II. ARBITRATION II. ARBITRATION I. INTRODUCTION I. INTRODUCTION In Hong Kong, a person, a company, or the Government can be a party in a civil litigation [Bringing & Defending a Civil Case]. They may be either complainants (the party bringing the litigation) or defendants. In a litigation, each party presents their case to the court in order for the court to determine whether or not the legal rights and obligations of one (or more) of the parties are being infringed, and if so, to obtain appropriate compensation and remedy for that party. The judge will act as an umpire and make decisions concerning the case after considering the evidence and hearing the arguments from the parties involved. The judge will normally order the losing party to pay the costs of the court action to the winning party. These court costs are in addition to and separate from whatever amount the court may order the losing party to pay the winning party as a result of the judgment. These court costs are the expenses that the winning party has had to spend on the preparation and hearing of the case, including their expenses for the solicitors and barristers representing them. The amount of these costs can be substantial, depending on various factors including the complexity of the case, the work required for preparation of the hearing and the length of the hearing. B. ARBITRATION AGREEMENT B. ARBITRATION AGREEMENT To start with, the parties need an arbitration agreement. An arbitration agreement provides the basis for an arbitrator's jurisdiction. An arbitrator will not entertain a request for arbitration in the absence of an arbitration agreement. The parties may also modify or supplement the applicable arbitration rules by express provision in the arbitration agreement. An arbitration agreement is usually drafted to include claims arising "out of or in connection with" a particular contract. This wording is broad enough to cover tort claims (such as misrepresentation) that relate to the parties' transaction, and generally enables related tort and contract claims to be determined together by the arbitral tribunal. Stay of court proceedings when an arbitration agreement exists If a party tries to commence court proceedings in a dispute which is covered by an arbitration agreement, the court should normally stay (i.e. stop) its proceedings and decline to hear the dispute. III. MEDIATION III. MEDIATION A. OVERVIEW A. OVERVIEW Mediation is a flexible process conducted confidentially in which a neutral person actively assists the parties concerned in working towards a negotiated agreement of a dispute or difference, with the parties themselves remaining in ultimate control of the decision to settle and the terms of resolution. On 2 April 2009, the Judiciary implemented the Civil Justice Reform ("CJR") with a view to encourage and facilitate the settlement of disputes by a means other than litigation in court. Mediation is the recommended ADR process. The CJR introduced changes to the Rules of the High Court and the Rules of the District Court. Various new Practice Directions have been introduced to reflect these changes. The Judiciary has set up a Mediation Information Office [Address: LG104, High Court Building, 38 Queensway, Hong Kong] to help the public understand the nature of mediation and to help them seek mediation from professional bodies. There are special information offices at the Lands Tribunal and Family Court to cater for parties in Lands Tribunal Cases and Family Cases. B. ROLE OF MEDIATORS B. ROLE OF MEDIATORS The mediator brings the parties together face-to-face in a private and confidential setting. Each party will have the opportunity of putting forward his point of view and listening to what the other party has to say. Unlike an arbitrator, the mediator does not impose a decision on the parties. He does not provide legal advice and would not take sides. He will not determine who is right and who is wrong in the disputes, but merely helps to facilitate settlements. The mediator will help the parties explore the strengths and weaknesses of their cases and identify possible solutions, and help them resolve the matter between themselves. The parties concerned may terminate the mediation sessions anytime during the process. If an agreement is reached, the parties will then sign the agreement which will then be binding on the parties. Generally speaking, mediators are required by their Ethical and Professional Code of Practice to observe confidentiality in respect of all matters disclosed in the mediation sessions. When the parties agree to take part in mediation, they will usually be required by the mediator to sign a Mediation Agreement (i.e. an agreement to mediate) which states that all negotiations undertaken pursuant to the mediation are to be privileged and conducted on a without prejudice basis. Without

prejudice means that nothing discussed can be used as evidence in any future legal proceedings. Mediation is considered to be a private and confidential process on two levels. Firstly, the mediation process must be kept confidential at all times in that no third party is allowed to be privy to the proceedings. Secondly, under no circumstance should any matters discussed by one party in private sessions with the mediator be disclosed to the other party by the mediator without permission. C. RELEVANT PRACTICE DIRECTIONS C. RELEVANT PRACTICE DIRECTIONS 1. PRACTICE DIRECTION 31 1. PRACTICE DIRECTION 31 Practice Direction 31 ("PD 31") came into effect on 1 November 2014. It applies to all civil proceedings in the Court of First Instance and the District Court which have been begun by writ, except for the proceedings set out in Appendix A of the PD 31: (1) Court of First Instance: (a) Proceedings in the Construction and Arbitration List (b) Proceedings in the Personal Injuries List (2) District Court: (a) Proceedings in the Personal Injuries List (b) Proceedings in the Equal Opportunities List under the Sex Discrimination Ordinance (Cap. 480), Disability Discrimination Ordinance (Cap. 487) and Family Status Discrimination Ordinance (Cap. 527) (c) Proceedings to recover tax under the Inland Revenue Ordinance (Cap. 112) PD 31 states that the underlying objective of the Rules of the High Court and the District Court (as amended under the CJR) is to facilitate the settlement of disputes. The Court has a duty as part of active case management to further that objective by encouraging disputing parties to use ADR if the Court considers that it is appropriate and that the court should facilitate its use. The Court also has a duty to help the parties to settle their case. The parties and their legal representatives have the duty of assisting the Court to discharge the duty in question. The other Practice Directions listed below echo the same theme. The Practice Directions state that that the Court will not make any adverse costs order against a party on the grounds of unreasonable failure to engage in mediation where: (1) The party has engaged in mediation to the minimum level of participation agreed to by the parties or as directed by the Court prior to the mediation. (2) A party has a reasonable explanation for not engaging in mediation. The fact that active without prejudice settlement negotiations between the parties are progressing is likely to provide such a reasonable explanation. However, where such negotiations have broken down, the basis for such explanation will have gone and the parties should then consider the appropriateness of mediation. The fact that the parties are actively engaged in some other form of ADR to settle the dispute may also provide a reasonable explanation for not engaging in mediation in the meantime. In other words, if a party has not engaged in mediation to the minimum level of participation, or has no reasonable explanation for not engaging in mediation, this party may face an adverse costs order. For details, please go to the Judiciary’s website. 2. PRACTICE DIRECTION 18.1 & 18.2: PERSONAL INJURIES LIST & EMPLOYEES COMPENSATION CASES 2. PRACTICE DIRECTION 18.1 & 18.2: PERSONAL INJURIES LIST & EMPLOYEES COMPENSATION CASES Personal Injury and Employees Compensation cases are not covered by PD 31. Practice Direction 18.1 and Practice Direction 18.2 covers these types of cases and lays down far more detailed provisions. The idea is to encourage early settlement by way of mediation. Before the commencement of proceedings, parties should explore settlement by making genuine attempts to engage in settlement negotiations by without prejudice correspondence, by structured without prejudice face-to-face meetings, or by any other manner agreed to by the parties. If such negotiations do not result in any settlement after a reasonable time, the parties should proceed to explore ADR by mediation or some other form of ADR. It is expressly stated that settlement negotiations that take place only between the parties themselves, without an arbitrator or mediator present, do not amount to ADR. In exercising its discretion on costs, the Court takes into account all relevant circumstances. These circumstances would include any unreasonable failure of a party to engage in mediation where this failure can be proven by materials that are admissible to the court. Legal representatives should advise their clients of the possibility of the Court making an adverse costs order where a party unreasonably fails to engage in mediation. Similar to PD 31, the Court will not make any adverse costs order against a party on the grounds of unreasonable failure to engage in mediation where: (1) The party has engaged in mediation to the minimum level of participation agreed to by the parties or as directed by the Court prior to the

mediation. (2) A party has a reasonable explanation for not engaging in mediation. If active without prejudice settlement negotiations are currently going on between the parties, this would be likely to provide such a reasonable explanation. However, where such negotiations have broken down, the basis for such explanation will have gone and the parties should then consider the appropriateness of mediation. If the parties are actively engaged in some other form of ADR to settle the dispute, this may also provide a reasonable explanation for not engaging in mediation in the meantime. The Court may, on the application of one or more of the parties or on its own motion, stay the proceedings or any part thereof for the purpose of mediation for such period and on such terms as it thinks fit. Where the Court stays the proceedings, the Plaintiff must promptly inform the Court if a settlement is reached and the parties should take the necessary steps to conclude the legal proceedings formally. For details, please go to the Judiciary's website. 3. PRACTICE DIRECTION 3.3: VOLUNTARY MEDIATION IN PETITIONS PRESENTED UNDER SECTION 724 OF THE COMPANIES ORDINANCE, CAP. 622 AND SECTION 177(1)(F) OF THE COMPANIES (WINDING UP AND MISCELLANEOUS PROVISIONS) ORDINANCE, CAP. 32 3. PRACTICE DIRECTION 3.3: VOLUNTARY MEDIATION IN PETITIONS PRESENTED UNDER SECTION 724 OF THE COMPANIES ORDINANCE, CAP. 622 AND SECTION 177(1)(F) OF THE COMPANIES (WINDING UP AND MISCELLANEOUS PROVISIONS) ORDINANCE, CAP. 32 Practice Direction 3.3 sets out the provision for voluntary mediation in respect of petitions presented under section 724 of the Companies Ordinance, Cap. 622 and petitions for winding up a company on just and equitable grounds under section 177(1)(f) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap. 32, where there is no allegation of insolvency concerning the subject company and no allegation that the affairs of the company would require full investigation in the public interest. Where the petitions are purely disputes between shareholders, not involving the interest of the general body of creditors of the subject company or affecting the public's interest, the court wishes to encourage those shareholders to consider the use of mediation as a possible additional means of resolving their disputes in a cost-effective and more expeditious manner. For details, please go to the Judiciary's website. 4. THE LANDS TRIBUNAL -BUILDING MANAGEMENT CASES 4. THE LANDS TRIBUNAL -BUILDING MANAGEMENT CASES Since 1 January 2008, the Lands Tribunal had introduced a pilot scheme to streamline the processing of building management cases. The aims of the Pilot Scheme are to streamline the processing of building management cases and to encourage parties involved in or considering civil legal action to attempt to resolve their differences by mediation, so that such cases can be disposed of in an efficient and expeditious manner. A Building Management Mediation Co-ordinator's Office (BMMCO) has been set up in the Lands Tribunal [Address: Room 206-208, Lands Tribunal Building, 38 Gascoigne Road, Kowloon] since January 2008 to facilitate concerned parties seeking mediation on matters concerning building management. BMMCO mainly holds information sessions on mediation and help the litigants seek mediation to resolve their disputes in a more cost effective, timely and satisfactory manner. The Tribunal has adopted the measures in the Pilot Scheme, with some modifications, as standard practice. A Practice Direction was issued by the Tribunal after the Pilot Scheme ended on 30 June 2009. For details, please go to the Judiciary's website. 5. COMPULSORY SALE CASES 5. COMPULSORY SALE CASES A Practice Direction has also been issued to cover all Compulsory Sale Cases under the Lands (Compulsory Sale for Redevelopment) Ordinance, Cap. 545 ("the Compulsory Sale Ordinance"). This Practice Direction came into effect on 15 February 2011. Parties to Compulsory Sales Cases can approach the BMMCO for information on mediation. For details, please go to the Judiciary's website. 6. PRACTICE DIRECTION 15.10: FAMILY MEDIATION 6. PRACTICE DIRECTION 15.10: FAMILY MEDIATION In 2000, a pilot scheme for family mediation was launched by the Judiciary. A Mediation Co-ordinator's Office was set up within the Family Court building [Address: Room 113-116, Wan Chai Law Courts Building] to assist in implementing the pilot scheme. The Mediation Co-ordinator provides information sessions on family mediation and generally assists couples seeking mediation to help resolve their problems in a non-adversarial way. The purpose of PD 15.10 is to prescribe (after the expiry of the pilot scheme for family mediation on 31st July 2003) the procedure to be followed by the petitioner, the respondent, the applicant or their legal

representatives, when instituting matrimonial proceedings. It also prescribes the format of the report to be provided by the Mediation Co-ordinator on the outcome of any information sessions held during family mediation. See also: Family, Matrimonial and Cohabitation: Resolution methods other than divorce - Q2 ; Family, Matrimonial and Cohabitation: Resolution methods other than divorce - Q3 For details, please go to the Judiciary's website. 7. PRACTICE DIRECTION 6.1: CONSTRUCTION AND ARBITRATION LIST 7. PRACTICE DIRECTION 6.1: CONSTRUCTION AND ARBITRATION LIST Parties in construction cases are encouraged to attempt mediation as a possible cost-effective means of resolving disputes. Like PD 31, when a party was engaged in mediation up to the minimum level of expected participation agreed by the parties or as determined by the court, and has reasonable explanation for non-participation, he should not suffer any adverse court order. （Practice Direction 6.1） For details, please go to the Judiciary's website. IV. RELATED WEBSITES IV. RELATED WEBSITES Hong Kong International Arbitration Centre Hong Kong Judiciary Department of Justice Legal Aid Department Hong Kong Bar Association The Law Society of Hong Kong Joint Mediation Helpline Office Limited 1. WHAT IS ALTERNATIVE DISPUTE RESOLUTION (ADR)? 1. WHAT IS ALTERNATIVE DISPUTE RESOLUTION (ADR)? Given that the cost of litigation is normally high, the Hong Kong judicial system has provided some other means of dispute resolution in the form of ADR that seek to minimize the costs of dispute resolution by avoiding expensive court costs. Alternative Dispute Resolution is a dispute resolution process whereby the disagreeing parties can come to an agreement short of litigation. The idea is that using ADR can minimize the time and costs involved in litigation. The most common forms of ADR are arbitration and mediation. Arbitration Arbitration is a legal process which results in the arbitrator(s), instead of a court judge, issuing an award to the aggrieved party. Arbitration awards are final and binding on the parties involved and the parties can only challenge these awards in very exceptional circumstances. An arbitration award has a status similar to a court judgment and is enforceable in a similar manner. Arbitration awards made in Hong Kong are enforceable through the courts of most of the world's trading nations. Arbitration is a binding form of dispute resolution, equivalent to litigation in the courts, and is entirely distinct from the various forms of non-binding dispute resolution such as negotiation, mediation, or non-binding determinations by experts. For an arbitration to take place, the disputing parties must agree to take their dispute to arbitration. In practice, this agreement has often been made before any dispute arises as companies will often include arbitration clauses in their various business contracts. By signing a contract with an arbitration clause in it, the parties are agreeing that any dispute arising from the contract will not be heard by a court, but will instead be heard by a private individual or a panel of several private individuals. If the parties have agreed to arbitration, they will generally have to proceed with an arbitration rather than litigation since courts will normally force the parties to honour their agreement to arbitrate. You may also refer to Hong Kong Legal System. Mediation Mediation involves the appointment of a third party to help disputing parties reach a settlement. The mediator is not given any power to impose (or force) a settlement. The mediator will encourage the parties to reach an agreement during mediation so that the parties will not have one imposed upon them by an arbitrator or a judge. In contrast to an arbitrator, a mediator will attempt to bring the parties to a mutually accepted settlement. A party is not legally required to accept the terms of a settlement proposed in a mediation. A mediation settlement takes effect as an agreement, rather than as an immediately enforceable award. You may also refer to Hong Kong Legal System. 2. WHAT FORM OF ADR SHOULD BE ADOPTED? 2. WHAT FORM OF ADR SHOULD BE ADOPTED? The parties should first refer to the terms in their contracts (i.e. the contract(s) that are providing the subject matter of their disputes). In most commercial contracts (e.g. construction, insurance), there will normally be an arbitration clause stating that when there are disputes arising from the contract, the parties should refer to arbitration before instituting legal proceedings. The parties are therefore bound by their contracts to go for arbitration before commencing any civil action in Court. [see: Introduction - Arbitration] Although mediation is the ADR recommended by the Judiciary, the parties are free to choose either arbitration or mediation to resolve their dispute.

No party shall be compelled to go to mediation as it is purely voluntary. If the parties chose to go for arbitration, the award made by the arbitrator(s) would be final and binding on the parties. On the contrary, a mediator would not impose a settlement. It is entirely for the parties to decide whether to settle and if so on what terms. A settlement after mediation is an agreement rather than an enforceable award. 3. WHERE DO I FIND ARBITRATORS OR MEDIATORS? 3. WHERE DO I FIND ARBITRATORS OR MEDIATORS? There are a number of organizations in Hong Kong which provide lists of arbitrators and mediators. The major providers are: the Hong Kong Bar Association, the Law Society of Hong Kong and the Hong Kong International Arbitration Centre (“HKIAC”). The parties have to agree to appoint the same arbitrator or mediator before the arbitration or mediation can commence. In ad hoc proceedings, the HKIAC is authorized to carry out two important functions in relation to an arbitration: HKIAC may appoint arbitrators or umpires where the parties have failed to agree or have not designated an appointing authority or the designated appointing authority fails to carry out its function. HKIAC may determine whether a tribunal of one or three arbitrators should consider a dispute under the international (UNCITRAL Model Law) regime. (Where an arbitration falls within the domestic regime, unless the parties have agreed otherwise there shall be only one arbitrator). Mediation, however, is a voluntary process and no party can be forced to go to mediation and no party can be forced to appoint a particular mediator. 4. DO I NEED LEGAL REPRESENTATIONS IN ARBITRATION OR MEDIATION? 4. DO I NEED LEGAL REPRESENTATIONS IN ARBITRATION OR MEDIATION? Just like any Civil Proceedings in Hong Kong, a party can represent himself or herself in Arbitration or Mediation if they cannot afford, or do not wish to have, legal representation. However, a party may have professional legal representation if they want to and can afford it. Generally speaking, legal representation is recommended and is likely to be helpful if the case involves points of law that the party does not fully understand, or is complicated. The Judiciary’s Mediation Information Office provides useful information on mediation. For details, please go to http://mediation.judiciary.gov.hk. The Joint Mediation Helpline Office Ltd. (“the JMHO”), a non-profit-making organization jointly founded by the Hong Kong Mediation Council, the Hong Kong Bar Association, the Law Society of Hong Kong, the Chartered Institute of Arbitrators (East Asia Branch), the Hong Kong Institute of Arbitrators, the Hong Kong Institute of Architects, the Hong Kong Institute of Surveyors and the Hong Kong Mediation Centre, also provides useful information to the general public. (http://www.jointmediationhelpline.org.hk)