Mediation, Legal Certainty and Regional Connectivity

Author: Edward LIU

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Mediation and the Practical Meaning of Legal Certainty

Cross-border trade and investment depend on legal certainty. That much is obvious. Parties need to know that their rights and obligations can be identified, interpreted and, where necessary, enforced. They need a legal environment in which contracts are taken seriously, outcomes are broadly predictable and dispute-resolution mechanisms are credible.

But in practice, legal certainty does more work than that. It is not tested only when a contract is negotiated, or when a court or tribunal is eventually asked to decide who was right and who was wrong. It is tested much earlier, and often under pressure: when a commercial relationship starts to come under strain and the parties need to decide, sometimes quickly, how to contain disruption, preserve value and manage risk across borders. At that point, certainty is not just a matter of legal analysis. It is also a question of whether the legal system, viewed as a whole, offers tools that are capable of responding to commercial reality as it unfolds.

That is where mediation deserves a more central place in the discussion. It is

still sometimes described as an “alternative” to formal dispute resolution, as though it sits outside the legal framework proper. That description is too limited. In many areas of trade and investment, mediation is better understood as part of the legal infrastructure that allows legal certainty to function in practice. It does not replace law, and it does not reduce the importance of adjudication. What it does is address a set of commercial needs that adjudication, by its nature, cannot always meet in sufficient time.

When Legal Rights Meet Commercial Pressure

This point becomes clearer when one starts not with legal theory, but with the reality of a live dispute. Once a transaction has gone off course, parties usually want to know more than who will ultimately prevail. A buyer wants to know whether cargo can be released. A contractor wants to know whether a project can continue without further delay. A lender wants to know whether performance can be stabilised. A supplier wants to know whether payment can be secured without bringing the wider relationship to an end. In each of these cases, legal rights remain central. But the immediate problem is not exhausted by the question of liability. The parties need a process capable of dealing with forward-looking commercial questions while the merits remain contested.

That distinction is especially important in sectors where disputes arise against a backdrop of continuing performance. Shipping is an obvious example. Delay, damage, non-payment or non-delivery may generate claims under a chain of contracts involving sellers, buyers, charterers, owners, carriers, insurers and financiers. Each participant may have a legally arguable position. Yet if the matter is left entirely to formal determination, the commercial consequences may deepen long before any decision is reached. Storage charges accumulate, financing windows narrow, substitute arrangements become more expensive, and working relationships harden into prolonged hostility. Much the same is true of infrastructure, energy and investment-related disputes, where a disagreement may affect not only the immediate parties but also subcontractors, lenders, public authorities and future project phases.

In that kind of setting, mediation serves a practical function closely tied to legal certainty, even if it is not always described in those terms. It gives parties a

structured way of asking what can be done now, rather than only who will prevail later. Can payment be made in stages without conceding liability? Can security be offered on a temporary basis? Can part of a claim be parked while the wider relationship continues? Can the dispute be narrowed sufficiently to prevent broader operational damage? A court or tribunal may eventually determine legal rights with precision. Mediation may help ensure that, by the time that happens, there is still something commercially meaningful left to protect.

Mediation as Strategy, Not Concession

Seen in this way, mediation is not a soft substitute for legal analysis. It operates in the shadow of legal rights, and indeed depends on them. Parties negotiate differently when they have a realistic view of their contractual position, procedural risks and likely enforcement outcomes. The law sets the parameters within which serious mediation takes place. But because mediation is not confined to awarding damages or declaring rights, it can produce outcomes more closely calibrated to business needs. In cross-border trade and investment, that matters. Regional connectivity is not sustained by legal doctrine alone. It also depends on mechanisms that allow commercial actors to manage friction without turning every serious disagreement into a destructive contest of endurance.

The question of timing follows naturally from this. In practice, mediation is still too often left until after positions have hardened. By that stage, substantial cost may already have been incurred, internal narratives may have become entrenched, and correspondence may have made pragmatic movement more difficult. Mediation can still be effective in those circumstances, but it is often working against momentum that could have been avoided. A more useful way of thinking about mediation is as part of dispute-risk management rather than a late-stage concession once all else has failed.

That does not mean every dispute should be mediated immediately, still less that parties should compromise for the sake of compromise. Some cases require urgent interim relief, determinations of principle, or the exercise of coercive powers that a consensual process cannot provide. Others may involve fraud, sanctions, insolvency concerns or asymmetries of information that make early mediation unattractive or unrealistic. Even so, the tendency to treat mediation as

a sign of weakness remains misplaced. In many commercial contexts, an invitation to mediate reflects not a lack of confidence but the opposite: a sufficiently clear-eyed assessment of legal and commercial risk to recognise that unmanaged escalation may be more damaging than controlled engagement.

For advisers, that calls for a slightly different habit of mind. The task is not simply to identify the strongest legal case, but to help clients use legal rights intelligently in support of broader commercial objectives. Sometimes that will mean pressing hard in formal proceedings. Sometimes it will mean using the prospect of formal proceedings to create the conditions for meaningful negotiation. Often it will involve both. The point is not that mediation displaces adjudication, but that effective dispute strategy should leave room for both where appropriate. In cross-border matters, especially those involving ongoing projects or repeated dealings, value may lie not in immediate capitulation or total victory, but in preserving optionality.

Mediation as Strategy, Not Concession

There is, however, a risk of overstating mediation's virtues if one speaks only of flexibility and commercial pragmatism. Flexibility is an advantage, but not a guarantee. In complex international disputes, mediation is useful only to the extent that the process is trusted and the outcome can be implemented. Those are practical matters, but they go to the heart of the process.

The first is authority. Mediation has limited value if those attending cannot make decisions or secure approvals within a workable time frame. This is a familiar issue where settlement authority is dispersed across regional offices, boards, insurers, lenders or state-linked entities. A day spent exploring possibilities may still be worthwhile, but unless the process is designed with authority structures in mind, even productive discussions may lead nowhere. One of the least dramatic but most important features of a successful mediation is that the right people are either in the room or immediately reachable.

The second is trust in the framework itself. Cross-border disputes bring with them differences in legal culture, business practice and internal decision-making. An offer to mediate may be read in one jurisdiction as pragmatic and commercially mature, and in another as a sign that something is wrong.

Expectations about confidentiality, disclosure, the role of the mediator and the acceptable degree of evaluative intervention may differ significantly. These differences do not make mediation less attractive. But they do mean that the process must be designed and explained with some care. A mediator who understands those dynamics, and an institutional framework that gives parties confidence in neutrality and procedure, can materially improve the prospects of meaningful engagement.

The third is implementation. Settlement in principle is only the beginning. In substantial trade and investment disputes, mediated outcomes must be translated into documentation that works: payment mechanics, conditions precedent, security arrangements, releases, regulatory approvals, tax implications, continuing obligations and dispute-resolution clauses for any future disagreement over performance. If these matters are left vague in the interest of preserving momentum, the resulting agreement may do little more than postpone further conflict. Here again, mediation depends not on informality alone, but on disciplined legal work. A commercially imaginative outcome is of limited value if it cannot be carried through in practice.

Institutions and the Architecture of Trust

This also helps explain why institutions matter. They do more than administer cases or appoint neutrals. In the best cases, they provide a credible entry point into dialogue, especially where no prior agreement to mediate exists or where trust between the parties is thin. In cross-border disputes, the hardest step is sometimes not settlement itself but getting the parties into a process that each considers legitimate enough to try.

The establishment of the International Organization for Mediation (IOMed) is significant in this regard. IOMed was inaugurated in Hong Kong on 20 October 2025 as the first treaty-based intergovernmental organisation devoted exclusively to mediation. Its significance lies not only in its institutional novelty but in what it suggests about mediation's evolving place within the international dispute-resolution landscape. As recently noted by Professor Teresa Cheng at IOMed 1st Anniversary Cerebration on 20 October 2026, the Secretary General of IOMed, matters have so far been successfully administered under IOMed's auspices include a maritime dispute involving Chinese and Singaporean parties and an

infrastructure construction dispute concerning a project in Malaysia. Particularly striking is her description of "pre-mediation mediation", which is the idea that an institution may play a role not merely in conducting mediation, but in helping parties reach the point where mediation becomes possible at all.

That phrase captures something practitioners will immediately recognise. In many disputes, especially cross-border ones, the initial difficulty is procedural and psychological rather than substantive. Parties may not trust the other side's motives, may be reluctant to make the first move, or may need a neutral framework within which engagement can occur without any perceived loss of position. An institution capable of providing that framework performs a function that is highly relevant to legal certainty. It reduces the chances that escalation becomes the default simply because no credible mechanism exists for beginning a serious conversation.

Mediation, Connectivity and Systemic Resilience

From the standpoint of regional connectivity, this is more than a matter of dispute-resolution technique. Connectivity is not tested when transactions proceed smoothly. It is tested when supply chains are disrupted, projects encounter difficulty, counterparties disagree and pressure begins to spread through contractual networks. In those moments, the resilience of the legal environment depends in part on whether parties have access to processes that can contain disruption without unnecessary destruction of value. Mediation, supported by credible institutions and used with discipline, contributes to that resilience.

None of this is to suggest that mediation is the answer to every dispute. It is not. Nor should it be insulated from sober assessment. Some cases will require adjudication from the outset. Others will settle only after formal proceedings have clarified the legal terrain. But it is a mistake to think of mediation as peripheral to serious commercial dispute management. In many cases, it is one of the means by which legal certainty becomes economically meaningful.

That, ultimately, is the broader point. Legal certainty is not only about the existence of rights or the availability of final remedies. It is also about whether the legal system equips parties to deal with disagreement in a way that is

commercially rational, procedurally credible and practically effective. In cross-border trade and investment, where delay and escalation can themselves become sources of serious loss, that function should not be underestimated.

Mediation belongs within that picture. It does not stand outside the legal order as a softer or secondary option. Properly understood, it is part of the infrastructure that enables legal certainty to work in practice: not by displacing rights, but by helping parties protect value while those rights remain in issue. In a period in which regional connectivity is both economically essential and legally complex, that is not a marginal role. It is a substantial one.

文章作者



刘 洋 (Edward Liu)

合伙人 Partner

edwardliu@haiwen-law.com

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