

高等法院 建築與仲裁案件審訊表 自願調解試驗計劃

Pilot Scheme for Voluntary Mediation Construction and Arbitration List High Court

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序言

2006年，實務指示6.3（該「實務指示」）提出建築與仲裁案件審訊表中案件進行一個自願調解試驗計劃。該試驗計劃定由2006年9月1日至2008年8月31日進行。

本小冊子旨在幫助市民明白甚麼是調解，以及採用調解的好處。本小冊子亦簡介了該試驗計劃的內容，以及在有關建築事宜的爭議中如何以調解作為達至和解的方法。

為誰而設？

調解提供切合實際的步驟，輔助爭議各方達至其需要的和解，不但省時省錢，而且有助維持良好商業關係。根據該實務指示所定的程序，建築與仲裁案件審訊表中訴訟的任何一方，可向爭議的另一方送達調解通知書。如爭議牽涉多方，調解通知書可送達其中任何一方或各方。

甚麼是調解？

調解是解決問題的一個途徑，讓爭議各方可循此途徑達成相互接納的協議。從世界各地採用調解的經驗顯示，達至和解的比率約為80%。

調解屬自願參與，由一名公正和受過訓練的第三者，即調解員，協助爭議各方在保密的環境下相互溝通和協商。調解時，各方均有機會陳述本身的論點，以及聆聽對方的說法。調解員並非要決定誰是誰非，而是幫助各方探索各自論據的強弱，尋求可行的解決方案，從而協助各方自行解決爭端。調解員受過專門訓練，即使談判陷於膠着狀態，也能設法打破僵局，促使各方專注尋求解決方法。

調解員在調解會中協助爭議各方：

- 從商討中釐定爭議事項；
- 探索各方的實際需要和權益所在；
- 擴大和解選擇範圍和衡量最適合的解決方案；
- 擬訂和解協議，詳細列出各方同意解決每項爭議的方式。

其他關於調解的意見包括：

- 不是每宗案件都適合採用調解。調解員或會邀請當事人出席初步會議，就該當事人的特定情況而言，評估案件是否適合調解。當事人也可諮詢律師，以便作出決定。

- 爭議各方在調解過程的任何階段均可尋求法律意見。
- 雙方均有權隨時終止調解。
- 雙方必須明白，任何一方在調解會上說的話，都是在無損權利的原則下說的，所以在任何法律程序中，均不可以之作為證據。
- 在調解會上草擬的協議，經雙方簽署後便如合約般具有約束力。經調解達成的和解協議，不可當作仲裁裁決、判決或法庭命令般強制執行（但如一方違反了協議條款，另一方便可根據協議起訴對方）。這個情況同樣適用於牽涉多方的爭議。

調解有甚麼好處？

調解的好處甚多，包括：

- 可使爭議各方避開對抗性訴訟制度所帶來的衝突與緊張。
- 可讓爭議各方不用把爭議訴諸法庭，省時省錢。
- 可讓爭議各方自行作出決定和達成協議，因而更願意遵守。
- 可使爭議各方更能維持甚至提升相互的商業關係。
- 可使爭議各方達至的和解，超越法院所能作出的損害賠償與禁制令的法律補救。在Dunnett V Railtrack [2002]一案（一宗英國案例），大法官Brooke (Lord Justice Brooke)說：

「熟練的調解員現在能夠取得的成果，在許多案件中都使雙方感到滿意，而法庭和律師限於權力，卻是取不到這些成果的。……（那）成果使雙方在事情完結時彼此樂於握手並感到爭議已以他們樂於接受的條款得到解決。」

誰是調解員？

往哪裡找調解員？

調解員來自不同的專業。建築範疇的調解員通常具有法律、工料測量、建築、工程或其他與建造有關的專業資格。

許多機構都備有經評審或未經評審的調解員名單。在香港，可給予調解員認可資格的評審機構包括香港國際仲裁中心(The Hong Kong International Arbitration Centre)和英國特許仲裁員學會(The Chartered Institute of Arbitrators)。認可調解員受過特別訓練，在談判及解決爭議方面擁有的知識與技巧，均達到規定的標準。認可調解員亦必須遵守香港國際仲裁中心與英國特許仲裁員學會的道德及專業實務守則。其他可評審調解員的機構還包括香港律師公會和香港大律師公會。

調解員：

- 不會提供法律意見。當事人若需要法律意見，應該諮詢自己的律師；
- 不會偏袒任何一方；
- 不會替當事人作出決定，但會協助評估當事人所作決定的可行性。

調解費時嗎？

調解需時長短視乎爭議事項的多寡和複雜程度，而爭議各方願意合作和參與調解會議的程度也會影響調解進度。如爭議事項不那麼複雜，而調解過程又順利的話，爭議各方可能只需參與兩至三次調解會議（每次為期一天或少於一天）便可達成協議。總的來說，以調解方式解決爭議一般都比仲裁或訴訟更為便捷（尤以費用來說，爭議各方的得益更大）。

保密

除該實務指示所訂定的保密規定外，認可調解員還必須遵守其道德及專業實務守則，對調解會中透露的所有事宜保密。當爭議各方同意調解，調解員通常要求各方簽署一份調解協議（即同意提交調解的協議），表明按調解協議而進行的一切談判，均在享有特權和無損權利的原則下進行。

調解服務收費嗎？

當事人須支付的調解服務費用，主要是調解員的計時收費和租用會議室的開支等。爭議各方通常會在調解開始前先行同意平均分擔費用。當然，當事人若聘請律師或其他專業人士在調解過程中給予協助，則該等律師或專業人士的費用，全部由該當事人承擔。

調解試驗計劃指引摘要

根據試驗計劃調解建築爭議

該實務指示列出把建築與仲裁案件審訊表中案件的爭議轉交調解時須依循的程序。當事人應參考該實務指示，並與律師或申索顧問商討。以下摘要列述該實務指示的規定，並且就其適用範圍提供一般指引。

- 該試驗計劃旨在鼓勵爭議各方以調解方式解決爭議，以減輕費用的負擔。
- 為達上述目的，該實務指示列出把案件轉交調解的程序、申請擱置訴訟以便進行調解的機制，以及在某方不合理地拒絕或不嘗試調解時，法庭以不利訟費令的方式向該方施加罰則的指引。

- 該實務指示明確述明，在該試驗計劃中，調解是自願參與、對外保密和在無損相關訴訟各方爭辯的權利下進行的。按該試驗計劃達成的調解協議（即同意提交調解的協議），不可當作合約提起訴訟。任何經調解而達至的和解，除非已以書面方式記錄並由雙方（各方）簽署，否則不具有約束力。
- 調解可由爭議任何一方以發出調解通知書的方式提出，通知書內應載列該實務指示所指明的資料，包括調解會按甚麼規則進行的建議。在香港，香港國際仲裁中心在其網址 (<http://www.hkiac.org>) 發布調解規則，但這些規則可能需要加以修訂，以符合該實務指示的規定。其他機構(例如香港測量師學會和香港建築師學會)也有發布調解規則，而該實務指示並不限定爭議各方採用某套調解規則。
- 調解通知書必須述明申請人認為怎樣的「最低程度參與」才符合「充分嘗試調解」的要求。這個規定的目的，是讓處理該案的法官，在衡量爭議各方的合作程度時，有一些客觀的準則以考慮是否就某方的不參與而施加訟費罰則。怎樣才是「充分嘗試」須視乎個別案件的情況而定。但作為一般指引，爭議各方也許可考慮以最少參加一次調解員在場的聯合會議為最低合理程度，並且視乎案件的複雜性與爭議數額，訂明出席的最低時間，例如半天。
- 答辯人接到調解通知書後，若選擇不參與調解或不同意申請人所定的最低合理參與程度，答辯人應在回應裡清楚述明理由，以減輕日後被判不利訟費罰則的風險。

- 爭議各方可在訴訟的任何階段，協議聯合向建築與仲裁案件審訊表專責法官申請擱置該訴訟（雖然該實務指示建議應在狀書提交期結束後才進行有關擱置申請的聆訊，以確保專責法官有充足的資料作出決定）。某一方亦可隨時單方面申請擱置。
- 為評估試驗計劃的成效，法院要求爭議各方或其法律代表向建築與仲裁案件審訊表負責書記匯報調解是否有效。（該實務指示列明要求匯報的資料，包括調解員的工作時間，這些資料通常可從調解員的收費單得知或直接要求調解員告知。）
- 上述向負責書記作出的匯報，只作記錄調解過程的成效之用，與相關訴訟的是非優劣並無關係。所以，匯報不應包括任何和解條款或數額的資料。儘管法院也接受單方面的匯報，但較佳的做法，還是由爭議各方協議聯合匯報（即使爭議各方並非每一點都同意，但仍然可以聯合匯報，並總結各方在異議上各自不同的立場）。

下列機構或組織提供有關調解的進一步資訊

香港國際仲裁中心

(Hong Kong International Arbitration Centre)

香港中環康樂廣場8號交易廣場第二期38樓

電話：2525 2381

傳真：2524 2171

電郵：adr@hkiac.org

網址：www.hkiac.org

香港調解會

(Hong Kong Mediation Council)

通訊由香港國際仲裁中心轉交

香港中環康樂廣場8號交易廣場第二期38樓

電話：2525 2381

傳真：2524 2171

電郵：adr@hkiac.org

網址：www.hkiac.org

英國特許仲裁員學會（東亞分會）

(Chartered Institute of Arbitrators (East Asia Branch))

通訊由香港國際仲裁中心轉交

香港中環康樂廣場8號交易廣場第二期38樓

電話：2525 2381

傳真：2524 2171

電郵：ciarb@hkiac.org

網址：www.ciarbasia.org

香港律師會

(The Law Society of Hong Kong)

香港中環德輔道中71號永安集團大廈3樓

電話：2846 0500

傳真：2845 0387

電郵：adea@hklawsoc.org.hk

網址：www.hklawsoc.org.hk

香港大律師公會

(The Hong Kong Bar Association)

香港金鐘道38號高等法院低層2樓

電話：2869 0210

傳真：2869 0189

電郵：info@hkba.org

網址：www.hkba.org

香港測量師學會

(The Hong Kong Institute of Surveyors)

香港中環康樂廣場1號怡和大廈8樓801室

電話：2526 3679

傳真：2868 4612

電郵：info@hkis.org.hk

網址：www.hkis.org.hk

香港建築師學會

(Hong Kong Institute of Architects)

香港銅鑼灣希慎道1號19樓

電話：2511 6323

傳真：2519 6011, 2519 3364

電郵：hkiasec@hkia.org.hk

網址：www.hkia.net

亦可諮詢律師或申索顧問

Introduction

In 2006, Practice Direction 6.3 (the "Practice Direction") introduced the Pilot Scheme for Voluntary Mediation in relation to cases in the Construction and Arbitration List. The Pilot Scheme is scheduled to run from 1 September 2006 until 31 August 2008.

This pamphlet aims to help you understand mediation, what it is and how it works to your advantage. It also tells you about the Construction and Arbitration List Pilot Scheme, and how to undertake mediation as a means of settlement for construction-related disputes.

For Whom?

Mediation provides supportive and practical steps to help disputing parties reach a settlement that is responsive to their needs, saves time and cost and helps to preserve commercial relationships. Under the terms of the Practice Direction, any party to a case in the Construction and Arbitration List may serve a Mediation Notice on any other party to the dispute. In the case of multi-party disputes, the Mediation Notice may be served on any or all other parties.

What is Mediation?

Mediation is a problem-solving process designed to help parties in dispute to reach their own mutually acceptable agreements to resolve their differences. World-wide experience has shown that mediation enjoys a settlement rate of about 80%.

It is a voluntary process in which a trained, impartial third person, the mediator, can assist the parties to communicate and negotiate issues in a confidential setting. In mediation, each party to a dispute has a chance to put its case and to hear what the other has to say. The mediator's job is not to make a decision, but to help the parties explore the strengths and weaknesses of their cases and to identify possible solutions, helping them to resolve the matter between themselves. The mediator is skilled in unlocking negotiations that have become deadlocked and in keeping everyone focused on finding a solution.

In a mediation session, the mediator will help you to:

- Discuss and decide what matters are in dispute;
- Explore each party's real needs and interests;
- Expand settlement options and assess the most suitable solution;
- Draw up the settlement agreement in detail, setting out how the parties have agreed to resolve each matter in dispute.

Other observations about mediation include:

- Mediation may not be suitable for every case. You may be invited to attend a preliminary meeting in which the mediator will assess whether mediation is suitable for your particular circumstances, or your legal advisor may be able to assist you to decide.

- Legal advice can be sought by the parties at any stage of the mediation.
- Both parties have the right to terminate the mediation at any time.
- Both parties must appreciate that what the other party says in a mediation session is without prejudice and therefore cannot be used in any legal proceedings.
- An agreement drafted in the mediation session and signed by both parties is legally binding as a matter of contract. A mediation settlement agreement is not enforceable as an arbitral award, judgment or order of court (but the agreement can be sued upon by the innocent party in the event that the other party is in breach of its terms). The same situation applies in the case of multi-party disputes.

What are the Advantages of Mediation?

The advantages are many and include:

- You may avoid the tension and conflict in the adversarial litigation system.
- You may save some time and money in not having to contest matters in court.
- You make your own decisions and reach agreements with which you and the other party may be more willing and ready to comply.
- Mediation can improve your ability to continue and may enhance your business relationships with the other party or parties involved in the dispute.
- Mediation can result in settlements which go beyond the legal remedies of damages and injunctions to which the courts are limited. In the English case of *Dunnett v Railtrack* [2002], Lord Justice Brooke said:

"Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve ... by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live."

Mediators?

Who are They, and How do I Find One?

Mediators come from various professional backgrounds. Mediators practising in the construction field usually have qualifications in law, quantity surveying, architecture, engineering or other construction-related professions.

Various organisations maintain lists of mediators, who may or may not have undergone an accreditation process. In Hong Kong organisations which accredit mediators include the Hong Kong International Arbitration Centre (HKIAC) and the Chartered Institute of Arbitrators (CI Arb). Accredited mediators are specially trained to meet defined requirements covering knowledge and skills in negotiation and dispute resolution, and are also required to abide by an Ethical and Professional Codes of Practice of the HKIAC and the CI Arb. Other organisations which accredit mediators include the Law Society of Hong Kong and the Hong Kong Bar Association.

Mediators :

- Do not provide legal advice. You will be encouraged to consult your lawyer for such advice;
- Do not take sides with either party;

- Do not make decisions for you, but help you to assess the feasibility of the decisions you make.

Does Mediation Take a Long Time?

It depends on the complexity and number of issues you need to settle. The degree of the parties' cooperation and readiness to participate in the mediation sessions also count. If issues are less complicated and the process goes smoothly, it may only take 2 or 3 mediation sessions of a day or less each for you to reach agreement. All in all, mediation is generally a far more expeditious form of dispute resolution when compared to arbitration and litigation (this is of enormous benefit to all parties especially in relation to costs).

Confidentiality

In addition to the confidentiality provisions of the Practice Direction, accredited mediators are required by their Ethical and Professional Code of Practice to observe confidentiality in respect of all matters disclosed in the mediation session. When parties agree to enter mediation, they will also usually be required by the mediator to sign a Mediation Agreement (i.e. an agreement to mediate) that all negotiations undertaken pursuant to the mediation are to be privileged and conducted on a without prejudice basis.

Do I Need to Pay for the Mediation Service?

While you will be required to pay for the mediation service which, principally, will include the mediator's charge for his or her time together with any room hire costs, it is usual for the parties to agree before the start of the mediation that they will be responsible in equal shares for them. Of course, if you should decide to instruct lawyers, or other professional persons, to assist you during the mediation, you will be responsible for the entirety of their particular charges.

Guidance Notes for the Mediation Pilot Scheme

Mediation of Construction Disputes under the Pilot Scheme

The Practice Direction sets out the procedures to be followed in referring a dispute in the Construction and Arbitration List to mediation. You should refer to the Practice Direction, and discuss it with your lawyer or claims advisor. The following notes are intended to provide a brief summary of the requirements of the Practice Direction, and general guidance on its application.

- The purpose of the Pilot Scheme is to encourage parties to use mediation as a possible cost-effective means of resolving disputes.
- To achieve this purpose, the Practice Direction sets out a procedure for referral of cases to mediation, a mechanism to apply for a stay of proceedings to allow mediation to progress and guidelines for application by the court of sanctions, in the form of adverse cost orders, against parties who unreasonably refuse or fail to attempt mediation.
- The Practice Direction expressly states that mediation under the Pilot Scheme is voluntary, confidential and without prejudice to the parties' contentions in the underlying action, and that a Mediation Agreement (i.e. the agreement to mediate) under the Pilot Scheme will not be actionable as a contract. Any mediated settlement will only become binding after being reduced to writing and signed by both (all) parties to form the mediation settlement agreement.
- Mediation may be initiated by any party, by the issue of a Mediation Notice, which should include the information specified by the Practice Direction. The specified information includes the nomination of the rules under which the mediation is proposed to be conducted. In Hong Kong, mediation rules are published by the HKIAC (<http://www.hkiac.org>). You should note that these rules may need amendment to comply with the requirements of the Practice Direction. Other organisations

(such as the Hong Kong Institute of Surveyors and the Hong Kong Institute of Architects) also publish rules for conducting mediations, and the Practice Direction does not restrict parties to any particular set of mediation rules.

- The Mediation Notice is also required to state what the Applicant considers the "minimum amount of participation" is to qualify as "a sufficient attempt at mediation". The purpose of this provision is to provide the Judge in the case with some objective criteria against which to assess the parties' level of cooperation, when considering whether to apply cost sanctions for non-participation. What will constitute "a sufficient attempt" will depend on the circumstances of each case. As a general guide, parties may consider a reasonable minimum to be participation in at least one joint session with the mediator, and may wish to specify a minimum time for attendance e.g. half a day, depending on the complexity of the case and amount in dispute.
- If, having received a Mediation Notice, a Respondent party chooses not to participate in mediation, or disagrees with the Applicant's opinion of the minimum amount of participation which it considers reasonable, it is recommended that reasons be set out clearly in its response, in order to reduce the risk of facing adverse cost sanctions.
- The parties can jointly by agreement apply to the Construction and Arbitration List Judge at any stage of the proceedings for a stay to those proceedings (albeit the Practice Direction recommends that such a stay be heard only after the close of pleadings, in order to ensure that the Judge has adequate information on which to base a decision). A party may also apply for a stay unilaterally at any time.

- In order to assess the effectiveness of the Pilot Scheme, the parties or their legal representatives are requested to report to the Clerk to the Construction and Arbitration List on the effectiveness or otherwise of the mediation. (The Practice Direction specifies certain information to be included in the report, including the number of hours spent by the mediator, which can usually be ascertained from the mediator's fee note or by request to the mediator.)
- Reports to the Clerk are concerned only with recording the effectiveness of the mediation process, and not with the merits of the underlying case. Therefore, it should not include any information on the amount or terms of any settlement reached. It is recommended that reports to the Clerk be made jointly by consent of the parties, although unilateral reports will also be accepted (joint report may be made even if the parties do not agree on all points, in which case the report will summarise the differing positions of the parties on those points which are not agreed).

Sources of Further Information on Mediation

Hong Kong International Arbitration Centre

38/F, Two Exchange Square, 8 Connaught Place, Central, Hong Kong

Tel: 2525 2381

Fax: 2524 2171

Email: adr@hkiac.org

Website: www.hkiac.org

Hong Kong Mediation Council

c/o Hong Kong International Arbitration Centre

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Consult your lawyer or claims advisor