

# *Building a Common Language*

Mediation & ADR in the US

## 和为贵

美国调解与替代诉讼纠纷解决方案

(汉英对照)

[美]詹姆斯·E.麦圭尔 陈子豪 吴瑞卿 著

James E. McGuire Chi-Ho Chan Sonia Ng



附汉英对照专业词汇

(with a bilingual glossary)

法律出版社

LAW PRESS · CHINA

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## 图书在版编目(CIP)数据

和为贵:美国调解与替代诉讼纠纷解决方案:汉英对照 / (美)麦圭尔(McGuire J. E.), 陈子豪, 吴瑞卿著. —北京:法律出版社, 2011. 3

ISBN 978-7-5118-1881-2

I. ①和… II. ①麦…②陈…③吴… III. ①调解(诉讼法)—司法制度—美国—汉、英 IV. ①D971.25

中国版本图书馆 CIP 数据核字(2011)第 028968 号

和为贵:

美国调解与替代诉讼纠纷解决方案(汉英对照)

[美]詹姆斯·E. 麦圭尔、陈子豪、吴瑞卿 著

编辑统筹 大众出版社

策划编辑 林 喆

责任编辑 林 喆

装帧设计 乔智炜

© 法律出版社·中国

出版 法律出版社

开本 A5

总发行 中国法律图书有限公司

印张 5

经销 新华书店

字数 89千

印刷 北京中科印刷有限公司

版本 2011年3月第1版

责任印制 沙 磊

印次 2011年3月第1次印刷

法律出版社/北京市丰台区莲花池西里7号(100073)

电子邮件/info@lawpress.com.cn

销售热线/010-63939792/9779

网址/www.lawpress.com.cn

咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里7号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782

西安分公司/029-85388843

重庆公司/023-65382816/2908

上海公司/021-62071010/1636

北京分公司/010-62534456

深圳公司/0755-83072995

书号:ISBN 978-7-5118-1881-2

定价:18.00元

(如有缺页或倒装,中国法律图书有限公司负责退换)

## Preface

For over ten years, American judges from the Massachusetts Judges Conference, a private association of Massachusetts active and retired state judges, and the McCormack Graduate School of Policy and Global Studies, a public policy research and training center which is part of the University of Massachusetts—a 150 – year old, major American public state university—have worked with their Chinese counterparts in courts and law schools throughout China to share experiences, explore areas of collaboration and exchange, and help innovative ideas to become reality. Court-connected alternative dispute resolution, or ADR, and in particular mediation, has grown to be a central component of this exchange.

Mediation is a preferred method of resolving disputes and managing conflict in most countries around the world. China is no exception, and under the leadership of China's Supreme People's Court as set out in its Third Five-Year Reform Outline for the People's Courts (2009 – 2013), Chinese courts are expanding their use and institutionalization of court-connected mediation. The Massachusetts Judges Conference and the University of Massachusetts

have been pleased and honored to be able to serve as a resource for Chinese courts as they undertake this formidable task.

Very early on, we realized that several concepts and terms in the ADR field are not easily translatable. The industry-specific jargon led to challenges during simple conversations and posed an even greater obstacle to information exchange at legal roundtables, workshops, and trainings. This volume—the first ever English-Chinese ADR Glossary and Handbook—was developed and co-written by one of the United States' foremost mediators, James E. McGuire, and legal interpreters Sonia Ng and Chi-ho Chan, all experienced professionals deeply involved in our US/Chinese judicial program.

Mr. McGuire has specialized in dispute resolution since the late 1980s, and has extensive experience in all aspects of alternative dispute resolution including mediation and arbitration. He has personally mediated over 150 cases and served as an arbitrator in over 100 cases, and his experience and expertise extend to a wide variety of disputes. Mr. McGuire also trains attorneys in negotiation skills and effective representation of parties in mediation. He is a lecturer at Boston University School of Law and the Harvard Law School Program for Instruction to Lawyers Mediation Seminar. Dr. Sonia Ng and Mr. Chi-ho Chan are both State Department contract interpreters; Dr. Ng has supported and specialized in legal exchanges for over 15 years. The United States Agency for International

Development ( USAID ) and the U. S. State Department has graciously provided funding to make this volume broadly available for use.

Of course, there is no “one size fits all” solution or approach to ADR – dispute settlement is influenced not only by legal systems and structures, but by culture, values, tradition, and history. We hope that this Glossary and Handbook will serve as a useful reference in the ongoing exchange of ideas between the US and China.

Hon. Wendie Gershengorn

Hon. Peter Anderson (Ret.)

Adria Warren, Esq.

February 8, 2011

## 序 言

在过去十多年,马萨诸塞州法官协会与马萨诸塞州大学迈科马克政策及全球研究院作为伙伴,与中国不同的法院和法学院合作在中国进行法律交流,就共同关注的主题分享经验与交流,探索有助双方专业实务的创新理念。与法院有关的替代诉讼纠纷解决方案(ADR),尤其是调解,是交流的核心组成部分。马萨诸塞州法官协会是由现职和退休麻州(“麻州”为“马萨诸塞州”简称)法官组成的民间组织,迈科马克政策及全球研究院是拥有150年历史的州立马萨诸塞州大学属下的公共政策教研中心。

调解现在已被全球大多数国家视为解决纠纷和控制冲突的优先方法,中国也不例外。根据中国第三个五年(2009—2013)改革中关于人民法院部分的纲领,在中国最高人民法院的领导下,中国法院正在扩大法院解调的使用和制度化;这是十分艰巨的工作。麻州法官协会与麻州大学能够在这主题上为中国同业提供一些参考资料,深感荣幸。

从一开始我们已体会到替代诉讼纠纷解决方案当中一些概念和名词是很难翻译的。在普通交谈中,专门术语是翻译的挑战;在法律专业的圆桌讨论、小组工作坊和培训中信息交流,障碍更大。这是第一本关于替代诉讼纠纷解决方案的中英对照词汇

和手册,作者詹姆斯·麦圭尔先生是美国首屈一指的调解人,吴瑞卿博士和陈子豪先生都是长期参与我们中美司法交流项目、经验丰富的翻译员。

麦圭尔先生早在 20 世纪 80 年代已经是解决纠纷的专家,他在替代诉讼纠纷解决各方面的经验极其丰富,包括调解和仲裁。他曾主持超过 150 宗调解,亦曾为过百宗案件担任仲裁员;在解决纠纷的领域里,他的经验和专长既全面且深入。吴瑞卿博士与陈子豪先生均为美国国务院的约聘翻译员;吴博士专注法律交流和翻译工作超过 15 年。本书更蒙美国国际开发署和美国国务院的资助,得以出版和广泛流传。

当然,世界上没有“一通百通”的替代诉讼纠纷解决方案或方式—纠纷的和解不但受法律制度和结构的影响,也涉及文化、价值、传统和历史。我们期盼这本词汇手册在未来中美不断的交流中,可以成为有用的参考资料。

温迪·格申冈法官

彼得·安德森法官(荣休)

阿德瑞阿·沃伦律师

2011 年 2 月 8 日



目  
录  
Contents

- 001 **Preface**  
序言
- 001 **Introduction and Overview**  
导言和概览
- 005 **PART I 甲部**  
**MEDIATION AND ADR IN THE UNITED STATES**  
美国调解与替代诉讼纠纷解决方案
- 007 **Chapter 1 A Brief History of the Development of  
Mediation and ADR in the US**  
第一章 美国调解与替代诉讼纠纷解决方案简要发展史
- 015 **Chapter 2 The ADR Spectrum**  
第二章 替代诉讼纠纷解决方案范围

015	I . Placing Mediation in the ADR Spectrum
	替代诉讼纠纷解决方案中调解之定位
022	II . ADR Spectrum
	替代诉讼纠纷解决方案的范围
023	III . Key Elements of the Mediation Process
	调解的主要元素
030	<b>Chapter 3 The Mediation Process</b>
	<b>第三章 调解程序阐释</b>
030	I . Convening the Process
	开启程序
031	A. Prior Agreement to Mediate
	预先约定调解
032	B. Agreement to Mediate Current Dispute
	纠纷出现后约定调解
035	C. Order to Mediate
	法院规定进行调解
037	D. Selecting the Mediator
	选择调解员
041	II . Agreement to Mediate
	调解协议
044	III . Pre-mediation Conference

	<b>调解前会议</b>
045	A. Scheduling the Mediation 安排调解
047	B. Identifying Who will Attend the Mediation 确定参加调解人员
048	C. Information Exchange 交换信息
049	<b>IV. The Mediation Process</b> <b>调解程序</b>
049	A. Introductions and Ground Rules 各方介绍与设置基本原则
061	B. Initial Joint Presentations 首次各方陈述
065	C. Private Party Caucus 单方会谈
071	D. Generating Options 提出解决方案
074	E. Conveying Offers 转达各方提议
080	F. Dealing with Impasse 处理僵局
081	1. Analyze why there is an apparent impasse

- 分析为何出现表面僵局
- 084 2. Techniques for modifying the perspective of the parties  
改变双方看法的策略
- 086 3. Techniques for starting stalled negotiations  
重启僵局谈判的策略
- 087 4. Rearrange the players  
重新安排参与人角色
- 089 5. Saving face  
保留面子
- 092 6. Evaluative techniques  
评估型技巧
- 098 7. Mediator's proposal  
调解员的提议
- 100 8. Scheduling another mediation session  
另行安排调解会议
- 104 9. Discussing alternative dispute resolution processes  
讨论其他替代诉讼纠纷解决方案
- 109 G. Reaching Closure: Drafting the Settlement Agreement  
结束调解:起草和解协议

117 **PART II 乙部**

**ABC OF ADR GLOSSARY**

**替代诉讼纠纷解决方案 (ADR) 基本词汇**

## Introduction and Overview <sup>①</sup>

### 导言和概览 <sup>[1]</sup>

Mediation is simple. Parties to a dispute ask a third party to help them resolve the dispute. They meet in an informal, confidential setting. The parties discuss the history of the dispute and their interests in resolving it. The mediator listens to both sides, may meet separately with each side, discusses options and may convey

<sup>①</sup> This is an overview of mediation in the United States. Given the complexity and diversity of the United States, nearly every sentence could be qualified with words like “usually” or “generally” or “in many cases.” The reader will understand that every “fact” will have at least one exception. Except where context specifically requires some qualifier or makes an explicit comparison, I have omitted such phrases. I favor clarity over precision. A similar broad disclaimer is appropriate when discussing the mediation process; there are many variants. The most widely-used is the facilitative, problem-solving method. Mediation in this article refers generally to this style of mediation.

[1] 本书是对美国调解体制的概观。考虑到美国的复杂性和多样性,几乎每个句子都可能使用“通常”、“基本上”或是“大多数情况下”的用语来作限定描述。读者会理解到每个“事实”都可能存在至少一项例外。文本中除了特别需要限定描述或明确对比的地方,我都会将此类限定描述加以省略。相较之下,我倾向说明清楚胜于说明精确。在讨论调解程序时,适合以类似“调解有很多变种”的省略方法加以说明。而众多变种中,最常用的则是以斡旋来解决问题的方法。本书所述调解多指此类方法。

proposals from one party to another. The mediator may ask questions and, upon request, may even offer an opinion. The mediator has no power to decide any disputed fact or legal principle. The mediator has no power to order a settlement. In most cases, after this process, the parties reach an agreement. In most cases, the agreement reached in mediation is durable and self-executing, requiring no further intervention by a court or a governmental agency.

调解可以很简单,由争议双方提请第三方协助解决纠纷。大家在非正式的场合会面,但是过程保密。争议双方论述纠纷来由以及各自涉及纠纷的利害得失。调解员听取双方陈述,他可以与各方单独会面,探讨各种可能性,并可以将一方的提议转达给另一方。调解员可以提问,受请时甚至可以提供意见。然而,调解员无权对任何纠纷的事实真伪或适用的法律原则作出裁决,也无权强制和解。在多数情况下,调解后双方所达成的协议是持久的,并自行执行,毋须法院或政府机关介入。

Mediation is complex. What makes a successful mediation? No one definitive answer exists. There are many theories and many approaches, but no clear consensus. No one knows what qualifications should be required of a mediator. Courts have imposed qualifications, but there is no consensus that these are necessary or even useful. No one knows how many mediators there are in the United States or in any one state. The data is fragmentary. No one knows whether mediation is efficient—that it resolves more disputes

at less cost than any other process. There is no consensus that mediation should be measured by notions of efficiency. No one knows whether mediation is sustainable in the way it practiced today in the United States. Will it still be the dispute resolution procedure of choice 25 or 50 years from now?

调解也可能很复杂,对如何方可取得成功的调解并无一定的答案。理论和方法虽然存在不少,却并不统一。没有人知道调解员应当具备什么资格,法院对其资格有一些硬性要求,但是这些资格是否必要,甚至是否有用,皆无定论。没有人知道在全美或各个州究竟有多少调解员,数据零零散散。也没有人知道调解是否高效,即调解是否能够比其他程序解决更多纠纷,费用也更低廉,对调解是否应当使用效率的概念来衡量无统一看法,美国现行的调解制度是否能够持续也无人知晓。20年,或者50年之后,调解是否仍适用于解决纠纷呢?

Mediation is magic. Despite the open questions, it seems that most people who participate in mediation like the experience and would recommend the process to their friends. This is true whether they liked the settlement, whether they are plaintiff or defendant, large corporation and private individual. We also know that mediation has emerged as a preferred method of resolving disputes and managing conflict in most countries around the world.

调解是神奇的。虽然在提请调解初期,结果如何尚是个未知数,但大多数经历过调解的人仍旧对过程抱持肯定,愿意向外推

荐这一程序。无论双方是否对结果满意,亦无论身为原告或被告,是大公司还是小个体,肯定态度皆然。在全球大多数国家,调解也开始逐渐变成解决纠纷和控制冲突所偏好的方法。

This article provides a basic framework for understanding mediation as it is practiced in the United States in the early part of the 21<sup>st</sup> Century. We will start by placing mediation on the dispute resolution map, comparing it generally to other methods of resolving disputes. The article then gives a general description of the mediation process and some common principles of mediation. The primary focus will be on mediation of civil disputes, both court-connected and those resolved by private party mediators.

本书提供一个基本架构来协助读者了解美国在 21 世纪初期如何实行调解制度,我们将从与其他众多纠纷解决方法相比的情况下,调解如何定位的角度出发,再概述调解程序及一些常见的调解原则。本书将重点论述民事纠纷中的调解,包括法院参与的调解以及私人组织的调解。



PART I

甲部

MEDIATION AND ADR IN THE UNITED STATES

美国调解与替代诉讼纠纷解决方案

By

James McGuire

詹姆斯·麦圭尔 著

Translated by

Chi-Ho Chan

陈子豪 译