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The Safeguarding of Children's Rights through Collaborative Practice in Resolving Disputes After Parental Separation

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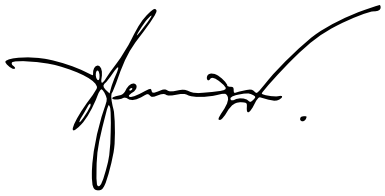

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Acknowledgements

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Executive Summary

Family is a fundamental and integral group of society, unfortunately it is not immune from crises. When parents decide to separate, it is common that the children are unseen and unheard throughout the dispute resolution. They are rarely placed at the centre of the decision-making process, but at the discretion of the parents, lawyers, social workers, and judges. They are usually perceived as "human becomings" instead of "human beings", who are able to actively participate in society.

The research question of this thesis is how a child rights-based model of collaborative practice should look like. It requires the thesis to first explore the rights of these children after parental divorce or separation. It concludes that they are primarily entitled to 3 rights pursuant to Article 9 of the United Nations Convention on the Rights of the Child. These children have the right to co-parenting, insofar as it is in their best interests, which should be determined in a way that the children have exercised their procedural right to participate. These rights are explained below.

First, these children have the right to be cared for by both parents. The parent-child relationship should be maintained and restored proactively. Second, they have the right to have their best interests regarded as a primary consideration in the decision-making process. Although the indeterminacy of the best interests principle has been problematic in implementation, its high degree of flexibility is championed in a less adversarial setting, especially when parents are willing to negotiate on the basis of co-parenting. Third, they have the right to participate, namely a right to audience and to have their views be given due weight according to their age and maturity in determining their best interests. As explained, the these rights are interdependent.

Premised on the legal framework based on international children's rights law, this thesis moves on to analyse the implementation of these children's rights through collaborative practice in resolving disputes after parental separation. Collaborative practice is a new form of alternative dispute resolution, whose distinguishing feature is an agreement among the parents that they are not going to resolve the dispute via litigation. If they do, the lawyers representing them are automatically disqualified from assisting them anymore. The parents have to start from square one, recruiting a completely new legal team in the pursuit of litigation. This theoretically gives incentives to the parties into negotiating an agreeable and realistic parenting plan.

There are 3 models of collaborative practice: the team model, the lawyers-only model, and the referral model. The team model assembles multi-disciplinary professionals such as child specialists, financial specialists, and divorce coaches as a team with the collaborative lawyers at the outset of the case. The lawyers-only model features a four-way meeting between the 2 parents and their respective collaborative lawyers. The referral model is also known as a hybrid model, where multi-disciplinary professionals are hired only when necessary.

The essence of collaborative practice ensures the parents' high degree of self-determinacy, therefore logically there is no set model of collaborative practice in any jurisdiction. However, the local cultural practices of each jurisdiction are interesting reference points in the construction of a child rights-based model of collaborative practice. Therefore, this thesis conducts a comparative analysis of collaborative practice in the contexts of 4 jurisdictions: the United States, England & Wales, Singapore, and Hong Kong. This thesis studies the legal context, social culture, and structure of the most popular collaborative practice model in these 4 jurisdictions. These elements are then evaluated in light of the 3 children's rights identified above.

The researcher finds that collaborative practice is child-centric but not child rights-based. The contingent protection of children's right to co-parenting and the best interests principle is postulated on a traditional,

paternalistic, and welfare-oriented perspective of the parents and collaborative practitioners. This makes the lawyers-only model particularly unaccommodating to children's right to participate. A child's voice can only be conveyed through a child specialist in a team model, or often, a referral model. However, there are also concerns about the cost and artificial nature of the involvement of some multi-disciplinary professionals.

Drawing threads from the above findings, this thesis proposes a new model of collaborative practice based on international children's rights law. In particular, this model sees children as a stakeholder, instead of an interest on the negotiation table. It confers children the procedural right to participate, but not the right to self-determination. It allows children to be represented by an adult of sufficiently close relationship, who volunteers to participate around the negotiation table, and has no conflict of interests with any relevant parties. It is a concept borrowed from the next-friend in litigation. It empowers the community in voicing out for children in a cost-effective manner.

Key Words

Collaborative practice; Children's rights; Divorce; Co-parenting; Alternative Dispute Resolution

Overview of Main Findings

This thesis has three main findings, adding new perspectives to the pre-existing knowledge of the relationship between children's rights after parental separation and the new alternative dispute resolution of collaborative practice.

First of all, this thesis is original as it designs a new model of collaborative practice based on international children's rights law. It serves as a starting point of discussions and debates in the community of collaborative practitioners in all jurisdictions in addition to those 4 examined in this thesis.

This thesis takes the novel approach of evaluating collaborative practice from the perspective of international children's rights law. Most of the present academic writings on this focus on the child's best interests but in a welfare-oriented viewpoint. This research adds depths to the analysis of the best interests principle, and especially the child's right to participate as an integral element embedded in the determination of child's best interests.

Second, this thesis is the first academic paper that exclusively dedicates to collaborative practice as an alternative dispute resolution in Hong Kong and Singapore, whose practices are still at their infancy: it is introduced in Hong Kong in 2010, and Singapore in 2013. In the past 5 to 8 years, no centralised data is collected. Therefore, a qualitative research on the perspectives of local collaborative practitioners there is especially invaluable.

In addition, the implementation of collaborative practice in Hong Kong and Singapore is comparatively analysed with those in England & Wales and the United States, which has introduced collaborative practice since 2006 and 1990 respectively. The wide *geographical* and extensive *temporal* reach is able to illustrate the evolution of the landscape of collaborative practice across the globe since its creation.

Third, this thesis contributes to the findings of co-parenting. As a recent social phenomenon, co-parenting is seldom evaluated in the light of the United Convention on the Rights of the Child, particularly reading Articles 9 and 18 in conjunction, and in the context of parental separation. This thesis provides a legal basis of co-parenting with an in-depth exploration of international legal jurisprudence, as well as an inter-disciplinary research on sociology and psychology.

Furthermore, the relationship between the phenomenon of co-parenting and related domestic legislations is thoroughly analysed among 4 common law jurisdictions: the United States, England & Wales, Hong Kong and Singapore. It finds that although the United States and England & Wales have explicit legislations that guarantee shared physical custody of the child, they have vastly different operations of the rule. The former applies the approximation rule, which gives sufficient room for a case-by-case analysis. The same outcome is achieved by Singapore, but without an explicit legal instrument in this regard. Singapore has adopted a child rights-based approach in creatively interpreting another legislation, the Women's Charter, into conferring the parents an obligation cooperate and collaborate.

To this end, Hong Kong, who also has no explicit laws that recognise co-parenting, experiences failure of law reform. Neither has the court there taken a child rights-based approach in honouring children's right to co-parenting. The binary mindset of parents in custody proceedings is long-standing in Hong Kong, but this is also found in England & Wales despite the legislations on co-parenting. This is because the law on shared residence is applied by the courts as a rule instead of exception, which encourages the strategic positioning of parents.

List of Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
ACHR	American Convention on Human Rights
ADR	Alternative dispute resolution
CRC	United Nations Convention on the Rights of the Child
CRC Committee	United Nations Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EW	England & Wales
HCCH	Hague Conference on Private International Law
HK	Hong Kong
HRC	United Nations Committee on Human Rights
IACP	International Academy of Collaborative Professionals
PA	Participation Agreement
UCLA	The Uniform Collaborative Divorce Law Rules and Act
US	The United States of America

1. Introduction

1.1. Background

One of the most widely ratified international treaties,[1] United Nations Convention on the Rights of the Child (hereinafter, "CRC"),[2] describes the concept of family as a "fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children".[3] Despite its "fundamental" and "natural" nature, no family is immune from crises. Parental divorce or separation is one of them.

Based on the statistics provided in the United Nations Demographic Yearbook 2016,[4] the divorce rate of each country can be calculated by dividing the number of divorces by the number of marriages per year.[5] In Europe, nuptiality is declining,[6] while there has been a steep divorce increase.[7] For example, the divorce rate in 2013 at Portugal is as high as 70%,[8] immediately followed by Denmark (69%),[9] Luxemburg (68%),[10] and Belgium (66%).[11] In these countries, around 7 out of 10 married couples (which include families with children) break up. In Asia, the divorce rate is 55% in Russia,[12] 40% in Hong

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1 196 State Parties have ratified, only except the United States, see United Nations, 1577 Treaty Series 3, Depository Notifications, UN Doc. C.N.147.1993.TREATIES-5, 1993; UN Doc. C.N.322.1995.TREATIES-7, 1995; see also (https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en), last accessed (10-07-2018).

2 UN General Assembly, Convention on the Rights of the Child, United Nations, 1577 Treaty Series 3, 1989, (hereinafter, "CRC").

3 Preamble, CRC, at para. 5.

4 UN, Department of Economic and Social Affairs, 2016 Demographic Yearbook, 67th Issue, UN Doc. ST/ESA/STAT/SER.R/46, 2017, (hereinafter, "UN, 2016 Demographic Yearbook").

5 J. Scott (Ed.), A Dictionary of Sociology, Oxford University Press, 4th ed., 2014.

6 Crude marriage rate in the 28 State Parties of Europe has dropped by half since 1965; see European Commission, Employment, Social Affairs & Inclusion Eurostat, *Short Analytical Web Note: Demography Report*, 2015, at 39, (hereinafter, "EC, Demography Report").

7 Ibid.

8 UN, 2016 Demographic Yearbook, Table 22, at 603: total number of marriages in Portugal in 2013 is 31,998; c.f. Table 24, at 659: total number of divorces in Portugal in 2013 is 22,525.

9 *Ibid, Table 22*, at 602: total number of marriages in Denmark in 2013 is 27,503; c.f. Table 24, at 658: total number of divorces in Denmark in 2013 is 18,875.

10 *Ibid*, Table 22, at 602: total number of marriages in Luxembourg in 2013 is 1,722; c.f. Table 24, at 659: total number of divorces in Luxembourg in 2013 is 1,163.

11 *Ibid*, Table 22, at 601: total number of marriages in Belgium in 2013 is 37,854; c.f. Table 24, at 658: total number of divorces in Belgium in 2013 is 24,872.

12 *Ibid*, Table 22, at 603: total number of marriages in Russia Federation in 2013 is 1,225,501; c.f. Table 24, at 659: total number of divorces in Russia Federation in 2013 is 667,971.

Kong,[13] 35% in Japan,[14] and 27% in Singapore.[15] In America, that of the United States is 40%.[16] On average, 1 out of 3 married couples or families face divorce in these countries. Whilst these numbers illustrate the multitude of divorce, they cannot reveal its magnitude, especially its impact on children.

As Hetherington reiterates, there is a "great diversity in children's responses" to divorce.[17] However, recent child psychology and development studies on the impact of family breakdown have revealed that children respond to it as early as 2 to 4 years *before* the parent's divorce.[18] The pre-divorce "temporal effect",[19] should not be downplayed. During this period, the heated parental conflict, emotional distress, and reduced parental contact are in fact more damaging to the children than that of post-divorce.[20] These children display a lower reading comprehension ability,[21] worse behaviour problems,[22] and higher likelihood of sleeping disorder, mood disorder and depression.[23] The impact of these escalates as time passes from divorce.[24] Therefore, an earlier closure of some marriages are in fact a *relief* to the children, since there are simply less parental conflict and/or contact with an abusive parent.[25] Indeed, both the parents and children of divorced families perceive "divorce" more positively than those from a "happy family", a phrase coined by society.[26]

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13 *Ibid*, Table 22, at 600: total number of marriages in Hong Kong in 2013 is 55,274; c.f. Table 24, at 657: total number of divorces in Hong Kong in 2013 is 22,271; see also Census and Statistics Department, Hong Kong Special Administrative Region ("HK"), *Marriage and Divorce Trends in Hong Kong, 1991 to 2016*, 2018 Hong Kong Monthly Digest of Statistics, at 1 and 15.

14 *Ibid*, Table 22, at 600: total number of marriages in Japan in 2013 is 660,613; c.f. Table 24, at 657: total number of divorces in Japan in 2013 is 231,853; see also Statistics Bureau, Ministry of Internal Affairs and Communications Japan, *Statistical Handbook of* Japan, 2017, available at: http://www.stat.go.jp/english/data/handbook/pdf/2017all.pdf#page=17, last accessed (10-07-2018), at 7 and 19.

15 *Ibid*, Table 22, at 601: total number of marriages in Singapore in 2013 is 26,254; c.f. Table 24, at 657: total number of divorces in Singapore in 2013 is 7,133; see also Department of Statistics Singapore, *Statistics on Marriages and Divorces*, 2016, available at http://www.singstat.gov.sg/docs/default-source/default-document-library/publications/publications_and_papers/marriages_and_divorces/smd2016.pdf, last accessed (10-07-2018), at xi.

16 *Ibid*, Table 22, at 599: total number of marriages in United States in 2013 is 2,081,301; c.f. Table 24, at 656: total number of divorces in Untied States in 2013 is 832,157.

17 E.M. Hetherington, Coping with Family Transitions: Winners, Losers, and Survivors, 60 Child Development 1, 1989, at 1; E.M. Hetherington, M. Bridges, & G. Insabella, What Matters? What Does Not? Five Perspectives on the Association Between Marital Transitions and Children's Adjustment, 53 American Psychologist, 1998, at 168.

18 J. Arkes, *The Temporal Effects of Divorces and Separations on Children's Academic Achievement and Problem Behaviour*, 56 Journal of Divorce & Remarriage 1, 2015, at 39, (hereinafter, "J. Arkes").

19 J. Arkes, at 26.

20 J. Arkes, at 27.

21 J. Arkes, at 39; F.M. al Gharaibeh, *The Effects of Divorce on Children: Mothers' Perspective in UAE*, 56 Journal of Divorce & Remarriage 5, 2015, at 361: divorced children generally show a lack of concentration, and lower academic achievement.

22 J. Arkes, at 39.

23 T.O. Afifi, J. Boman, W. Fleisher, & J. Sareen, The Relationship Between Child Abuse, Parental Divorce, and Lifetime Mental Disorders and Suicidality in a Nationally Representative Adult Sample, 33 Child Abuse and Neglect, 2009, at 142-143; H. Uphold-Carrier, & R. Utz, *Parental Divorce Among Young and Adult Children: A Long-Term Quantitative Analysis of Mental Health and Family Solidarity*, 53 Journal of Divorce & Remarriage 4, 2012, at 261.

24 J. Arkes, at 39.

25 C.R. Pierret, *The Effect of Family Structure on Youth Outcomes in the NLSY97*, in R.T. Michael (Ed.), Social Awakening: Adolescent Behaviour as Adulthood Approaches, New York, NY: Russell Sage Foundation, 2001.

26 M. Moon, *The Effects of Divorce on Children: Married and Divorced Parents' Perspectives*, 52 Journal of Divorce & Remarriage 5, 2011, at 347.

This illustrates the importance of an *earlier* response to parental conflicts in order to better protect children. Without responding to the irreconcilable differences between the parents immediately and effectively, the tension within these families can mushroom into a "high-conflict divorce",[27] or a high-conflict separation. In these cases, the polarisation of parents can easily displace their children's best interests in allocating parental responsibility, making it another battle field for visitation and custody rights.[28] In at least 10% of these high-conflict cases, one of the parents intentionally estranges the child from the other parent.[29] Typically in an adversarial setting, the parties' submissions in a litigation are akin to propaganda of their partner's bad parenting and unfit character. Even worse, a parent may disregard the court's decision and abduct the child from their usual abode to another jurisdiction. As one of the preventive measures, a "culture of negotiation" by developing alternative dispute resolution ("ADR") is essential.[30] Collaborative practice is one of the most recent resolution models, whose popularity has been gaining since 1990.[31]

1.2. Definition and Scope

1.2.1. Divorce and Separation

Divorce, as understood by many academics,[32] is not a single event but a "complex phenomenon" and a "complex personal experience".[33] Bohannan (1971) describes the process of divorce with "six stations":[34]

1) Emotional divorce	a loss of affection and trust and an accumulation of anger
2) Legal divorce	a legal decree obtained to regain marriageability
3) Economic divorce	a restructure of family finance and property
4) Co-parental divorce	**an arrangement of the residence of and contact with children**
5) Community divorce	an integration with society with a new identity as a divorcee
6) Psychic divorce	a recapture of personal autonomy

The fourth "station", co-parental divorce, is acknowledged as the "most enduring pain of divorce".[35] The main reason is that when children are involved, there can never be a "clean break" between the parents unless a child can ever be evenly "split" just as any object without life. This difficulty robustly rebuts the

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[27] Also known as "complex divorce", or "fighting divorce", see S. Dijkstra, *Listening to Children and Parents: Seven Dimensions to Untangle High-Conflict Divorce*, in T. Liefaard & J. Sloth-Nielsen (Eds), The United Nations Convention on the Rights of the Child: Taking Stock After 25 Years and Looking Ahead, Brill/Nijhoff, 2017, (hereinafter, "T. Liefaard & J. Sloth-Nielsen"), at 861, (hereinafter, "S. Dijkstra").

[28] S. Dijkstra, at 860.

[29] S. Dijkstra, at 860.

[30] W. Duncan, Keeping the 1980 Hague Child Abduction Convention Up to Speed. Is it Time for a Protocol?, 1 Journal of Family Law and Practice 3, 2010, at 5.

[31] P.H. Tesler, *Collaborative Family Law*, 4 Pepperdine Dispute Resolution Law Journal 3, 2004, at 317, (hereinafter, "P.H. Tesler").

[32] P. Bohannan (Ed.), Divorce and After, New York: Doubleday, 1971, (hereinafter, "P. Bohannan"); J.B. Kelly, *Power Imbalances in Divorce and Interpersonal Mediation Assessment and Intervention*, 13 Mediation Quarterly 2, 1995; J.M. Haynes, Divorce Mediation: A Practical Guide for Therapists and Counsellors, New York: Springer, 1981; K. Kressel, The Process of Divorce, New York: Basic Books, 1985; C. Clulow (Ed.), Women, Men and Marriage, London: Sheldon Press, 1995.

[33] P. Bohannan, at 33; see also M. Roberts, Mediation in Family Disputes: Principles of Practice, (4th ed.), Ashgate, 2014, at 34-35, (hereinafter, "M. Roberts").

[34] P. Bohannan, at 33; see also M. Roberts, at 35.

[35] *Ibid*.

doctrine of *patria potestas*, in which children are property of their father.[36] In contrast, following the introduction of the CRC, a child rights-based approach is called for in addressing co-parental divorce, whereby children are seen as active social agents,[37] and human "beings" instead of human "becomings".[38] Since this thesis aims at analysing divorce and separation from the perspective of international children's rights law, the scope is limited to only discussing the fourth "station", co-parental divorce.

Following from the above that this thesis takes the perspective of a child, the scope of co-parental divorce is extended to any situation insofar as a child is to "be *separated* from his or her *parents* against their will" but is necessary because "the parents are living separately and a decision must be made as to the child's place of residence",[39] pursuant to Article 9(1) of the CRC.[40] As the CRC Committee has interpreted the concept of family broadly to include "biological, adoptive or foster parents",[41] this thesis therefore intentionally pays minimal heed to the legal differences between the breakup of a marriage and cohabitation; and that between heterosexual or homosexual parents, etc.. Although unmarried and married parents (especially fathers) are entitled to different legal rights concerning the custody and visitation with their children,[42] the relevant children's rights should be respected and ensured without discrimination based on their parent's or legal guardian's statuses.[43]

1.2.2. Collaborative Practice

Among the many ADR, this thesis only delves into collaborative practice (also known as collaborative family law), because there is no pre-existing research into the practice from the perspective of international children's rights law. Collaborative practice is a specifically-defined model of ADR.[44] It is a "close cousin" of mediation,[45] but the core element that distinguishes collaborative practice from other forms of ADR, is the binding agreement that neither parties are going to threaten or resort to litigation in courts during the process.[46] In the event that collaboration breaks down, all lawyers and/or practitioners involved are disqualified from representing their clients entirely.[47] Its extrajudicial nature intends to encourage parties making all efforts possible to reach a solution outside the court system.

1.3. Aim and Research Questions

This thesis aims at providing a legal analysis of children's rights after their parents have divorced or separated, and identifying the essential elements of the most ideal yet practical model of collaborative

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36 J. Tobin, *Understanding Children's Rights: A Vision Beyond Vulnerability*, 84 Nordic Journal of International Law, 2015, at 179, (hereinafter, "J. Tobin").

37 J. Tobin, at 176.

38 J. Tobin, at 160.

39 Article 9(1), CRC.

40 Article 9(1), CRC.

41 CRC Committee, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para 1), UN Doc. CRC/C/GC/14, 2013, at para 6, (hereinafter, "CRC Committee, GC 14").

42 For example, in the United States, an unmarried biological father, unlike a married one, is not automatically entitled to the right to custody and visitation unless a meaningful relationship with the child is established, as in *Lehr v Robertson*, 463 U.S., 1983, (US), at 266-267; see also *Ex Parte C.V.,* 1981316 WL 1717011, Ala., 2000, (US).

43 Article 2(1), CRC; see also Preamble, CRC, at para 3.

44 P.H. Tesler, at 320.

45 M. Roberts, at 17.

46 P.H. Tesler, at 317; M. Roberts, at 17.

47 *Ibid*, at 320.

practice that would safeguard the relevant rights of children of divorcing parents. It serves as a starting point of discussions among collaborative practitioners on how to "separate together" and give meaning to co-parenting.[48]

To accomplish this aim, the research question at the heart of this thesis is: how should collaborative practice be designed in a way that safeguards children's rights? Breaking it down to 4 sub-questions, this thesis aims at answering:

(a) What are the relevant children's rights according to the CRC that merit special safeguarding after the parents have divorced or separated?
(b) Compare and contrast how other jurisdictions have approached collaborative practice within each of their domestic family law context?
(c) To what extent are these jurisdictions and the model of collaborative practice therein comply with the international children's rights legal framework pursuant to the CRC?
(d) Drawing from the good practices of the aforementioned jurisdictions, what are the essential elements of a model of collaborative practice that safeguards children's rights?

1.4. Analytical Framework and Methodology

1.4.1. Children's Rights Legal Framework of Analysis

To answer research sub-question (a), Article 9 of the CRC provides this thesis with a valuable legal analytical framework. This is especially so when there are no other international laws comparable to Article 9 of the CRC that explicitly and specifically deals with the separation of children from their parents,[49] save for the African Charter on the Rights and Welfare of the Child ("ACRWC"), which is reminiscent of the CRC.[50]

[48] A. Stewart, A. Copeland, N.L. Chester, J. Malley & N. Barenbaum, Separating Together: How Divorce Transforms Families, New York: Guildford, 1997.

[49] J.E. Doek, A Commentary on the United Nations Convention on the Rights of the Child: Article 9 The Right to Preservation of Identity; Article 9 The Right Not to be Separated from His or Her Parents, Leiden, Boston: Martinus Nijhoff Publishers, 2006, at 17, (hereinafter, "J.E. Doek").

[50] Organisation of African Unity, African Charter on the Rights and Welfare of the Child, 1990, CABLEG/24.9/49, 1990, (hereinafter, "ACRWC").

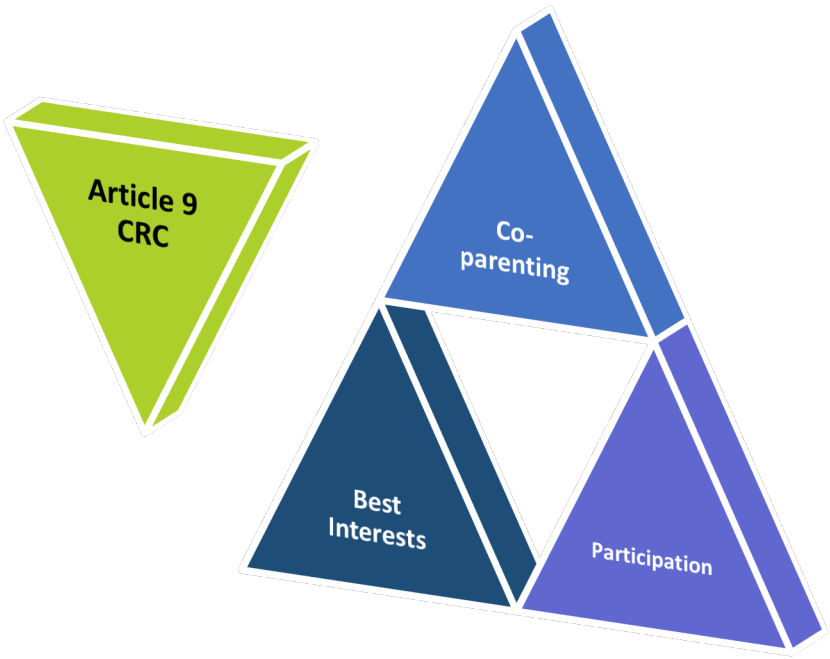

Figure 1. Trinity of Rights Pursuant to Article 9 of the CRC in the Context of Parental Separation

In the context of parental separation, Article 9 of the CRC highlights a trinity of children's rights that should be safeguarded, where they are inalienable and correlated. First, the default position is that children have the right to co-parenting;[51] if this is impossible at least they have the right to maintain personal relationships regularly with both parents.[52] Second, children are entitled to have their best interests taken into account as a primary consideration in all actions concerning them.[53] Third, children, as one of the interested parties, have the opportunity to participate in the process,[54] whether directly or indirectly through a representative,[55] and their views in matters affecting themselves are to be given due weight in accordance with the age and maturity of the child.[56]

1.4.2. Methodology

This thesis approaches research sub-questions (b) and (c) with the methodology of comparative legal analysis, which is a "fundamental technique",[57] of empirical and descriptive research.[58] The aim of it is to change the perspective of legal analysis "from the vertical to the horizontal",[59] through which it enables topic-specific legal convergence and harmonisation among legal systems.[60] Among the many theories

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51 Article 9(1), CRC.
52 Article 9(3), CRC.
53 Article 9(1), CRC, read in conjunction with Article 9(3) and Article 3(1), CRC.
54 Article 9(2), CRC.
55 Article 12(2), CRC.
56 Article 12(1), CRC.
57 H.P. Glenn, *The Aims of Comparative Law*, in J.M. Smits (Ed.), Elgar Encyclopaedia of Comparative Law, Cheltenham: Edward Elgar Publishing, 2012, at 65, (hereinafter, "H.P. Glenn").
58 A.E. Örücü, *Methodology of Comparative Law*, in J.M. Smits (Ed.), Elgar Encyclopaedia of Comparative Law, Cheltenham: Edward Elgar Publishing, 2012, at 565, (hereinafter, "A.E. Örücü").
59 A.E. Örücü, at 563.
60 H.P. Glenn, at 70.

of comparative law, the "functionalist method"[61] is the most widely recognised methodology.[62] It presupposes that the chosen jurisdictions for comparison are experiencing the same social problem, and that the laws of these jurisdictions respond to that problem similarly but via different routes and have different outcomes.[63]

Putting it into context, the chosen jurisdictions in this thesis are encountering the same problem in resolving child-involved family conflicts: delay, high cost, and acrimony in the traditional court process.[64] They have all addressed it by introducing collaborative practice along with other ADR, but have employed different approaches and philosophies of collaborative practice according to legal and social cultures that bear different outcomes.

The choice of jurisdictions are the United States, England and Wales, Hong Kong Special Administrative Region, and the Republic of Singapore. This combination of jurisdictions offers a broad geographical scope, covering the regions of America, Europe, Southeast Asia, and East Asia. As the models of collaborative practice are introduced at different times from 1990s to 2010s, the extensive temporal reach examines the evolution process: what elements have been washed away, substituted, or added.

Moreover, it adds dimension to the thesis as these jurisdictions all share the common law adversarial legal tradition, but have different social culture and history, such as the previous participation of colonisation.[65] As "recipients" of common law, the subsequent legal development of Singapore and Hong Kong are interesting to investigate. Even at times, the "model" (i.e. England and Wales) can learn from the offspring.[66] As collaborative practice is still at its infancy in Hong Kong and Singapore, no academic legal analyses and research have been conducted before. Therefore, semi-structured interviews are executed to provide a contextual analysis from the perspectives of ADR practitioners in Hong Kong and Singapore. The researcher aims at starting dialogues, and laying the groundwork for a child rights-based analysis.

Since comparative law research now adopts a "system dynamics approach",[67] more importance is placed on the background and context. Therefore, on top of the model of collaborative practice, the domestic laws on co-parenting such as custody, contact and visitation of parents, determination of children's best interests, and protection of children's right to participate in decision-making process are also studied. For each of these children's rights, the compliance of both the domestic laws and model of collaborative practice are evaluated.

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61 K. Zweigert, *Methodological Problems in Comparative Law*, 7 Israel Law Review, 1972, at 465-74; see also K. Zweigert, & H. Kötz, Introduction to Comparative Law, (3rd ed.), translated by T. Weir, Oxford: Clarendon Press.

62 M. Graziadei, *The Functionalist Heritage*, in P. Legrand, & R. Munday (Eds.), Comparative Legal Studies: Traditions and Transitions, Cambridge: Cambridge University Press, 2003, at 100-127.

63 A.E. Örücü, at 561-562.

64 E.E. Sutherland, *Imperatives and Challenges in Child and Family Law: Commonalities and Disparities*, in E.E. Sutherlands (Ed.), The Future of Child and Family Law: International Predictions, New York: Cambridge University Press, 2012, at para 1.17, (hereinafter, "E.E. Sutherland").

65 Singapore and Hong Kong had been colonised by the United Kingdom before gaining independence.

66 A.E. Örücü, at 572.

67 V.V. Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 4 Global Jurist Frontiers 2, 2004, at 1-29; also known as the "post-modernist methodology", see A. Peters & H. Schwenke, *Comparative Law Beyond Post-Modernism*, 49 International and Comparative Law Quarterly, 2000, at 800-834, see also A.E. Örücü, at 564.

Finally, to answer research sub-question (d), this thesis uses the "model-building" and "common core" studies,[68] to construct an ideal model of collaborative practice from the perspective of international children's rights law.

1.5. Outline

Following the present introduction, Chapter 2 elaborates and explains the analytical framework of the thesis by unfolding the trinity of children's rights in the event of parental separation: right to co-parenting, have their best interests regarded as a primary consideration, and participate in the decision-making process. Based on these 3 themes, Chapter 3 provides a comparative analysis of the 4 models of collaborative practice, and the domestic legal context therein. Chapter 4 moves forward by recommending a model of collaborative practice that is the most compatible with the CRC. Chapter 5 concludes.

[68] R.B. Schlesinger (Ed.), Formation of Contracts: A Study on the Common Core of Legal Systems, Dobbs Ferry, NY: Oceana Publications, 1968.

2. Children's Rights in Divorce and Separation Procedures

The starting point of this thesis is an in-depth comprehension of the analytical framework based on international children's rights law, primarily Article 9 of the CRC. Building on Article 9, this chapter elaborates on the trinity of children's rights in the event their parents decide to live separately.[69] The trinity consists of the right to co-parenting (Section 2.1), the right to have their best interests considered as a primary consideration (Section 2.2), and the right to participate throughout the decision-making process (Section 2.3).

2.1. CRC Framework on Co-parenting

2.1.1. Article 9(1) CRC: Right Not to be Separated from Parents

Paragraph 1 of Article 9 of the CRC has a complex structure and rich drafting history. It reads:

> "States Parties shall ensure that a child *shall not be separated* from his or her parents *against their will*, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is *necessary* for the *best interests of the child*. Such determination *may* be *necessary* in a particular case such as one involving abuse or neglect of the child by the parents, or one where the *parents are living separately* and a decision must be made as to the child's place of residence". (emphasis added)

The default position is that States Parties have a positive obligation to ensure that a child is not separated from his or her parents.[70] The underlying principle of non-separation is supplemented by children's right to privacy and family life. Article 16 of the CRC stipulates that "…no child should be subjected to arbitrary or unlawful interference with his/her privacy, family, home…".[71] This principle has many counterparts in international law such as Article 8 of the European Convention on Human Rights ("ECHR"),[72] Article 10 of the ACRWC,[73] and Article 11 of the American Convention on Human Rights ("ACHR").[74] In particular, the European Court of Human Rights ("ECtHR") has interpreted Article 8 of the ECHR in *Elsholz v Germany* as that, "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life".[75] They all point to the same direction: that it is not automatically legitimate for the State to separate children from either of the parents when their parents decide to divorce or separate.

There are 3 ways to rebut this position. First, the separation is necessary because *inter alia* the parents are living separately. Analysing from the drafting history, the text of Article 9(1) intentionally abstains from pinpointing to an exhaustive list of reasons for parental separation.[76] It has therefore been applied

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69 Refer to Section 1.4.1. of this thesis, at 5.

70 J.E. Doek, at 21.

71 Article 16(1), CRC.

72 Article 8, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, ETS 5, 1950, (hereinafter, "ECHR").

73 Article 10, ACRWC.

74 Article 11, Organisation of American States, American Convention on Human Rights, "Pact of San Jose", 1969, (hereinafter, "ACHR").

75 App. No. 25735/94, 34 EHRR 58, 2002, (ECtHR), at para 43; see also *Johansen v Norway*, 24/1995/530/616, 1996, (ECtHR), at para 52; *Bronda v Italy*, 40/1997/824/1030, 1998, (ECtHR), at para 51.

76 S. Detrick, at 168, at para 20.

to an array of situations involving imprisoned parents,[77] deported parents that are illegal residents of a jurisdiction,[78] and economically insufficient parents that abandon their children,[79] etc.. As a matter of consistency, the last sentence of Article 9(1) states that it is merely a matter of "*may*" as to whether a determination of separation is necessary when the parents are living separately.[80] Further, an additional hurdle is to be overcome: a decision of the child's residence *must* be made. Therefore, Article 9(1) is drafted in such a flexible way that parents and children are provided with an ample of room for self-determination.

Logically, the second way to rebut is that the separation is not against the parents' and the child's will,[81] provided that both the parents and concerned child(ren) have reached a consensus.[82] Accordingly, when a family has come up with an amicable resolution through mediation, conciliation or negotiation, it overrides the non-separation principle. Whilst the parents have the primary responsibility in constructing the agreement,[83] the States should also ensure that the parental agreement is procedurally fair to not only the parents but also the child(ren) concerned, pursuant to the "applicable law and procedures" and determined by "competent authorities".[84] After all, the involved parties are more willing to adhere to the agreement because of the sense of ownership in the decision-making process.

However liberal Article 9(1) seems to be, the third way to rebut non-separation acts as a safety net: the separation must be necessary for the child's best interests according to competent authorities, which is further explained in Section 2.2.

2.1.2. Article 9(3) CRC: Right to Maintain Personal Relations with Both Parents

Even if the principle of non-separation is exempted, Article 9(3) of the CRC provides a fall-back position, which reads:

> "States Parties shall respect the right of the child who *is separated* from one or both parents to *maintain personal relations* and *direct contact* with both parents on a *regular* basis, *except* if it is contrary to the child's best interests".[85] (emphasis added)

A similar provision is also found in Article 10(2) of the CRC, which extends the scope to parent(s) who reside at a different State than the child(ren).[86] Both of these Articles are based on the presumption that it is in the child's best interest to keep contact with his/her parents, because contact can *only* be ceased when it is not in the child's best interests,[87] or in exceptional circumstances.[88] Although this assumption

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77 CRC Committee, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents", 2011, at para 35.

78 Human Rights Committee ("HRC"), *Winata v Australia*, Communication 930/2000, 2001.

79 CRC Committee, *Concluding Observations: Norway*, UN Doc. CRC/C/15/Add.262, 2005, at para 24; CRC Committee, *Concluding Observations: Kyrgyzstan*, UN Doc. C/15/Add.244, 2004, at para 40.

80 Article 9(1), CRC.

81 S. Detrick (Ed.), The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires", Dordrecht, Boston, London, Martinus Nijhoff Publishers, 1992, at 168, at para 21; see also at 163, at para 65; and at 168, at para 21, (hereinafter, "S. Detrick").

82 The child's objection is insufficient to rebut his/her parents' right to decide the child's residence: see J.E. Doek, at 22; S. Detrick, at 168, at para 20.

83 Article 5, CRC.

84 Article 9(1), 9(2) & 9(3), CRC.

85 Article 9(3), CRC.

86 Article 10(2), CRC.

87 J.E. Doek, at 18.

88 Article 10(2), CRC.

is not found in the texts of ACRWC or the ECHR, the ECtHR has explained in *Görgülü v Germany* that, "it is in a child's interest for its family ties to be maintained, as severing such ties means cutting a child off from its roots, which can only be justified in very exceptional circumstances".[89] The Court has further ruled that when direct contact is impossible, it is "ordinarily highly desirable" for there to be indirect contact.[90] This is further extended by English domestic laws in *P (Children)*,[91] where the Court has held that "contact should not be stopped unless it is the last resort":[92] a very proactive reading of the ECHR and the CRC.

Indeed, in some jurisdictions like England & Wales, Article 9(3) is not only a negative obligation – "to respect" – but also a positive one: to *restore* and *maintain* contact. Support can be drawn from the Hague Conference on Private International Law ("HCCH"),[93] which states that "*all possible steps* should be taken to secure the rights of children to maintain personal relationships and have regular contact with both of their parents…".[94] This position is compatible with Doek (2006)'s stance that when Article 9(3) is read in the light of Articles 2(1) and 4 of the CRC,[95] it does not merely confer negative obligations but also positive ones.[96] As explained in General Comment No. 31 of the Human Rights Committee, the rights of individuals should be protected against private persons as well,[97] hence children's right to such contact should, for instance, be protected from parents, who intentionally estrange their children from another parent in some high-conflict cases. In these circumstances, the States Parties are obliged to facilitate contact between them.

One of the main ways for the States to discharge this obligation is to promote and facilitate parental agreement in realising such contact, as suggested by Doek (2006).[98] Pursuant to Article 31(b) of the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, and Article 7(2)(c) of the 1980 Convention on the Civil Aspects of International Child Abduction, States are obliged to facilitate the reaching of an amicable agreement through mediation or conciliation, etc.. The HCCH explains that this allows the parents to "establish a *less conflictual framework* for the exercise of contact and therefore strongly in the interests of the child; and once a certain level of co-operation between the parents is established, the painful and expensive pattern of re-applications to the court for orders for modification or enforcement is less likely to become established".[99] All in all, the international legal framework advocates a culture of parental cooperation through mediation or similar means when resolving issues

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89 App. No. 74969/01, ECHR 89, 2004, (ECtHR), at para 48.

90 *Ibid*.

91 EWCA Civ 1431, 2008, (England & Wales).

92 *Ibid*, at para 38.

93 HCCH, *Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice*, 2008, available at https://assets.hcch.net/upload/guidecontact_e.pdf, last accessed (10-07-2018), (hereinafter, "HCCH, Guide to Good Practice on Contact").

94 HCCH, Guide to Good Practice on Contact, at 4.

95 Article 2(1), CRC: "States Parties shall respect *and ensure* the rights set forth in the present Convention to each child…"; Article 4, CRC: "States Parties shall undertake all appropriate … measures for the implementation of the rights recognised in the present Convention".

96 J.E. Doek, at 28.

97 HRC, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004, at para 8.

98 J.E. Doek, at 29.

99 W. Duncan, Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Final Report, HCCH Prel. Doc. No. 5, 2002, available at https://assets.hcch.net/upload/abd2002_pd05e.pdf, last accessed (10-07-2018), at para 89, (hereinafter, "W. Duncan").

concerning contact after the separation of parents and their children. It is believed to be the most cost-effective and beneficial model in protecting the rights of the concerned children and parents.

2.1.3. Co-parenting: Right to be Cared for by Both Parents

A common thread that permeates Article 9(1) and 9(3) of the CRC is the assumption that parental cooperation is the optimal approach to resolve children-related issues in a way that safeguards children's rights. The conjunctive reading of these 2 children's rights is consistent with the developing social phenomenon of *cooperative co-parenting* (also known as joint parental responsibility), which is defined as the "interactions between the parents in their roles as parents".[100] Co-parenting is about "supporting each other as parents, sharing responsibility for the child, and minimising parenting-related dissonance between the two partners".[101] It starts from childbirth, and is an "enduring tie" between the parents for the rest of their lives.[102] The quality of co-parenting is related to the quality of the couple's romantic relationship, but they are of distinct natures.[103]

2.1.3.1. Co-parenting and Law

The legal basis of co-parenting is well-documented in international law. Article 18(1) of the CRC enunciates the principle that "*both* parents have common responsibilities for the upbringing and development of the child".[104] This is echoed in Article 5(b) of the Convention on the Elimination of All Forms of Discrimination Against Women,[105] where it states that family education should include "the recognition of the common responsibility of men and women in the upbringing and development of their children". [106] In addition, Article 16(1)(d) specifies that parents should enjoy the "same rights and responsibilities, irrespective of their marital status".[107] Similarly, comparing to the CRC, the ACRWC and ACHR,[108] more explicitly spell out respectively that the States are obliged to ensure the "*equality* of … responsibility of spouses with regard to children",[109] and the "*adequate balancing* of responsibilities of the spouses",[110] during marriage and even post-dissolution.

Although Article 18(1) of the CRC is drafted in general terms, the CRC General Comment No. 7 concurs with the international legal community by emphasising that both fathers and mothers are regarded as "equal caregivers".[111] This position is further solidified through domestication by judges in *Case No. 2-*

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[100] B. Hohmann-Marriott, *Co-parenting and Father Involvement in Married and Unmarried Coresident Couples*, 73 Journal of Marriage and Family 1, 2011, at 298, (hereinafter, "B. Hohmann-Marriott").

[101] *Ibid*, see also J. Belsky, K. Crnic, & S. Gable, *The Determinants of Co-parenting in Families with Toddler Boys: Spousal Differences and Daily Hassles*, 66 Child Development, 1995, at 629-642; and J.P. McHale, R. Kuersten-Hogan, & N. Rao, *Growing Points for Co-parenting Theory and Research*, 11 Journal of Adult Development, 2004, at 221-233.

[102] L.E. Kotila, & S.J. Schoppe-Sullivan, *Integrating Sociological and Psychological Perspectives on Co-parenting*, 9 Sociology Compass 8, 2015, at 731, (hereinafter, "L.E. Kotila").

[103] L.A. van Egeren, *Prebirth Predictors of Co-parenting Experiences in Early Infancy*, 24 Infant Mental Health Journal 3, 2003, at 282; see also B. Hohmann-Marriot, at 298; L.E. Kotila, at 731.

[104] Article 18(1), CRC.

[105] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, United 1249 Treaty Series 13, 1979, (hereinafter, "CEDAW").

[106] Article 5(b), CEDAW.

[107] Article 16(1)(d), CEDAW.

[108] Refer to note 74, at 8 above.

[109] Article 18(2), ACRWC.

[110] Article 17(4), ACHR.

[111] CRC Committee, General Comment No. 7: Implementing Child Rights in Early Childhood, UN Doc. CRC/C/GC/7/Rev.1, 2006, at para 19, (hereinafter, "CRC Committee, GC 7").

138 (2015) in Kazakhstan,[112] in *CX v CY (2005)* in Singapore,[113] and *Maja Dreo et al. v Slovenia (2003)* in Slovenia.[114] The concept of co-parenting is also reflected and improvised in domestic legislation, such sub-concepts as "joint or no custody" in Singapore,[115] "shared parenting or care" by the "approximation rule" in the United States,[116] and "joint or shared residence" in England & Wales.[117] All of these legal sub-concepts approach co-parenting by dividing the time with their child(ren) in proportions that complements with the principle of equality between the parents.

2.1.3.3. Co-parenting and Sociology

Sociology premises its understanding of human beings upon the studying of the interaction between individuals and social institutions.[118] To examine the role of "mothers" and "fathers", one must examine their interaction with the social construct of marriage and/or parenthood. According to the theory of social constructionism, an individual's perception of his/her role is *co-constructed* with other individuals through relationship building.[119]

At the outset, many sociologists reveal that homosexual parents operate fairly similarly to heterosexual parents, especially in terms of the division of labour, and economic dependency on one partner.[120] At the core, it is a common ground that the parent who has a "father" figure struggles to participate in a co-parenting relationship after parental separation, because the "mother" figure acts as a "gatekeeper", who takes control of the access point into the concerned children's life.[121] Usually, the "gate" is closed due to the distrust between the parents,[122] and has little to do with the children. Nonetheless, sociological research has also pointed to a solution: early *supportive co-parenting*. Some jurisdictions,

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[112] Дело № 2-138, 12 июля 2005г., Нуринский районный суд Карагандинской области, (Nurinskiy District Court of Karaganda Oblast), 2015.

[113] *CX v CY (Minor: Custody and Access)*, SGCA 37, 2005, (Singapore Court of Appeal), at para 26, (hereinafter, "*CX v CY*"); see also *ZO v ZP and Another Appeal*, SGCA 25, 2011, (Singapore Supreme Court), 2011, at para 11, (hereinafter, "*ZO v ZP*"); see also Refer to Section 3.2.2.3. of this thesis for further explanation, at 29.

[114] U-I-312/00, Official Gazette RS, No. 42/2003; ILDC 414, 2003, (Slovenia Constitutional Court), at para 20.

[115] Section 46(1), Women's Charter, Cap 353, 1997, (Singapore), (hereinafter, "Women's Charter"); confirmed in *ZO v ZP*, and *CX v CY*.

[116] A. Jones, *Big Shift Pushed in Custody Disputes*, Wall Street Journal, 2015; L. Nielsen, *Shared Physical Custody: Does it Benefit Most Children?*, 28 Journal of the American Academy of Matrimonial Lawyers, 2015, at 83: "Currently, however, twenty states are considering changes in their custody laws that would be more favourable to shared parenting, while at least ten states have already done so".

[117] Section 11(4), Children Act, 1989, (England & Wales); confirmed in *Re AR (A Child: Relocation)*, EWHC 1346 Fam, 2010, (England & Wales).

[118] L.E. Kotila, at 732.

[119] P. Berger, & T. Luckmann, The Social Construction of Knowledge: A Treatise in the Sociology of Knowledge, Soho, NY: Open Road Media, 1966.

[120] M. Sullivan, *Rozzie and Harriet? Gender and Family Patterns of Lesbian Co-parents*, 10 Gender & Society 6, 1996, at 747-767; M.E. Feinberg, *The Internal Structure and Ecological Context of Co-parenting: A Framework for Research and Intervention*, 3 Parenting: Science & Practice, 2003, at 101, (hereinafter, "M.E. Feinberg"); M. Moore, Invisible Families: Gay Identities, Relationships, and Motherhood among Black Women, Berkeley, CA: University of California Press, 2011.

[121] L. Trinder, Maternal Gate Closing and Gate Opening in Post-divorce Families, 29 Journal of Family Issues, 2008, at 1298-1324; J. Arditti, S. Smock, & T. Parkman, "It's Been Hard to be a Father": A Qualitative Exploration of Incarcerated Fatherhood, 3 Fathering: A Journal of Theory, Research, and Practice about Men as Fathers, 2005, at 267-288.

[122] K. Edin, & T. Nelson, Doing the Best I Can: Fatherhood in the Inner City, Berkeley, CA: University of California Press, 2013; P. England, & K. Edin, Unmarried Couples with Children, New York: Russell Sage Foundation, 2007.

such as Hong Kong, have provided parenting coordination and co-parenting services,[123] but it must be acknowledged that the quality of co-parenting is also dependent on relationship quality, whether the parents are married or not, and the "father's" mental health, education, and conviction record, etc.[124]

2.1.3.3. Co-parenting and Psychology

Co-parenting is also rooted in psychology, which gives insights on supportive co-parenting. Psychologists perceive the family as "a management team", [125] or "executive subsystem" of childrearing. [126] Whether such a team is well-functioned largely depends on the "capacity to acknowledge, respect and value the parenting roles and activities of *their* partner".[127] This is the key to supportive co-parenting. On the contrary, amplifying the mistakes, hostile blaming and competing with their partner undermines co-parenting.[128] It is through sharing the responsibilities and dividing the labour can the parents share the joy and satisfaction as their child(ren) grow. Literature on psychology especially underlines the significance of "childrearing agreement", because it ensures the parents are "on the same page",[129] on issues such as moral beliefs, appropriate behaviours, disciplinary measures, emotional development, education, etc. The figure below visualises how psychology comprehends co-parenting:

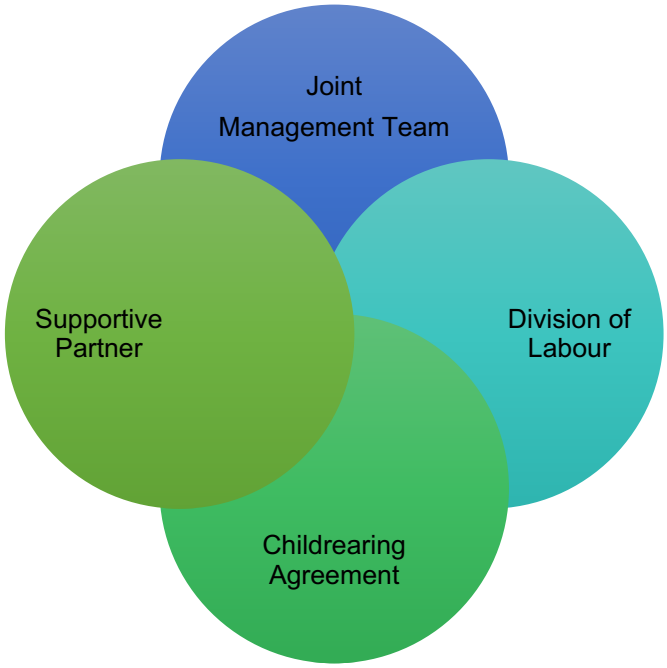

Figure 2. Feinberg's Model of Co-parenting[130]

[123] Hong Kong Family Welfare Society, A Beam of Hope – Pilot Project on "Child-focused" Parenting Coordination and Co-parenting for Divorced Families, 2016, available at http://58.64.139.168:8080/en_service.aspx?id=75&show=3&aaa=2, last accessed (10-07-2018).

[124] J. Bronte-Tinkew, & A. Horowitz, Factors Associated with Unmarried, Non-resident Fathers' Perceptions of their Co-parenting, 31 Journal of Family Issues 1, at 31-65.

[125] L.E. Kotila, at 734.

[126] S. Minuchin, Families and Family Therapy, Cambridge, MA: Harvard University Press, 1974.

[127] L.E. Kotila, at 734; see also S.H. Weissman, & R.S. Cohen, *The Parenting Alliance and Adolescence*, 12 Adolescent Psychiatry, 1985, at 24-45.

[128] L.E. Kotila, at 735.

[129] M.E. Feinberg, at 102; L.E. Kotila, at 735.

[130] M.E. Feinberg, at 101.

2.2. CRC Framework on Children's Best Interests

2.2.1. Article 9(1) and (3) CRC: Best Interests Determination as a Substantive Right

The aforementioned children's right to be not separated from their parents,[131] the right to maintain personal relationship,[132] and the right to be cared for by both of their parents,[133] are all conditioned by the determination of whether such an arrangement is necessary for the child's best interests.[134] The CRC Committee emphasises that the child's best interests principle is a three-fold concept: a substantive right, a procedural right, and an interpretative tool.[135] By virtue of Articles 9(1) and (3), a best interests determination in the event of separation of a child from his or her parents is a "concrete right".[136] It is a "self-executing" substantive obligation at the outset on the States Parties to guarantee that a best interests determination has taken place before any decision is made (Section 2.2.2.). In addition, there are procedural safeguards as to how such determination is conducted (Section 2.2.4.).

2.2.2. The Best Interests of the Child Principle

The concept of best interests is well-known globally since its embellishment in the CRC in 1989. It has changed the landscape of custody cases by recognising the new status of children as subjects of rights.[137] Early laws on parent-child relationships have been constructed on the perspectives of parents' rights, remarkably silent on their duty to love their children's well-being.[138] As right-holders, children's best interests are to be a "primary consideration", in the words of Article 3 of the CRC.[139] However, it is only *one* of the primary considerations in decision-making, contrary to the wording "best interests of the child shall be *the* paramount consideration", pursuant to Principle 2 of the 1959 Declaration of the Rights of the Child.[140]

The concept of "the child's best interests" has evolved rapidly overtime.[141] It encompasses diverse terminologies such as welfare, well-being, wishes, feelings, needs, rights, etc., whose content reflects social attitudes and historical contexts. For example, the Declaration of Geneva (1942) after an imperialist war perceives children's welfare as basic needs,[142] whilst the ECHR (1950) a decade later

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[131] Article 9(1), CRC.

[132] Article 9(3), CRC.

[133] Article 18(1), CRC, read in conjunction with Article 9, CRC.

[134] Articles 9(1), 9(3), 18(1), CRC; CRC Committee, GC 14, at para 60, above at note 41, at 4; see also J. Zermatten, *The Best Interests of the Child Principle: Literal Analysis and Function*, 18 International Journal of Children's Rights, 2010, at 491, (hereinafter, "J. Zermatten").

[135] CRC Committee, GC 14.

[136] CRC Committee, GC 14, at para 58.

[137] J. Zermatten, at 483.

[138] P. Silverman, Who Speaks for the Child?, Don Mills, Ontario: Musson, 1978; M. Freeman, A Commentary on the United Nations Convention on the Rights of the Child: Article 3 The Best Interests of the Child, Leiden, Boston, Martinus Nijhoff, 2007, at 11, (hereinafter, "M. Freeman").

[139] Article 3, CRC.

[140] R. Hodgkin, & P. Newell, Implementation Handbook for the Convention on the Rights of the Child, (3rd ed.), New York: UNICEF, 2007, (hereinafter, "R. Hodgkin, & P. Newell").

[141] J. Zermatten, at 494.

[142] M. Freeman, at 11; E. Fuller, *Great Britain and the Declaration of Geneva V*, VI The World's Children 7, 1925, at 116; E. Jebb, International Responsibilities for Child Welfare, Geneva, Save the Children International Union, 1927.

comprehends children's best interests implicitly in the shadow of family life.[143] Another example is the Hague Convention on International Child Abduction (1980), which presupposes that it is in the abducted child's best interests to be promptly returned to his/her jurisdiction of habitual residence,[144] but it is a "palpable fiction" to some judges and scholars.[145]

Its implication is also hotly debated among judges in the ECtHR. *Neulinger v Switzerland (2010)* held that the determination of the abducted child's best interests must be an "in-depth examination of the entire family situation",[146] but it was overturned by the same court 2 years later in *X v Latvia*.[147] It held that an "effective examination" regarding the refusal to return is sufficient,[148] so to strictly complement with the 1980 Convention framework.[149] The relevant legal basis, choice-of-law,[150] sociological research of various disciplines that warrants re-learning and redefinition,[151] historical context, and social attitude all shape the "collective subjectivity" of any society in perceiving the best interests of the child.[152]

In addition to "collective subjectivity", there is "personal subjectivity" of the parents, the legal representatives, the child, the judge, etc. in understanding the concept of "best interests".[153] The subjectivity shows "both the potential *richness* and *flexibility* of this criterion and its *weakness*".[154] In the words of van Bueren:

> "…a lack of certainty or indeterminacy is inherent in the best interests principle. Indeed such a lack of certainty, which some may regard as *flexibility* and as a virtue, is *essential* in the case-by-case approach, which the best interest standard requires".[155]

Recognising the essence of flexibility, the CRC Committee provides States and decision-makers with a *non-exhaustive* and *non-hierarchical*[156] list of elements to be considered when determining what is in the best interests of the child.[157] Undoubtedly, each relevant party has different perceptions of these

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[143] Article 8(2), ECHR: "… for the protection of the rights and freedoms of others"; reaffirmed in *Hokkanen v Finland*, 1 FLR 289, 1995, (ECtHR), at 305, domestic courts should consider particularly "the best interests of the child and his or her rights under Article 8 of the Convention" in resolving a custody dispute; see M. Freeman, at 13.

[144] Article 12(2), 13, and 20 of the HCCH, Convention on the Civil Aspects of International Child Abduction, 1980, (hereinafter, "HCCH Abduction Convention"): exceptions of this assumption are (i) the child have settled down; (ii) the applicant have consented; (iii) there is a grave risk to return the child and it is intolerable; (iv) the child's objection.

[145] M. Freeman, at 17; see also *Re W*, 2 FLR 499, 2004, (England & Wales).

[146] App. No. 41615/07, 2010, (ECtHR), at para 139.

[147] App. No. 27853/09, 2013, (ECtHR).

[148] *Ibid*, at para 118.

[149] P. Beaumont, K. Trimmings, L. Walker, & J. Holliday, *Child Abduction: Recent Jurisprudence of the European Court of Human Rights*, 64 International and Comparative Law Quarterly, 2015, at 44.

[150] M. Župan, The Best Interests of the Child: A Guiding Principle in Administering Cross-Border Child-Related Matters?, in T. Liefaard, & J. Sloth-Nielsen, (hereinafter, "M. Župan"), at 216.

[151] J. Zermatten, at 494.

[152] J. Zermatten, at 494.

[153] J. Zermatten, at 494.

[154] J. Zermatten, at 494.

[155] G. van Bueren, Child Rights in Europe, Pushing and Pulling in Different Directions: The Best Interests of the Child and the Margin of Appreciation of States, Strasbourg: Council of Europe, 2007; see also R.H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemporary Problems 3, Children and the Law, 1975, at 226-293.

[156] *Ibid*, at para 50.

[157] CRC Committee, GC 14, at para 51-79: the list of elements include (a) the child's view, (b) the child's identity, (c) preservation of the family environment and maintaining relations, (d) care, protection and safety of the child, (e) situation of vulnerability, (f) the child's right to health, (g) the child's right to education.

elements. Personal subjectivity opens up second guesses and tension in determining the child's best interests. What adds to the complexity is the *balancing* of all elements, in which collective subjectivity dictates what is more important. Whose perception should be the starting point of the decision-making process? Whose perception weighs more than the others', and in what circumstances? Trying to solve this conundrum, experts have explored and debated on the use of *presumption*.

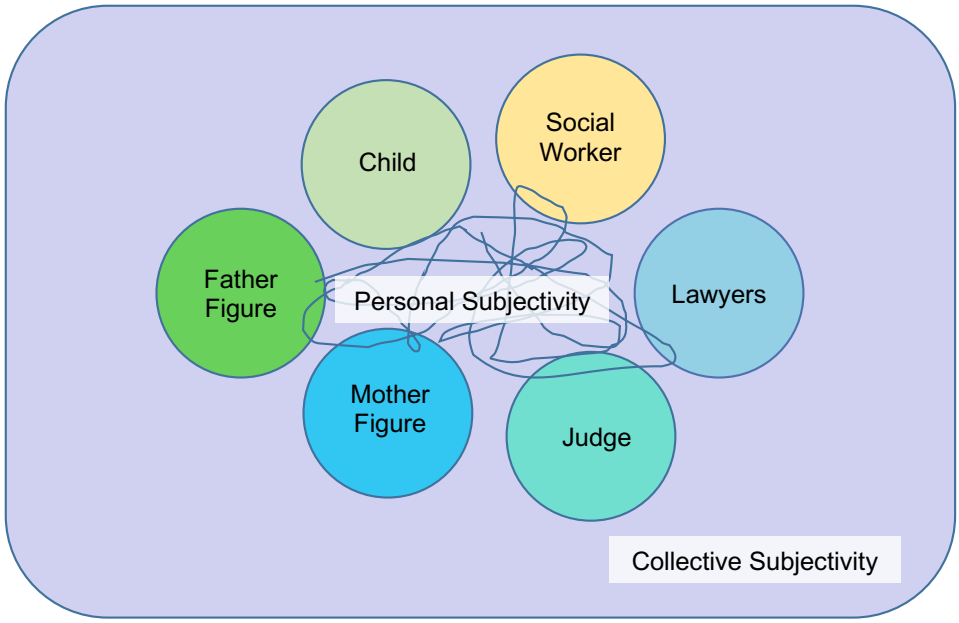

Figure 3. Personal and Collective Subjectivity in the Best Interests Determination[158]

2.2.3. Presumption and Burden of Proof

The most ideal form of legal system amidst the struggle of judges and/or decision-makers between subjectivity and flexibility in determining the children's best interests is succinctly described by Heneghan (2011):

> "A responsible legal system would not encourage numerous appeals in relocation cases, particularly where judges are putting weight on different facts in the same case. This is not law; this is the application of *personal preference*. Once considered and applied, the matter has been decided, and people should move on with their lives, rather than suspend them waiting for an appeal and spending precious resources on litigation that could much better be used for the child. The *earlier* adjustment to a decision is made, the more likely healing will occur and conflict dissipate".[159] (emphasis added)

To ensure "uniform treatment",[160] effective use of resources,[161] and efficiency,[162] Thompson (2015) recently proposed the use of presumption and allocation of burden of proof,[163] as an antidote to the

[158] J. Zermatte, at 494.
[159] M. Henaghan, Relocation Cases: The Rhetoric and the Reality of a Child's Best Interests – A View from the Bottom of the World, 23 Child and Family Law Quarterly, 2011, at 248.
[160] R. Thompson, *Presumptions, Burdens, and Best Interests in Relocation Law*, 53 Family Court Review 1, 2015, at 43, (hereinafter, "R. Thompson").
[161] *Ibid*, at 47.
[162] *Ibid.*
[163] R. Thompson; see also J. Atkinson, The Law of Relocation of Children, Behavioural Science and the Law, 2010.

inherent indeterminacy of the best interests principle.[164] Presumptions are not hard rules but "starting points" that are rebuttable.[165] He claims that by recognising patterns emerged from recurring facts,[166] and acknowledging research on child development and sociology,[167] presumptions are able to give structure, and to remedy judges' lack of specialist knowledge in the determination process.[168] Thompson therefore presents a few presumptions, one of which is a presumption *against* relocation of a parent with his/her child(ren) to a foreign country when the parents have a shared care plan.[169]

How and who should define "shared care"? – a focal point discussed at great length in *Re Marriage of Burgess (1966)* after such a presumption is established.[170] Thompson understands that it should not be a quantitative definition, but pitches a "threshold percentage" in a qualitative definition: 35% of the time or 5 overnights every ordinary fortnight.[171] Parkinson and Cashmore disagree with this approach, stating that it encourages "strategic positioning" of the parents in arranging a parenting plan.[172] They rhetorically ask what lawyer would advise a mother to share care with a father when there is a possibility of relocation?[173] Indeed, such a presumption results in "a *battle* of a different sort" – one loses instantly when he/she has the onus to rebut the presumption.[174] Naturally, the motivation for lawyers to press for co-parenting plan is to *avoid* the presumption instead of acting in the children's best interests.[175] Not only does it encourage an adversarial "battle" led by lawyers in a role-differentiated manner,[176] but also drives the judges to be "overly committed" to a perception that children are passive properties of their parents.[177] Its underlying belief is that the parents have to *prove* that the happiness of their children is inextricably linked to *either* one of them. This *a priori* assumption underlines that the best interests of the children are aligned with, and perceived primarily from the perspectives of their parents,[178] making the decision-making process adult-centric.[179]

Whilst presumptions in general give structure to the determination of children's best interests, the specific presumption against relocation in shared care cases brings "unintended detrimental consequences".[180] It is *far* from a child rights-based approach. As Tobin has pointed out, children are "active participants" to be seen and heard if they wish.[181] The CRC Committee also accord to it, highlighting that notwithstanding the position that co-parenting is "generally in the child's best interests", any presumption that *automatically* grants parental responsibility to either or both parents is

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[164] *Ibid*, at 41.
[165] *Ibid*, at 47.
[166] *Ibid*, at 46.
[167] *Ibid*, at 47.
[168] *Ibid*, at 48.
[169] *Ibid*, at 50.
[170] 913 P.2d 473, 1996, (California, United States).
[171] *Ibid*, at 50.
[172] P. Parkinson, & J. Cashmore, *Reforming Relocation Law: A Reply to Prof. Thompson,* 53 Family Court Review 1, 2015, at 63, (hereinafter, "P. Parkinson").
[173] *Ibid*.
[174] P.M. Stahl, Critical Issues in Relocation Cases: A Custody Evaluator's Response to Parkinson and Cashmore (2015) and Thompson (2015), 54 Family Court Review 4, 2016, at 633, (hereinafter, "P.M. Stahl").
[175] *Ibid*, at 634.
[176] J. Weinstein, And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System, University of Miami Law Review, 1997, at 92.
[177] J. Wallerstein, & T. Tanke, To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce, 30 Family Law Quarterly 2, 1996, at 307.
[178] P. Parkinson, at 60.
[179] *Ibid*; aligned with Article 3(2)-(3), CRC.
[180] P. Parkinson, at 63.
[181] J. Tobin, at 178.

undesirable.[182] Support can also be drawn from judges in Switzerland,[183] the United States,[184] and Canada;[185] as well as the Washington Declaration on International Family Relocation.[186]

However, when a presumption is child rights-based and child-focused, it serves as a better tool to counterbalance the indeterminacy of best interests determination.[187] Indeed, when Articles 9(1) and (3) are read in its entirety, the best interests determination should be understood in the context of children's right to co-parenting. Kruk (2011) has developed such a model based on the presumption of equal parental responsibility, employing a "responsibility-to-needs" framework.[188] This model is primarily premised on the children's needs, their parent's responsibilities to satisfy those needs, and the State's obligation to cater the parents' needs in fulfilling those responsibilities.[189] Among the 4 stages of this presumption, the first and foremost is to establish a legal expectation that parents should come up with a *parenting plan* through *negotiation* or mediation and parental coordination service.[190] Another side of the same coin is that there is a presumption *against* equal parenting when a child should be protected from a parent, in situations such as child abuse or family violence, etc..[191] This model preserves self-determination of the parents from lawyers' tendering of the conflict and judges' imposition as high priests. In a more conciliatory setting, children's best interests are more of a "primary consideration".[192] The sense of ownership among the parents and children in the parenting plan also enhances its sustainability.

2.2.4. Best Interests Determination as a Procedural Right

Procedural safeguards ensure the *implementation* of children's right to have their best interests taken into account. Children's access to the decision-making process, justice, and effective remedy are largely dependent on the professionals that children encounter.[193] In particular, child specialists that communicate with children,[194] legal representatives that assess children's best interests,[195] decision-makers that explain and justify why such a decision is made taking into account children's best interests.[196] The CRC Committee suggests that "a multidisciplinary team of professionals" are best placed to assess child's best interests. The role of these professionals are further explored in Chapter 4 of this thesis.[197]

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[182] *Ibid*.

[183] Article 133(2), Civil Code, SR 210, (Switzerland); see also *Bundesgericht*, 5A_375/2008, Supreme Court of Switzerland, 2008, (Switzerland).

[184] American Bar Association, Model Relocation of Children Act, 2012, (United States), at 10-11; see also *Tropea v Tropea*, 665 N.E.2D 145, 1996, (New York, United States), at 57.

[185] *Gorden v Goertz*, 2 SCR 27, 1996, (Canada).

[186] 2010, at para 3: "the best interests of the child should be the paramount consideration in all applications concerning international family relocations".

[187] E. Kruk, *A Model Equal Parental Responsibility Presumption in Contested Child Custody*, 39 The American Journal of Family Therapy 5, 2011, at 381, (hereinafter, "E. Kruk").

[188] *Ibid*.

[189] *Ibid*.

[190] *Ibid*, at 382.

[191] *Ibid*, at 383.

[192] Article 3(1), CRC; see also P.M. Stahl, at 634.

[193] J. Williams, *The Role of the Professions in Effective Implementation of the CRC*, in T. Liefaard, & J. Sloth-Nielsen, at 142, (hereinafter, "J. Williams").

[194] CRC Committee, GC 14, at para 89 and 94.

[195] *Ibid*, at para 96.

[196] *Ibid*, at para 97.

[197] Refer to Section 4.1.2. of this thesis, at 37.

2.3. CRC Framework on Children's Participation

2.3.1. Article 9(2): Right to an Opportunity to Participate

In arranging matters that concern a child after parental separation, the child's voices are likely to be submerged in three ways. First, the absence of an opportunity to be consulted and/or facilitated to be heard; second, the parents' dominance, influence or pressure that neglects the child's evolving capacity; third, the decision-makers' common practice as to when and how a child's voice should be heard and how much weight it carries. "I am an individual. I wanted to be part of the process determining my future", is what one of the grown-ups who experienced parental separation thinks.[198] This stance is not without legal basis. Article 9(2) of the CRC provides that:

> "In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be *given an opportunity to participate* in the proceedings and *make their views known*".[199]

"All interested parties" include parents and the child.[200] This is reminiscent of Article 12 of the CRC, which is regarded as a general principle in implementing the CRC.[201] It reads:

> "1. States Parties shall assure to the child who is capable of forming his or her own views the *right to express those views freely* in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child",
>
> "2. For this purpose, the child shall in particular be *provided the opportunity to be heard* in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".[202]

Articles 12 and 3 of the CRC are complementary because children's right to be heard is also embedded in the best interests determination,[203] giving it a double legal protection. The CRC Committee enunciates that if a child's views are not taken into account when determining the child's best interests, it "does not respect the possibility for the child or children to influence the determination of their best interests".[204] The Committee unequivocally clarifies that "there can be no correct application of Article 3 if the components of Article 12 are not respected".[205] The myth, where it is in the child's best interests to prevent them from participating throughout parental separation, is without legal foundation from a child-rights' perspective.

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[198] China Daily, Let the Children Speak, 20 September 2012, available at http://www.chinadaily.com.cn/china/2012-09/20/content_15771228.htm, last accessed (10-07-2018).

[199] Article 9(2), CRC.

[200] J.E. Doek, at 27.

[201] CRC Committee, General Comment No. 5, General Measures of Implementation of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5, 2003, at para 12, (hereinafter, "CRC Committee, GC 5").

[202] Article 12, CRC.

[203] CRC Committee, GC 14, at para 43, 53; CRC Committee, General Comment No. 12, The Right of the Child to be Heard, UN Doc. CRC/C/GC/12, 2009, at para 68, 74, (hereinafter, "CRC Committee, GC 12").

[204] CRC Committee, GC 14, at para 53.

[205] CRC Committee, General Comment No. 12: The Right of the Child to be Heard, UN Doc. CRC/C/GC/12, 2009, at para 74, (hereinafter, "CRC Committee, GC 12").

The right to participation signifies a paradigm shift from a child's welfare perspective to a child's rights perspective: "it recognises the child as a full human being with integrity and personality and the ability to participate freely in society",[206] instead of an incompetent "incomplete human being",[207] or a "human-becoming" in need of protection.[208] Such a shift from the long-standing welfare perspective is an essential feature of the CRC,[209] upholding that children are subjects of rights,[210] so that a "new social contract" is warranted.[211] Social contract is not at all easy to transform. It requires time, change of mind-sets, cultures and even rules, such as code of practice of the relevant professionals and legislations.

2.3.2. Right to Participation as a Procedural Right

Scholars in many jurisdictions believe that there is still a long way to ensure children's meaningful participation, especially in divorce or separation cases.[212] This is mainly because it can be "burdensome and invidious" for the child,[213] especially when it does not influence the outcome much because the court rarely gives more weight to the child's views than welfare.[214] However, some practitioners advocate that the inclusion of the child's views is crucial in safeguarding the child's best interests.[215] Milne (2015) therefore holds that the CRC does not guarantee children the same participation rights as adults,[216] but only gives them the right to express their views *insofar* as their best interests are in question.[217]

This narrow reading of the CRC is not without legal standing. To begin with, Article 12 does not confer a child the right to self-determination automatically.[218] Aligned with the principle that children's capacities keep evolving throughout childhood,[219] a child *may or may not* enjoy the degree of independence that an adult enjoys.[220] A child should not be expected to have the power, ability or duty to make any decision when his/her parents decide to separate.[221] Within the context of Article 9, a child is at most granted a *procedural right* to participate. The following section dissects the content of it on the basis of Lundy's model.[222] It first discusses children's right to express views freely (Section 2.3.1.), then their right to have

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[206] M. Freeman, *Children's Education; A Test Case for Best Interests and Autonomy*, in R. Davie & D. Galloway (Eds), Listening to Children in Education, London: David Fulton, 1996, at 37.

[207] L. Krappmann, *The Weight of the Child's View (Article 12 of the Convention on the Rights of the Child*, 18 International Journal of Children's Rights 501, 2010, at 502, (hereinafter, "L. Krappmann").

[208] J. Tobin, at 160.

[209] L. Krappmann, at 502.

[210] CRC Committee, GC 12, at para 18.

[211] CRC Committee, Recommendations: Day of General Discussion on the Right of the Child to be Heard, 29 September 2006, Preamble.

[212] E.E. Sutherland, at para 1.61; see also chapters on Canada at para 3.37, Israel at para 6.13, Malaysia at para 7.28, New Zealand at para 9.52, Norway at para 10.41, Russia at para 11.24, and Scotland at 12.30.

[213] E.E. Sutherland, at para 1.61.

[214] *Ibid*, even though Article 3 of the CRC provides that the child's best interests is only *one of the* many primary considerations.

[215] A. Martalas, Child Participation in Post-divorce or -separation Dispute Resolution, in T. Liefaard, & J. Sloth-Nielsen, at 904, 907.

[216] B. Milne, Rights of the Child: 25 Years After the Adoption of the UN Convention, Cham: Springer, 2015, at 16.

[217] *Ibid*, at 18.

[218] K. Herbots, & J. Put, *The Participation Disc: A Conceptual Analysis of (a) Child('s Right to) Participation*, 23 International Journal of Children's Rights, 2015, at 160; R. Hodgkin, & P. Newell, at 150.

[219] Article 5, CRC.

[220] G. Landsdown, *Best Interests of the Child and the Right to be Heard*, in M. Sormunen (Ed.), The Best Interests of the Child – A Dialogue Between Theory and Practice, Strasbourg: Council of Europe, 2016, at 31.

[221] C.J. Davel, & A.M. Skelton, (Eds.), Commentary on the Children's Act Revision Service 6, 2013, at 3-34.

[222] L. Lundy, "Voice" Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child, 33 British Educational Research Journal 6, 2007, at 932-933, (hereinafter, "L. Lundy").

their views given due weight (Section 2.3.2.). As these rights are dependent on how the relevant professionals' implementation, their role is further discussed in Chapter 4 of this thesis.[223]

2.3.3. Right to Express Views Freely

States have a positive obligation,[224] to provide a safe *place*,[225] that is child-friendly and enabling for children to freely express views.[226] Children should be able to decide whether or not, and how, they should be involved in the decision-making process after their parents separate.[227] Furthermore, children are entitled to be assisted in forming views by the provision of child-friendly *information*,[228] and trained *professionals* or any *representatives*.[229]

According to Article 17(e) of the CRC, information and material that are "injurious to his or her well-being" should be subjected to appropriate guidelines.[230] Such guidelines serve as a gatekeeper of child's participation: without the information of parental separation, a child cannot participate. As to the representative, the role is merely to convey accurately the child's views.[231] The first exception exists when the child holds different views that his/her representative, then the child can have another representative.[232] The second exception is when the child's best interests is being assessed formally by judicial bodies, and particularly when there is a conflict between views among the parties, then the child may need a *legal* representative.[233]

2.3.4. Right to Have the Child's Views Given Due Weight

A meaningful participation entails that children's views are "listened" to, and are "given due weight" that may be able to influence the decision.[234] Lundy highlights that children have a "right of audience",[235] a powerful translation of a guaranteed "opportunity to participate" pursuant to Article 9. However, it is only "decorative",[236] when the next requirement – giving due weight – is not in place. This is not as easy.[237] It is challenging mainly because it is dependent on the adults' perception of whether the child is of sufficient age and maturity in forming that particular view,[238] and the adult's perception of the child's best interests. The CRC Committee recommends that when the child's views are formed reasonably and independently, it should be given due weight.[239] The decision-makers should also give *feedback* to the child's views by explaining how it influences the outcome.[240]

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[223] Refer to Section 4.1.2. of this thesis, at 37.
[224] Article 12, CRC, "assure".
[225] Article 19, CRC.
[226] CRC Committee, GC 12, at para 42.
[227] L. Lundy, at 934.
[228] Article 13, 17, CRC; CRC Committee, GC 12, at para 41; Article 3, European Convention on the Exercise of Children's Rights, European Treaty Series No. 160, Strasbourg, 1996, (hereinafter, "European Convention on the Exercise of Children's Rights"); L. Lundy, at 935.
[229] CRC Committee, GC 12, at para 41; Article 5(a), European Convention on the Exercise of Children's Rights.
[230] Article 17(e).
[231] CRC Committee, GC 14, at para 90.
[232] CRC Committee, GC 14, at para 90.
[233] CRC Committee, GC 14. At para 96.
[234] CRC Committee, GC 12, at para 42; *L v Finland*, App. No. 25651/94, 2000, (ECtHR), at para 126-128.
[235] L. Lundy, at 937.
[236] L. Lundy, at 938.
[237] CRC Committee, GC 5, at para 12.
[238] L. Lundy, at 937.
[239] CRC Committee, GC 12, at 44.
[240] CRC Committee, GC 12, at 45.

3. Comparative Analysis of the Implementation of Collaborative Practice

Whilst the current international laws do not confer individuals the "right to divorce",[241] in jurisdictions where divorce is legal, the process should at least safeguard the trinity of children's rights.[242] This obligation is not only conferred to the States, but also to private agents especially professionals such as parents, lawyers, practitioners, etc..[243] Therefore, all relevant parties of a collaborative practice team should yield to protect children's rights.

Before answering the research question of this thesis: how should a child rights-based model of collaborative practice look like, 2 steps are prerequisite. First, an identification of the common core elements of collaborative practice through a comparative analysis of its implementations in different jurisdictions. Second, an evaluation of the extent to which these elements of various models comply with the international legal standards pursuant to Article 9 of the CRC. These 2 steps are addressed in this chapter.

In this chapter, the models and development of collaborative practice is first explored (Section 3.1.). Then, the modalities of collaborative practice in the United States, England and Wales, Singapore and Hong Kong are compared and evaluated according to 3 themes: (i) safeguarding of children's right to co-parenting (Section 3.2.); (ii) protection of children's rights to have his/her best interests taken as a primary consideration (Section 3.3.); and (iii) protection of children's right to participation (Section 3.4.).

3.1. Collaborative Practice

3.1.1. Models of Collaborative Practice

The only corner stone of collaborative practice is to "reverse" the adversarial nature of dispute resolution,[244] and that court should be the last resort: giving it ample of room for various models.[245] One of the most common taxonomies of models is premised on *who* the participating professionals are, and *how* they are involved in a collaborative practice case.[246] There are 3 such models. A "lawyer-only model" involves only 2 collaborative lawyers, each representing one side of the dispute.[247] It is the original model, featuring a four-way meeting,[248] and is sometimes referred to as "collaborative law".[249] A "team model" is later developed by Dr. Thompson in the United States,[250] which assembles a fixed group of multi-disciplinary professionals at the beginning of the case,[251] typically involves 2 collaborative lawyers,

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[241] Articles 8 and 12 of the ECHR on the right to private family life and the right to marry are not interpreted as conferring the right to divorce: *Johnston and Others v Ireland*, App. No. 9697/82, 1986, (ECtHR), at para 57; *Ivanov and Petrova v Bulgaria*, App. No. 15001/04, 2011, (ECtHR), at para 60 and 64.

[242] Including children born out of wedlock, pursuant to Article 2, CRC.

[243] HRC, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004, at para 8; Refer to Section 4.1.2. of this thesis, at 37.

[244] J. Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 Journal of Dispute Resolution 1, 2008, at 204, (hereinafter, "J. Lande (2008)").

[245] F.S. Mosten, Collaborative Divorce Handbook, Jossey-Bass, 2009, at 8-9, (hereinafter, "F.S. Mosten").

[246] J. Lande, *An Empirical Analysis of Collaborative Practice*, 49 Family Court Review 257, 2011, at 257, (hereinafter, "J. Lande (2011)").

[247] *Ibid*.

[248] 2 clients and 2 collaborative lawyers.

[249] G.L. Voegele, R.D. Ousky, & L.K. Wray, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 William Mitchell Law Review 3, Article 10, 2007, at 977, (hereinafter, "G.L. Voegele").

[250] G.L. Voegele, at 977.

[251] *Ibid*, at 257.

2 divorce coaches (who must be licensed mental health practitioners), 1 child specialist, and 1 financial specialist.[252] These professionals must all be well-trained for mediation, have experience in divorce work, and chosen by the clients.[253] A "referral model" (also known as the "hybrid model") allows the disputed parties to hire any professionals only when necessary.[254] Sometimes the parties hire and share one neutral professional, while sometimes each party hires a different professional.

According to a survey conducted by the International Academy of Collaborative Professionals ("IACP"),[255] among the 933 collaborative cases reported from 2006 to 2010, 97% of them concerned divorce,[256] and 84% of them involved children.[257] Fitting to the group that this thesis is investigating, these statistics are valuable data to be analysed. In particular, 43% of the 933 cases used the "team model", whilst coincidentally another 43% of the cases used the "lawyer-only model", and the remaining 14% used the "referral model".[258] The percentage of multi-disciplinary professionals' involvement is illustrated in the table below.[259]

	Team Make-up			
	Collaborative Lawyers	Child Specialist(s)	Divorce Coach(es)	Financial Specialist(s)
Lawyer-only Model (43%)	√	**X** (0%)	**X** (0%)	**X** (0%)
Team Model (43%)	√	√ (82%)	√ (82%)	√ (79%)
Referral Model (14%)	√	Δ (45%)	Δ (45%)	Δ (71%)

√: Involved at the Beginning Δ: Involved only when Necessary X: Uninvolved

Since collaborative practice provides clients with a high degree of self-determination and flexibility, theoretically they can choose whichever model that suits them the most. Nevertheless, the "local practice culture" influences how clients decide.[260] Such practice culture, and the *modality* of collaborative practice is further explored by a comparative analysis of the United States, England & Wales, Hong Kong and Singapore.

3.1.2. History and Legal Development of Collaborative Practice in the 4 Research Sites

In the United States ("US"), collaborative practice was first described by Stu Webb, a family lawyer in Minnesota in and around 1990s.[261] It has since rapidly developed in the US, and grown in support

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[252] P.H. Tesler, at 331; S. Gamache, *Collaborative Practice: A New Opportunity to Address Children's Best Interests in Divorce*, 65 Louisiana Law Review 4, 2005, at 1464, (hereinafter, "S. Gamache").

[253] *Ibid*.

[254] J. Lande (2011), at 257; G. Voegele, at 977.

[255] L.K. Wray, *The International Academy of Collaborative Professionals Research Regarding Collaborative Practice: Basic Findings*, International Academy of Collaborative Practitioners ("IACP") Research Committee, 2011, at 1, available at: https://www.collaborativepractice.com/sites/default/files/2011_08_26_CollaborativePracticeReport_shortversion.pdf, last accessed (10-07-2018), (hereinafter, "L.K. Wray").

[256] L.K. Wray, at 2.

[257] L.K. Wray, at 5.

[258] L.K. Wray, at 3.

[259] L.K. Wray, at 3.

[260] J. Lande (2011), at 265.

[261] S. Webb, *Collaborative Law: An Alternative for Attorneys Suffering "Family Law Burnout*", 13 Matrimonial Strategist, July 2000, at 7; see also National Conference of Commissioners of Uniform State Laws, Uniform Collaborative Law Rules and Uniform Collaborative Law Act, 2010, (United States), available at http://www.uniformlaws.org/shared/docs/collaborative_law/uclranducla_finalact_jul10.pdf, last accessed (10-07-2018), Prefatory Note, at 4, (hereinafter, "UCLA").

among courts.[262] In 2007, the first court-based collaborative family law centre was set up in New York.[263] It has then grown vigorously in other jurisdictions, including England & Wales ("EW") since 2006,[264] Hong Kong ("HK") in 2010,[265] and Singapore in 2013.[266]

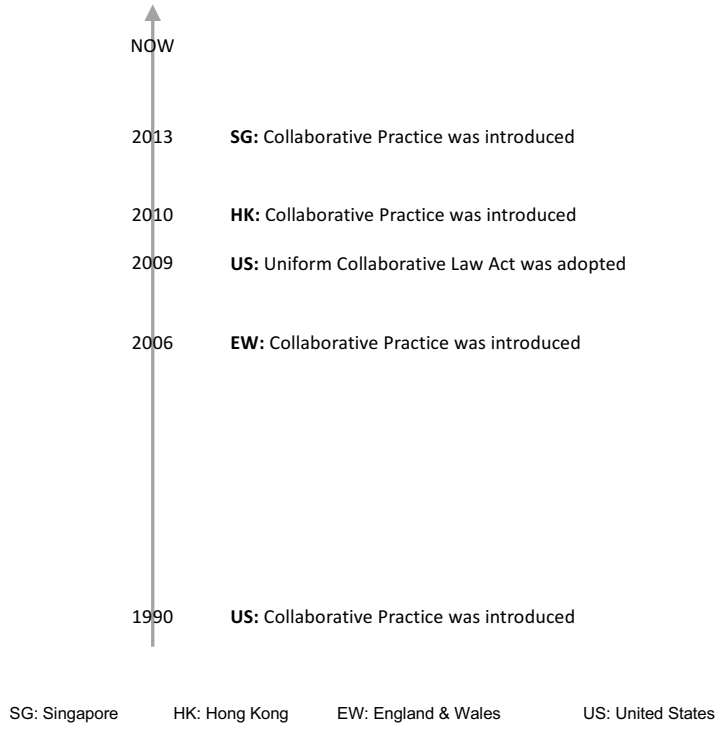

Figure 4. Timeline of the Development of Collaborative Practice in the 4 Research Sites

The Uniform Collaborative Divorce Law Rules and Act ("UCLA") was enacted in 2009, and amended in 2010.[267] It aims at encouraging its growth as an ADR,[268] as well as standardising behaviour and conduct of all participating parties, such as the content of participation agreements that disqualify collaborative lawyers from representing the clients in litigation when the negotiation fails,[269] parties' obligation to disclose relevant information, [270] lawyers' obligation to screen clients on their suitability of engagement,[271] etc.. The Ohio Judicial Conference, representing judges in Ohio, welcomes the Act,

[262] Rule 304.05, Rule 111.05, General Rules of Practice, Minnesota Court Rules, 2008; Rule 12.5, Local Court Rules, Contra Costa County; Rule 14.26, Local Court Rules, Los Angeles County; Rule 11.17(B), (E), Local Court Rules, San Francisco County; Rule 9.26, Local Court Rules, Sonoma County.

[263] UCLA, Prefatory Note, at 5-6.

[264] Launched in London in November, 2006, see F. Gibb, *Family Judges Campaign to Take the Bitterness and Cost Out of Divorce*, The Times, 4 October 2007.

[265] Interview with a collaborative practitioner, vice-chairperson of Collaborative Practice Group in Hong Kong, Annex C, at 69, (hereinafter, "Annex C"); see also Singapore Mediation Centre, available at http://mediation.com.sg/about-us/, last access on 15 June 2018.

[266] Interview with a collaborative practitioner in Singapore, board member of the IACP, Annex D, at 73, (hereinafter, "Annex D").

[267] UCLA.

[268] UCLA, Prefatory Note, at 16.

[269] *Ibid*; see also W.H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 Pepperdine Dispute Resolution Law Journal 351, 2004, at 358.

[270] *Ibid*, at 18.

[271] *Ibid*.

commending that such codification enhances the public's confidence in collaborative law as an ADR.[272] The UCLA is regarded as the "model of best practice", and has triggered a ripple effect to other jurisdictions.[273]

Such a strong legal basis of collaborative practice is not found in the 3 other jurisdictions. However, all of them have embedded collaborative practice in court practice directions. In HK, Practice Direction 15.13 enunciates that a judge may adjourn any dispute related to children for collaborative practice.[274] In Singapore, collaborative practice is referred to more specifically as "collaborative family practice", whose features are succinctly defined in the Family Justice Courts Practice Directions.[275] It provides that parties who have reached an agreement through collaborative practice can request a "simplified hearing track".[276] Similarly in EW, Practice Direction 12B defines collaborative practice,[277] and stipulates that judges should allow parties to consider whether collaborative law is appropriate.[278]

3.2. Co-parenting and Collaborative Practice

3.2.1. Participation Agreement as the Common Ground

A Participation Agreement ("PA"),[279] can be a private agreement or a court order that regulates the conduct of the parties in the process of collaborative practice.[280] According to the father of collaborative practice, Stu Webb, the PA "requires the attorneys to withdraw from your case if they can't resolve all of your issues out of court".[281] This is later endorsed as the "disqualification requirement" in the UCLA.[282] However, there are other lawyers that practise all the principles of collaborative practice except the disqualification requirement, making it a *cooperative practice* instead of a collaborative practice.[283] The disqualification requirement is a *defining* feature of collaborative practice,[284] and is found in all PAs in the US,[285] EW,[286] Singapore,[287] and HK.[288]

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[272] Ohio Judicial Conference, RE: House Bill 467 (Collaborative Family Law), 6 October 2010, available at http://www.uniformlaws.org/Shared/Docs/UCLA/Ohio%20Judicial%20Conference%20UCLA.pdf, last accessed (10-07-2018).

[273] C. Healy, Collaborative Practice: An International Perspective, Routledge, 2018, at 2, (hereinafter, "C. Healy").

[274] Hong Kong Chief Justice, Practice Direction 15.13: Children's Dispute Resolution, 2016, available at http://www.hklii.org/eng/hk/other/pd/PD15.13.html, last accessed (10-07-2018), at para 12(vii); Annex C, at 70, (hereinafter, "PD 15.13").

[275] Singapore Family Justice Courts, Practice Directions, 2015, at para 15(3).

[276] *Ibid*, at para 15(2).

[277] Ministry of Justice, Practice Direction 12B: Child Arrangements Programme, (EW).

[278] *Ibid*, at para 14.13.

[279] Also known as "disqualification agreement", "withdrawal provision", "collaborative commitment".

[280] F.S. Mosten, at 29.

[281] S.G. Webb, & R. Ousky, The Collaborative Way to Divorce: The Revolutionary Method that Results in Less Stress, Lower Costs, and Happier Kids – Without Going to Court, Plume, 2007, at 6-7, see also F.S. Mosten, at 29.

[282] Section 9, UCLA.

[283] E.g. Wisconsin practice group, Divorce Cooperation Institute.

[284] G.L. Voegele, at 978.

[285] Sections 2(3)(a), 4, UCLA.

[286] Resolution, Guide to Good Practice for Collaborative Professionals, 2016, at 3, available at http://www.resolution.org.uk/site_content_files/files/good_practice_guide_for_collaborative_professionals.pdf, last accessed (10-07-2018), (hereinafter, "Resolution, Guide to Good Practice").

[287] Singapore Mediation Centre, *Collaborative Family Practice Process*, available at http://www.mediation.com.sg/assets/downloads/collaborative-family-practice/process.pdf, last accessed (10-07-2018); Annex D, at 74.

[288] Annex B, at 65.

Analysing it alongside with children's right to co-parenting, a PA is helpful in 3 ways. First, it ensures a high level of commitment among the parties. Many last-minute mediations happen right in front of the doorsteps of the courts, out of pressure or necessity.[289] When either party runs out of emotional energy, or realises the minimal chance of winning in litigation, the settlement is of significantly lower quality because most of the effort and resources are spent on a litigation that has not taken place. A PA establishes a "common understanding" between the parties,[290] and allows them to utilise the resources in a cost-effective way when constructing a high-quality agreement. The parties are facilitated to act as a "joint management team", that supports each other.[291] Research reveals that collaborative practitioners in EW believe the process fosters some creative agreement that can never be reached via litigation or negotiations.[292]

Second, a PA creates a "sense of security" without the use of tactics.[293] Naturally, the parties are less anxious and more able to identify what is the best "childrearing agreement" and "division of labour".[294] Third, a PA ensures that the parties are represented by a non-aggressive lawyer with similar soft skills and focus on conciliation.[295] A Hong Kong collaborative practitioner describes that the PA makes the lawyers in one of the collaborative cases she handled "work really hard" to rescue the case from the verge of litigation.[296] She expresses that the lawyers do not want to "lose the work", and "truly believe in" collaborative practice, so they are willing to do all that they can to *rescue* it.[297] On the contrary, in mediation, the threat of litigation lingers throughout, and the mediator does not feel as strongly as a collaborative practitioner to achieving an agreement.[298] All in all, a PA safeguards children's right to co-parenting by creating an amicable environment, where the parents and lawyers are committed to reaching a high-quality co-parenting agreement.

3.2.2. Different Legal Contexts of Co-parenting

In terms of the legal context, the US has not ratified the CRC that guarantees children's right to co-parenting, while all the other jurisdictions have ratified the CRC. This background is not mirrored in domestic laws however. The US and EW have enacted legislations on parental joint physical custody as early as 1980s, whilst it is not found in SG and HK.

3.2.2.1. The United States

The law on shared parenting in the US,[299] is operated by the "approximation rule" when the parents are unable to reach an agreement, which allocates parental responsibilities according to their distribution

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[289] G.L. Voegele, at 979.

[290] Annex B, at 64.

[291] Refer to Section 2.1.3.3. of this thesis, at 13.

[292] M. Sefton, *Collaborative Law in England and Wales: Early Findings*, Resolution, 2009, at 5, (hereinafter, "M. Sefton").

[293] Annex B, at 65.

[294] Refer to Section 2.1.3.3. of this thesis, at 13; G.L. Voegele, at 980; J. Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases*, Department of Justice Canada, 2005, at ix, (hereinafter, "J. Macfarlane").

[295] F.S. Mosten, at 28; G.L. Voegele, at 982.

[296] Annex B, at 65.

[297] *Ibid*.

[298] Annex A, at 55.

[299] The American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 2001, (hereinafter, "ALI"); see also J. Folberg (Ed.), Custody Overview in Joint Custody and Shared Parenting, (2nd ed.), 1991, at 3-10,

before separation.[300] When the parents are likely to *at least* maintain their pre-divorce parental role in litigation, they are more willing to negotiate on a co-parenting plan. This soft law in the US cultivates an amicable settlement regarding child-rearing, which facilitates collaborative practice between the parties.

3.2.2.2. England & Wales

In EW, the legal basis of co-parenting is found in Section 11(4) of the Children Act 1989.[301] The domestic courts have repeatedly described the concept of shared residence "provides legal confirmation of the factual reality of a child's life",[302] including those children born out of wedlock, whose fathers do not earn parental responsibility automatically. In *Re AR (A Child: Relocation)*, Justice Mostyn holds that shared residence is "the rule rather than the exception".[303] Support can also be drawn from *D v D (Shared Residence Order)*,[304] and *Holmes-Moorhouse v Richmond-Upon Thames LBC*.[305] The implementation of co-parenting through legislative means is a step further from the US's position towards protecting child's right to co-parenting, but its legal application is not without controversies. Of the greatest significance, it is argued that "empirical support for legislating to prioritise shared time over other parenting arrangements is lacking".[306] Australia, who has a similar legal provision, has collected evidence that reveals the possibility of "deleterious impact" of shared care on children under the age of 4.[307] An adequate balancing of the *quantity* of parenting does not guarantee *quality* parenting.

Evaluating alongside with Article 9 on co-parenting, Section 11(4) of the Children Act 1989 in EW serves as a concrete legal expectation that the parents should cooperate after divorce in any matters regarding parenting their child(ren).[308] However, this legal assumption may shape the negotiation within a collaborative practice team in EW negatively, namely it may be more challenging for the primary caretaker to ensure the child (especially young or vulnerable ones with special needs) staying at the matrimonial home on a long-term basis. However, it may be counter-balanced by the parties' self-determination, the family consultant's professional advice, and/or the child's participation regarding the co-parenting relationship.[309] If the Code of Practice is abided by all parties, where the best interests of any children should be considered first,[310] then the quality of co-parenting is more likely to be guaranteed than a judgement made within the court system. The judges' hands are tied by this law, whilst collaborative practice allows parties to co-parent in a more sustainable and realistic manner.

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[300] E.S. Scott, *Pluralism, Parental Preferences, and Child Custody*, 80 California Law Review 615, 1992; at 8.

[301] Children Act, c. 41, 1989, (England), (hereinafter, "CA, 1989").

[302] *Re A (Joint Residence: Parental Responsibility)*, EWCA Civ 867, 2009, (EW), at para 66; see also *Re H (Children)*, EWCA Civ 902, 2009, (EW); *Re F (Children)*, EWCA Civ 392, 2003, (EW), at para 21.

[303] EWHC 1346 (Fam), 2010, (EW), at para 52.

[304] 1 FLR 495, 2001, (EW).

[305] UKHL 7, 2009, (EW), at para 7: "shared residence orders are not nowadays unusual", (hereinafter, "*Holmes-Moorhouse*"); see also *Re A (Joint Residence: Parental Responsibility)*, EWCA Civ 867, 2009, (EW), at para 66.

[306] J. McIntosh, B. Smyth, K. Margaret, T. Wells, & C. Long, *Post Separation Parenting Arrangements and Developmental Outcomes for Infants and Children*, Family Transitions, 2010, at 47-49, (a report prepared for the Australian Government Attorney General's Department).

[307] *Ibid*, at 9.

[308] Section 11(4), CA, 1989.

[309] Resolution, Guide to Good Practice at 2.

[310] Resolution, Code of Practice, at 1, available at http://www.resolution.org.uk/site_content_files/files/code_of_practice_full_version_web.pdf, last accessed (10-07-2018)

3.2.2.3. Singapore

In Singapore, comparing to EW, co-parenting is not a hard legal obligation, because it has retained the custody and access model from EW since colonial times.[311] Nevertheless, co-parenting is unequivocally commemorated recently through the court's creative reading of another relevant law, the Women's Charter, in *CX v CY* in 2005. It is reaffirmed in *ZO v ZP*,[312] which states:

> "This idea of joint parental responsibility is deeply rooted in our family law jurisprudence. Section 46(1) of the Women's Charter … exhorts both parents to make *equal co-operative efforts* to care and provide for their children. Article 18 of the United Nations Convention of the Rights of the Child 1989, to which Singapore is a signatory, also endorses the view that both parents have common responsibilities for the upbringing and development of their child … There can be no doubt that the *welfare of a child is best secured* by letting him enjoy the love, care and support of *both parents*. The *needs* of a child do not change simply because his parents no longer live together. Thus, in any custody proceedings, it is crucial that the courts recognise and promote *joint parenting* so that both parents can continue to have a direct involvement in the child's life".

Section 46 of the Women's Charter,[313] provides that the husband and wife shall "co-operate with each other in safeguarding the interests of the union and in caring and providing for the children",[314] and they have "equal rights".[315] The concept of co-operation is explained in *LSJ v LKK*, as requiring the husband and wife "to work together, collaborate, connive, unite, contribute, lend assistance or act in concert".[316] When Section 46 is read into the legislations on custody and access innovatively, a new legal norm of co-parenting is created.

Although co-parenting is not *explicitly* legislated, a Singaporean collaborative practitioner, who handles the first collaborative case in 2013, believes that it is for a good reason.[317] He views that shared parenting is a "practical and emotional issue" that should not be "defined or dictated" by legislations. He believes that since the relevant legislation, Women's Charter, is broadly drafted, the flexibility is much valued as it ensures a case-by-case determination.[318] In Singapore's first collaborative case in July 2013 ("*SG CP, July 2013*"),[319] the co-parenting arrangement is a "success", and is still on-going until last checked in 2017.[320] The collaborative lawyer of that case highlights that collaborative practice is "able to protect the rights of the child… especially co-parenting".[321] One can see that the legal context of Singapore allows a high degree of autonomy to parents in reaching a parenting plan in the collaborative process, while upholding children's right to co-parenting as far as possible.

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[311] Section 5, Guardianship of Infants Act, Chapter 122, 1987, Singapore.
[312] At para 11.
[313] Cap 353, 1997, Singapore.
[314] Section 46(1), Women's Charter.
[315] Section 46(4), Women's Charter.
[316] 2 SLR 813, 1992, at 815; see also D.S.L. Ong, *Time Restriction on Divorce in Singapore*, 418 Singapore Journal Legal Studies, 2003, at 421.
[317] Annex D, at 73.
[318] Annex D, at 76.
[319] Annex D, at 74.
[320] Annex D, at 76.
[321] *Ibid*.

3.2.2.4. Hong Kong

In the absence of a legislation akin to the Women's Charter, the laws in Hong Kong (an inheritance of EW from colonial times) still rigidly divide parental responsibilities into "care and control" and "access".[322] It shapes a binary mind-set on the 2 separated parents: one can either be a "custodial parent" or a "non-custodial parent". Among sole custody, joint custody, and split custody orders,[323] the court most commonly order "sole custody", which in effect transfers "most, if not all, parental rights and authorities to the custodial parent *exclusively*".[324] Children in Hong Kong typically associate parental separation with the question, "which parent should I pick?". Although the Law Reform Commission recommended the abolishment of the custody and access paradigm to the joint parental responsibility model in 2005 as that in EW and Australia,[325] it has not been taken on board due to divided views in society.[326]

However, the judiciary has slowly progressed towards safeguarding children's right to co-parenting,[327] but in a way vastly different from Singapore. In *PD v KWW (2010)*, the court states that joint custody orders are "no longer uncommon in Hong Kong".[328] This position is reaffirmed in *SKP v Y, ITT*,[329] ruling that joint custody probably reflects "a cooperative co-parenting scenario".[330] In that case, joint custody takes an unusual form of "sole custody *and* shared care", which is reminiscent of parallel parenting.[331] The *ratio decidendi* behind it is that the child should "spend significant amounts of time with both parents".[332]

Unlike Singapore, the courts in Hong Kong have not perceived co-parenting as a child's right, not to mention any reference to the CRC; rather, it is merely seen as a measure that safeguards a child's best interests according to social science.[333] It is a welfare-oriented reading of the law. The complex conceptions and legal terminologies of custody, access, shared care, and co-parenting are expected to be inaccessible to parents and children. The legal jargon is also difficult to reflect a personalised and unique parenting plan. As such, the failure of legal reform provides impetus behind the new Practice Direction 15.13 that promotes settlement between the parties through ADR.[334] If an agreement is not

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[322] Section 10(1), Guardianship of Minors Ordinance, Cap. 13, Hong Kong; Sections 2, Matrimonial Proceedings and Property Ordinance, Cap. 192, Hong Kong; Section 48, Matrimonial Causes Ordinance, Cap. 179, Hong Kong.

[323] Section 19, Matrimonial Proceedings and Property Ordinance, Cap. 192, Hong Kong.

[324] A. Liu, Family Law for the Hong Kong SAR, Hong Kong University Press, 1999, at 276-279; The Law Reform Commission of Hong Kong, Report: Child Custody and Access, 2005, at para 2.26, (hereinafter, "HK Law Reform").

[325] HK Law Reform, at para 11.1.

[326] Labour and Welfare Bureau, Child Custody and Access: Whether to Implement the "Joint Parental Responsibility Model" by Legislative Means: Consultation Paper, 2011; Legislative Council Panel on Welfare Services, Hong Kong Law Reform Commission Report on Child Custody and Access, LC Paper No. CB(2)1483/12-13(02), 2013, at Annex A, at 1.

[327] *S v Z*, FCMC 14535/2005, 2007; *PD v KWW*, CACV 188/2009, 2010, (hereinafter, "*PD v KWW*").

[328] *PD v KWW*, at para 52-57.

[329] SKP v Y, ITT (Legal Terminology to be Used in Child/ren's Arrangements), FCMC 17772/2011, 2012, (Hong Kong), (hereinafter, "SKP v Y, ITT").

[330] *Ibid*, at para 21-22.

[331] *Ibid*, at para 22; also ordered in *RWS v KCC*, FCMC 9661/2010, 2010, (Hong Kong); on parallel parenting, see also K. Mandarino, M.K. Pruett, & L. Fieldstone, *Co-parenting in a Highly Conflicted Separation/Divorce: Learning About Parents and Their Experiences Parenting Coordination, Legal and Mental Health Interventions*, 54 Family Court Review 4, 2016, at 566-567.

[332] *SKP v Y, ITT*, at para 22.

[333] *Ibid*, at para 21-22.

[334] Including collaborative practice, PD 15.13, at para 12; S. Ser, & P. Hewitt, *Putting More Focus on Children: The Children's Dispute Resolution Pilot Scheme*, Hong Kong Lawyer, November 2012, available at: http://www.hk-

reached, the judge can adopt a facilitator role in a pilot scheme called the "Child Dispute Resolution", which has then been formally adopted since April 2016.

3.2.2.5. Summary

The laws on co-parenting in these research sites generally have a positive effect on collaborative practice, but the motivation behind is vastly different. Regarding the effect on parties' willingness to engage in collaborative practice, the legal context in the US and EW gives parties an expectation of parental cooperation. The US participants work on the basis that both parents should at the minimum retain approximately their pre-divorce parental roles, whilst the EW participants cooperate in a "less conflictual framework",[335] in order to avoid judge's rigid ruling on shared residence that potentially compromise the child's best interests according to the parents' subjectivity. In the absence of a legislation on co-parenting, Singapore adopts a more child rights-based approach than HK by bestowing an *obligation to cooperate* on the parents, making ADR "very accepted" in society.[336] HK, on the other hand, promotes ADR with the parties' fear of complex legal jargon and loss of control to the judges that are bound by laws, which are insufficient to protect rights and interests of all parties.

Regarding the effect on parties' perception before entering the negotiation room of collaborative practice, the legal context may affect how the lawyers tender their legal advice. It may also affect the expectation and perception of the parents and even children. The laws in EW and HK are more prone to cultivate an adversarial and binary thinking of the parties, but those in the US and Singapore are more able to facilitate parenting agreement unique to the parties.

	United States	England & Wales	Singapore	Hong Kong
Legislation on Co-parenting	√	√	X	X
Implementation	Approximation Rule	Shared Residence	Co-parenting	Joint Custody
Effect on Collaborative Practice	++	+/-	++	+/-

Figure 5. Comparison of Legal Contexts on Co-parenting

This evaluation is *purely* based on the legal context, it must be understood that the outcome is largely dependent on the role and guidance provided by the participating professionals, as explained in the following section.

lawyer.org/content/putting-more-focus-children-children%E2%80%99s-dispute-resolution-pilot-scheme, last accessed (10-07-2018).

[335] W. Duncan, at para 89, refer to note 99, at 10.

[336] Annex D, at 77.

3.2.3. The Role of Professionals in Facilitating Co-parenting

Mental health practitioners that facilitate co-parenting can be divorce coaches, therapists or psychologists, etc., and they can be part of the collaborative practice team that practises a multi-disciplinary team model, or a referral model. They assist on communication, reaching consensus on parenting, stress and anger management, etc..[337] In more than 70% of the cases, parents are also assisted by a financial specialist on issues such as budgeting, assets, debts, etc..[338] These professionals are separately billed at their own rate.[339]

The multi-disciplinary model is popular in the US,[340] and it is also the prescribed model by Resolution (Solicitors Family Law Association) in EW.[341] Among the significantly lower number of cases in Singapore and Hong Kong, whilst the practitioners endorse the team model, most of the cases are dealt with the lawyers-only model.[342] It is clearly impossible to transfer the therapeutic jurisprudence of collaborative practice to Asia without any adaptations, and the reason is two-fold. First, the relevant personnel are lacking – therapists are rarely collaboratively trained – Singapore does not have any financial specialist,[343] and HK only has 1 divorce coach.[344] Second, the culture of "going to a therapist" is not predominant if not stigmatised. A Hong Kong collaborative practitioner coined the term "a very American concept", when explaining why collaborative practice has not rocketed since 2010. The absence of professionals may mean that the parents' needs and expectations are *subsumed* to the shoulders of collaborative lawyers. A Singaporean collaborative practitioner highlights the importance of "soft skills", and the capability to "wear many hats" as lawyers after the Singapore Family Justice Court is reformed.[345] A HK collaborative practitioner concurs, saying that "I don't think you can be a collaborative practitioner if you actually don't realise that the process itself does involve an element of healing".[346]

On the other hand, a research done in the US finds that 60% of the collaborative lawyers think "there often is an expectation to use more professionals than needed", and that reduces the lawyers' contribution when some of them are comfortable with their "quasi-therapeutic" role.[347] From the perspectives of the parents, some feel that the participation of divorce coaches is "artificial" and too expensive.[348] Similar findings are present in EW.[349] Evaluating it in the light of the CRC, there is no assumption that parents are better positioned in reaching a sustainable co-parenting agreement with the help of mental health professionals. Therefore, insofar as the collaborative lawyers are willing to be a good team player, for example "eating humble pie",[350] then it is not necessary to engage other professionals in order to facilitate co-parenting. A state-provided service of parenting coordination or facilitation, or parenting course may suffice.

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[337] S. Gamache, at 331.
[338] L.K. Wray, at 3.
[339] *Ibid*.
[340] S. Gamache, at 331.
[341] Resolution, *Finding Solutions Together: How the Collaborative Process can Help Ease the Pain of Family Breakdown*, 2016, available at http://www.resolution.org.uk/site_content_files/files/pod_flyer_2016.pdf, last accessed (10-07-2018).
[342] Annex B, at 64; Annex C, at 69; Annex D; at 73, 75.
[343] Annex D, at 75.
[344] Annex B, at 65.
[345] Annex D, at 75.
[346] Annex B, at 66.
[347] J. Lande (2008), at 222-223
[348] J. Macfarlane, at 51-55.
[349] M. Sefton, at 53-55; see also J. Lande (2011), at 266.
[350] Annex B, at 66.

3.3. Children's Best Interests and Collaborative Practice

3.3.1. The Elimination of an Adversarial Deliberation

The 4 chosen research sites are all common law jurisdictions, whose adversarial legal culture is more visible than that in civil law jurisdictions. Their judgement is also bound by legal precedents handed down by the courts, substantially restricting the judges' discretionary power. For instance, in the US, the elimination of maternal preference in implementing the child's best interests determination sees opportunists engaging in strategic behaviour.[351] Some states in the US even have presumptions in favour of joint custody,[352] allocating the onus of proof to one parent. It encourages parents to position themselves according to the law's preference, instead of the real needs of their children and their ability to fulfil those needs. The adversarial nature, instead of an inquisitorial one, is problematic when determining children's best interests.

3.3.2. A Lawyer-driven Interest-based Negotiation

Although a case-by-case determination of child's best interests is more aligned with the CRC, many scholars in the US critique its biased application.[353] In collaborative practice, a "judge" is out of the picture. In litigation, a judge makes a judgement with tendered evidence owing to the lawyers' duty of confidentiality; in mediation, it is a "natural attitude" that the disputed parties would convince the mediator into becoming his/her ally.[354] In contrast, in SG, HK and sometimes the US, collaborative practice is "lawyer-driven",[355] and client-led. A collaborative practitioner in HK remarks:

"In litigation, when you are fighting over rights, there would be a winner and a loser. I think because of that dynamic, invariably the child's best interests get submerged into litigation and the adversarial nature of litigation. Whereas when you are encouraged to speak, and speak freely, and look at interests – beyond your own interests as well – but also what is the best for the family as a whole – I think that setting lends itself to giving a more exposed opportunity for the child's best interests to be properly weighed in the forefront".[356]

A collaborative practitioner in SG adds that a lot of "non-legal issues can be dealt with" in collaborative practice, for example when and how to inform the young children about the divorce.[357] With the aid of interest-based negotiations,[358] the lawyer-only model in HK and SG allows the parties to minister the unique needs of all relevant parties through a contextual and close assessment of the post-divorce situation.[359] It allows the parties to perceive children's best interest primarily through the parents'

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[351] ALI, at 2.

[352] Code of the District of Columbia, Chapter 9: Divorce, Annulment, Separation, Support, Etc., at §16-914, (a)(2); see also ALI.

[353] G. Crippen, Stumbling Beyond the Best Interests of the Child: Re-examining Child Custody Standards-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference, 75 Minnesota Law Review 427, 1990, at 499-500, see also J. Elster, Solomonic Judgements: Against the Best Interests of the Child, 54 University of Chicago Law Review 1, 1987.

[354] Annex A, at 53.

[355] Annex D, at 73.

[356] Annex C, at 72.

[357] Annex D, at 74.

[358] J. Hilbert, Collaborative Lawyering: A Process for Interest-Based Negotiation, 38 Hofstra Law Review 1083, 2010, at 1085; L.K. Wray, Collaborative Practice: Lawyer as Negotiator and Problem-Solver, available at: https://www.americanbar.org/content/dam/aba/images/dispute_resolution/Linda_Wray_Article_of_interest.pdf, last accessed (10-07-2018), at 3; G. Voegele, at 984.

[359] *Ibid*, at 1086.

perspectives, without the tension of other personal subjectivities of the judge, mental health practitioners, etc., and they can even break through collective subjectivity of social norms. This model makes good use of the flexibility and indeterminacy of the child's best interests principle. The outcome is also a detailed and realistic co-parenting agreement, which is sustainable and easy to modify. So much so that the process is more child-centric than any other ADR, it is parent-led instead of child rights-based.

3.3.3. A Multi-disciplinary Team Effort

The US and EW on more occasions adopt the team model of collaborative practice. It involves mental health practitioners such as child specialists in constructing the co-parenting plan.[360] Inevitably, the weight of parents' perception of child's best interests is more easily balanced out by other subjectivities: first, the child specialist; second, the child's voice through the child specialist (if any). In EW, it is further balanced out by the structured determination of best interests enunciated in section 1(3) of the Children Act.[361] Although the team model is less client-led comparing to the lawyer-only model, this approach corresponds to the CRC Committee's recommendation of having a "multi-disciplinary team of professionals" when assessing child's best interests. It guarantees a holistic approach, where child specialists are able to provide valuable information to the parents about the child's best interests that collaborative lawyers can never substitute.[362]

3.4. Children's Participation and Collaborative Practice

3.4.1. Lawyers-only Model in HK and SG

Children's participation is not a core element in the models of collaborative practice in the 4 research sites. As it now stands, children's voices can only be channelled through a child specialist in collaborative practice. Child specialists put on the negotiation table objective, non-judgemental, and non-evaluative information related to the child's needs.[363] They are not included in a lawyer-only model, which is the most common model in SG and HK. In Singapore, there has only been 1 case since 2013 that involves a mental health practitioner specialised in children matters.[364] This is the same in Hong Kong: there is only 1 case so far, where a family consultant is involved.[365]

Evaluating this against the international legal framework, this is far from satisfactory. Participants of a lawyer-only model may have thought that the child's best interests determination done in a more conciliatory dynamic is able to remedy the serious lacking of child's participation. However, this is not a "correct application" of Article 3 because Article 12 is not respected.[366] In fact, the Singaporean court acknowledges that children are "*unseen* and *unheard* victim" of parental breakdown,[367] but has not

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[360] Lande (2011), at 265: The [team] model practiced predominantly in Texas involves both clients retaining one neutral MHP [mental health practitioner]; in Northern California, the predominant model involves each of the clients having an MHP as a coach; in Georgia, the majority of clients hire a coach and both parties also retain a child specialist; and in New York and Canada, clients most often do not retain any MHPs.

[361] CA, 1989.

[362] G. Voegele, at 1003; S. Gamache, *Child Specialists as Collaborative Team Members*, in S.M. Gutterman, Collaborative Law: A New Model for Dispute Resolution, Bradford, 2004, at 151-68; S. Gamache, *The Role of the Child Specialist,* in N.J. Cameron, Collaborative Practice: Deepening the Dialogue, Nancy J. Cameron Q.C., 2015, at 213-21.

[363] S. Gamache, at 331.

[364] Annex D, at 76.

[365] Annex C, at 69.

[366] Refer to Section 2.3.1. of this thesis, at 19.

[367] *CX v CY*, at para 50.

addressed the lack of children's participation. To access the decision-making process, children under this modality of collaborative practice face a two-fold barrier: the parents and the lawyers.

The parents first have the discretion in deciding whether the cost of a child specialist is worth-it,[368] after all they are paying for the service, and the collaborative practice is led by them. Second, parents' perception of their child's best interests trumps the child's participation rights. In some cases, the parents may view that the information of parental separation is "injurious to the child's well-being",[369] possibly due to the child's age or capacity to process the news. Therefore, some children are not provided with the opportunity to participate because they are not informed.[370] In other cases, the parents may assume that they know what their child's views are, and their voices have already been taken into account when determining the child's best interests.[371] The structure of this model fosters a *paternalistic* perspective.

As for the lawyers, they show deference to the parents, because they are the ones "living and breathing" the outcome of the negotiations.[372] Besides, lawyers' perception of child's involvement in the best interests determination is still holding onto the traditional approach: it is in line with child's best interests to keep them away from lawyers, mediators, and court.[373] The structure of this model encourages a *welfare-oriented* perspective.

Article 12 of the CRC requires a dramatic paradigm shift among lawyers, and it certainly takes time. Nevertheless, there has already been more willingness towards child's participation. Child-inclusive *mediation*, for instance, sees the power of the child's participation and the professionals' feedback to the child.[374] According to the Charter for International Family Mediation Process, child's participation requires "trained mediators or trained child specialists in addition to careful evaluation of the suitability of such intervention".[375] Such a *cautious* approach towards the child's procedural right to participate is substantially restricted in a lawyers-only model of collaborative practice in HK and SG.

3.4.2. Team Model in the US and EW

In the US, it is cheaper to involve child specialists, so people are more willing to do that. Tesler claims that when the clients are not emotionally or intellectually capable of having a "good divorce", it costs less when they are assisted by an interdisciplinary team than just collaborative lawyers.[376] He explains that lawyers generally have a higher hourly rate than the rest of the team, and normally spend more time than the specialists in explaining or counselling the clients in realms that they are not experts in, such as child-related issues.[377] The *social culture* of consulting a specialist, therapist, or psychologist pays dividend to the operation of the team model.
In EW, the child's wishes and feelings are particularly important because it is stipulated in the Children Act 1989.[378] It is also held by courts that it is of significance because it is the children who will have to

[368] Annex C, at 71; annex B, at 67.
[369] Article 17(e), CRC.
[370] Annex B, at 67.
[371] Annex C, at 71.
[372] Annex C, at 72.
[373] Annex D, at 77; Annex B, at 67; Annex C, at 71.
[374] For more information, refer to a case study of child-inclusive mediation of a cross-border family dispute, Annex A, at 57-58; see also Annex C, at 71.
[375] Principle 8(c), Charter for International Family Mediation Process: A Collaborative Process, International Social Service, available at http://ifm-mfi.org/sites/default/files/CHARTER/ENGLISH/IFM%20Charter_ENG.pdf, last accessed (10-07-2018).
[376] P.H. Tesler, at 332.
[377] *Ibid*, at 332, footnote 25.
[378] Section 1(3)(a), CA, 1989.

divide their time between two homes and it is *all too easy* for the *parents' wishes and feelings* to *predominate*.[379] Support can also be drawn from *Re R (Residence: Shared Care: Children's Views)*.[380] The *legal culture* moulds the lawyers' advice, and stimulates the supply of trained specialists who understand family legal proceedings.

The team model in the US and EW neutralises the paternalistic and welfarist dimensions of the parents and lawyers by involving child specialists or other mental health practitioners. This is more complementary with the CRC, but its implementation also depends on the professionalism and sensitivity in communicating with the child, as well as the availability of these specialists.

[379] *Holmes-Moorhouse*, at para 36.
[380] EWCA Civ 542, 2005, (England & Wales).

4. Child Rights-based Model of Collaborative Practice

This chapter answers the final research sub-question of this thesis: drawing from the good practices of the aforementioned models of collaborative practice implemented in the 4 research sites, what are the essential elements of a child rights-based model? Chapter 2 explains and provides a legal basis of the trinity of children's rights after parental separation: the right to co-parenting, the right to have the child's best interests determined, and the right to participate in the decision-making process. In Chapter 3, the compliance of these 3 rights are evaluated through a comparative analysis of the implementation of collaborative practice in the US, England & Wales, Singapore, and Hong Kong. Drawing threads together, this chapter presents a novel design of collaborative practice that safeguards children's rights.

4.1. Child Rights-based Approach

4.1.1. Child-centric Approach verses Child Rights-based Approach

Collaborative practice, as implemented in the 4 research sites, is child-centric and adult-led. A child-centric model is not necessarily a child rights-based model. As examined in Chapter 3, the parents, collaborative lawyers and multi-disciplinary professionals largely adopt a traditional and welfare-oriented appreciation of the relationship between the child and the collaborative team.[381] Although co-parenting is inherent in collaborative practice since it relies on the parents' willingness to cooperate, the relevant child's rights are conceptualised paternalistically: it is in the child's welfare to be co-parented. In particular, in a lawyers-only model, the best interests determination lacks the child's voices. It can be concluded that the models of collaborative practice in the US, EW, SG, and HK are not rooted in the substantive application of the CRC, despite the *contingent safeguard* of the child's right to co-parenting.

4.1.2. Role of Professionals

Essentially, as collaborative lawyers shift from the rights-based court system to an interest-based negotiation outside court, they are also expected to retain part of their rights-based mind set when dealing with matters related to children. The most significant changes should be a willingness to consider the child's voice. The role of professionals should be monitored, in order to implement the CRC more effectively.

The legal basis of this recommendation is founded on international children's rights law. Article 4 of the CRC documents that the States should "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention".[382] States are suggested to provide "systematic child rights training for children and their parents, as well as for all *professionals working for and with children*, in particular… judges… lawyers… health personnel… social workers", etc..[383] These parties, especially professionals, should be encouraged to acquire specialised skills and trainings and an understanding of children's rights.[384] Furthermore, since a profession is a "business" that involves specialised skills and knowledge,[385] the CRC General Comment on business sector is also applicable. Collaborative practitioners should incorporate children's rights to their code of

[381] See also J. Williams, *The Role of the Professions in Effective Implementation of the CRC*, in T. Liefaard, & J. Sloth-Nielsen, at 152, (hereinafter, "J. Williams").

[382] Article 4, CRC.

[383] CRC Committee, GC 7, at para 41.

[384] CRC Committee, General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/4, 2003, at para 19, 23, 29, 32.

[385] J. Williams, at 150.

conduct.[386] In effect, children perceive the collaborative lawyers and mental health practitioners as "the face of state authority".[387] Therefore, a normalisation of implementing children's rights in the daily job of these professionals is a big step towards the implementation of the CRC.

4.2. Model of a Child Rights-based Collaborative Practice

As a background, the participation agreement is an essence of collaborative practice, therefore it must be in place. The diagram below is an original design of how a collaborative practice should look like when the *co-parenting agreement* is in place after parental divorce or separation. It has 3 layers: the inner circle that encompasses the red, blue, and green patches (Section 4.2.1.), the outer yellow circle (Section 4.2.2.), and the 4 grey blocks (Section 4.2.3.).

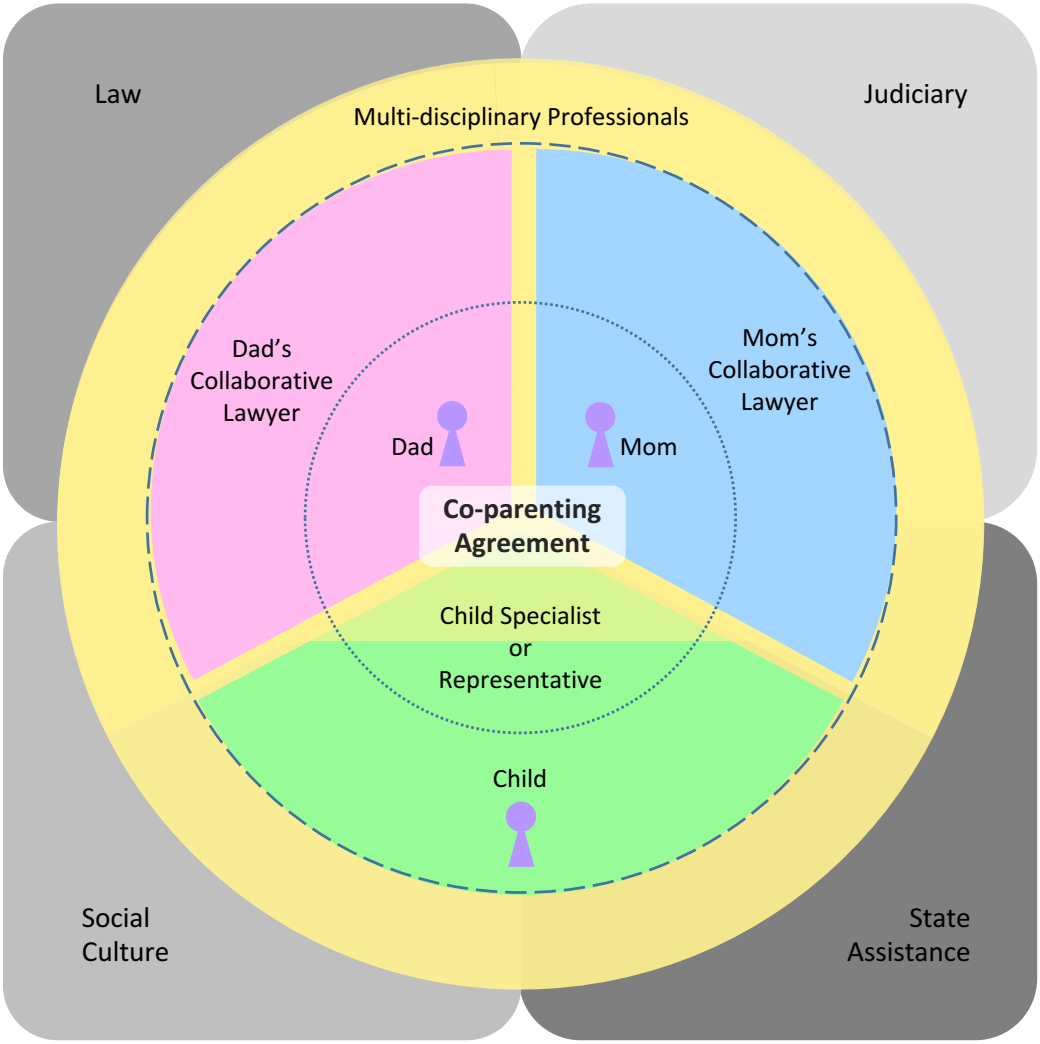

Figure 5. Child Rights-based Model of Collaborative Practice

[386] CRC Committee, General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights, UN Doc. CRC/C/GC/16, 2013, at para 9.

[387] J. Williams, at 151.

4.2.1. A Three-dimensional Approach

The three dimensions are presented by the three colour patches: red (the father, assisted by his collaborative lawyer), blue (the mother, assisted by her collaborative lawyer), and green (the child specialist or representative, instructed by the child). Comparing to a four-way meeting, a three-dimensional approach includes the concerned child (of his or her choice to participate or not, and how) as a *stakeholder*, instead of an *interest* on the negotiation table.

As a child does not have the right to self-determination, he or she is not placed at the innermost circle where the parents are at. A child is one layer outside of the central circle, together with the other 2 collaborative lawyers: they all give information to those in the central circle.

Zooming into the green patch. A child can choose to participate or not, but at the first place should receive the necessary information in a child-friendly manner about the parental separation. If a child chooses to participate, his or her views can be expressed by a child specialist *or* a representative at the child's choice. A *representative* can be any adult that has volunteered to participate. He or she can be the child's teacher, tutor, grandmother, or godmother, etc. of a sufficiently close relationship, and are able to convey the child's voices accurately. Similar to the a-next-friend concept, the representative can be objected by the parents with valid reasons, such as conflict of interests. The role of a representative is to express the child's views, and feedback to the child as to how his/her views are taken into account. A representative without specialised training is sufficient to discharge the child's procedural right, because the negotiation environment is theoretically safe and amicable.

The use of child representative *empowers* and engages the community in making these children heard. It also increases a child's *access* to the decision-making process, and safeguards the *procedural* right to participate in a cost-effective manner. In the absence of a representative, and/or in complex cases, a child specialist can be involved at the *forefront* of the central circle. Both a child specialist and representative negotiate with the father and mother around a negotiation table.

4.2.2. Multi-disciplinary Professionals by Referral

As analysed in the previous chapter, these professionals are best utilised in a referral model – they participate when necessary. It prevents the professionals from dominating the negotiation. The only exception is when a child is represented by a child specialist, then the specialist is expected to take a leading role during discussions. By referral, it also remedies the lack of personnel in some jurisdictions, and the parents' lack of financial resources.

4.2.3. A Four-bedrock Foundation

Law on co-parenting should be drafted with sufficient flexibility, whereas a presumption-based law should be avoided. In this way, the parents are less motivated to take a strategic position but more willing to negotiate. Law on collaborative practice gives consistency in implementation, and a legal recognition of it as a new form of ADR.

The *judiciary* should not be a rubber stamp of all agreement reached through collaborative practice, but should conduct final checks on whether the co-parenting agreement is in the child's best interests, including whether the procedural obligation of offering the child an opportunity to participate is fulfilled. The judges should be able to make enquiries freely, and to hold the parents accountable to the agreement.

Social culture affects public perception of collaborative practice as an ADR, children's right to participate, and self-determinacy of the parents. Regarding the first, *pro bono* service can be provided.[388] As for the child's participation, trainings and a consensus on the significance of the CRC should be provided to collaborative practitioners.

Concerning self-determinacy, it is more difficult in Asian cultures because of people's "expectations to fulfil obligations in hierarchical relationships". [389] However, Singapore has developed a good model in changing such a social culture. The amendment of Section 50(1) of the Women's Charter enables court-based mediation when a divorce involves children.[390] In particular, mediation is *mandatory* for divorcing parents with children under the age of 21 since 2014.[391] Settlement agreements reached through mediation are recognised as court orders quickly pursuant to the Mediation Act 2017, offering divorcing parents a higher degree of self-determination than never before.[392] In fact, only 3 out of the 7,525 divorce cases were settled through collaborative practice in 2013, and it was quickly doubled to 7 cases in 2014.[393] Such culture in Singapore makes collaborative practice much easier to be install and accepted in the community.[394]

Finally, *state assistance* is important. State-provided services such as parenting coordination, public education, and legal aid all promote and facilitate the wider and better use to collaborative practice. Collaborative practice has a lot of potential in resolving family disputes that concern children in a less costly and less adversarial way. The States, in discharging the obligations of the CRC, should promote the use of this extrajudicial ADR to the public.

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[388] S. Eckstein, & W. Warren, The Collaborative Project of Maryland: How Pro Bono Projects Can Find a Place in the Collaborative Community, 14 The Collaborative Review 1, 2014, at 16.

[389] H.H. Teh, *Mediation Practices in ASEAN: The Singapore Experience*, available at https://www.aseanlawassociation.org/11GAdocs/workshop5-sg.pdf, last accessed (10-07-2018).

[390] See also, Section 26(8), Family Justice Act, Cap. 26, 2014, (Singapore); Family Justice Courts Practice Directions, (Singapore), at para 11, available at https://www.familyjusticecourts.gov.sg/QuickLink/Documents/Master%20FJC%20PD%201%20Nov%2017.doc.pdf, last access on 15 June 2018.

[391] Singapore Mediation Centre, Expanding the Scope of Dispute Resolution and Access to Justice: The Use of Mediation Within the Court: Opening Remarks by the Honourable Justice Belinda Ang Saw Ean, Judge of the Supreme Court of Singapore, at para 27, 2018, speech transcript available at http://mediation.com.sg/assets/downloads/expanding-the-scope-of-dispute-resolution-and-access-to-justice-the-use-of-mediation-within-the-courts/Justice-Ang-UseofMediation-Within-the-Courts-For-Publication-19.3.18.pdf, last accessed (10-07-2018).

[392] Mediation Act, Cap. 26, 2017, (Singapore).

[393] The Straits Times Singapore, *Divorcing Couples Urged to Resolve Disputes Amicably Before Going to Court*, 18 May 2015, available at https://www.straitstimes.com/singapore/courts-crime/divorcing-couples-urged-to-resolve-disputes-amicably-before-going-to-court, last accessed (10-07-2018).

[394] Annex D, at 73, 77.

5. Conclusion[395]

The answer to the research question of this thesis, "how should a child rights-based collaborative practice model look like?" is illustrated in Chapter 4, in particular *figure 5* in Section 4.2.[396] This thesis has explored thoroughly children's rights in the resolution of disputes directly concerning them after parental separation in Chapter 2. It provides the analytical framework of Chapter 3, where it evaluates the implementation of collaborative practice in the US, England & Wales, Singapore, and Hong Kong. The comparative analysis serves as a valuable reference point in the construction of the child rights-based model, through the identification of good practice and inadequacies in safeguarding children's rights.

5.1. Children's Rights after Parental Separation

Following parental divorce or separation, children have the right to co-parenting. To ensure this, the relevant public and private agents shall proactively restore and maintain personal relationships between the child and the parents. Parental agreements and supportive co-parenting should be encouraged. Children also enjoy the right to have their best interests considered as a primary factor in decision-making. It is better safeguarded in a non-adversarial setting, where there is less strategic positioning. Third, children's right to participate is a procedural obligation, but is also crucial in the best interests determination.

5.2. Comparative Analysis of Collaborative Practice

It should be acknowledged that collaborative practice has huge potential in safeguarding children's rights, because of its facilitation of co-parenting, and a conciliatory dynamic that gives more weight to the child's best interests. The comparative analysis however reveals that collaborative practice is largely child-centric, instead of child rights-based.

5.3. Novel Aspect of this Research

This research analyses collaborative practice from a novel perspective of international children's rights law. Most child-related evaluations of it focuses on the safeguard of the best interests principle, but without account as to the child's right to participation. Furthermore, it is the first academic research on collaborative practice in Hong Kong and Singapore. The geographic reach from East and Southeast Asia, to Europe and America provides a new viewpoint of the different dynamics in common law jurisdictions. Finally, this research moves forward from comparative analysis of the 4 jurisdictions to a creative direction into model-building. The answer to this thesis provides a starting point for further discussions among collaborative practitioners.

5.4. Further Research

Since there is still no centralised data collection and analysis on collaborative practice in Hong Kong and Singapore, more research can be done in the future especially on how they have transformed from their infancies. An action research in the field is going to generate invaluable data. Moreover, further research on the feasibility and perception of the child rights-based model can be done by inviting more input from collaborative practitioners from jurisdictions of an even wider geographical reach, for instance in Australia and New Zealand.

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[395] Refer to Overview of Main Findings of this thesis, at *ix*.

[396] At 38.

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Annex A

Interview Transcript 1

Interviewee: A cross-border family mediator and a registered social worker in Hong Kong
Language: Cantonese (transcript translated to English)

Q: Does the typical adversarial atmosphere within a court system also exist in the family mediation cases you have handled before? I am thinking of something akin to the affirmation vs opposition format in a debating competition.

A: In a family court… allow me to perceive this concept as a non-lawyer, family cases are civil cases not criminal cases, it's not about wrong or right. It's about relationship. There is no right or wrong in relationships. It's all about obtaining interests…

Q: You mean interests among adults?

A: It could be interests, or benefits, yes. Those interests about property, money, etc., are among adults. However, there are also interests for children, for example receiving the best care, protection of best interests, etc. Therefore, we can perceive it [family cases] as obtaining the maximum interests according to the needs of each party. So it's not about "affirmation" and "opposition".

Q: Within a court, parties normally usually write affidavit that points the finger to the opposite party about poor parenting, etc., such as not taking initiatives with the family, etc.

A: Yes.

Q: Does this kind of situation happen a lot in mediation sessions as well?

A: Yes. As long as there are neutral parties, the disputed parties would convince them to their side, as alliance. It could be a judge, or a mediator. As long as there are any parties who seem neutral, the disputed parties would normally go like, "Trust me…", and they give you reasons to convince the neutral parties to trust their versions. Of course, these are natural attitudes that disputed parties would take, because they believe that they have to convince the "neutral party", who would make decisions, to help him/her achieve what he/she wants to. This can be done by the disputed parties giving evidence, providing facts, etc. just to make sure the neutral party is on his/her side. The situations within a mediator or a court system are just the same. That's why the court system requires the disputed parties to provide a lot of affidavits and even evidence to let the judge know more about the situation.

Q: Are you talking about a structure of mediation, where there is only 1 mediator?

A: There could be co-mediation, where there are 2 mediators. Normally, the cases I handle are just me as a mediator, and maybe sometimes a colleague of mine, who is also a mediator, would come and assist me. Then comes the 2 disputed parties. Sometimes the parties can also bring their own lawyers respectively. That would make up to a meeting of 6 people in total. However, this kind of make-up is only for complicated and difficult cases. But so far, normally, most of the cases I handle are done by just 1 mediator (i.e. me), and 2 disputed parties.

As to children's involvement within a mediation session, this really depends on the case. As for now, Hong Kong does not entirely agree with the concept of child-inclusive mediation. It really depends on the needs of the case. Normally we keep children away from mediation as much as possible. At the end of the day, the culture has it that the best way to deal with divorce cases is not to involve children when resolving disputes between their parents. However, there are more questions as to how to involve children in these proceedings, and how their voices can be included. These questions have been more and more frequently asked within society, and there seem to be some changes lately.

Q: I think what we have discussed so far is a very good overview. If we can now dive into more about the single mediation we talked about the situation that you most commonly encounter: you as the only mediator, and the father and the mother in a mediation session. Normally, do you think the threat of litigation by any of the disputed parties is unhealthy to the mediation? In collaborative practice, such a threat is eliminated by an agreement…

A: Mediation is also the same. Mediation requires the parties to sign an agreement before any session begins. The agreement stipulates that all information and all things done by the mediator(s) cannot become evidence within a court. This is clear in a lot of practice directions in Hong Kong. This is followed by all mediators in Hong Kong. When we were trained as mediators, we were all aware of this fact.

Q: So even the lawyers involved cannot participate in the case anymore?

A: Everyone.

Q: So when, for example, a father has brought a lawyer with him to a mediation session, then that lawyer cannot be involved in that case any further if it is put to the court?

A: Technically speaking, lawyers rarely participate directly in the mediation process. Lawyers only participate within breaks of the mediation, where the lawyer would advise the client on matters in a separate room. Mediation encourages parties to talk on behalf of themselves, instead of blaming and criticising each other. Mediators are interested in knowing what each party wants only. Therefore, what said within mediation sessions cannot be submitted to court as evidence. The judge would not accept this evidence as well.

Q: I see. But when the parties do not have the consensus to not bring the case to litigation in a court system, do you think it would help them negotiate or cooperate at all?

A: I don't think this is a matter of "consensus" or not. This is about agreement. When they enter into mediation, they have to know that is a hard rule.

Q: Do you think because they still have the possibility of bringing the case to court, saying things like "see you at court" quite easily, that it would…

A: Well, mediation is voluntary anyway

Q: Yes, but if the disputed parents have the consensus not to bring the case to court, do you think it would help you mediate?

A: Hm… it's irrelevant. Because when the parties decided to enter the process of mediation at the very beginning, they already knew they have to mediate. It's not the case that the disputed parties would threaten another party to put this case in a court system. But if it does happen, the mediator should stop this from happening, because it contradicts the agreement entirely. All agreements are clear that everything, including the negotiating terms and requests that happened within a mediation can never been submitted to the court as evidence.

Q: Is this your common practice?

A: No, it is within the code of practice. Furthermore, mediation practice of all jurisdictions do not allow this from happening.

Q: I think the biggest difference between the agreement in mediation and collaborative practice is that, when the disputed parents would like to put the case in front of the court, the only loss is 1 mediator…

A: In fact, if they are going to put this case to the court anyway, they would not use these methods [alternative dispute resolutions], including collaborative practice, and mediation. These are all alternative dispute resolutions. If they really want to bring the case to court, they would go there immediately anyway.

Q: Are there any cases that you have handled before, that the disputed parties decided to bring the mediation to an end, and submit the case to the court then?

A: A lot. This is very normal. I think mediation is voluntary. Even collaborative practice, it is voluntary. Whenever one party wants to give up, then they go to court. A lot of the time, during mediation,

when for example, a party is not willing to disclose some particular things to the mediator, then the party would resort to the court system. In fact, the very nature of mediation is that the clients can set the pace for themselves. However, if you go to court, the mediator would inform the parties the advantages and disadvantages of it. A lot of the time, as I have told you in our prior conversation over the phone, that case about a mother asking for HKD$5,000 maintenance fee. In that case, the father refused and decided to put forward the case at a court. The judge at the end handed down a judgement that is even more unfavourable to the father. The father regretted the decision. Even in some cases, the disputed parties contacted me for mediation after the court has handed down the judgement. Of course I would say yes, because it is easy to make variation to court orders in civil litigation. But the problem is, why didn't the parties persevere in the mediation and proceed to litigation?

Q: Yes, it incurs a lot of cost there as well.

A: Indeed, but a lot of the clients I met would say, "I have no experience in divorce" – but neither do I. A lot of people would say they rely on my expertise in this. But in a way, this is true, a lot of people divorce for the very first time, and they do not know what they should do and shouldn't do. Therefore, mediators should be very careful in overly guiding or even manipulating their decision-making process. A lot of the people feel helpless because the mediator doesn't seem to "help", but this is not our role as mediators to help you make decisions.

Q: Personally as a mediator, when you hear that one of the disputed parties have the intention to put forward the case from mediation to litigation… will you make every effort to make sure this doesn't happen…?

A: I would be curious why the parties would choose mediation. But personally, I have no preference as to whether they choose mediation or litigation. On the contrary, it is about the disputed parties – if they think there is a better way of resolving conflicts – then we are ready to help anytime. We really cannot force them – the disputed parties surely have done their own thinking before making such a decision.

Q: Is it also because there are simply no reasons for you to make sure they are resolving the matters by mediation anyway?

A: Indeed it is unnecessary. This is their own choice.

Q: And for you as a mediator, there is nothing to lose as well?

A: Not really… but I think I respect their decisions. At most, I only have the responsibility to inform you what are the advantages and disadvantages of resolving the conflicts here in mediation, and in litigation.

Q: I see.

A: But we also suggest them talking through this matter with their lawyers. We are cautious about giving too many unnecessary advices.

Q: You mean legal advice?

A: Yes, mediators do not give legal advice. In most of the cases, when I inform them about their decision-making as to whether to proceed the case to litigation, I would offer them perspectives from their children. Both parties would never want to cause too much disruption to their children, and would like to resolve the disputes as soon as possible. Therefore, they really have to ask why is it necessary to put the disputes to the court – because once you do so – you would lose a lot of the control. Although you would submit affidavits and evidence, all the decisions are made by the judge. This is unlike mediation or collaborative practice, where you can talk about your beliefs. By putting a case to court, the parties would lose the flexibility. Especially in cross-border cases, where one of the parties are unfamiliar with the domestic laws in Hong Kong, litigating a case is tricky. They would have thought, we should split 50/50 post-divorce, but this is not founded on the case laws in Hong Kong. Although there are cases that allows 50/50 split, it depends on a lot of factors such as the duration of marriage, the parties' participation in marriage and family life, or the

contribution of the parties in marriage or family, etc. We are evaluating a 10-year or even 20-year marriage here… In contrast, cross-border marriage would normally last for 3 or 4 years, and one of the parties would request a large sum of money to be paid lump-sum, like HKD$100,000-200,000 one off. From my perspective, I think when one of the parties are unfamiliar with the laws in Hong Kong, they would bring their conception of marriage from their jurisdiction of origin, such as that of Mainland China. In these circumstances, I would explain more to the parties, and they make their own decisions afterwards. Mediators would say, according to what the courts have decided before, the judge is unlikely to award you this and that. But it is them who make the decision, and I always recommend them to ask their lawyer.

Q: Does legal aid provide the parties lawyers when they are assigned to a mediator?
A: Yes, most of the times. Legal aid also pays for the mediation most of the time. Depending on the disputed parties' circumstances, legal aid would pay for the lawyers' fee, mediation fee, and fee for investigation reports, etc. However, after legal aid paid for it, the receiving parties have to return it by deducting it from the property or a sum of money obtained pursuant to the court order of resolution.

Q: I am interested to know about your personal feelings about not being able to ensure the parties stay in mediation… would you feel helpless that you can only inform their decision-making process?
A: Not at all. I have to know my role as a mediator. I acknowledge how maximum my responsibility should go. If I go any further, it is illegal. If one of the disputed party ask me if HKD$10,000,000 is enough or not, and I give him/her recommendations saying that "no, this is not enough, because…", this is not legal. I would be sued against the code of conduct. What I would do is, "well, I cannot give suggestions, but maybe you can make a financial budget spreadsheet, and evaluate the financial needs of yourself and your children". So I just guide them in making their decision-making process.
Q: And do these parties normally listen to your advice as to really making a spreadsheet?
A: In fact a lot of the things are unsaid but are known… they really do not need a spreadsheet to understand whether the amount of maintenance is sufficient or not… I just cannot make recommendations and suggestions. When you are in mediation, the disputed parties are the ones who make decisions. The mediators are only there to facilitate the procedure, ensuring that consensus can be reached. Pretty much similar to the position of a judge. The owner of the problem is the disputed parties. Any parties can just make a summon and submit to the court. So I would not overly put the responsibility of resolving disputes on myself. Surely, the facilitation and negotiations skills of mediation can be improved, but it is more about the attitudes and thinking of the disputed parties that determine the outcome of any mediation. For example, when a party obtains a custody over the weekend… what is it called…
Q: The bargaining…?
A: The bargain or the end-result of any negotiations… are premised on a lot of circumstances, such as psychological or emotional conditions, and the lack of legal knowledge. Surely the former can be absolutely handled by the mediators. But not so much on legal advice. Even the mediator is also a lawyer, the role of mediator forbids him/her from giving legal advice. From my experience, the most complicated cases are about money and property, and even cross-border property. I do not have expertise in these things. So according to my personal experience, I would only assist them to make the decision, even if they have brought their lawyers. Lawyers do not have a role to make decisions for their clients anyway. If I own the problem, and overly involve in reaching a decision, then the disputed parties might say, "it was not my decision at the first place!" The planning is owned by the disputed parties. The mediators should not involve in making a decision – it is about educating the parties in communicating and discussing the problem. In collaborative practice, there are more professionals involved. Maybe the voices and thinking of clients may be

washed away, or interpreted by many other professionals. Some parties may be interested in fighting for more interests by way of involving professionals. I, however, feel that mediation is sufficient in fighting for his/her own rights and interests without involving many professionals.

Q: This is great data. Is it alright if we move on to the next section about children's best interests and participation? My thesis focuses on custody and shared parenting. If we first focus on best interests, do you have any tools that help you determine what is in the child's best interests? Or is it your role to determine?

A: The court has made directions on this.

Q: So do you use the list of factors in determining best interests of the child?

A: I personally do not rely on that. When I do custody investigation or mediation, there are no black and white rules to follow that list of factors in determining the best interests of the child. It is more about the parents coming up with a solution. Normally, when a solution is made, the list of factors should have been complied. However, I will just give you a case study that serves as a negative example.

There is a family of 3. The care and custody of the child was awarded to the mother in Hong Kong, and the father was working in Beijing. The parents, after mediation, had made a consensus. They then consulted their respective lawyers. After that, another plan was come up, which I thought was really undesirable. The plan was that: from Monday to Friday, the child would stay with the mother in Hong Kong. But from Friday after school, the child would have to go to the airport immediately, and climbed on a flight to Beijing and would spend the weekend at Beijing until the evening on Sunday every week. This sounds fair and unproblematic. However, realistically, flight delays are very severe from Hong Kong to Beijing. There are times where the child got to Hong Kong airport on Friday night, and only arrived at Beijing at 3am the next day. Sure, the father would pick him up from Beijing airport, and even managed to buy business class air tickets. So? From the parents' perspectives, they would feel they have given everything and it's for his best interests, like he can go to the lounge, etc. However, I just want to point out that, when we disregard the legal principles and rules, parents do not always do things that are at their child(ren)'s best interests, that would fit the child(ren)'s needs.

That plan lingered for a year. After that, the child could not bear it and made a phone call to me. He asked if the parents could negotiate again. The child was 11 years old. I remember during mediation I have already told the parents that the child was not okay with the plan, but the parents insisted that the child liked riding on a plane, etc. I think I have missed a step. At that moment I should have asked the child, but I didn't do it. I thought that case was a very typical example where child-inclusive mediation should be carried out. I remember I had doubts why would the parents come up with a plan that involved the child commuting by air that frequently. If I were the child, I would be exhausted. I remember I have tuned the parents a little bit as to whether this agreement is indeed desirable. But at the end, the agreement was confirmed by the judge, who did not question anything at all.

So after 1 year, I invited the parents to mediate again. It is pretty much a child-inclusive mediation. I asked the child first, as to what he wants, and needs. I asked the child, "you parents feel this arrangement is fair, what do you think?" At that time, the child was 12 years old, and should have been regarded as with sufficient maturity by Hong Kong courts usually. The child was also able to express his views, and he went to an international school. He said, "quantity-wise, it is fair, but quality-wise, it is really bad for me". Enough, I thought, what he said was sufficient. Then I invited the parents to mediation, without the child. I told the parents what the child thoughts, and that the child sometimes caught a cold during these frequent travelling and could not go to school at the

start of the week. The parents might have perceived that it was because the plane got delayed, that the child could not go to school the next day, without actually noticing that the child didn't want to go to school because he felt sick.

At the end, the order was varied. It was changed to where all long school holidays are spent at Beijing, and all the other days spent at Hong Kong. The father would visit Hong Kong every weekend. In fact, the father could work at Hong Kong, but it was because of some bitter feelings that he did not want to do so.

This experience makes me reflect that maybe an earlier involvement of the child would be better. It was only when the order was varied after a year that child participation is made possible. This is the most terrible case I have encountered among all the other mediation cases – it was a case where the terms are negotiated really badly. But I am only saying this under the table. When I have my mediator hat, I can only ***question*** whether this is indeed in the child's best interests, but not dominating the decision-making process.

In fact, recently there are many more mediators sharing the same thinking: to invite the parents think more from the perspective of their child(ren)'s situation. During trainings on skills, we are encouraged to conduct child-centric mediation, and to give more attention to the children involved.

Q: Why is there suddenly a change in mind-set among the mediators?

A: It was a sudden change. The child-centric paradigm has always been part of our trainings as mediators. When a mediation isn't child-inclusive, but then a lot of the interests of the parties are related to children, then you really have to take children as one of the parties. Therefore, recently there have been trainings on how to conduct a child-inclusive mediation. But when it is not a prevalent practice, it really depends on how the mediator conducts the mediation. So there are more developments on child participation mechanisms.

Q: What kind of mechanisms?

A: For example, when I do investigations, I would ask the children if they would like to talk to the judge.

Q: But these are not mediation cases?

A: No, these are litigation cases. In mediation, it is really up to the mediator in deciding whether it is necessary to involve children's participation in the process. It varies a lot, not a lot of mediators would do that.

Q: As for you, what is the main reason for you to involve a child's participation? Does it make the decision more sustainable… or?

A: In fact I can sense something when the two adults are discussing with each other. Things such as, "it wasn't my fault, it was your child that says XXX", "no, it wasn't what the child meant", etc. Simply put, when the child becomes an "interests" on the bargaining table, then I will decide whether I should meet the child in person. When the child is used as a pawn by one or both of the parents, I would consider involving the child. I would normally shift the focus back to the parent's own interests, and ask what he/she wants. It is curious to see how some of the adults do not even know what they want, and would just say "it wasn't my opinion, it was our child that says XXX". Sure, the child's voices are to be heard, but the voices of the care-taking parent are also important. In particular, when a child expresses an opinion that is contrary to his/her best interests, for example to be taken care by a drug-addict parent, alcoholic parent, or a parent with a third-party that does not really care about the child, etc. And the true reason behind the child's view is that the concerned parent always buys toys for him/her. Of course this is child's views, but the mediator also has to voice out to all disputed parties whether the child's view is at his/her best interests. If it's not, then how should the parties improve in taking care of the child, etc.?

Q: I see… can I understand what you said as follow? When the mediators feel that the child's interests become the pawns of the parents, you would shift from treating the child's interests as interests, to treating the child as a stakeholder.

A: Yes, yes. Treating children as pawns are also very common. As you said, when children's interests are seen as pawns, it is not desirable.

Q: Would you feel there is a need for a child specialist to communicate with the child? Or do you feel comfortable talking to a child, for example, a 11 or 12 year-old in the previous case mentioned?

A: For me, I do not feel there is a need for a child specialist, because I know how this works. Having said that, Hong Kong does not always do co-mediation. This is due to a lot of reasons, for example, a shortage of resources, or that mediators are commonly trained to conduct single mediation. For me, when I was doing cross-border mediation training at Germany, I understand that Europe commonly practises co-mediation. Co-mediation means that both of the mediators have to maintain a gender balance, a professional balance (legal and psycho-social), a national balance (for language balance), etc. In that case, there might not be need to involve specialists. It is only in exceptional cases where there is a lack of professional knowledge on a particular field that the mediators would seek help from other specialists.

Q: Do most of the mediators in Hong Kong have similar trainings as you?

A: Not really. The training I had in Europe is only completed by me and another lawyer in Hong Kong. Mediation in Hong Kong is well-developed, so most of the mediators are trained in Hong Kong. The foreign lawyers may be trained elsewhere, but if you have to convert your practice in Hong Kong, normally they would also get mediation trainings in Hong Kong. I only do trainings at Germany at my own initiative. In my experience though, I think maybe sometimes a financial specialist is necessary. Legal specialists are not really necessary because the clients normally would have lawyers to accompany them in mediation.

Q: So do you think that you feel equally comfortable even when communicating with children under the age of 5?

A: Yes, this is what I have been doing anyway. Hong Kong isn't so fragmented… that we need specialists in law, finance, etc. Every mediator has their own background and strength. I think if co-mediation can serve this purpose, I do not think there is a need for involving specialists. So far I have not invited any specialists as I conduct mediation.

Q: What do you mean by Hong Kong isn't so fragmented?

A: You know since you have been studying abroad, that there are just many specialists to handle different specific situations and problems. But in Hong Kong, social work is general and all-rounded; counsellors are not really fitting in the system, clinical psychologists are also not included in the system; so social workers do counselling, resources management, and many other things. Lawyers, might be more specialised, construction law, family law, financial law, company law, etc. They all have their niche areas. It is really not easy to find specialists. In fact in terms of mediators in Hong Kong, there are specialised mediators, such as construction mediators, financial mediators, family mediators, general mediators (water leakage, noise pollution, and other community-based disputes). In fact… Hong Kong uses other categorisation in specialism. Mediators in Hong Kong would make use of each of their unique background to build a specialists experience in a particular area of mediation, such as construction mediation and family mediation.

Q: So although mediation is categorised to niche and specialist branches, but each person within a specialist branch is also able to conduct multiple tasks across many disciplines.

A: Yes. I am both a general mediator and family mediator. It might take me a while to construct a general mediation, comparing to a family mediation, but I can still do it. Within family mediation, most of the cases I work on are cross-border family cases. It might also take a while for me to handle local family cases. But I don't think this really relates to the issue of "specialism", it's more about some common practices in Hong Kong.

Q: Do you think there are enough mediators in Hong Kong?

A: (sigh) it is always said that it is not enough, but I always feel there are enough mediators. It very much links to the cost, if mediators do not have a high hourly rate, people would be more likely to try. At the same time, some mediators who have a higher hourly rate may offer services that are more effective and efficient. Chinese culture has it that people believe judges are able to make some really good decisions for them. This is a cultural issue. The social environment is in-built in hierarchy. I am talking about Chinese culture, not Asian culture in general. The culture is that there is always person that makes decision and order. In ancient China, the leader of a village would "mediate" a dispute by making judgements. This culture is lingering until now in Hong Kong. Hong Kong has spent a lot of time in promoting and educating the public as to what mediation is. People would always think that it is always good to find a judge and see how he/she decides. Judges are always right. This culture is prevalent in Chinese communities.

Q: So therefore it is pretty rare when the divorcing parents negotiate by themselves, and even collaborate with each other…?

A: This mind-set and approach need time to be cultivated. So even if there are eventually more specialists in Hong Kong, they are not of good use here. For example, if the disputed parties are asked if they need a financial specialist, my personal take is that they normally would not recruit one. They would surely seek advice from their lawyers first, even though it is obviously financial matters. Well, yes, lawyers are also not financial specialists, but to the parties, whatever the lawyers say, it is always right, even if they are not financial specialists.

Q: Can I understand what you said this way: among the many clients you have met in Hong Kong, although you really want to give client-control to them, at the same time they mostly want someone to make decisions for them?

A: Hong Kong is mildly better, but this situation is very obvious in Mainland China. When I was working in Mainland, I was pulled by the clients very roughly…

Q: Pulled by the clients?

A: As in the clients there would always ask me to make a judgement, but this is against my role as a mediator.

Q: You mean Mainland clients do not want client-control that much?

A: Yes, because they are not familiar with the legal position in Hong Kong at the first place. It would be much better if someone tells me what to do, and how to protect my interests as much as possible.

Q: I see, so they are a bit scared…

A: Yes. They would also think whether it is not in the best interests of the child to live at Mainland instead of Hong Kong. They would even think that they are at an inferior position if they reside in Mainland China. They would think that living conditions in Shanghai and Beijing are worse than that in Hong Kong. I do not think this is necessarily true. But you can see that their underlying belief is that Hong Kong courts are biased against Mainland, so children would normally remain in Hong Kong. However, in fact, among the 200 odd cases I have done, I usually conclude that the living conditions in Mainland are slightly better than that in Hong Kong. It is primarily because of the location of the carer. If you ask me what the best interests of a child means, I would say it is about the living environment and the location of the carer. A lot of the times, in Hong Kong, I beg your pardon if I have some gender bias, most of the grooms are from Hong Kong and the brides are from Mainland.

Q: Oh, but this is also shown in statistics.

A: Normally, the fathers in Hong Kong struggle to take care of the child. Even at times, the father would appease the child by for instance buying toys, etc. The mother would feel helpless, and would feel hopeless in getting the custody of the child. But most of the time the child would know who is genuinely taking care of him/her. During investigation, we would always ask what the child

thinks. We wouldn't ask the child directly, but would make observations from their reactions and through inference.

Q: You do investigations as a social worker, not a mediator right?
A: Yes, but in fact as a mediator, I would also ask the same things.
Q: But you wouldn't do home visits as a mediator, right?
A: No, it is very, very rare that we would do visits as a mediator. But as a social worker, it is compulsory to do home visits.
Q: So when you are doing investigations, it is not a mediation case.
A: Of course not. I cannot wear the social worker hat at the same time when I have the mediator hat. This is impossible.
Q: So you are doing investigations as a child specialist?
A: This is what the court views.
Q: The report was about basic information, living environment, economic situations, education, child's views, parents' views, and clinical observation of the interaction between parents and children.

Q: Comparing the role of a social worker submitting an investigation report to the court, to the role of a mediator, do you think a mediator really needs such a report, or do you think the report that you submitted to the court isn't really of much importance?
A: The report, as it now stands, is quite… I am not sure of powerful is the right word, but it is influential. The nature of the two is different. When I investigate, the process is not interactive. Mediation is led by the mediator, although the process relies on the parties' participation and change in cognition. Even the mediator doesn't have the investigation report, he/she can still facilitate a mediation. I as a mediator wouldn't actually look into the report that much. The report is about how a professional thinks about the current situation, and it is for the judge's reference when making a decision. Having said that, mediation can happen any time throughout litigation. At times, when the report does not favour one of the parties, the interaction is quite interesting. Assuming that the professionals are conducting the investigation genuinely, one of the parties have exhibited problems in taking care of the child. But does that mean these problems cannot be overcome? It depends on the effort of the parties.
Q: So when the report is unfavourable to one of the parties, would that more likely result in mediation instead of litigation
A: No, but the clients would inform the mediator. Parties are situated at a very sensitive position, so they sometimes over-interpret the questions asked by the social workers during investigation. So suddenly, the social worker plays a very important role in deciding whether a parent would be awarded the child's custody, downplaying the role of the collaboration between the parents. Interestingly, I would suggest the parties mediate before the judge reads that report. Mediation is self-driven and self-determined. This is something that I would use to facilitate mediation.

Q: Hypothetically, if you take off all the roles that you could be, you are not a family mediator, nor a social worker, would you want to make use of all your expertise as a family mediator and social worker in assisting a family to resolve disputes? Do you think this is the most ideal way of dealing a dispute that involves children?
A: (laughs) This model is adopted in Mainland China. In fact it is very difficult for social workers and lawyers to be trained as mediator because they are bound by the mind-set of their own profession. For example for social workers, based on our knowledge and expertise, we would suddenly really want to conduct counselling during a mediation. But this is not something that a mediator should do. However if counselling helps sooth the emotions and facilitate mediation, this is fine. But it is difficult to employ counselling skills in resolving for example financial matters. When we do emotional support, or perspective understanding, some mediators would employ counselling skills

as a mediator. This is a bit confusing. Lawyers are very focussed on legal terms and legal reasoning, but lack emotional support to clients, and even sensitivity towards children's needs. It is very difficult to imagine how one person can carry out the role of a counsellor and a mediator. Therefore, the concept of mediator is premised on the fact that he/she must be a neutral third party that helps parties to resolve problems.

Q: So one-man-band is a very difficult thing to achieve.

A: Indeed. I am capable of doing it, but many others would prefer co-mediation. But co-mediation is also difficult in terms of logistics, thinking about the time, cost, venue, etc. The 2 mediators also have to click, and cooperate well. If this is doable, co-mediation is very likely more effective than single-mediation. Also the travelling aspect would make co-mediation more difficult as well, as I have to travel to Mainland for mediation too. But I would say there are health and safety concerns if you work as a single mediator at Mainland China.

Q: Health and safety?

A: This is a bit culturally biased, but when you talk to a party from Mainland, it could be quite aggressive. I was even once slapped on the face. It was some 7-8 years ago, so it wasn't a big deal now. I understand it now that the disputed party would be mad because he/she felt misunderstood, or really wanted to catch your attention to convince you to hear him/her. If this happens though, it may mean the mediator isn't that sensitive anyway. But it seldom happens when I do investigations, because the parties try hard to convince you that they are fault-less. When you ask whether it would be better to have specialists involved? I think it may, because professionalism may be able to insulate the escalating conflict or anger. Collective practitioners also have to stand from their clients' perspective, but a mediator does not have to, so they are more likely to involve the child's perspectives.

Q: You mean mediators are less client-focussed?

A: Mediators are more willing to see children as a stakeholder in a single mediation I think.

Q: And collaborative practice is more client-centric, because it is the clients who pay for the service.

A: Correct, according to my understanding.

Q: Are most of your clients funded by legal aid?

A: Not really. Some are private clients too. But in terms of the cost, I am receiving money from both of the parties, because I am a neutral party. In Hong Kong, when there are complicating cases, and that the clients have the resources, they would resort to collaborative practice. Legal aid does not support collaborative practice anyway.

Q: I think I pretty much have everything I need from you, thank you so much! Do you have anything to add?

A: I think if the reform was successful in 2015, the role of the specialists would be enhanced. But the market does not have a lot of specialists at the first place. At that time, the role of child specialists in enhancing the child's participation and having his/her best interests considered is discussed. But the courts' understanding has it that social workers and clinical psychologists also perform the same function, and even counsellors. The concept of child specialists is a little bit inconvenient in this structure. When you look at the social develop as a whole, the division of labour among different professions in particular, from the perspective of child specialists, in fact psychology and social work have already trained a good number of professionals. Do we really need someone as "child specialists"? From the perspective of the government, there is already psychology unit, social worker department, etc. These professionals are already found in the current system. Do we need a new way of specialism? Maybe there isn't such a need at this moment, but not sure if we need it in the long term. Whether a specialism can perform its function depends on whether the law gives that specialism a legal basis, on its role, function, rights and power. Co-parenting work has the same problem. Because the law fails to reform, so all co-parenting work are done without legal

support. The social work department is doing co-parenting work at the moment, but there are only 5 centres. Had co-parenting been established in law, it would have been much better. For example, all parents might have to go through some compulsory parenting courses. This is happening in some States in the US. Or when the judge decides that this is a high-conflict divorce, then co-parenting course must be attended. But without the law support in Hong Kong, co-parenting cannot become a compulsory thing.

Q: How does that influence your work as a mediator?
A: Co-parenting is something. But I am just talking in analogies to illustrate that law support is very important in establishing the functions and powers of some specialists. Without it is very difficult to develop collaborative practice.

Mediation is embedded in some legal practices and procedures, so it is different from collaborative practice. Reform is necessary.

Q: You are talking about the reform in 2005 right?
A: Yes, and it was brought up in 2015, but still failed to reform.
Q: So you mean if the reform was successful, it would help…?
A: At least there would be more specialists, especially child specialists. Child specialists could be lawyers, or human professionals, etc. Hong Kong still have these cases, but very rare. It would mostly involve foreigners. It is not prevalent. Only found in complex cases that have enough resources that the parties are willing to involve child specialists. It is not difficult to find anyone to resolve disputes, social workers are quite accessible.

Q: Great! Thank you very much for your time today, it has been very fruitful.

Annex B

Interview Transcript 2

Interviewee: A collaborative practitioner and lawyer in Hong Kong; a Board Member of the Collaborative Practice Group in Hong Kong
Language: English

Q: What are the latest development of collaborative practice in Hong Kong?
A: Hong Kong lawyers are still remained in their mindset that they have to fight and litigate.

Q: Do you think the legal culture, or adversarial nature has an impact in shaping the CP model in HK?
A: CP is not taking off its ground in Hong Kong mainly because therapy is not a common culture just like the US. The US doesn't give stigma to therapy: almost everyone has at a point in life been to therapy. Even in England, although the promotion of mental health is more common than that in Hong Kong, the scale is incomparable to that of the US. Now in Hong Kong, not even all lawyers have been to one session of therapy themselves. Therefore, the culture of therapy is lacking, and the CP model in the US cannot be transported to HK directly.

The model of CP in Hong Kong allows parties to decide how the process should look like. The most common way of doing it is, considering the cost at the outset, recruit collaborative practitioners from all fields in Hong Kong, these practitioners are not necessarily lawyers, but can also be mental health practitioners, therapists, etc. The parties can even choose to do mediation within CP, or the common 4-way meeting, or a child-inclusive mediation.

However, the most common way of doing it is that there are at least 4 people in a collaborative team: the 2 clients, and a collective practitioner on each side.

Q: And the practitioners are not necessarily lawyers.
A: Exactly. It could be a therapist, or whoever, as long as they are trained collaborative practitioners.
Q: How many trainings are there so far in Hong Kong?
A: I think there are around 2 or 3 trainings, but I am not certain.

Q: So you refer it as a hybrid model?
A: Well, maybe…
Q: Since it doesn't fit in to the normal categories of models, so I suppose a hybrid model is a right way to refer it.
A: Yes, the essence is to preserve clients' control.

Q: Am I quite right to say that the pre-condition of collaborative practice is that the clients (divorcing parents) are to some extent, quite… friendly?
A: Hmm… I would say "friendly" is a wrong word. I would say the clients would not destroy each other. It also depends on how the collaborative practitioners facilitate and help the clients. There must, at least, be a "common understanding" between the clients that they do not want to solve the matters by litigation. That's why the PA (Participation Agreement) is very important.

H: Do you think the PA facilitates the parents cooperate with each other, or is it the other way around: the parents have to first at least be cooperative before signing a PA?

A: I think the PA is something that distinguishes collaborative practice from mediation. Within a mediation, there are still threats of litigation, but it is comparatively rare in collaborative practice. I think a PA helps the divorcing parents to (1) provide a sense of security, and the acknowledgement that they are willing to try everything; (2) have a 21-day rescue period, which means when a party wants to end the collaborative sessions and bring the case in front of the court, the practitioners would try all that they can to rescue the case within 21 days. I have a similar case before, where all practitioners really tried their best to negotiate. At the end the parties reached an agreement and it was a relief to have rescued the case from litigation. We and the parties would lose almost everything if the collaborative case is closed, and the disputes have to be resolved in litigation. This is not only for the collaborative lawyers, but that the clients might lose their therapists or psychologists too; (3) the PA relaxes the anxiety among the parties.

Q: How about divorce coaches? Do you think they help the parties in achieving the same function of a PA?

A: I agree that divorce coaches can benefit the parties, however as I said earlier, it is a very American concept. Most of the time, therapists that have trainings in collaborative practice would perform a similar role. However, these therapists are rarely involved in a collaborative case. The parties are worried about the risk of losing the therapist if the collaborative practice case fails at the end. Therefore, they would keep their therapist out of the collaborative practice sessions. Normally clients would not pay for another therapist to be included as a team member in collaborative practice. That means the client would pay double.

Q: So it's pretty much a leap of faith for the clients and even the practitioners to resolve any disputes by collaborative practice?

A: Yes, a leap of faith, because there is no guarantee that the dispute would not be resort to litigation. You can only believe and try your best to facilitate as a collaborative practitioner.

The clients can also do something what we called a cooperative practice, so it's the same sort of thing, as much as a 4-way meeting, we sit around and discuss, but it doesn't have the structure or security of a collaborative practice. I really do think the actual agreement really, really helps. That same fear that you are going to lose the work, so that's why I'm not going to sign the PA, kicks in when it's going really bumpy, and that you think it's going to fail. And you work *really* hard to make sure it doesn't fail… I think it really has that effects on the solicitors, I think it has the effect on the clients as well. I think the clients would think, "oh the last thing I'm going to do is to find a new lawyer, so I may as well… just".

So one of the cases that I have failed, actually almost settled immediately afterwards because toys were thrown out of the tantrum, and that was the end of the collaborative… but then they sort of work up the next day with their litigation writ, realising that it would be really awful. Calm down, and settle things.

Q: So that was within the 21 days?

A: Well, that was slightly different, but you got 21 days to rescue to start with. During those 21 days, the lawyers work really hard because even if you think cynically, they do not want to lose the clients, they don't want to lose the work. That combined with the fact that we truly believe in it, so we will do all that we can to rescue it. The clients themselves think, "well I might as well go back to it, because otherwise I have to meet another lawyer, and tell the lawyers this and that… and why would I waste the money on this again, so I may as well try really hard within a collaborative".

Q: I have had enough for cooperation between the parents. As you said they have a strong client control, so they can control the process, and as long as the clients are mentally prepared to

cooperate and the collaborative practitioners would help as much as possible, and the PA would help.

A: (Nod). Yep.

Q: And although the divorce coaches are not really available in Hong Kong, I suppose the collaborative lawyers would kind of stepped in…

A: In a sense, yes. If you worked well with other collaborative practitioners, erm… sometimes you can play good cop bad cop. Sometimes it really helps if you tell your client off nicely in front of the other party. Because your relationship with your client's spouse is really important. They have got to have some faith in you as well. Yes you represent your client, and only your client. But you gotta have that good relationship, with not just your counterpart, but with your client's spouse as well. Because they have got to believe what you are saying. Yes you are doing it for your clients, but ultimately you are doing it for (a) the children, and (b) the family as a whole.

Q: There is this research saying that collaborative lawyers are categorised to 3, one is a friend and a healer, the second is a team player, and the third is a cooperative legal advisor. Some say that the English collaborative practitioners don't really follow the categorisation, and perceive themselves only as an objective lawyer. Which way do you perceive yourself?

A: Myself or?

Q: Yourself, or maybe in general?

A: I don't like the term friend and healer, because that's not my job. But I have to have a certain understanding of that, because I don't think you can be a collaborative practitioner if you actually don't realise that the process itself does involve an element of healing. Friendship maybe not so much, but healing. The middle one is team player – that's a must. You have got to be a team player.

Q: Even if it's just a small team of 4 people?

A: Yes, after my last collaborative meeting, my client wrote me and thank me for eating humble pie because effectively the wife got really upset, irrationally so. But there was no point me to saying to her, you are being irrational. What needed was an apology even though I really do not need to apologise. Because she needed to feel that for whatever reason, she needed that. That an element of team-playing. You take someone to the team. That's a definite must.

Objective legal advisor – that got to be right. I think it's a combination, but not so much the friend. I think everything else, it has to be a combination of the 3. As an objective legal advisor, you got to advise someone A, B and C. I can tell you, there are 2 sides to it. This happens a lot in collaborative practice: I advise this, and I have discussed it with, let's say, Nick, and he advises this. My view is yeah maybe A, but not so much of B; I disagree with B. So there is your advice. That's cooperative advice if you see what I mean.

Q: Maybe we can move on to children. Are children ever directly participating in the team?

A: Not that I have done one. That's very much the same as child-inclusive mediation. I don't think you would actually have them directly. What you would do is you would have a child psychologist, who has a meeting and reports back to the collaborative session.

Q: Is it more like fact-finding? Or does the psychologist have an active role in it?

A: The psychologist can have an active role. As in, "I have spoken to your children, and I am not going to tell you what exactly they have said, but you have to take this, this, this into consideration". Or they may say, "you both have to go back and tell them, blah blah blah". There's no direct link, I wouldn't like to have a mediation with a child in the room. Only when it is deemed necessary to have a child-inclusive collaborative.

Q: When children are involved in a case, is it quite a common rule to have child psychologists?

A: It's not a rule. When I have clients that have children, I always insist, but I can't make them do anything. On top of my agenda in my agenda though, is to encourage the client to take child

psychologists' advice. Because we all think we know what we are doing, but we don't. and none of us knew we would get a divorce, so how are we supposed to know what to do when we get divorced? Why don't you talk to somebody who would guide you through what is going to happen, especially what is your child thinking, etc. I can't insist the clients having a child psychologist, but I always advise them to have them.

Q: Have there been any cases where things have gone terribly wrong because a child psychologist wasn't involved?

A: Not in my cases, no. The cases that I have chosen are that the clients have always been very child-centred, and so no I don't have the experience.

Q: Do you think the child psychologists would in any way control the process or discussion?

A: Well they might, if that particular session was about children. I would almost expect them do.

Q: Do you think they dominated the decision-making process, especially when the parents hold different views or…?

A: I think the lawyers have to make sure the clients know that it is the clients who are making the decision, not the child psychologists. I think it would be a sad day if the parents delegated the decision to other parties. I think they should take their [child psychologists'] advice, and consider the advice, and consider what is the best for their children. If I did do, I haven't done one, that have a psychologist, and we were actually talking about children… I would almost expect the child psychologist to take the lead role in advising but not in decision-making.

Q: So the psychologists would normally be a bridge between the collaborative team and the children, maybe?

A: Yes, it might be the case.

Q: How about… if a psychologist isn't there, how should a child get information…?

A: They don't necessarily, that's the problem. They don't. Some children are not aware…

Q: Especially the younger ones…?

A: Yea. And some children are involved, and they are involved when they shouldn't be involved.

Q: What do you mean?

A: There's no reason why a five-year-old should know that mommy and daddy are meeting with their lawyers or even if there's a court order. There's absolutely no reason on earth why a child should have any idea of what is going on. Most times the mother would be like, "your father is taking me to court!" Erm… there may be a 16-year-old that in fact should have a voice, maybe a 14-year-old, maybe a 12-year-old, do you know what I mean? But having a voice, and being involved, is very different. So… erm… meeting with a child psychologist, and because mommy and daddy want you to meet, so we can make better decisions for you, etc… that's all that a child needs to know.

Q: So are you trying to say that a child may be able to express their views, but their views are not necessarily important throughout the decision-making process…

A: Well they are important, but they are not necessarily followed. But it's also about how these views are elicited. If they are elicited correctly, then they are obviously very important. But if it's just that they have only heard one side of the story… then…

Q: Yes, that's why I just don't understand why a child specialist isn't a mandatory player in a team…

A: I think it's a financial thing that it's not mandatory. If we made it mandatory, a lot of people would go, "how much is this gonna cost me?" I think that's the main reason why it's not mandatory. The simple fact is, if you are going to a litigation, I'm gonna have a lawyer, you're gonna have a lawyer. Us all sitting down and doing a 4-way [meeting], that's fine, because that's what it is going to cost us anyway. But if you make it mandatory that there is a child psychologist, I think a lot of the people will go, "no… thank you".

Q: So it goes back to the client-control…

A: Client-control, and… money and resource. Cause, ultimately it's cheaper but it's front-loaded. The price is front-loaded so by the time you get to an FDR [Financial Dispute Resolution], you are

spending more money than you are if you had collaborated, but within the first 6 weeks, absolutely you have spent more money in collaboration than a litigation because this is how things are [in litigation]… slowly, slowly, slowly, and then in court, the price starts going up. Where in a collaborative, as soon as you get 2 lawyers in a room, you are spending dollars in a room… it clogs up.

Q: When you determine what is in the best interests of the child, do you have a particular tool… or is it more like an open-ended question, uncertain, really depends on the psychologists, etc…?
A: Yea, it really depends on the child, depends on the circumstances, the age, sex…
Q: And you just discuss what is in the best interests of the child…?
A: Yea.
Q: So there aren't a list of questions that you would go through when determining…?
A: No, I don't. We just come up with a…
Q: So it's just common sense?
A: Yea.

Q: Great, thank you so, so much for your time!
A: You're welcome.

Annex C
Interview Transcript 3

Interviewee: A collaborative practitioner and lawyer in Hong Kong; a Board Member of the Collaborative Practice Group in Hong Kong
Language: English

Q: It seems that Hong Kong is sort of practising a referral model in a way, where the tem would bring in specialists to the collaborative when necessary…

A: Can I just stop you there… the birth of collaborative practice was in 1990s in the US, so that's as I understand, the history of collaborative practice is only 20 years old. Hong Kong had its first training in 2010, so Hong Kong's history is only 8 years old. So I don't think there will be a significant change in landscape if you only look at Hong Kong in isolation, there will probably have a bigger change in landscape in America over the years. Hong Kong is still in its infancy, and it's unfortunately not as many cases as we would have liked, I don't even think we have enough cases to even push for a significant change in dealing with it. As far as I'm aware, there are really a handful of core practitioners doing it, and they are doing it in a particular way. So it's not like we have got 20-30 practitioners actively doing it, and developing it to more styles. But we did right from the get-go, deliberately decided to have a consensus that it would be multi-disciplinary, and it would be a formal recognition of family group to recognise, that lawyers cannot do everything, especially us because we have the biggest ego, and dealing with family law really requires a multi-disciplinary approach, because there are so many aspects to it, children, taxation, financial, inter-personal aspects, etc. So a lawyer cannot possibly deal with all of that. That just was so crystal clear to many of us, who are passionate about collaborative. And really welcome that involvement, because we really need to work as a team, and lean on each other, for the sake of the couple. So that was sort of how we deliberately the start the process. Because we were given the option to do the solicitor model, the multi-disciplinary model, and we all collectively chose multi-disciplinary.

Q: But then the multi-disciplinary model asks the practitioners to have mandatory inclusion of other specialists at the outset of the case, is that what is practising in Hong Kong?

A: It's not mandatory, ultimately it's down to client-control, which is opposed to the litigation process, which is more lawyer/court-controlled. Equally, there is an equal measure of client's wishes and the lawyers' advice on actually deciding whether this case warrants experts. Sometimes clients are resistant to that. I think it goes both ways.

Q: When children are involved in a case, it is also not mandatory to involve a child specialist?

A: No, it's not. As far as I am aware, there has only been one case where a family consultant has been involved, that's I'm aware of. That's another problem where there is no centralised statistics of the case, and because it doesn't go to court, you don't get it published. But this HK Collaborative Practice Group is just a few of us who are really passionate about it, but we all have our day job. And it takes dedication to maintain the group, administrative aspect, etc. We just found out, in one of our collaborative practice group meeting, where we just talk and vaguely get an idea of what's going on… but there's no centralised system.

Q: If I ask you to anticipate what would CP look like in 20 years, assuming there are more centralised data, etc.?

A: Even if it doesn't have that [centralised data], I think it will become more mainstream. We are getting there, and family law has always been the most innovative branch to try new things. We

are sort of the guinea pig, we had FDR before anybody else, CDR, one of the first are to have mediation… maybe together with construction [mediation]. We have a friend of coordination, and finally an inclusion of collaborative practice in one of the practice direction. I think within the field, where there are lawyers, judiciary and practitioners, that they sometimes confuse collaborative practice with mediation. We get sort of scuffed under the umbrella of mediation, which we are really not mediation. So it kind of just watered down to lack of public education and lack of understanding.

Q: I think there is also value in looking into how the infancy of collaborative practice in Hong Kong… as I understand, Hong Kong gives a lot of flexibility to clients as to shape collaborative practice. Am I quite right to say that it is adult-centric?

A: Not necessary, but actually I would say it's more child-friendly than any other resolution process. Because you are not thinking from a system that is interests-based negotiation, because there are no litigations, certainly not on a parallel basis. So it takes away the normal… even if there is mediation it takes away the back of the parties' mind or the lawyers' "red flag risk", that, "okay we will go back to litigation". This is genuine negotiation, wherein collaborative practice it is a genuine ceasefire, people are willing to negotiate without the threat of litigation. I think that really changes the dynamics of the parties. You also find that when people do sign up to CP, and right now the court practice is that there is a good element of trust. So amongst the practitioners, there is good trust, and you are more willing to go an extra mile in the negotiations.

Q: How does that make it more child-focussed then?

A: It's about interests, you are not talking about… "I want little Johnny, or I want the house", that's either you have or you don't, so black-and-white. If it's interests, you are talking about, "I just want to make sure he sees me as part of his life". So it reframes things, and gives it much more options. Because when you don't do interests-based negotiations, like "I want the house", then it's either you have the house or she has the house. There's very little option. When you say, "I want Johnny", but you actually want to say "I want to be part of his upbringing, or because I came from a broken family, and I didn't have my mom or my dad, I know how it feels, etc." That provides more options then. How does it work with your work schedule, living arrangement, logistics, where to live, etc. That just opens up brainstorming, and more options, as opposed to the option of "yes or no". A very good analogy that they always give is that, 2 children are fighting over an orange. Mom goes over and says "why do you want the orange?", that's interests-based. But normally mom would just go, "okay let's split the orange into 2 halves", this is based on the position of "I want the orange". But if you get to the bottom, which is interests, and "*why* do you want the orange?", one might say "I want the juice to make the cake", and the other may say "I want the rind to make a dressing". Then both children can get the full use of the orange, the juice and the rind.

Q: The stakeholders that we are talking about are the parents… do you see the children as stakeholders… or as "oranges"?

A: Because our profession is about the lawyers don't have contact with the child, unless you're a child-appointed lawyer. In this process, you bring in the child by having the child expert, who would feed back on the child's voice. You can loop in the child's voice that way. Because it's not a court process, you don't have to have a joint expert of the child, etc. and the system is based on the multi-disciplinary approach, so the fact that you are mentioning the reference to child specialists takes away the stigma that otherwise families would think whether they are the hired guns, etc. it just neutralises these stigmatisations. And it's a really neutral way to bring a child's voice if you have a single child expert appointed by the clients to loop back into the child's voice, or at least provide guidance according to the age and maturity of the child.

Q: So the thing that really distinguishes CP from other ADR is the participation agreement, and if we take away that, do you think maybe mediation or any other ADR would be a better way to facilitate

children's voices to be heard? Or do you think CP has something in there, like structurally for example, that makes children's voice more accessible to the team?

A: I don't think it's the process necessarily, I think it's more the clients and the lawyers involved. The lawyers are more open-minded anyway, and at the forefront of their minds, they always also see the child is kind of your client. At least you have a duty to make sure the child's interests are not compromised. In my personal practice, I would say to a client, "yes, you are my client, but I also have a duty towards the child or children involved, and that if I think if you are giving me instructions that go against the child's best interests, I may challenge you or ask you, why is that in Johnny's best interests". I would challenge my clients, yes these arrangements are convenient to you, but what about the child?

Q: Does it involve a lot of education for the parents/clients, because it's pretty much the mind-set of the parents and practitioners that make CP a CP. Do you have to educate the parents to think the same way as you do throughout the process? Is it a factor that makes it a successful model for child's participation?

A: I think the way of thinking ought to be imputed in whichever process you use anyway. CP just lends itself to that because it is such a conciliatory process. It removes the adversarial nature of litigation completely, and it's off the table completely. So you are in a safer place to negotiate.

Q: You mean it's a safe place for the children as well, or is it for the clients?

A: For the clients. Because children aren't clients. None of the cases I have looked in actually have the child involved directly.

Q: The child specialists would not only do a fact-finding job, but also…

A: There is not so much a fact-finding per se, it's more to do with looping in the child's views, or that person assists the parties in coming up with some sort of parenting plan based on his/her observation of the child, family or research. The specialist helps these families come up with an arrangement.

Q: How do you think the CP could be improved in terms of child participation?

A: In any other process, the child's voices are seriously lacking. Even with litigation, yes you can theoretically hear the child by way of legal representative, but it is rarely invoked. Most children don't know about it. Then there's the funding aspect. Our courts are quite paternalistic, and there is still some resistance to meeting children. I think maybe there hasn't been sufficient trainings to deal with children in practice. Family lawyers traditionally were told not to have interaction with the children involved, unless as a child representative. So most of the time, you get the child's voices via the social welfare officer. The very recent case that I did was child-inclusive mediation, where there is a consultant who meets with the children, feeds back to the mediator, who then help the parties to come up with an arrangement. I thought that was really powerful. So the children themselves are considered to be part of the mediation, and get feedback from the consultant. Another case I did was not collaborative, but the parties agreed to appoint a child expert, who then met with the child and then conveyed back the child's wishes. And it resolved the case, and it was actually a relocation case, and very black and white – the child goes or stays. But if you had left it to just the parents, they would probably have to resolve it by litigation. When you bring in the child's voice via a child expert, it really changes the dynamics of the parents, making them think what is in the best interests of the child.

Q: And the main reason for not bringing a child specialist in all collaborative practice is cost?

A: Not necessarily, it might be that the parties thought they do not need an expert, and that they can resolve it by themselves. Sometimes they are able to resolve by themselves.

Q: Do you think the control that clients get is a bit too excessive, or is it suitable?

A: I think it's right. Why shouldn't they control their own lives? Why litigate and leave it to the judge, who only sees you in a 3-day hearing in a witness box for 6 hours per day? But you are the parents,

and those are your children. You are living and breathing it. Whatever decision the judge is going to make has a profound impact on your child, so why wouldn't you make that decision yourself?

Q: When you determine the best interests of the child, do you have a list of questions to go through, or is it quite common-sense based?
A: It depends on the case of each case. It boils down to the facts of the case, and the circumstances of that family.
Q: If you compare the best interests determination of a CP and litigation…
A: Should be the same. It's just how much that get factored into the process. In litigation, when you are fighting over rights, and there would be a winner and a loser, I think because of that dynamic, invariably the child's best interests get submerged into litigation and the adversarial nature of litigation. Whereas when you are encouraged to speak, and speak freely, and look at interests, beyond your own interests as well… but also what is the best for the family as a whole as well… I think that setting lends itself to giving a more exposed opportunity for the child's best interests to be properly weighed in the forefront.
Q: And the determination is a conclusion come up by the 4 parties, at least – the 2 collaborative lawyers and the 2 clients?
A: Yea, but in theory, it could be the clients and the child specialist, it could be a 3-way.
Q: Ah, so the collaborative practitioner doesn't always have a role in determining the best interests of the child.
A: No, the lawyers don't determine it. The clients do. We never make the decision, the parties do. We are only helping them to make the decision.

Q: About the training and membership of Collaborative Practice Group in Hong Kong, the local community… how do you renew a membership?
A: You have to pay a due every year.
Q: It's not really active in a way?
A: The problem is we all have our day job, and because it's relatively in its infancy, and because it's not mainstream yet, so it's been a struggle.
Q: And on trainings, are they frequent?
A: No, I think we have 4 trainings since 2010.
Q: So every time you attend a training, you become a practitioner?
A: Yes in theory, but we would just say recently, you really should have a few years of experience in family law before you get the maximum benefit of it. Because a lot of it has to be applied on a practical level. If you haven't got that practical experience, a lot of it will be lost. The more experience you have, the more that training would benefit you.

Q: How many collaborative cases do you handle a year?
A: A handful… because I have to make sure that the collaborative practitioner on the other side is trained, and they are not always trained. Even if they are trained, they may not be willing to do it because they haven't tried it. They may be too shy to do it, or they are not confident enough to do it. It wasn't even 10 a year.
Q: And those that involve children are…?
A: Most cases do involve children. I have only done one without… oh they are actually children that are grown.

Q: Thank you very much for your precious time!

Annex D

Interview Transcript 4

Interviewee: A collaborative practitioner, mediator, and lawyer in Singapore; a Board Member of the International Academy of Collaborative Practitioner
Language: English

A: I really think I should spend some time. How can I help, and what are your thoughts and questions?
Q: My burning question is: I think Singapore has a really super world-class model of family mediation, and how it is really child-rights based. I just wonder how collaborative family practice ("CFP") tunes into this kind of culture or structure. Is it CP popular, or is it in the shadow of mediation? Do you think CP has any role in the future… is it that valuable in a sense?
A: Hm… I think it's a very good question. The context, as you said, especially the use of ADR [alternative dispute resolutions] in Singapore is very, very strong and vibrant. It is largely due to the Family Justice Courts. The whole thing started, I think, probably in 2015. It started with mediation, which is now an integral element of our family justice system. We also have counselling in the courts. Collaborative Family Practice, as we call it in Singapore, was introduced in 2013. It came about because of our former head of family court then, who came to some of us, and she showed us something from the South China Morning Post. A story about a collaborative lawyer in Hong Kong. That's how CP started. There are 39 of us who are training in this field, all lawyers and 2 mental health professionals. There is a number of cases. We don't have hard data or raw data at the moment, it is still vibrant, it is not dead. It has been there for 5 years. You may know that I have the privilege of being in the first one in the first two training available in Singapore, and doing the first case in Singapore in July 2013.
Q: The very first case in Singapore?
A: Yes, I did it right after my training, which is very unusual I am told in the rest of the jurisdictions. Hong Kong has to attend trainings for at least 1 or 2 years, I think? It took them longer to get on the board. So in Singapore we are faster. Our family practice rules have this in the rules, so if you have a divorce done by collaborative law, the time line and the process is faster. So there is a lot of support from our judiciary. It is a very lawyer-driven thing, whilst mediation is a court-driven thing. There are a number of us [lawyers] who push for it, and promote it. We don't have a lot of cases right now. But if you look at the jurisdictions around the world, it took them many, many years to get to somewhere. So I would like to think that Singapore has done faster and better. I think we have done well in 5 years. But I don't have any data to share. There are cases going on each year. But we are kind of loose – we are initiating the Society of Collaborative Professionals in Singapore – once we form it we will start collecting data. Right now, we have cases each year. So it's not dead, it's very alive. A lot has to be done but I am so excited about it. I think it's the best way to solve family disputes. To me, cause I'm also a trained mediator, I think CFP is better than mediation, because it doesn't have an extra party called the mediator, so it saves the cost on the mediator. Since it's a lawyer-driven process, the parties can save costs on the mediator.
Q: Is it mainly because of the cost that you feel CFP is better than mediation?
A: The cost, and also how it is lawyer-driven, so it gives more control to the lawyers and the parties. In mediation, some degree of autonomy is in the hands of the mediator. It is still a process driven by the mediator, yes, autonomy still lies in the parties, but it is a process driven by the mediator. In CFP, it's a process driven by the lawyers who act for the parties. I personally think it's much better than mediation.

Q: So the main reason is the "judge" is out of the picture? When you have a mediator… are you talking about single mediation, so there is only one mediator? And the 2 parties are paying to just 1 mediator…

A: Technically we have co-mediation. So we don't always have a solo-mediation. So you are paying the cost of 2 mediators. I can also sometimes get solo-mediation. On average, a 1-day mediation session 9am to 6pm will costs you at least $5,000 in Singapore Dollars. If you do CFP, you can save you $5,000. It's a lot of money.

Q: Why do you say CFP is cheaper than mediation? Is it because the lawyers act more effectively?

A: In Singapore, the lawyers go together with the parties to co-mediation.

Q: Oh, so you pay double.

A: Yea, so you pay for the mediators, and the lawyers. If you do CFP, you only pay for the lawyers only, not the mediators. This is pros and cons. As long as you want to resolve a divorce through ADR, it doesn't matter you choose negotiation, mediation, or CFP.

Q: Do you think the participation agreement also helps or distinguishes CFP from mediation?

A: Yes, it does. I think the downside of CFP around the world is the fact that the moment you fail, your CP lawyers cannot act for you in litigation. That's a down side. I personally don't see it as a down side, because I will only have people in the CFP room if they are suitable. I believe that they are capable of reaching an agreement. If the agreement isn't binding, there's no point.

Q: When you see the judges and lawyers in Singaporean courts aren't that adversarial… do you think it is really that important to have a participation agreement?

A: Participation agreement is the rule of the game. You have to have that, to state the expected conduct. Importantly, I think it has the effect that prevent the parties going to the court. Even in mediation, you get back fired. That's why it's important.

Q: Can you tell me more about your first case of CFP?

A: It was a Singaporean couple, who took a leap of faith. I think they trusted their lawyers. They know they were test case but they were prepared. It was successful. My client was the husband. He will usually give me an update once a year or once in 2 years. Last time I had it was last year, and he said he is doing very well. CFP really helped and supported co-parenting in that case. It doesn't put children in the centre of the table, and it is really aligned with children's rights.

Q: Are there any child specialists, or counsellors for the child in the process?

A: I will talk about that in a while.

Q: Sure, sure!

A: So the case was successful because the parties were able to put themselves in the shoes of parents, despite the divorce was about them. We talked about that in the CFP, and talked about non-legal issues, such as when do I break the news to the children, what time in the year, how do we tell them, and even prepare them how to tell the children. So in that sense, a lot of non-legal issues can be dealt with in CFP. So that's why that case was good, because the focus was on the children, and the success was because we were able to protect the rights of the children, and the future and especially co-parenting. Co-parenting went well even until last year.

As to your question, yes, we have a child representative. The child representative, is like the independent child lawyer in Australia. It's been going on since 2014. It's 4 years old. It is not a way to reach out-of-court settlement. It is not for amicable divorce, but for contested child custody issues, or when the court has to deal with variation of court orders, etc. Child representatives are only for court process. It has to be appointed by the court, so far there are no private ones yet. Our courts don't allow for private ones.

In Singapore, we also have parenting coordinators - very popular in the US but not sure about the UK. That one is specialised in helping parents in getting child access. The coordinators will help the parties work out child access issues, so they can play a hybrid role… wearing the lawyers hat, or wear the mediator hat, and try to solve their child access problems. So we do have mediation, counselling in courts, child representatives, CFP and parenting coordinators.

Q: So are there lots of specialists in Singapore?

A: They are all lawyers, who are trained to be in these roles. I wear all these hats. A lot of lawyers in Singapore wear many hats.

Q: So you get the trainings in Singapore,

A: Yes.

Q: Is it State-provided?

A: It's not, it's paid by lawyers. The training started with the family justice court with the help of the Law Society of Singapore. In Singapore, there are rarely anything that gets state funding for anything.

Q: Is it a popular thing to do for a lot of lawyers?

A: The last few years, yes.

Q: Is there any particular reason for that?

A: I think things have changed when our family justice court is set up, the focus is really on soft skills, social sciences, and the use of ADR in family cases. It doesn't mean we don't have litigation, we still have it. We also have a high number of cases, which aren't contested and don't go through litigation.

Q: How do the lawyers collaborate together, and support each other in a community setting?

A: For CFP, or generally?

Q: Maybe in general. Do the lawyers have a gathering from time to time, and support each other as a community.

A: I think in CFP, there is a community. We have practice group, just as any jurisdiction that practices CFP. We meet on a regular basis. That's for CFP. The rest of them, for example in the mediation circle in Singapore, there is some kind of a community but not a strong one.

Q: Do you think the CFP community helps you in equipping yourself to be a…

A: It's not a rule, but one of the features of CFP when it started off in the US is to have practice groups. They believe in communities, and learning from each other. There are even practice groups in towns or whatever. In Singapore, it's an island, so we only have one.

Q: What is the team make-up of CFP in Singapore then?

A: We have 2 parties, 2 lawyers, mental health practitioners. We don't have financial specialists yet. We will probably soon have.

Q: If I could focus more on the best interests determination, do you have any particular tools, or do you have a presumption on whatever?

A: As a starting point, the child's welfare, best interests is the paramount consideration for custody, control and access. This is a universal thing around the world, it is also in Women's Charter. It varies from case to case, and it is the judge who make the decision if there is no settlement made by the parties.

Q: In your experience, especially your first CFP case, do you think the parents are the best people to determine what is in the child's best interests, or do you think someone, or professionals should dominate the decision-making process?

A: I really think parents should be the first line of people who should make the call, it is their children. In litigation, people tend to say "my child", instead of "our child", because of the emotion. So people in litigation don't really see things from the child's point of view, but they call that the child's view. So in that emotional cases, I think lawyers or counsellors, mediators, child representatives,

coordinators would play a bigger role. So of course, first are the parents, then if they can't they resort to professionals. In all the cases I have done, parents get clouded, and they thought they are acting in the child's best interests.

Q: I see that Singapore also gives a lot of attention to co-parenting. But I see that it's stemmed from a court judgement, instead of a legislation. It's more like an interpretation of Women's Charter… do you think Singapore needs a more concrete legislation on co-parenting, or do you think it's sufficient now?
A: I think it should not be legislated, it's a practical, emotional thing. Law cannot define or dictate it. I think it should be left to the parties. For child access, there is no legal problem, it's a practical problem, it's an emotional problem. So I think it should not be legislated, especially the Women's Charter is very broad. Best interests principle for example can mean a lot of things to a lot of people.
Q: So the flexibility is very much valued?
A: Yes. Because it's case-to-case, couple-to-couple, child-to-child kind of determination.

Q: Maybe I can move on to child participation. Do you think it's a problem that there are no child representatives in the CFP?
A: In CFP there are mental health professionals, so they will handle child-related issues.
Q: So will they also be the "representatives" of the child?
A: No. Child representatives and mental health practitioners are two different things.
Q: I understand, but then…
A: In the CFP, the players are parties, lawyers, mental health practitioners. Mental health practitioners are specialised in child issues, therefore you don't need a child representative. You cannot have a child representative together with a mental health practitioner.
Q: Is it mandatory to have a mental health practitioner in all cases? Is it entirely up to the parties as to whether to appoint a mental health practitioner specialised in children's issues?
A: In CFP, not each case in Singapore has mental health practitioner, we don't call them a child specialist. So far, we only have 1 case last year where a mental health practitioner is used. Mental health practitioner does not only attend the meetings, but also work outside the room, where she sees the children, or with the parties jointly. Child representatives are quite different in Singapore.
Q: So am I correct to understand that the child representatives provide a more adequate protection to children than mental health practitioners in Singapore?
A: 2 different things, different context, different usage. We can't say one is better than the other. To be very fair they are 2 very different schemes. There is no interrelationship between the two.

Q: When a child wants to participate in CFP, there really aren't a guarantee that they have access or even have information as to how the CFP is going on, right?
A: Generally in Singapore, we don't encourage children to be involved in divorce proceedings, in or outside of court. In CFP, children are not part of the mediation.
Q: But you as a lawyer, will also think about the best interests of the child, right?
A: I have never seen children as a family lawyer, neither as a CFP lawyer, nor as a mediator. The only time is when I was a child representative. There are fine lines.
Q: So only in complex cases, when a child needs a child representative that they would have access to the process…
A: Yea, and it's not for every case. It's not like a mediator or counsellor – those are for each and every case.
Q: Is there any reason for that? Is that a cultural thing to not include children in these proceedings?
A: It's a new scheme, and it needs a court order to appoint child representative. It's not something that you can have every time… but I guess you could.
Q: To you personally, what is the main reason for not involving children in divorce proceedings?

A: I think it's not in the child's best interests for the child to go to court, or for them to be viewed by judges or lawyers, or mediators. I think that is in line with the best interests of the children.
Q: Are you thinking of emotional disturbance caused on the child?
A: The paramount rule is the child's best interests… if the child is to be interviewed by judges and lawyers in court, I think it's a "no".
Q: But you also do a lot of litigation on divorce proceedings, is it quite adversarial?
A: Yes.
Q: And normally the best interests determination wouldn't be the same in litigation and CFP, right?
A: Well, it will be something that the judge decides in litigation.

Q: How many CFP cases do you handle now?
A: Not a lot in a year.
Q: I have done a handful, less than 10 in the past 5 years. I will have to do more, but there's no way that I can make a living just by doing that. And there's just no way I can make a living by being just a mediator. So we are not like the UK or the US, where people can make a living just as a collaborative lawyer. We have to wear many, many hats, and the lawyer's hat is always one of them.

Q: I see that you really enjoy being a collaborative practitioner.
A: It's something that has been very, very close to my heart. I read about it in 2007, and trainings were only introduced not until 2013 in Singapore. It's one of the best ways to handle divorce proceedings for parents, and children. In Hong Kong, you have the Chinese and the Westerners, and the Chinese are not so receptive to CFP, whereas the Westerners are. In Singapore, it's easy, because we don't have that distinction. It's very accepted by the locals and the foreigners in Singapore.

Q: Thank you so much for your precious time!
A: Thank you so much! Take care!

Annex E

Interview Questions with Family Mediator / Social Worker

Introduction

- Background information of the mediation work you have been doing
- How does the process of mediation generally look like in your experience?
- How should an ideal process of mediation look like and/or achieve at the end?

How has mediation functionally substituted collaborative practice?

- Many scholars refer mediation as a “sibling rivalry” of collaborative practice, do you agree?
- Compare the family mediation work you have been doing with collaborative practice with regards to the following:

A) Participation Agreement

- Participation Agreement is a binding agreement that neither parties are going to threaten or resort to litigation in courts. In the event that collaborative practice breaks down, all those lawyers involved are disqualified from representing their clients entirely. Its extrajudicial nature intends to encourage the parties to make all efforts to reach an agreement outside court.
- According to your experience, is this Agreement significant in helping the divorcing parents create a collaborative or calm environment for productive negotiations or mediations?
- According to your experience, can the function of this Agreement be substituted by any other means during mediation?

B) Collaborative Practitioners / (mostly) Lawyers

- MacFarlanes have categorised collaborative practitioners to 3 roles:
    - As a cooperative legal advisor
    - As a friend and a healer
    - As a team player

  Do you think the role of collaborative practitioners can be substituted by the mediators or any other means during mediation?
- Do you think legal advice or legal education significantly contributes to the divorcing parents in reaching a decision that protects children’s rights and welfare? For example, children’s right to be cared by both parents, to have their best interests considered as a paramount factor, and to participate and/or be represented in decision-making process?

C) Child Specialists

- Are child specialists always necessary in practice in achieving your goal of mediation?

- Have you ever presumed the role of a child specialists? If yes, in what circumstances? Have you encountered any difficulties?

- Have you ever involved a child specialist by referral during mediation? If yes, in what circumstances? Have you encountered any difficulties?

- Do you think mediators can substitute the role of child specialists, in performing the primary tasks of:

    - (i) determining the best interests of the child; and
    - (ii) allowing children's voices be heard?

- If not, what are the other means to perform the same function of child specialists during mediation?

D) Divorce Coaches

- Divorce coaches are sometimes referred to as "communication facilitators". They take care of the emotional needs of the divorcing parents during collaborative practice, but not after it.

- As a practitioner of mediation, what do you think of the significance of divorce coaches?

- If necessary, do you think the function of divorce coaches can be substituted by any other means?

- What is the role of mediators in facing the divorcing parents' emotional needs?

E) Financial Specialists

- Financial specialists give advices to the divorcing couples on complex issues such as tax and budgeting, and simple ones like check-books.

- As a practitioner of mediation, what do you think of the significance of financial specialists?

- If necessary, do you think the function of financial specialists can be substituted by any other means?

- What is the role of mediators in facing the divorcing parents' confusion over financial matters?

Generally, how do you perceive the background and context of Alternative Dispute Resolution in Hong Kong?

A) Socially

- How feasible do you think cross-border disputes can be resolved by collaborative practice? (For example, to conduct a face-to-face meeting?)

- What do you think about the education and promotion of alternative dispute resolution in Hong Kong?

B) Legally

- How has the adversarial court system in Hong Kong (just as any other common law jurisdictions) shaped the process of mediation in your experience?

- How has the legal framework (for example, the law on custody & access of divorced parents) shaped the process of mediation in your experience?

- How have the judges in Hong Kong shaped the process of mediation in your experience?

C) Structurally

- How has the Legal Aid Scheme shaped the process of mediation in your experience?

- How has the difference in cost of mediation provided by NGOs and lawyers shaped the process of mediation in your experience?

Other Remarks

- Where do you see collaborative practice in 20 years of time from now?

- What are the main difficulties you currently encounter in mediation? Something that makes you feel helpless?

Annex F

Interview Questions with Collaborative Practitioners

I am aiming for an unstructured interview, because your perceptions, personal experiences and feelings are the most important. Albeit unstructured, my interview is going to be centred around the following 3 themes:

1) How does collaborative practice (CP) in Hong Kong / Singapore safeguard **children's right to be cared for by both parents**, including their right to maintain regular and direct contact with the parents?
    - The role of divorce coaches (if any)
    - The role and attitude of the court, e.g. in recognising children's right to co-parenting
    - The role of legislature
    - Society, culture, existing mediation structure, etc. and other factors

2) How does CP in Hong Kong / Singapore safeguard **children's right to have their best interest** considered as a primary factor in decision-making?
    - The role of collaborative lawyers in determining what the concerned child(ren)'s best interests are
    - The role of child specialists

3) How does CP in Hong Kong / Singapore safeguard **children's right to participation** or representation in the decision-making process?
    - The role of child specialists
    - The role of legal representatives of the child