confidence in Mediators and Mediation Conducted Outside Courts*

With a long period of development under peace and stability, the well-developed legal system in Hong Kong, and its robust rule of law, commands the respect of both the international and the Chinese community.<sup>102</sup> Even after Britain handed back Hong Kong to China in 1997, the people's faith in the legal system, an independent judiciary, and a law-abiding government remained strong.<sup>103</sup> Accordingly, peoples' reliance on their access to court as the primary means for resolving disputes has not changed<sup>104</sup> and many people are very reluctant to settle disputes through means not coordinated by the judiciary in which they have faith.<sup>105</sup> Since mediation is currently conducted outside the court under the court-annexed mediation system in Hong Kong, many parties do not have confidence in it and the normal judicial process is still inherently more attractive to them because of their confidence in the legal system.<sup>106</sup>

At the same time, disputants also have concerns over the discrepancies in the quality of mediators since mediation accreditation is not governed by law and there is no common benchmark in Hong Kong for mediator accreditation comparable to the high standard set in major jurisdictions.<sup>107</sup> Private mediators can be accredited by a number of different bodies and each of them adopts its own accreditation criteria.<sup>108</sup> In fact, there have been occasional mediators who have used inappropriate pressure to convince the parties to settle or delay the mediation process, or even terminate the mediation before the parties have had the chance to mediate.<sup>109</sup> These unhappy incidents have made many disputants lose faith in the quality of mediators as well as the whole mediation process, which is already inherently less attractive than litigation in disputants' eyes. Despite the recent joint attempt by the Hong Kong Bar Association, the Law Society, and two mediation service providers to establish a single accreditation body in Hong Kong in the hopes of addressing this problem,

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<sup>102</sup> Elsie Leung, *Mediation - A Cultural Change*, 17 ASIA PAC. L. REV. 44 (2009).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 45.

<sup>106</sup> *Id.*

<sup>107</sup> CECILIA KIT WAH WONG ET AL., HONG KONG MEDIATION HANDBOOK 296 (Raymond Hai Ming Leung ed., 2d. ed. 2009).

<sup>108</sup> Press Release, Yan Lung Wong, Secretary for Justice, Opening Remarks at the "Mediate First" Conference (May 11, 2012), [http://www.info.gov.hk/gia/general/201205/11/P201205110350\\_print.htm](http://www.info.gov.hk/gia/general/201205/11/P201205110350_print.htm).

<sup>109</sup> WONG ET AL., *supra* note 107, at 296.



it is arguably weak in its effectiveness. This is due to the fact that those mediators who are accredited in their respective mediation organizations are unlikely to be strictly assessed once again, and those organizations are still allowed to maintain their own panels of mediators.<sup>110</sup>

### B. Rigid Mindset of Individual Lawyers

Until now, many legal professionals still have the rigid mindset and their habitual practice is shaped by an adversarial and confrontational approach to litigation.<sup>111</sup> Litigation as a ‘legitimate’ form of dispute resolution is also firmly ingrained in the mind of all law students.<sup>112</sup> Thus, other than the settlement negotiations reached in non-contentious matters, many lawyers regard litigation as the typical form for resolving their clients’ disputes.<sup>113</sup> They think that alternative dispute resolutions, such as mediation, are a threat to their income<sup>114</sup> and therefore do not strongly encourage and fully assist their clients to settle disputes through mediation since they would receive lower fees.<sup>115</sup>

While lawyers are under a duty<sup>116</sup> to advise their clients of the possibility of the court sanctioning a party for unreasonably failing to engage in mediation,<sup>117</sup> many lawyers, however, actually treat the mediator as a member of the opposite camp.<sup>118</sup> As a result, they often discourage their clients from engaging in direct dialogue during mediation<sup>119</sup> or they either inadequately or incorrectly prepare their clients for mediation.<sup>120</sup> In some cases, instead of using a problem solving approach, lawyers continue to adopt the adversarial strategy and focus

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<sup>110</sup> Hong Kong Mediation Accreditation Association Ltd., *Frequently Asked Questions* (2013), <http://www.hkmaal.org.hk/en/faq.php>.

<sup>111</sup> Gu, *supra* note 42, at 43.

<sup>112</sup> *Id.* at 52.

<sup>113</sup> *Id.* at 53.

<sup>114</sup> *Id.* at 62.

<sup>115</sup> A Wong, *Changes Will Promote Mediation: Lawyers “Not Ready” For Civil Justice Reform*, SOUTH CHINA MORNING POST, Sept. 29, 2008, at 12 (Hong Kong).

<sup>116</sup> PD 31, *supra* note 44, at paragraph 4.

<sup>117</sup> Steven Yip and James Yeung, *Win the Case but Lose the Costs: Mediated Settlements, World Services Group* (2010), <http://www.worldservicesgroup.com/publications.asp?action=article&artid=3314>

<sup>118</sup> The Honorable Mr. Justice Barnabas Fung, *Establishing Your Reputation as a Professional Mediator, Hong Kong Judiciary* (2012), <http://mediation.judiciary.gov.hk/en/doc/Establishing%20your%20reputation%20as%20a%20professional%20mediator%20by%20Fung%20J%20dd%2018.4.12.pdf>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

only on legal issues<sup>121</sup> when preparing clients for mediation or advising them during the mediation process.

*C. Inadequacy of the Court-Annexed Mediation to Make the Parties Cooperative*

To date, because PD 31 places a duty upon civil litigants to consider and reasonably engage in mediation before going to trial, with sanction costs for failing to do so,<sup>122</sup> and a duty upon lawyers to advise their clients of the consequences of non-compliance with the client's obligation,<sup>123</sup> most parties are willing to attempt mediation according to the Mediation Certificates filed with the courts.<sup>124</sup> However, it should not be surprising to realize that the triggering factor for compliance is often the fear of being ordered to pay costs, instead of true appreciation and comprehension of the fundamental benefits of the mediation process itself.<sup>125</sup> As a result, even when cases are suitable for mediation, many disputants do not wholeheartedly or genuinely seek to resolve the dispute through mediation and are often uncompromising during the mediation process.<sup>126</sup> Some disputants 'attempt' mediation by choosing cheap mediators or those with dubious qualifications simply to comply with their lawyers' formalities.<sup>127</sup> Some lawyers will even regard mediation as a 'tick-box' before litigation<sup>128</sup> just to satisfy the court's question as to whether the parties have ever sought mediation.<sup>129</sup>

Worse still, nothing can be done under the current court-annexed mediation system in Hong Kong to prevent these situations from occurring and ensuring parties are cooperative and willing during the mediation process. For instance, for cases listed in the Construction and Arbitration List where Practice Direction 6.1 applies, it clearly states that the court will use its discretion in deciding what constitutes an unreasonable refusal to mediate, but it will not take into account what happened during the mediation, why the mediation failed, or whether any failure in the

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<sup>121</sup> *Id.*

<sup>122</sup> PD 31, *supra* note 44, at paragraph 4; ALEXANDER, *supra* note 1, at 275.

<sup>123</sup> ALEXANDER, *supra* note 1, at 275.

<sup>124</sup> The Honourable Mr. Justice Johnson Lam VP, Development of Mediation in Hong Kong, *Hong Kong Judiciary* (2011), [http://mediation.judiciary.gov.hk/en/doc/Development%20of%20mediation%20in%20Hong%20Kong%20\(Hon%20Lam%20J\)\(27%20May%202011\).pdf](http://mediation.judiciary.gov.hk/en/doc/Development%20of%20mediation%20in%20Hong%20Kong%20(Hon%20Lam%20J)(27%20May%202011).pdf).

<sup>125</sup> HILMER, *supra* note 2, at 158.

<sup>126</sup> Priscilla T.Y. Lam, Judicial Insistence on Taking Mediation, 1 J. ON MEDIATION 13 (2011), <http://www.mediationcentre.org.hk/sources/HKMCJM01.pdf>.

<sup>127</sup> Yan Lung Wong, *supra* note 108.

<sup>128</sup> *Id.*

<sup>129</sup> HILMER, *supra* note 2, at 158.

mediation may be ascribed to unreasonable conduct by any party.<sup>130</sup> While there is no such provision stipulated in PD 31, it recognizes that the court will only look at the currently admissible evidence such as Mediation Notice and Mediation Response in determining the party's reasonableness in refusing to mediate. This reveals that the conduct of the parties during mediation, no matter how unreasonable it may be, will not be taken into account by the court in making the costs order. As a result, the court-annexed mediation and the supporting practice directions in Hong Kong are unfortunately inadequate to ensure parties are genuine but not intransigent in attempting mediation which, if genuinely pursued, could be very helpful in settling disputes and cases that now go to trial.

#### VI. HOW THE MEDIATION SYSTEM IN HONG KONG CAN LEARN FROM MAINLAND CHINA'S EXPERIENCE

In the existing court-annexed mediation system in Hong Kong, mediators are not court personnel but are merely private mediation service providers, and litigants have to pay extra fees for participating in mediation (which is presently independent from the legitimate duties of the court).<sup>131</sup> As such, there has been a lack of confidence in the court-annexed mediation conducted outside the reliable judicial system and many still have the mindset that mediation is inferior to litigation. In order to address this problem, Hong Kong can change the community's mindset on mediation by implementing the good mediation practices of Mainland China.

Notwithstanding the problems discussed earlier, the 'court-performed' mediation in Mainland China has played an important role in timely resolving disputes and easing conflicts as well as maintaining social stability.<sup>132</sup> After the disputants resort to legal action, the Chinese courts take the primary responsibility of directing and performing mediation.<sup>133</sup> Additionally, mediation in court is offered on a more comparable basis with litigation. For example, there are no differences in training or education between judges and mediators as the officials presiding over disputes perform both functions<sup>134</sup> and no additional costs are charged for mediation. Litigants, therefore, generally do not perceive that mediation is an inferior method of resolving disputes.<sup>135</sup> As such, despite the fact that the legal system in China generally has recognized defects in need of

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<sup>130</sup> PD 6.1, *supra* note 44, at paragraph 44.

<sup>131</sup> Colatrella, *supra* note 22, at 418.

<sup>132</sup> Wang, *supra* note 58, at 68.

<sup>133</sup> Colatrella, *supra* note 22, at 418.

<sup>134</sup> *Id.* at 419.

<sup>135</sup> *Id.*

reform, Chinese litigants have no reason to have less confidence in mediation than they would have in the litigation process.<sup>136</sup>

In light of boosting the public's confidence in the mediation system, Hong Kong could potentially borrow these decent features from Mainland China and transform the current court-annexed mediation system from a rather tangential approach into a 'court-performed' approach in which mediation becomes a customary and legitimate responsibility of the court after an action has been brought.<sup>137</sup>

By adopting the 'court-performed' approach, the mediation process in Hong Kong could take place in the court building with court-based mediation practitioners,<sup>138</sup> which includes full-time mediators, judges, and registrars trained in mediation and accredited by the Judiciary. Mediators could be chosen and appointed by the court in order to prevent the parties from treating the mediators as the opposite camp. The costs of mediation, excluding the legal costs of the parties' own lawyers, should be borne by the justice system so that mediation is not regarded as an inferior process or 'second class' remedy that does not warrant funding like traditional litigation.<sup>139</sup> Yet there should not be a wholesale adoption of China's 'court-performed' approach and it must be stressed that when considering this approach, the judge who adjudicates a particular dispute must not perform mediation of that same dispute and the success rate of mediation must also not be used to assess the mediator's performance given the reasons previously discussed.

The implementation of the new approach can bring in several benefits. First, as mentioned earlier, litigants in Hong Kong generally have greater respect for the established legal system and court personnel such as judges. Therefore, when mediation is structured more integrally with the court process and mediation duties are assigned to full-time, highly trained court personnel rather than private mediators, litigants are more likely to put their trust and confidence in mediation<sup>140</sup> and consequently become more willing to genuinely participate in the process.

Furthermore, when court mediators are all accredited by the Judiciary acting as the sole accreditation body, a standardized and reliable set of accreditation criteria can be implemented so that those who mediate must have certain qualifications, skills, knowledge, and experience deemed essential by the Judiciary. As such, the skepticism over the discrepancies in the accreditation standards of different private mediation

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 418.

<sup>138</sup> ALEXANDER, *supra* note 1, at 230.

<sup>139</sup> Colatrella, *supra* note 22, at 419.

<sup>140</sup> *Id.*

organizations and the quality of private sector mediators, which currently shatters the public confidence in using mediation, can be avoided.<sup>141</sup>

Last but not least, the ‘court-performed’ approach can, together with proper amendments of Practice Directions, also help to increase the likelihood that disputants are genuine but not intransigent when attempting mediation. This is because when mediation is conducted by the court personnel, these personnel can also assist the court in overseeing the mediation process. For instance, in cases the court deems suitable for mediation, but the failure of mediation is ascribed to insufficient preparation or even the unreasonable conduct by any party, the court mediator should be allowed to reflect this to the trial judge without disclosing the substance of the mediation conference (such as the information obtained relating to the case). The trial judge can then take this into consideration when considering the issue of costs. In consequence, parties will no longer regard mediation as just a formality and a ‘tick-box’ before litigation since their preparation beforehand and their conduct during mediation will be assessed. In order to avoid sanctions for their clients, lawyers would have no way but to properly prepare their clients not only on the real merits of their case but also on the available options (such as briefing the clients on the benefits of mediation over litigation) and their needs (in terms of time and resources).<sup>142</sup> In this way, the ‘court-performed’ approach can help to significantly raise the probability that parties are genuine and cooperative but not intractable during the mediation process, which can then unquestionably improve the quality of mediation and its chance of success.

## VII. CONCLUSION

This paper has shown that despite the efforts in both Mainland China and Hong Kong to improve the use of mediation, the current mediation systems in both places are still facing many problems which undermine the quality and effectiveness of mediation as a powerful dispute resolution tool. Having said that, by learning and borrowing the merits from each other’s mediation system, they could both be effectively rectified. Learning from Hong Kong, Mainland China should separate mediation from adjudication and also enable people’s mediators to charge for their services. On the other hand, Hong Kong should actively consider adopting the ‘court-performed’ approach implemented in Mainland China (on the premise of separating mediation from adjudication) in hopes of gaining the public’s confidence and increasing the likelihood that disputants use mediation more cooperatively and genuinely. Once these reforms are in place, the quality of mediation will improve and mediation will assume an even more significant role in the resolution of disputes.

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<sup>141</sup> Wong, *supra* note 108.

<sup>142</sup> Lam, *supra* note 124.