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THE VIEW
RICHARD HARRIS

High time for arbitration

As the student protests drag on in HK, both sides should resort to 'jaw' rather than 'war' to find common ground and resolve their disputes

Winston Churchill said at the dawn of the cold war: "It is better to jaw-jaw than war-war."

Nowhere has this been more evident than in Hong Kong in the standoff between the government and the protesting students. The time to a solution has been much extended because wise heads on both sides have generally prevailed – with a few exceptions – by the desire to talk rather than to fight. There have been tentative steps to try to find common ground rather than falling prey to holding one's ground. This gentler form of dispute resolution is appropriate in that it has been the Arbitration Week, organised by the Hong Kong International Arbitration Centre, which in turn is keenly supported by the government.

Typically, in the resolution of disputes, local protagonists have been quick to say "see you in court".

Hong Kong's courts are going through an important time with the criminal trial of one former top government official and the loss of a defamation action by a current top government official. The students are partially revolting to maintain our independent judiciary. Simply, that means you can sue the government and, if your case is meritorious, you will win.

But court actions are expensive, public and lengthy. The alternative is jaw-jaw, which can happen through mediation or arbitration.

Mediation is the kind of discussion that the government needs to have with the students.

A trusted independent mediator speaks to the disputing parties, both together and individually, to try to find common ground.

For instance, the students are calling for the chief executive to be elected by universal suffrage; a topic on which the government will not budge. An independent mediator might find that both sides accept a core issue, which is that the students want some assurance that Hong Kong freedoms (like using Facebook) will be preserved.

The government might be willing to commit to a form of assurance to get everyone back to work. It is a voluntary process and it provides a chance for cool heads to see some common ground.

Arbitration uses a judicial technique to solve disputes where both sides agree to have their case heard in front of an independent arbitrator.

In a complex dispute, the parties can select a technical expert with relevant expertise to act as an arbitrator, or if the arbitrator has no knowledge of how derivatives work, as an expert witness. In some cases, three arbitrators might be used to provide the panel with needed expertise.

The government has been a big supporter of arbitration, leading to the establishment of the independent, not-for-profit arbitration centre, partly because it puts less pressure on the courts to solve disputes.

Arbitration can result in a quicker and cheaper settlement

for technical cases rather than facing a judge in court who is not a specialist in the field. For instance, the centre recently administered a dispute between a bank and its client over US\$50 million of derivative investments that went the wrong way.

Arbitration is also more confidential than the glare of a court action where the dirty linen gets washed to the amusement and entertainment



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of the general public. Published court papers might also reveal commercial secrets to the world and encourage further legal action.

A great advantage that arbitration has over other methods of dispute resolution is that not only can it be enforced by the full power of the courts, but also by international treaty. Arbitral awards are enforceable in 150 countries, including China.

More than 50 per cent of the disputes administered by the arbitration centre in Hong Kong involved mainland parties last year. In one case, a company that had defaulted on loans from an Asian bank to finance a building in Beijing refused to sell the property to pay its debt.

The case was taken to arbitration and an award was given in favour of the bank for a sum of US\$430 million. The proceedings took just two months.

Hong Kong has long been known as a place where independent judges in court will balance the scales of justice; neither in favour of rich or poor, powerful or weak, or big or small, but in accordance with the law of the city.

It is perhaps our biggest business asset and a major generator of confidence in our economy. The respect and credibility that Hong Kong has gained in the global business community in its handling of the umbrella revolution shows it is much better to "jaw" to find common ground than "war".

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