律政司
香港特別行政區政府
Department of Justice
The Government of the Hong Kong Special Administrative Region

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Mediate First for a Win-Win Solution
調解為先 互利雙贏

Mediation Conference in Hong Kong
20-21/03/2014

Edited by Mediation Team, Department of Justice HKSAR

"Mediate First for a Win-Win Solution"

20 – 21 March 2014

Organised by:

律政司
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Mediation Conference 2014
"Mediate First for a Win-Win Solution"

Hong Kong Convention and Exhibition Centre, Meeting Room N101

20 – 21 March 2014

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Mediation Conference 2014

“Mediate First for a Win-Win Solution”

20 – 21 March 2014

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Foreword

As confirmed and reiterated on numerous occasions, it is the staunch policy of the Hong Kong Special Administrative Region Government to enhance Hong Kong's status as a leading centre for international legal and dispute resolution services in the Asia Pacific region. As mediation is gaining ground in Hong Kong as an effective and popular method for resolving disputes, the Government has been sparing no efforts in promoting the development of mediation and its wider use in the community.

The Mediation Conference organised by the Department of Justice exemplifies one important aspect of our on-going efforts. The Conference, with the theme of "Mediate First for a Win-Win Solution", has provided a useful platform to encourage the use of mediation, share our experience and keep ourselves abreast of the latest international development. These are all crucial elements as we press ahead in Hong Kong various initiatives to provide an environment more conducive to mediation, in terms of legislative framework, capacity building and cultivation of mediation culture.

Whilst this was the third time the Mediation Conference was held in Hong Kong, insightful views and thought-provoking ideas sprang up from the discussions. They have kept the conference an occasion of lively exchanges. They have also accounted for the strong appeal of the conference to the participants, as reflected in the triple fold of attendance (as compared to 2007 when the conference was first launched). We are wholeheartedly indebted to the speakers, the organising committee, the supporting organisations and sponsors, and all the participants for their support and contributions.

This book is a collection of the papers presented by various international and local speakers over the two-day conference. It is, however, more than a mere record of discussion. The collection represents an excellent wealth of expertise and talented ideas which can shed light on the way ahead for mediation, and contribute to the shaping of its future directions in Hong Kong as well.

We sincerely hope that this book will provide useful reference for practitioners, researchers and, indeed, any parties interested in the development of mediation.

Mr. Rimsky Yuen, SC
Secretary for Justice
August 2014

Preface

"Unless both sides win, no agreement can be permanent."
- Former US president, Jimmy Carter

The Mediation Conference organized by the Department of Justice and the Hong Kong Trade Development Council was held over two days at the Hong Kong Convention and Exhibition Centre on 20 and 21 March 2014. The Conference themed "Mediate First for a Win-Win Solution" was the main event of the Mediation Week held in Hong Kong between 20 and 27 March 2014. 46 international and local speakers shared their views and experiences on the global development and trend in mediation and the latest mediation practice in various sectors. The Conference also provided a forum for exchange of views among speakers and participants and attracted over 1000 participants in two days. To date, it is the largest mediation conference held in Hong Kong.

The collection of papers presented by a distinguished panel of international and local speakers touched on topics ranging from general to specific issues from both local and international perspectives. These include a review of the latest development of mediation in Hong Kong and in other jurisdictions, the use of mediation in various sectors, the applications and exceptions to confidentiality, mediators' skills and qualifications and the power of apology in enhancing settlements. The Conference was conducted in English for the first day and in Chinese for the second day. Most of the articles contained in this publication have been developed from papers presented at the Conference. I am grateful to the speakers for their generous contribution to sharing their wealth of experiences. I trust that readers will find the discussions in this publication stimulating and intriguing.

A vote of thanks to the members of the Organizing Committee of the Mediation Week and the members of the Public Education and Publicity Sub-committee on Mediation for their invaluable comments. I would also like to thank all the sponsors, stakeholders and participants for their continuous

support and substantial contribution to the Conference and the development of mediation in Hong Kong. Lastly, my appreciation goes to the Mediation Team of the Department of Justice who has been instrumental in supporting the Organizing Committee and for putting this publication together.

The evolution of the "win-win" mediation culture is a result of concerted effort of the Administration and stakeholders. It takes much faith and dedication to achieve the progress made in the development of mediation in Hong Kong today.

Mr. Chan Bing Woon, SBS, MBE, JP
Chairperson of the Organizing Committee of the Mediation Week 2014
August 2014

“Mediate First for a Win-Win Solution”
Conference in Hong Kong

20 – 21 March 2014

Day 1: 20 March 2014

(Conducted in English)

Welcome Addresses

The Honourable Chief Justice Geoffrey MA Tao-li, GBM[1]

1. The theme of this Conference encapsulates in an attractive and catchy way the philosophy of mediation. It goes far beyond merely providing another avenue of dispute resolution and fills in a much needed gap in the administration of justice. Everyone present today will only be too aware of this point but from time to time it is important to remind ourselves of it.

2. The problem with other traditional forms of dispute resolution is that it does only that: resolves disputes – sometimes in a multi-layered way when appeals are involved – and that is all. What commentators, academics and lawyers have described as wounds that need healing, bitterness, relationships (commercial or otherwise) that perhaps need continuation, are all aspects untouched generally by these other traditional means of dispute resolution. Settlements in the course of such proceedings may go some way towards addressing these aspects, but often only fortuitously so.

3. The beauty of a mediation process, if carried out conscientiously and properly, is that protagonists are able – sometimes for the first time and perhaps on the only occasion after a dispute has arisen – to meet and discuss on neutral ground, with an impartial person (the mediator), their real problems. Often, the real problems as I have used this term, are matters with which other forms of dispute resolution cannot adequately cope. Even post the Civil Justice Reform, in traditional litigation in the courts (and this applies also to arbitration), the pleadings and lists of issues will define the so-called matters in dispute which the court or the arbitral tribunal will have to resolve. Where, one can legitimately ask, is there any room to try to sort out long term relationships, to heal wounds opened up by the very human emotions that humans have and which have been stirred by what has led to the legal dispute between the parties? And also what of the future for our litigants? As Eliza Doolittle says after the Embassy Ball: “What will become of me?”

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[1] Chief Justice, The Court of Final Appeal, Judiciary, HKSAR

4. In 2002, in a well-known but evocative passage (among many this most distinguished Judge has written), he described just what a mediator can achieve: "it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel they have gone away having settled the dispute on terms with which they are happy to live. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant's precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away."[2]

5. The experience in Hong Kong has been that mediation has largely been successful in the type of cases where the characteristics I have just enumerated as the human facets of a dispute, exist – family disputes, personal injury cases, disputes between neighbours and in a number of different types of commercial dispute, both large and small.

6. The variety of representation in this Conference also amply reinforces the point that mediation looks very much further than just the legal issues that other forms of dispute resolution solely concentrate on. Just a quick look at the list of participants reveals the presence of bankers, other commercial persons, medical practitioners, academics, persons in the construction industry, religious groups, social and family welfare representatives, and of course lawyers and judges.

7. Far from just being another form of dispute resolution, mediation has turned out to be an established and integral social and public service. Many mediators may perhaps not see their role quite in this way, but I venture to suggest that it is useful to bear this in mind, of course in the context of the resolution of a legal dispute.

8. I have had debates with fellow judges over whether mediation, like arbitration, can be said to be a part of the administration of justice. This is largely a sterile debate over whether the term "the administration of justice" is confined to what the courts do and the role of judges. For me, the administration of justice includes as an integral activity the resolution of

[2] *Dunnett v Railtrack Plc* [2002] 1 WLR 2434, at para 134 (Lord Woolf MR).

disputes to arrive at a just, proper and legally justifiable result. Mediation fits into this rubric.

9. I was involved from the start in the Civil Justice Reform in Hong Kong. You will see from the various Reports compiled in the course of that Reform (which of course led to the formal implementation in 2009) that mediation was very much an important feature. It also featured prominently in the Woolf Reform in the United Kingdom. I am extremely pleased to see that Lord Woolf of Barnes is present today (I have earlier quoted from his judgment when he occupied the position of the Master of the Rolls). He is due to deliver an important Keynote Address.

10. As a further indication of the role of mediation in the administration of justice, it has been recognized that a regulatory framework is needed. The Mediation Ordinance[3] came into effect on 1 January 2013 dealing with some important aspects of the conduct of mediation, including the critical aspect of confidentiality of mediation communications (a topic to be discussed this afternoon).

11. A few days ago, I gave a talk to Lingnan University, the theme of which was "A Respect for Rights and A Respect for the Rights of Others". Mediation aims to do both and, simultaneously, to achieve both.

12. I welcome everyone to this two day Conference, with a special welcome to those who have travelled from afar. I wish it much success.

[3] Cap 620.

Welcome Addresses

The Honourable Mr Rimsky YUEN, SC, JP[1]

Chief Justice, Lord Woolf, distinguished guests, ladies and gentlemen:

On behalf of the Department of Justice, may I begin by extending our warmest welcome to all of you here.

2. With the support of the key players in the dispute resolution sector, this is the third time this Mediation Conference is held. The first conference, entitled "Mediation in Hong Kong: The Way Forward" was held at the end of 2007. The second one, entitled "Mediate First", was held in mid-2012. It is no exaggeration to say that much has happened since 2007 in the development of mediation in Hong Kong. This occasion, which also marks the commencement of the Mediation Week this year, provides a good opportunity to take stock as to what has happened in the past seven years, as well as to explore how we may navigate the journey ahead in the promotion and development of mediation as a means of dispute resolution in Hong Kong.

The Past Seven Years: A Brief History

3. Back in 2007, the development of mediation in Hong Kong was still at a relatively early stage. However, it was the year when the Administration expressed, for the first time, its official commitment to promote mediation through the then Chief Executive's Policy Address. Since then, much efforts have been made by the Administration in the promotion of mediation in Hong Kong.

4. The Working Group on Mediation, chaired by the then Secretary for Justice, was established in early 2008. It published its Report in February

[1] Secretary for Justice, Department of Justice, HKSAR; Chairperson of the Steering Committee on Mediation

2010, putting forward a total of 48 recommendations. The implementation of the recommendations was followed by the Task Force on Mediation, which was set up in December 2010 and which completed its task in around mid-2012. To continue with the promotion of mediation, a Steering Committee on Mediation was established in late 2012. This Steering Committee is supported by three sub-committees, one overseeing the regulatory framework, the other looking after matters concerning accreditation and training standards of mediators, whilst the third one is responsible for handling publicity and public education.

5. As a result of the efforts of the Administration and the stakeholders, we have seen the enactment of the Mediation Ordinance in mid-2012, which has since come into operation on 1 January 2013. The Mediation Ordinance provides a legislative framework for the conduct of mediation in Hong Kong, which can safeguard the fundamentals of mediation (such as the protection of confidentiality) and at the same time allows maximum flexibility of the conduct and future development of mediation.

6. The promotion and development of mediation would be meaningless unless we can ensure the public's confidence in the mediation process. In this regard, the setting up of the industry-led body known as the Hong Kong Mediation Accreditation Association Limited (HKMAAL) in 2012 is another milestone in the development of mediation in Hong Kong.

7. Apart from the Administration, the Judiciary has played a pivotal role in the development of mediation in Hong Kong in the past seven years. Amongst others, the underlying objectives set out in Order 1A, rule 4(2) of the Rules of the High Court (which was introduced as a result of the Civil Justice Reform implemented in 2009), together with the Practice Direction on Mediation (PD 31) (which was made effective from 1 January 2010) and the other Practice Directions (concerning specific areas of dispute such as admiralty actions, personal injuries actions and shareholders and winding up disputes), have proved to be strong impetus in the promotion of mediation in

Hong Kong.

8. Further, the Judiciary's efforts in relation to sector-specific mediation, such as the areas of matrimonial disputes and building management as well as the Mediation Information Office set up in 2010, have also made significant contribution in spreading the culture of mediation in resolving disputes in Hong Kong.

9. Any survey of what has happened in the past seven years would not be complete without an account of the contribution made by the professional bodies and mediation organisations. Apart from the establishment of the industry-led body HKMAAL that I have mentioned earlier, the Joint Mediation Helpline Office (JMHO) is another good example in this regard. Situated in the High Court Building, this non-profit-making organisation provides valuable mediator referral services to parties who require mediation services.

10. On the whole, through the joint efforts of the Administration, the Judiciary and the other relevant stakeholders, mediation has undergone healthy development in Hong Kong in the past seven years. Mediation is now firmly part of the dispute resolution landscape in Hong Kong. The question that calls for consideration is how we can take forward the future promotion and development of mediation in the best way that suits Hong Kong. We welcome views and ideas in this regard and this is one of the reasons why this Conference is organised.

Looking into the Future

11. Mapping the future is not, and has never been, an easy task. However, the Department of Justice and the highest level of the current Administration are firmly committed to the further promotion and development of mediation services in Hong Kong. This steadfast commitment is put in no uncertain terms in the latest Policy Address and Budget Speech.

12. In paragraph 31 of the Policy Address delivered by our Chief Executive on 15 January 2014 (which specifically dealt with dispute resolution services), it is stated as follows:

> "*Hong Kong has a fine tradition of the rule of law and a well-developed legal system. The Government will continue to actively promote Hong Kong's legal and dispute resolution services to enhance our status as a centre for international legal and dispute resolution services in the Asia-Pacific region. The Government will strengthen its promotion efforts overseas, continue to co-ordinate the development of mediation services through the Steering Committee on Mediation ...*"

13. In paragraph 97 of the Budget Speech delivered by our Financial Secretary on 26 February 2014, it is stated as follows:

> "*In recent years, arbitration and mediation have become the mainstream modes of resolving international commercial disputes. Building on our robust legal system and tradition, Government has all along been actively promoting Hong Kong's legal and arbitration services, and making its best efforts to advocate and develop mediation services, with a view to enhancing Hong Kong's position as an international legal and dispute resolution services centre in the Asia-Pacific region.*"

14. To take this commitment forward, we will endeavour to consolidate our efforts in various areas including the provision of an environment and legal infrastructure conducive to mediation, to strengthen efforts in the context of capacity building, to enhance public understanding and interests in the use of mediation, as well as to enhance Hong Kong's competitiveness and international image as a mediation services centre in the Asia Pacific region.

15. In the context of legislative framework, the Steering Committee is monitoring the operation of the Mediation Ordinance as well as looking into the question of whether it is necessary to introduce an apology legislation in Hong Kong. As many mediation practitioners would echo, an apology at the right time can very often facilitate the conclusion of a settlement in various areas of dispute (especially in cases where monetary compensation is not the only concern of the parties).

16. Quality, professional ethics and professionalism of mediators are crucial in ensuring public confidence in the use of mediation as a means of dispute resolution. It is for this reason that HKMAAL was established. Judging from the experience of other jurisdictions and the features of the local circumstances, the task of setting accreditation and training standards as well as developing an effective disciplinary mechanism has never been an easy task. Thanks to the efforts of the Chairman and the other members of HKMAAL, much has already been achieved, but a lot remains to be done to ensure that this industry-led body would fulfil its mission of becoming the premium mediation accreditation body in Hong Kong, and win the confidence of both the mediation sector and the general public.

17. Infrastructure and hardware aside, it is equally important to build up a mediation culture in Hong Kong. Such a mediation culture includes, amongst others: (a) a proper understanding of mediation and its relationship with other modes of dispute resolution such as arbitration; (b) how mediation can assist parties to resolve disputes; and (c) when mediation may not be appropriate and when other modes of dispute resolution should be considered. Further, people should not adopt the “tick the box” approach and go for mediation with the mentality of going through the motion in the course of a litigation. Nor should the professionals involved in mediation put their own interests (especially financial interests) ahead of the interests of the parties to the disputes, which is a mentality that should definitely be avoided in any genuine attempt to resolve disputes by mediation.

18. The cultivation of mediation culture takes time. Now that mediation is taking root in Hong Kong, its future healthy development turns on the joint efforts of all the stakeholders and the community. Judging from what has been achieved in the past seven years, I am confident that we can continue to have further healthy development of mediation in Hong Kong, so as to complement our efforts in promoting Hong Kong as an international legal and dispute resolution services hub in the Asia Pacific region.

19. On this note, may I wish this Conference every success. I also wish to express our utmost gratitude to all the supporting organisations and sponsors. Without their support, this Conference would not have been possible.

20. Thank you.

Keynote Speech

The Right Honourable the Lord Woolf of Barnes[1]

I am delighted to return to HK (Hong Kong) with my wife to give this talk.

We are extremely grateful to the organisers for the hospitality we have received.

My instructions are to give a key note address.

Those of you who are musicians which, I am not though I love listening to music, will know that the "key note" is the lowest note in the scale and so if my talk qualifies for the title "a key note speech" at least you will know that the subsequent presentations can only get better.

If you have been in the litigation trade as long as I have you will have seen many dramatic changes in the litigation scene. The 2 changes I am most enthusiastic about are the growth in the recognition of the importance of the role of the rule of law in achieving a healthy society. The second is the increasing contribution that mediation is making in achieving access to justice. As access to justice is an important constituent of the rule of law my 2 enthusiasms are directly linked.

The warm words of the CJ and the SJ make clear they share my enthusiasm. This is not surprising. My experience while visiting HK to sit on the Final Court of Appeal brought home to me the extent to which HK benefited from it international reputation of being committed to upholding the rule of law.

But by itself this is insufficient if HK is to achieve it aspirations of being the Asian hub of choice for resolving international commercial disputes in the region. About a decade and a half ago now I published at the behest of the UK

[1] former Lord Chief Justice of England and Wales

government my report on Access to Justice. The reforms I recommended have been implemented in England and Wales and adopted and influenced many countries including HK. A key message of the reforms is that it is insufficient to provide justice alone; the justice must be accessible, affordable, effective, expeditious, economic and proportionate if it is to be fit for purpose. These words highlight what those who are embroiled in disputes want. Unfortunately litigation was becoming inaccessible and not meeting the needs of the public. There was a recognition that the emphasis or key had to be on the constructive resolution of disputes with litigation as the last resort.

The result has been a dramatic increase in the interest in mediation throughout the common law world with the US and Australia in the lead. After I began sitting in HK in 2005. Mediation was already being promoted by CJ Andrew Li[2].

Since that time the developments in HK have been remarkable. There has been the establishment of the Working Group on Mediation, Mediation Task Force, Steering Committee on Mediation and the enactment of the Mediation Ordinance. In addition substantial progress is being made in establishing effective accreditation and regulation.

Clearly in Hong Kong both the judiciary and the legal profession are proactively encouraging the public to use mediation in a constructive manner. But HK should not become complacent. Great strides are also being made in jurisdictions that could be seen as competitors of HK such as Singapore.

My recommendations in my report are as relevant today as they were when first presented. Though the principles have to be applied to the very different world by which we are now confronted - a world that is of far greater complexity; a world in which there is infinitely greater international activity; where there are many more global companies and trade than even a few years ago.

[2] Andrew Li was the former Chief Justice, the Court of Final Appeal, HKSAR [1997 to 2010]

The significance of China a country of which HK is part has also grown beyond recognition. HK, in particular because of its separate legal system, has been able to support that growth to an extent which is far beyond its modest size by comparison to the main land.

Today, both the business world and individual members of the public have expectations of what a justice system should provide that have also expanded dramatically from a decade ago. The bar is now set much higher and if countries which, like our own, want to be at the forefront in meeting those expectations they must continually improve their performance. This is what I believe you have been doing and should continue to do.

This conference and the Mediation Week of which this is part are clear evidence of what HK is achieving. However, I emphasise the success you have had in mediation would have been much more difficult to achieve if you did not have the support of a first class legal system.

In addition, wisely in determining the way forward you are adopting an approach that is research-based. This is an essential part of achieving constructive change.

One of the core recommendations in my report, “Access to Justice” was that the role of the judiciary should no longer be limited to conducting trials in a way which almost inevitably drives the parties further apart. Instead, the judge throughout the litigation should be looking for ways of reducing the areas of dispute and in this way promoting more proportionate litigation. That is litigation that is more efficient, less expensive, more expeditious and consensual. Alternative dispute resolution,, and especially mediation, are an important part of the approach.

Despite encouragement from the judiciary and a solid core of ardent supporters, use of mediation has remained sluggish across the broad range of litigation in most jurisdictions. Even here in HK greater use of mediation

techniques could have made a more significant contribution.

That is easy to say. What is more difficult is to ascertain what should be done to build on the striking progress that has already been achieved. Here I am all too conscious that I am not in a position to pontificate on what HK should do and it would be arrogant for me to lecture you on what I think needs to be done in HK. You are already in many respects ahead of the UK. So instead I am going to rehearse what are I believe are the basic features any worthwhile system of mediation an understanding of which is essential for the matters we will be discussing later in this conference.

My first point is the basic distinction between litigation in the Courts and mediation, even though I have already indicated, that they should be regarded as partners

When I refer to "litigation" I mean civil as opposed to criminal litigation, although in many jurisdictions the dividing line between them is becoming increasingly blurred. I am also primarily focussing on substantial disputes with a commercial and international flavour. Different considerations can apply to small or family disputes.

For present purposes, in most jurisdictions "litigation" can be described as the process that a state provides for resolving disputes in its courts. A process which, if it runs its course, will usually culminate in a trial before an independent judge appointed by the state and subject to any appeal in a final judgment.

Mediation on the other hand, is also a process for resolving disputes but while it may be recognised and supported by law, it is not usually established by law. Instead, it is primarily a consensual process established by an agreement between the parties with the purpose of trying to resolve a dispute with the assistance of an independent neutral mediator jointly agreed upon by the parties who can be, but who need not be, a lawyer. Such a process is inherent

in many, if not most, legal systems.

What I have just said is not inconsistent with the provisions of the Mediation Ordinance which states its purpose (and I quote) is “to provide a regulatory framework in respect of certain aspects of the conduct of mediation”.

The second point is that mediation is a consensual arrangement its governed by the terms of the agreement on which it is based. So what I am about to say indicates no more than the general position that the limits of a mediation agreement are no greater than the limits to the ingenuity of the parties to the agreement. The Ordinance says it refers to an agreement in writing. That is sensible but if the parties decide orally or by conduct to mediate that would still be a mediation although outside the regulatory provisions of the Ordinance. The fact that you can have mediations outside does not in my view detract from either those mediations or the Ordinance it just maintains the flexibility that should be an essential element of mediation.

The third point is that the mediator will usually decide on the procedure to be followed in consultation with the parties and their advisors. If the parties in the course of the mediation reach an agreement as to how the dispute should be resolved, this does not constitute a judgment. It has no greater status than any other contract entered into by two individuals. The mediator will normally assist the parties to set out in writing the terms which the parties have agreed.

The fouth point is that if no agreement is reached that is the end of the process and what happens during the mediation cannot be relied on by either party without the consent of the other. In this it resembles a “without prejudice” negotiation so it is confidential. This means it cannot unilaterally be relied on by the parties in subsequent litigation. In HK this is subject to the provisions of the Ordinance. The confidentiality is binding on the parties as well as the mediator. If an agreement is reached, unlike a judgment it cannot be directly enforced.

The fifth point is the fact that if it is not observed by one of the parties it has to be enforced in a separate action unless in any particular jurisdiction legislation provides for direct enforcement. The settlement of the dispute means that for most purposes the agreement to mediate has served its purpose and exhausted its useful life. Thereafter in relation to the dispute the parties have to rely on the terms of the settlement.

The sixth point is that the success of the process is very much dependant on the skill and the creativeness of the mediator. His appointment is also a matter for the agreement of the parties, unless there is an agreement for a third party to have the power to appoint. The selection of the mediator or mediators is most important. Here it is essential that they should be able to obtain the confidence of the parties.

Like any other procedure mediation has advantages and disadvantages. I include among the advantages:

a) The fact that the process can usually be completed in a day and is almost invariably quicker and less expensive than litigation.

b) Unlike litigation it is not likely to damage any pre-existing relationship between the parties.

c) It can produce solutions that would be beyond the powers of any court to order. As long as the parties agreed on a solution, it does not matter if the parties as part of the settlement depend on matters quite outside the original dispute.

d) If it is successful and ends in agreement, it reduces the demand on scarce court resources.

e) Even if it is unsuccessful it can reduce the complexity of the dispute and lead each party to understand more clearly the case of the opposing party.

f) The parties have a greater power to control the process including confining the costs. This is unlike in litigation where a party can be sucked into an extremely expensive process against his wishes.

g) The process is extremely flexible.

Mediation has disadvantages. They include:

a) If it is unsuccessful it can result, in extra expense and delay. But success can be limited but still extremely valuable. It can clarify and reduce the issues.

b) It may require a party who would be wholly successful, if the litigation continued, either to compromise partly on his or her legal entitlement or to provide some benefit to the other party that he would not otherwise be obliged to offer.

c) It can be weighted in favour of a stronger against a weaker party who may not have the financial muscle to stand out against the stronger party. Though a skilled mediator should guard against this and try and hold the balance between the parties.

d) It usually takes place behind closed doors, which is always undesirable and may, rarely in my opinion, mean the development of the law is prejudiced by the lack of a judgment. (My experience in the States)

At best, it produces only an agreement that cannot be directly enforced. This may create problems particularly in the case of international disputes.

Where does the balance lie? My own view is that the advantages of mediation far outweigh the disadvantages. While it is true the agreement will not be directly enforceable, it should only be rarely that an agreement which should have been freely entered into with the assistance of a mediator will be disowned by a party. Furthermore, like any other agreement it should be

readily converted into a judgment in proceedings that it will be difficult to contest. That judgment will be at least as enforceable as any other judgment. In this respect legislation may be useful to make clear that the agreement reached by parties is enforceable and, except in very limited circumstances, it should also make clear that the agreement that was reached should not be reopened by the courts. An example where it may be, reopened is where there is prima face evidence that the agreement was induced by fraud.

The fact that the process is consensual means that the parties are, and in my opinion should be, able to influence:-

- When the mediation should take place, how long it shall continue and not unimportant, the fees of the mediator and even the fees of the parties lawyers.

- Who should be the mediator and how the mediation is conducted?

- Its scope, i.e. should it cover the whole of the issues that divide the parties? Or for example, should it only cover liability or only quantum?

- Should it be a one off event or a continuing resource to which the parties can, for instance, continually have recourse whenever disputes arise? This can be very effective, for example, in the case of a large engineering contracts when it is important that the progress of a contract is not interrupted.

This brings me to one matter of real concern that I would like to see addressed and which is already beginning to receive attention (by the equivalent of the Ordinance) in HK. The lack of sufficient independent regulation of both the process and mediators could damage the reputation of mediation. Without this I fear it is inevitable that sooner or later there will be allegations of abuse that could be extremely damaging to the positive image of mediation.

There needs to be suitable screening as to who can properly be entrusted with

the very considerable powers of a mediator. Where parties are competently represented, the lawyers should take care of this. While recognising this, I do still believe there is a need for the market to be properly overseen. In the UK anyone can set up as a mediator. No training or qualification is required. Too often, there are possibilities of conflict of interest.

There is also a need for a continuing mentoring and appraisal of mediators who are accredited. And I should add that in addition to mentoring, there has to be continuing training. As part of the regulation there should be a sufficiently robust disciplinary process. Until this happens, some lawyers are going to advise their clients the risks involved in mediation are unacceptably high. What matters is not whether the regulation is statutorily imposed or self-imposed. What matters is that it is and is generally believed to be effective.

The task is far from an easy one. There are individuals who are formidable natural mediators who are totally unqualified but accepted as being masters of the art. This is the case, whether it is a dispute between neighbours or nations. When we talk of regulation we must bear in mind that the present situation has the virtue that it lets individual skills flourish; whatever the nature of the regulation, it should be no more restrictive than is necessary for the protection of its reputation.

Recently I attended the 90th birthday party of the Michal Leathes a Trustee of IMI who has campaigned for higher standards of integrity put it well when he said:

> *"Mediation has come a long way but still has further to go. The field now needs to evolve quickly into a true profession. High minimum practice and ethical standards need to be set, made transparent and achieved internationally. Users of mediation need to see these standards operating effectively. More and better information needs to made available by individual mediators about their skills, capabilities and personalities. Quality and transparency together will*

enable mediation to grow"

Should mediation be compulsory?

One of the issues that has worried supporters of mediation is whether it should be compulsory.

On one side there are jurisdictions where mediation has flourished by making it compulsory. On the other side there are those who say to do this interferes inappropriately with the right of access to the court

In my report, I came close to recommending compulsion but did not do so. Instead, I thought that the court's role should be one where the judiciary encourages litigants to mediate whenever it is appropriate to do so, but not to order its use or to make access to court conditional on a prior attempt to resolve the dispute by mediation. I recognise that there is a distinction between making it compulsory for the parties to go through the process of mediation and making it compulsory for the parties to resolve their dispute. It is suggested the first alternative is acceptable but the second is not. In fact both in my opinion can be equally unacceptable.

The second alternative is in reality not an alternative since, in my view, you cannot compel a party to reach a compromise that a party finds unacceptable. The first alternative has the disadvantage that it can be undesirable because of the difficulty in enforcement that it can create if a party does not wish to cooperate. The furthest a court can safely go is to make the provision for an opportunity for the parties to mediate if they wish to do so by building into the procedure a time for the parties to mediate.

The judiciary in England has a limited power to take a refusal to mediation into account when making an order for costs. The justification for the use of this sanction being that while every litigant has a right to have access to a court for the resolution of their disputes, if they choose to do so where mediation is an

obvious course, a refusal to take part in or lack of genuine cooperation with mediation could be classified as unreasonable conduct justifying penalising a party in costs. A more robust approach may be justified in family cases because of the possible effects on children of strife between their parents.

In addition, as I have already made clear, compulsion is inconsistent with the consensual nature of mediation and the importance of flexibility in the process. How do you force someone to agree with a compromise of his dispute by a process with which he does not agree, and at the same time expect him to feel justice has been done?

Again it is by no means easy for a judge, after the event, to determine whether a party has been unreasonable and the possibility of long inquiries as to who has been, and who has not been unreasonable, can only be through satellite litigation which should normally be avoided because it can create as much of a problem as it is meant to avoid.

When I have challenged the few lawyers who have admitted to me they have advised against mediation, they have sought to explain their attitude by saying it was too early or too late to mediate. However in my view while the earlier the better it is never too late. However timing is critical.

5) Mediation and Arbitration

An area where I've been surprised that mediation has not expanded more rapidly is in conjunction with arbitration. I consider "Med Arb" as an area of dispute resolution that is as suitable for mediation as it is for litigation, but so far mediation has not prospered in litigation.

An explanation may be that arbitrators, especially in commercial disputes are more diffident to encourage the use of mediation than full time judges who would conduct the trial in a civil or commercial court.I have, over the years, found among the arbitration industry a remarkable reluctance about

promoting mediation. I find the reasons advanced for this unsatisfactory. If this is due in any way to supposed self-interest, this view is mistaken. Parties to commercial arbitration as in commercial litigation are becoming increasingly jaundiced as to the rising costs and delays. If increased use of mediation would, as I believe is the case, reduce the average cost of an arbitration, and lead to arbitrations being resolved with greater expedition this would increase arbitration's popularity which would in turn increase the number of arbitrations.

In keeping with HK's high reputation as a centre for international arbitration, I hope it will take the lead in promoting "Med Arb".

Conclusion

It is now time to bring these remarks on the future of mediation to a conclusion. I hope this fragmented survey has not distracted from the great progress mediation has made over the years. It is an impressive story. Mediation has progressed from being a marginal activity of limited significance to becoming a major player on the dispute resolution landscape. The issue is not whether it will continue to be a valuable resource in the future, but whether it can achieve the greater potential that enthusiasts like myself are confident it has.

It could be and should become a critical part of any dispute resolution activity of significance. In HK this position is already close and should be brought closer by this conference which demonstrates commitment to this task. Future action should be based on proper and well-resourced research and should be implemented as part of an international programme with as much broad support as possible. The regulation should be sufficient to give the public confidence in mediation, but not so rigid as to defer innovative initiatives in the practice of mediation.

Certain jurisdictions will have to give a lead and this is a role H K is already embracing. It is in an ideal position to do this. This conference and the

Mediation Week, of which it is part, should prove to be excellent steps in the way forward. They will provide the sort of education that is essential.

The Global Trend in Mediation; Confidentiality; and Mediation in Complex Commercial Disputes - an Australian Perspective[1]

The Honourable Madam Justice P A BERGIN[2]

When this Conference was established in 2007, the judiciary and the legal profession of Hong Kong were interested in exploring the use of mediation as an alternative or additional mechanism for dispute resolution. It has been an honour to attend the Conference in 2007, 2012 and to return again this year. I have watched with great interest and pleasure the development of the additional mechanisms for dispute resolution and to see Hong Kong take a leading role in this regard in this region.[3]

On this occasion I have been asked to address you from an Australian perspective on the global trend in mediation; confidentiality in mediations; and the use of mediations in complex commercial disputes.

A THE GLOBAL TREND IN MEDIATION

It is appropriate first to address the trend in litigation because mediations are intrinsically intertwined with that process. Certainly governments throughout Australia have taken steps to ensure that small claims (and even larger ones) are mediated in an informal environment with the aim of reducing the cost to the parties. The statistics demonstrate that over the last decade (with few exceptions) there has been a decline in the number of cases commenced in the courts.[4] The reason for the 'trend' of declining numbers is sometimes linked anecdotally to the state of the economy. In difficult fiscal times where commercial confidence is vulnerable, corporations are less willing to expend time and money in uncertain environments. It is said that as the state of the economy improves and commercial confidence is boosted, corporations are more willing to expend both time and money in the litigious environment.

These theories are not based on empirical data linked to the process of litigation.

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1 I am grateful to Jack Orford, the Researcher (2014) to the Judges of the Equity Division of the Supreme Court of New South Wales for his assistance with the preparation of this paper.

2 Chief Judge in Equity, Supreme Court of New South Wales, Australia

3 Mediation Ordnance 2012 (Cap 620).

4 Attached Graph: Civil Filings 2003 to 2012

Rather they are general observations from statistics plotted over the years in which the global financial crisis occurred, many corporations perceived to be successful and profitable collapsed, and major international banks became the subject of various inquiries, including for the fixing of foreign exchange rates and the manipulation of the Libor.[5]

A factor impacting upon the reduction in the number of cases filed in the courts is the introduction of regimes for the resolution of disputes in Tribunals. The NSW Civil and Administrative Tribunal (NCAT), established under the *Civil and Administrative Tribunals Act* 2013 (NSW), commenced operating on 1 January 2014. NCAT and other similar tribunals throughout the country have been referred to as "super tribunals".[6] NCAT replaced 23 tribunals, many of which had their own processes for encouraging parties to mediate, with parties paying their own costs unless there are "special circumstances".[7]

Another factor is the appointment in 2013 of a Small Business Commissioner in New South Wales pursuant to the *Small Business Commissioner Act* 2013 (NSW).[8] The objectives of this appointment include: to provide a central point of contact for small businesses to make complaints about their commercial dealings with other businesses and about their dealings with government agencies; and to facilitate the resolution of disputes involving small businesses through mediation and other appropriate forms of alternative dispute resolution.[9] The Commissioner's general functions include the provision of "low-cost alternative dispute resolution services for small businesses".[10] However the Commissioner is only able to deal with a complaint made by a small business if satisfied that the subject-matter relates to the unfair treatment of a small business, or an unfair practice involving a small business, or the subject-matter relates to an unfair contract to which the small business is a party, or if it is in the public interest to deal with the complaint.[11]

Another factor is the introduction of legislative mechanisms to prevent

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5 Louise Armistead, 'Mark Carney: FX allegations more serious than Libor scandal'. The Telegraph (UK) (11 March 2014).

6 Early Dispute Resolution, Discussion Paper, Reference Group of NCAT.

7 *Civil and Administrative Tribunals Act* 2013 (NSW) s 60.

8 Small Business Commissioners were appointed in Victoria in 2003, in Western Australia in 2011 and in South Australia in 2012. A national Small Business Commission was also appointed in 2013.

9 *Small Business Commissioner Act 2013* (NSW), s 13.

10 Ibid, s 14(1)(c).

11 Ibid, s 15(1).

proceedings from being commenced in any court unless mediation has occurred and failed to resolve the dispute or the matter.[12] Governments throughout the nation are clearly committed to the process of mediation and other alternative dispute resolution mechanisms. For instance, in 2013 the NSW Attorney General requested the NSW Law Reform Commission to review the statutory provisions that provide for mediation and other forms of alternative dispute resolution, with a view to updating those provisions and, where appropriate, recommending a consistent model or models for dispute resolution in statutory contexts, including court-ordered mediation and alternative dispute resolution. That inquiry continues with the Law Reform Commission reviewing matters including referral powers, confidentiality, status of agreements reached and proper protection required for the parties, mediators and others involved in dispute resolution. It is also reviewing the proper role for legislation, contracts and other legal frameworks for dispute resolution.

All of these factors have impacted upon the Australian litigious environment and thus the use of mediation as an additional mechanism for the resolution of disputes.

Another factor of some importance in New South Wales is the commencement on 26 March 2012 of Practice Note SC Eq 11 *Disclosure in the Equity Division.* This has introduced a "new regime" with a far more disciplined analysis of the need for disclosure of documents by reference to the real issues identified in the pleadings and the evidence.[13] Its relevant terms are:

Purpose

3. This Practice Note is for the guidance of practitioners in preparing cases for hearing in the Equity Division with the aim of achieving the just, quick and cheap resolution of the real issues in dispute in the proceedings.

Disclosure

4. The Court will not make an order for disclosure of documents

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12 The Hon Justice P A Bergin, '*The objectives, scope and focus of mediation legislation in Australia' (Mediate First Conference, Hong Kong, 11 May 2012).*

13 *Armstrong Strategic Management and Marketing Pty Ltd & Ors v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393.

(disclosure) until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating disclosure.

5. There will be no order for disclosure in any proceedings in the Equity Division unless it is necessary for the resolution of the real issues in dispute in the proceedings.

6. Any application for an order for disclosure, consensual or otherwise, must be supported by an affidavit setting out;
   - the reason why disclosure is necessary for the resolution of the real issues in dispute in the proceedings;
   - the classes of documents in respect of which disclosure is sought; and
   - the likely cost of such disclosure.

Costs

7. The Court may impose a limit on the amount of recoverable costs in respect of disclosure.

It has enabled parties to reach more promptly the understanding of the case that is made against them for the purpose, amongst others, of deciding whether and when to mediate their differences. It is expected that it will assist in the reduction of the overall cost of litigation. I understand that the introduction of this regime is being considered in other international jurisdictions.

The combination of this new regime with the centralised form of case management now enables parties to estimate more accurately the amount of time that will be required to bring the case to a conclusion, with a more accurate estimate of costs. The Courts have made it very clear that the days of trial by ambush are over and all parties are required to put their cards on the table.[14] Cases must be managed efficiently and effectively with trials confined to the real issues in dispute.[15] This removes at least one aspect of the so-called unpredictability of litigation. However experience shows that there will always be

[14] *Nowlan v Marson Transport Pty Ltd* (2001) 53 NSWLR 116; *Glover v Australian Ultra Concrete Floors Pty Ltd* [2003] NSWCA 80.

[15] *Aon Risk Services Limited v Australian National University* [2009] HCA 27.

some aspects of litigation that are unpredictable. It is apparent that many mediators refer to the unpredictability of litigation to highlight the attractiveness of reaching the commercial resolution of a dispute at mediation. It would appear that this device (albeit now somewhat diluted in respect of matters in the Equity Division) will remain available to mediators.

One of the proposals that has been the subject of comment over the years is Harvard Professor Frank Sander's concept of the "multi-door courthouse" in which the doors represent various dispute resolution options that may be chosen by the litigant.[16] Although such a concept has not been adopted as defined by Professor Sander, Australian environments are moving closer to it with the establishment of court-annexed mediation services. A recent suggestion has been made that "State-resourced mediation services independent of the court system at a modest fee" should be considered.[17] Certainly the mediation services that are already in place, independent of the courts, such as the regime referred to earlier in respect of small businesses, seem to work well. The establishment of a separate and general state-based mediation service may have an adverse impact on the resources that are available to fund those mediation services provided within the court system. However it can be seen that the trend is to consider cheaper and quicker options for dispute resolution to avoid litigation.

I understand that there is some movement towards the use of the apology as a fundamental means for resolving disputes and addressing the anger or hurt feelings that sometimes accompany broken contracts and/or promises.[18] Indeed I see that it is the subject of one of the sessions at this Conference. The apology is not presently a pivotal aspect of the mediation landscape in Australia. However there is provision for an apology in the area of defamation actions.[19] The utility of an apology will very much depend upon the culture of the parties, the nature of the dispute, the perceptions of the parties about the strength of their relevant positions and entitlement to be vindicated. However if a willingness to give an apology (even one limited to the fact that the parties find themselves in dispute) were a pre-requisite to participation in the mediation it may very well soften the resolve of the hardy litigant or make the mediation environment more amenable

16 Nadja Alexander, *Global Trends in Mediation (*2nd ed, 2006, Kluwer Law International).

17 The Hon Wayne Martin AC, Chief Justice of Western Australia, *Access to Justice,* Notre Dame University Freemantle Campus, 24 February 2014.

18 Robyn Carroll, *Apologies as a Legal Remedy* (2013) 35 *Sydney Law Review* 317; Deborah L Levi, '*The Role of Apology in Mediation'* (1997) 72 *NYUL Rev* 1165.

19 *Defamation Act* 2005 (NSW) s 20.

for the achievement of a settlement.

The Graphs attached to this paper include one that charts the number of cases filed in the Supreme Court of New South Wales, the number of mediations and the number of mediations that have been referred non-consensually during the period 2007 to 2013.[20] Notwithstanding the importance of recognising the limited use to which raw statistics can be put, the trend is a reduction in the number of cases filed, with no reduction in the number of cases mediated. An important aspect of these figures is the acceptance of the process of mediation in the litigious environment. Opposition to mediation is now negligible.

As the litigious environment has contracted, the legal profession has changed its work practices to spend a great deal more time adopting strategies to settle cases at mediation rather than to run cases at trial. There will always be cases that will not settle and require judicial determination. The acceptance of mediation as part of the litigious process has resulted in the more complex and difficult cases that are not amenable to settlement being run at trial.

There is no doubt that the trend in Australia is a nationwide recognition and acceptance that alternative dispute resolution mechanisms have a pivotal role to play in the process of settling disputes. However it is access to the courts that determine and protect the rights and interests of the citizens that remains of paramount importance in the maintenance of the civility and stability of our Australian society.

B CONFIDENTIALITY IN MEDIATIONS

There is no single or uniform source of law governing the confidentiality of mediation in Australia. Some of the relevant principles were originally creatures of the common law, but have now been modified and codified by statute. Others in the statutory regime in the *Civil Procedure Act* 2005 (NSW) are aimed at encouraging pre-trial mediation of disputes. Some are rules of evidence, while others confer substantive protection against any form of public disclosure. The law in this area is a rather unruly patchwork. As has been said:

[20] Excluding mediations in the Family Provision List that are the subject of a separate regime. The Hon Justice P A Bergin *Executors/trustees and Mandatory mediations,* Sydney, 25 November 2009.

In the more nuanced situations legislation, court orders, dispute resolution clauses, Agreements to Mediate, codes of conduct and case law provide some guidance and direction. However, these sources and resources do not always deal with mediation confidentiality and its exceptions in comprehensive, consistent and complementary ways.[21]

One of the most attractive aspects of mediation to the parties is the secret or confidential environment in which the discussions take place. Naturally parties wish to avoid the publication of deeply personal, or commercially sensitive, or sometimes embarrassing information. Confidentiality balances the encouragement of settlements — and, in particular, the full and frank disclosure which facilitates them — against the desire to have all relevant evidence available in the event that judicial determination is necessary.[22] Speaking of legal professional privilege, Gleeson CJ has noted that:[23]

The rule that prevents an unauthorised disclosure of confidential communications … constitutes a restriction on the capacity of courts to ascertain the truth in certain circumstances. That restriction, however, is regarded as acceptable on the ground that it promotes the public interest, and assists the administration of justice …

The protections afforded in New South Wales in respect of matters referred to mediation by the court include the following:

- Immunity of the mediator and the parties from a defamation suit in respect of oral statements in a mediation session or documents or other material sent or produced to a mediator or to the court for the purpose of a mediation session;[24]
- For the mediator in relation to the referred proceedings, the same immunity as a judicial officer of the court;[25]

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21 Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 672.
22 Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 670.
23 *Benecke v National Australia Bank* (1993) 35 NSWLR 110, 111 (Gleeson CJ).
24 *Civil Procedure Act 2005 (NSW)* s 30(2)
25 *Civil Procedure Act 2005 (NSW)* s 33.

- The prohibition on the mediator disclosing information obtained as a result of the mediation except in certain circumstances;[26]
- Privileges protecting communications made, and documents prepared: in the course of a mediation session;[27] or for the dominant purpose of providing legal advice;[28] or in the genuine pursuit of a negotiated settlement of all or part of the dispute. These may be identified as the statutory mediation privilege in s 30(4) of the *Civil Procedure Act*, legal advice and/or litigation privilege, and the so-called 'without prejudice' communications privilege;
- Contractual obligations of confidence voluntarily assumed by parties to mediation, their representatives, and the mediator, under the usual terms of a mediation agreement; and
- The equitable remedies relating to the protection of confidential information.

Statutory protections

The statutory protections from suit for the mediator and to a limited extent for the parties, are an important factor in the creation of an environment in which the parties feel free to disclose matters in an attempt to reach a mediated settlement that they may otherwise not disclose (and not be required to disclose) in a court. It is that flow of easier communication that will provide some guidance to the mediator in identifying opportunities for the parties to reach a settlement with which they are willing to live.

The statutory protection for the mediator (and for the parties) is limited to a court-referred mediation. Accordingly when parties proceed to private mediation without the court referring it, the only protection available to a mediator is a contractual protection, which may prove to be of limited utility. Those practitioners who are alert to the statutory provisions protecting the mediator (and the parties) sensibly seek an order referring the matter to mediation to enliven the protections.

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26 *Civil Procedure Act 2005* (NSW) s 31.
27 Ibid s 30(4).
28 *Evidence Act 1995* (NSW) s 118.

Section 31 of the *Civil Procedure Act* provides that a *mediator* 'may disclose information obtained in connection with the administration or execution of this Part[29] *only*' in the following circumstances:

- Where the person from whom the information was obtained consents;[30]
- Where the mediator is called to give *limited evidence* as to the fact that an agreement has been reached and as to the substance of it;[31]
- Information disclosed in connection with the administration or execution of the Part of the *Civil Procedure Act* dealing with mediation[32] — which has been held to allow the mediator to express a view on the utility of continuing mediation;[33] or
- Where there are reasonable grounds to believe the disclosure is necessary to minimise or prevent the danger of injury to any person or damage to any property.[34]

Mediation 'privilege'

Section 30(4) of the *Civil Procedure Act* prohibits admission of evidence of the course of mediation, including documents prepared for, or as a result of, the mediation. Once again this only applies to court-referred mediation. It extends to the entire 'mediation session', defined to include steps taken in the course of arranging the session or in a follow-up session.[35] For example, a compromise offer sent by email subsequent to a mediation session that was not declared to be over (and where the court was not notified as required by the Rules) was held to be 'in the course of' or 'as a result of' the mediation session and so protected.[36] The prohibition has been held to exclude evidence relating to the conduct of the parties at mediation (eg, to explain why mediation was terminated);[37] and

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29 Dealing with court referrals to mediation.

30 *Civil Procedure Act 2005* (NSW) s 31(a).

31 Ibid ss 31(b), 29(2).

32 Ibid s 31(b).

33 *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 477, [11] (Palmer J).

34 *Civil Procedure Act 2005* (NSW) s 31(d).

35 *Civil Procedure Act 2005* (NSW), s 30(1).

36 *Sharjade Pty Ltd v RAAF (Landings) Ex-Servicemen Charitable Fund Pty Ltd* [2008] NSWSC 1347, [39] (Bergin J).

37 *Gain v Commonwealth Bank of Australia (1997) 42 NSWLR 252 (Gleeson CJ, Cole JA and Sheppard AJA), in relation to the very similar s 15(1) of the Farm Debt Mediation Act 1994 (NSW); but cf Al Mousawy bht Khamis v JA Byatt Pty Ltd [2008] NSWSC 264 (Hoeben J) (evidence of cancellation or refusal to attend*

evidence of a settlement offer made contemporaneously with, but not during, formal mediation.[38]

'Without prejudice' privilege

Communications 'made between persons in dispute' (whether or not also including a third party) '*in connection with* an attempt to negotiate a settlement of the dispute', or documents so connected, are not permitted to be admitted as evidence.[39] This embraces evidence of negotiations aimed at narrowing the scope of the dispute rather than settling the whole dispute.[40] Exceptions include where the communication is relevant to liability for costs.[41]

Legal Advice privilege/Litigation privilege[42]

Clients have a well-known privilege protecting communications with lawyers made for the dominant purpose of obtaining legal advice. Legal advice includes any advice as to 'what a party should prudently or sensibly do' in a legal context,[43] and many of the documents used or prepared for mediation may well be protected. It has also been suggested that with the increasing integration of Alternative Dispute Resolution (ADR) into pre-trial procedures (including the process of court referral, and of court-annexed mediation), that such mediations may be subsumed beneath the umbrella of litigation and thus attract the litigation privilege.[44]

Limitations

One important limitation on these privileges relates to communications during mediation that put a party on notice of the existence or possible existence of objectively provable facts. If party A makes party B aware, during mediation, that a document X exists and relates to some fact in issue, then on one view there is nothing to prevent later attempts to discover or have that document produced.

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considered in 'belated request for adjournment'), noted Ritchie's Uniform Civil Procedure New South Wales, above n 1, Civil Procedure Act Commentary [30.10].

38 *Jireh International Pty Ltd v Western Export Services Inc (No 2)* [2011] NSWCA 294.

39 *Evidence Act 1995* (NSW) s 131. (emphasis added)

40 *Lukies v Ripley (No 2)* (1994) 35 NSWLR 283, 292B (Young J).

41 *Evidence Act 1995* (NSW) s 131(2)(h).

42 Evidence Act 1995 (NSW) s 118 and s 119.

43 *AWB Ltd v Cole* (2006) 155 FCR 30, [44] (Young J).

44 Boulle, above n 20, 679.

This view was taken by Rolfe J in *AWA Ltd v Daniels*,[45] relying on the following passage from *Field v Commissioner of Railways*:[46]

"This form of privilege [without prejudice privilege] … is directed against the admission in evidence of express or implied admissions. … It is not concerned with objective facts which may be ascertained during the course of negotiations. These may be proved by direct evidence."

In other words there is a difference between evidence of a mediation communication referring to an objective fact (and perhaps explicitly to direct evidence of it), and that other direct evidence itself. The latter is not necessarily privileged.

If it were otherwise (ie the direct evidence of the fact was treated as poisoned fruit) it would open the possibility of a party sterilising evidence against them by disclosing it during mediation.[47] On the other hand, finding separate direct evidence of facts disclosed during mediation admissible might allow 'unscrupulous parties [to] use and abuse the mediation process by treating it as a gigantic, penalty free discovery process'.[48] Rogers CJ Comm D declined to adopt the apparent breadth of the passage from *Field*, contenting himself that: (1) the solicitor for the party put on notice was already alive to the possibility of the document's existence; and (2) in all but the most exceptional case such a relevant document would be discovered.[49] These decisions illustrate that privileges in respect of mediation communications do not entirely obviate the need for a party to preserve tactical advantages in anticipation of later litigation.

Mediation agreements

The New South Wales Bar Association's standard form of mediation agreement provides that the parties and the mediator together agree not to disclose 'any information or documents provided to them in the course of or for the purposes of the mediation to anyone not involved in the mediation' unless authorised by the disclosing party.[50] It requires parties to procure a signed confidentiality

45 *AWA Ltd v Daniels* (Unreported, Supreme Court of NSW (Commercial Division), 18 March 1992).
46 *Field v Commissioner of Railways for New South Wales* (1957) 99 CLR 285, 291.
47 Boulle, above n 20, 676.
48 *AWA Ltd v Daniels* (1992) 7 ACSR 463, 468 (Rogers CJ in Comm D).
49 Rogers CJ Comm D at 469.
50 NSW Bar Association, *Mediation Agreement*, 3 Nov 2012, cl 19.

agreement in prescribed form from anyone attending the mediation (for example, as a party's representative) which contains an undertaking not to use information for any purpose other than the mediation, and not to disclose it without written permission from *all* parties. Most mediation agreements will probably have clauses to similar effect.[51]

These clauses are probably the most important in protecting mediating parties from unauthorised disclosure to third parties. They complement the rules governing admission of evidence to the extent that a contractual confidentiality clause will not itself prevent mediation communications from being discovered or subpoenaed.

Confidential information in equity

The ingredients of an action for misuse of confidential information are: (1) information with a quality of confidence; (2) imparted in circumstances importing an obligation of confidence; and (3) unauthorised use.[52] So long as the information has the 'necessary quality' of confidence to begin with — which is to say that the information must actually be secret — the ordinary course of most mediations will supply elements (2) and (3).

Third party recipients of confidential information who can be fixed with knowledge — actual or constructive — of its nature will be restrained by injunction from making unauthorised use of it.[53] Parties who receive such information innocently may still be restrained from unauthorised use once they are on notice of its confidential origin.[54] It is more difficult where, by that stage, the information is in the public domain.[55]

Where there is a pre-existing contractual nexus (as between mediating parties and the mediator), the scope of the obligation of confidence will be evidenced by the mediation agreement.

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[51] See, for example, the clauses extracted in *Sharjade Pty Ltd v RAAF (Landings) Ex-Servicemen Charitable Fund Pty Ltd* [2008] NSWSC 1347, [24]–[25] (Bergin J), and as summarised in *Silver Fox Company Pty Ltd v Lenard's Pty Ltd* [2004] FCA 1570, [30] (Mansfield J).

[52] *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47–8.

[53] GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) 194; Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 4th ed, 1132.

[54] *Wheatley v Bell* (1982) 2 NSWLR 544.

[55] Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 4th ed, 1124.

Consent and waiver

Parties may of course waive privileges (the client, in the case of legal professional privilege; and the originator of 'without prejudice' communications). The NSW Bar Association's standard form mediation agreement between *parties* requires the consent of the 'disclosing Party' only; but the confidentiality agreement signed by all *participants* requires signatories to obtain the written consent of *all* parties before disclosure. The exception to s 30(4) of the *Civil Procedure Act* requires *all persons present* at mediation (thus including the mediator), or all persons specified in any document, to consent to its disclosure.[56]

Proof of compromise

Mediated settlement agreements are admitted into evidence for the purpose of enforcing a compromise.[57] This is a long-held exception to the without prejudice privilege, and is supplemented by s 29(2) of the *Civil Procedure Act* allowing the mediator to give related evidence. This exception extends to applications to have such an agreement rectified.[58]

It is important to avoid satellite litigation about the conduct of mediations. Such litigation is antithetical to the process. However it occurs. It is necessary for those involved in the process to not only obtain contractual rights and protections in the relevant mediation agreement but also to seek the protection of the statutory protections that may be available in the relevant jurisdiction. This requires the focus of the mediator and the parties ensuring that such protections are in place before embarking upon the process. Another mechanism that has been used is to embody the agreement in a form of consent order that is made by the court at the conclusion of the mediation. Although cases have been brought for the setting aside of such orders (for duress and the like), in the main, such orders afford additional protection to the parties and the mediator.

56 *Civil Procedure Act 2005* (NSW) s 30(5).
57 See generally Boulle, 693.
58 See generally Boulle, 694.

C. MEDIATION IN COMPLEX COMMERCIAL/FINANCIAL DISPUTES

Complexity, for the purpose of this discussion, may involve cases in which there are:

- Multiple parties with complicated and diverse interests;
- Operating in elaborate or labyrinthine contractual settings;
- In competitive relationships that have spanned many transactions (the understanding of the detail of which may require specialised knowledge) sometimes over years;
- In which there are allegations of serious commercial or financial misconduct;
- With multiple forms of relief or remedies being sought;
- In the pursuit of high stakes outcomes (financial as well as commercial).

Some parties may still be in a commercial relationship. Other cases may involve a combination of parties continuing in a relationship while others have terminated their relationship. Other cases may involve parties who are no longer in a commercial relationship.

From a case management point of view commercial/financial disputes in which the parties remain in a commercial relationship require prompt resolution. The parties embrace this promptitude because they wish to resolve the dispute that is presently affecting their commercial dealings. Others who have terminated their relationships are not as interested in such promptitude. This attitude flows through to the mediation setting. Experience in Australia is that parties in complex commercial disputes who are still in a relationship are more amenable to urgent mediation than those who have terminated their relationship. It would seem that the leverage available in the former setting may not be available where parties have gone their own ways.

In complex commercial/financial disputes it is necessary to have a more sophisticated approach to alternative dispute resolution mechanisms. The Court takes more of an interest in the pre-mediation steps to ensure that the real issues that are impeding the parties from a commercial settlement are identified so that the mediator is not met with a chaotic environment that may or may not be to the advantage of one or more of the parties.

In cases that involve complicated specialised knowledge, the Court may appoint a single expert to provide the parties with a premise from which a mediation might go forward. As the determination of the expert question is usually necessary for the ultimate decision, should the mediation be unsuccessful, it presents as an efficient and effective method of "settling" an issue that may divide the parties. The Court controls this process prior to any referral to mediation.

Another mechanism that is used in complex commercial/financial disputes is the appointment of a facilitator to meet with the parties to identify those real issues (both expert and lay) that each of the multiple parties contends requires resolution or determination. This mechanism has worked well in cases in which there are very complicated technological and/or mathematical issues that require precision in identification, agreed protocols for resolution, and competing theories in respect of the identified issues. Once the facilitator has assisted the parties in identifying the issues on which they disagree, a better judgment can be made about the nature and/or timing of any proposed mediation. In the cases in which this mechanism has been used, the facilitator plays no further part in the alternative dispute resolution mechanisms.

The Australian experience includes the appointment of multiple mediators with different tasks in respect of different aspects of the complex dispute. The parties usually identify a mediator with commercial experience combined with the relevant necessary legal experience and on occasions will appoint a person with particular scientific or financial expertise (depending upon the complexity of the issues to be mediated) as a co-mediator.

The involvement of a lawyer with experience in managing large disputes has proved to be pivotal in marshalling the parties' energies towards a commercial settlement rather than a dry run of the issues that will ultimately be determined in the court if the mediation is unsuccessful. In some instances the mediations have not concluded within the agreed timeframe and much work has been done to convince parties to continue their negotiations at another time. However the Court's experience is that multi-party complex disputes, if not settled at mediation, are usually less complicated at the trial because the parties have narrowed their real issues in dispute during the course of the mediation. This process is advantageous both to the parties and ultimately to the courts.

Although promptitude is an aspect of the case management of these difficult disputes, caution is necessary to ensure that matters are not prematurely referred to mediation. Parties in Australia are required to attend mediations in good faith. At least to some extent there is an expectation that settlement may be possible. However sometimes there are unexpected outcomes. Two examples come to mind.

As to the first, I would like to remind us of a mediation in a complex commercial dispute, not in Australia, but in United States of America - the Microsoft anti-trust dispute. You will recall that in 1998 the Department of Justice of the USA and more than 20 States sued Microsoft over alleged anti-trust violations under the *Sherman Act* and State anti-trust laws, relating to various tying relationships between its software products and alleged exclusive dealing arrangements.

Microsoft was accused of unlawfully maintaining market power through exclusive dealing and various other anti-competitive practices. It was also alleged that it leveraged market power to control related markets and crush competitors. It had bundled its own browser, Internet Explorer with its dominant Windows operating system, exhausting much of the consumer demand for an Internet browser and thus making it very difficult for competitors to enter and grow their market share.

The court ordered mediation that took place over a period of four months was ultimately unsuccessful. The mediator reportedly described the parties' differences as "too deep-seated to be bridged".[59]

The judgment at first instance found against Microsoft and would have forced its break up into smaller companies, one selling operating systems, another selling software for operating systems with other onerous restrictions. Microsoft appealed. While on appeal Microsoft's liability for unlawfully sustaining its operating system monopoly was affirmed, the finding of liability for monopolising the Internet browser market was reversed and the matter was remitted for re-hearing of the claim of unlawful tying of Internet Explorer to Windows. On remitter the new trial judge strongly urged the parties to settle.

Two mediators were appointed and allotted three weeks to attempt to settle the

[59] Andrew Marshall, *Microsoft Faces Prospect of Death by Lawyer* Independent (London) (3 April 2000), 15

case. The mediation was relevantly described as follows:[60]

Slow progress was made until a crucial compromise was reached on a critical issue over which the parties had been at impasse. Ironically, this key issue was not even in the original case that had been brought by the government, tried, and appealed. It emerged much later in the case, because the ways in which people used computers and software changed over the course of the litigation.

The mediation problem was that Microsoft's actions with respect to these key issues were not in the case that had been filed. Microsoft, not unsurprisingly, took the position that any settlement should not concern itself with issues that were not formally in the case. However as a very practical matter, considering how technology had evolved, this issue had become an important interest for the governmental parties to address in any settlement. Some of the governmental parties viewed failure to obtain any relief on this issue as a major stumbling block. Finally, two days before the court-imposed deadline for mediation to conclude, the parties agreed that the settlement would address this issue. Some of the governmental parties saw Microsoft's concession on this issue as a major achievement. Settlement became imminent: each side now felt that it had achieved more than it might possibly obtain if the case went to judgment

Notwithstanding the very complex issues involving many parties, it was the serendipitous introduction of a non-issue that grew out of real-time experience overtaking the issues with which the mediation was involved that ultimately facilitated the settlement. I have said elsewhere that mediators use the unpredictability of litigation to promote the attractiveness of the certainty of a mediated settlement. This is an exquisite example of the unpredictability of mediation. However in this instance it was a very advantageous one for the parties.

Australian experience is not dissimilar; mediation may lead to quite unexpected results.[61]

An Australian example with an unexpected outcome involved circumstances arising out of the collapse of a company known as Storm Financial Limited (Storm),

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60 Eric D Green *Re-Examining Mediator and Judicial Roles in large, complex litigation: Lessons from Microsoft and other Megacases* (2006) 86 Boston University Law Review 1171.

61 *Daya v CAN Reinsurance Co Ltd* [2004] NSWSC 795

a publicly listed company in Australia in respect of which investors lost approximately $830 million.

Mrs Richards, as the representative of a group of 1050 members, sued the Macquarie Bank (the Bank) and Storm (then in liquidation). It was claimed that on the advice from Storm they borrowed money in the form of margin loans from the Bank and then used it to invest in one or more of nine managed investment schemes over a period of three years from 2005 to 2008. The allegations against the Bank included: breaches of the *Corporations Act* 2001 (Cth) relating to an alleged unlawful operation of the managed investment scheme; breaches of contract and alleged unconscionable conduct by the Bank towards its margin borrowers; and being a linked credit provider of Storm and thereby vicariously liable for Storm's breaches of contract and misrepresentations under what was then known as the *Trade Practices Act* 1974 (Cth).

The parties took part in two mediations that were unsuccessful. The trial proceeded to finality and judgment was reserved. At that time the parties proceeded to a further mediation.

Some members of the group in the action were represented by the law firm, Levitt Robinson. Others (some hundreds of investors) were members of an action group, known as the Storm Investors Consumer Action Group and were not represented by Levitt Robinson.

Mrs Richards and the group members who retained Levitt Robinson entered into retainer agreements with that firm. Those agreements addressed the question of funding the litigation and provided that those persons (referred to as the Funding Group Members) would be subject to a levy to cover legal costs. The scale of levies in the retainer agreement was not calculated mathematically and the amounts of the proposed levies were not proportional to the losses suffered by the investors. There was nothing in the retainer agreement of any possible "uplift" payable to those investors who had paid the levy.

The law firm communicated not only with its clients, but also with those members of the action group. It warned them that any settlement that might be reached would be structured to provide that those who made a financial contribution to the litigation would gain "the major share of any settlement monies, in recognition of the financial strain and risk of even further erosion of their financial

position which they have endured".[62] This so-called "warning" was communicated in February 2013.

The proceedings settled at mediation and the fact of the settlement was announced on 15 March 2013.

There were some clients of Levitt Robinson who had not made any contribution to the costs of the proceedings and had apparently been excused from doing so on the grounds of hardship. They were given an opportunity to make a minimum contribution of $500 between 15 March 2013 and the date on which the approval application (referred to below) was due to come before the Court.

An application was made for the Federal Court to approve the settlement. This was necessary by reason of a statutory prohibition on settlement of representative proceedings (class actions) without the approval of the Court.[63] Such approval is necessary so the Court can be satisfied that any settlement has been undertaken in the interests of the group members as a whole, and not just in the interests of the applicant and the respondent.[64] The role of the Court in this regard is protective and akin to that of a guardian.[65] It is to decide whether the compromise is fair and reasonable, having regard to the claims made on behalf of the group members who will be bound by the settlement.[66]

The corporate regulator, the Australian Securities and Investments Commission (ASIC) intervened in the proceedings to oppose the approval of the settlement.

The "amount at stake" in that case was $282 million. The overall settlement sum was $82.5 million, about 30.57% of the total contributions of group members. The settlement represented a return of about 42% of the equity contributions to those who had funded the litigation and about 17.602% to those members who had not contributed.[67] A premium of 35% was fixed for those who had funded the litigation.[68]

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62 *ASIC v Richards* [2013] FCAFC 89 at [22].
63 *Federal Court of Australia Act* (1976) (Cth) s 33V
64 *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250 at 258.
65 *ASIC v Richards* [2013] FCAFC 89 at [8].
66 *Williams v FAI Home Security Pty Ltd* (No 4) (2000) 180 ALR 459 [19].
67 *Richards v Macquarie Bank Limited* (No 4) [2013] FCA 438 [26].
68 At [32].

The primary judge identified the two broad issues for determination on the application for approval. The first was whether the overall settlement could be regarded as fair and reasonable. The second was whether, even if that were so, the internal distribution was fair and reasonable. The primary judge decided "quite firmly" that the overall settlement was fair and reasonable.[69]

ASIC raised for consideration whether or not it could be said that all of the group had notice or at least sufficient notice that there was a premium for those who had funded the litigation, or the prospect of some better return, if they had contributed towards the recovery proceedings.[70] However the primary judge was satisfied that the internal allocation as between funding and non-founding members of the group was fair and reasonable.[71] ASIC also raised for consideration the fact that the Bank had obtained an indemnity from the members of the representative group. The primary judge saw this indemnity as preventing double recovery and saw nothing unfair about it.[72] The settlement was approved.

ASIC appealed that decision. On appeal, the Full Federal Court reversed the decision approving the settlement, as not to do so would involve "substantial injustice". The Court found that there was inequality of opportunity afforded to group members to share in the Funders' Premium. In this regard the court held that:

- Not all group members had notice of the premium;
- Unlike a commercial litigation funder, the Funding Group Members made a decision to fund the litigation on terms and conditions that did not contemplate a premium;
- The financial effect of the payment of the premium to the Funding Group Members was disproportionate in that they received a 525% return on the total amount paid to fund the litigation;
- The so-called return on "investment" was not consistent across the whole of the Funding Group Members because the premium was not paid in proportion to the funds advanced by each of them;

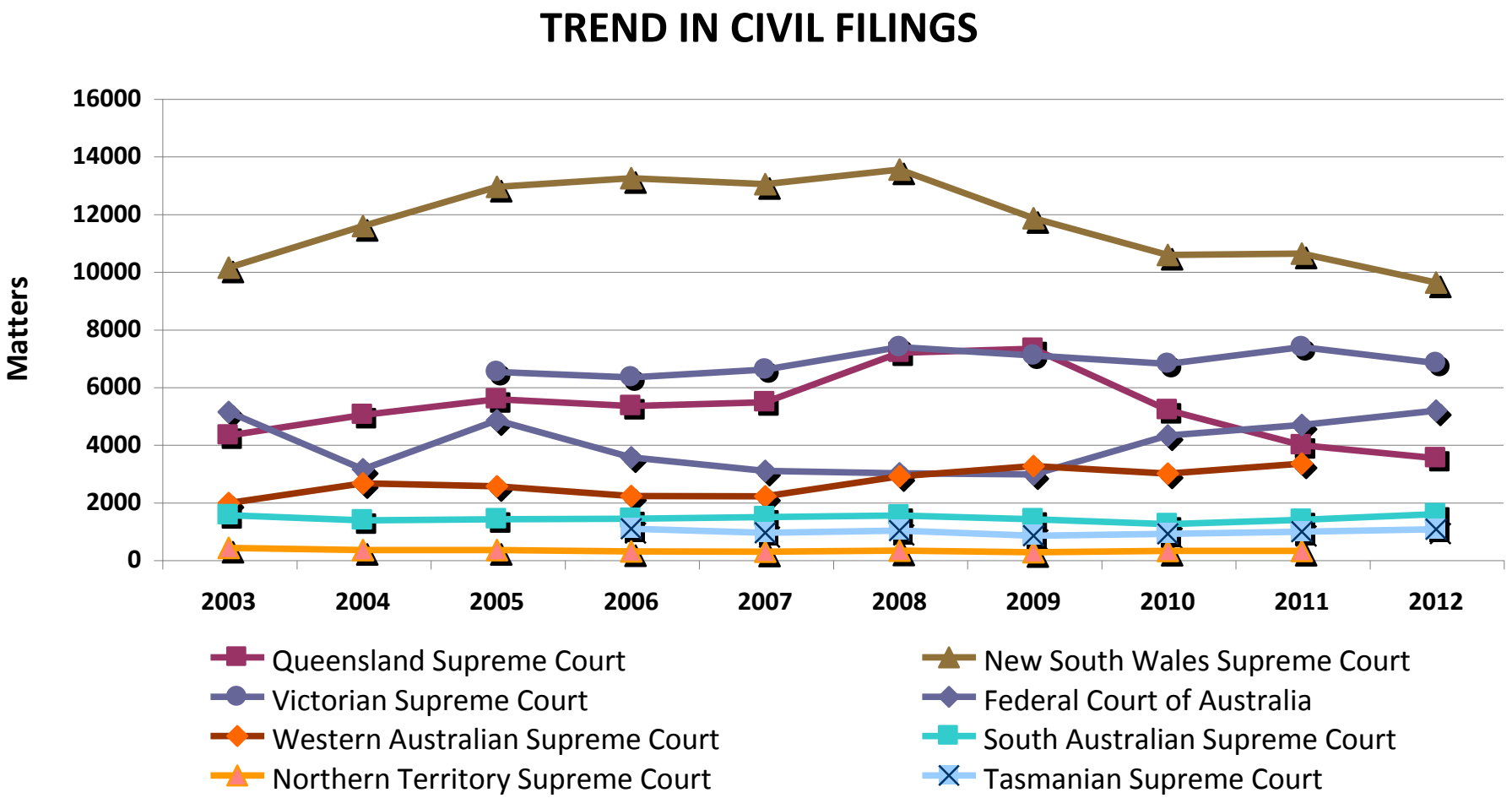
69 At [29].
70 At [39].
71 At [41].
72 At [44].

- Some group members were not provided with the opportunity to pay the minimum contribution, so as to qualify for a greater share of the settlement; and
- There was no rational explanation for rewarding the Funding Group Members by paying them a 35% premium (by reference to the premiums charged by commercial litigation funders) on an amount inclusive of interest and costs by a method that did not mathematically correlate with the amount they paid to fund the litigation.[73]

In overturning the approval of the settlement the Full Court was very conscious that its decision would "re-enliven an extraordinarily difficult class-action rather than give effect to a settlement reached after a mediation conducted by an eminent" person.[74]

This outcome demonstrates why the protections available to mediators and parties are so important. It is a salutary lesson for mediators and a reminder of the intricacies with which they must grapple in mediating multi-party complex commercial and/or financial litigation.

[73] At [46]-[57]
[74] At [59].


TREND IN CIVIL FILINGS
Matters
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10000
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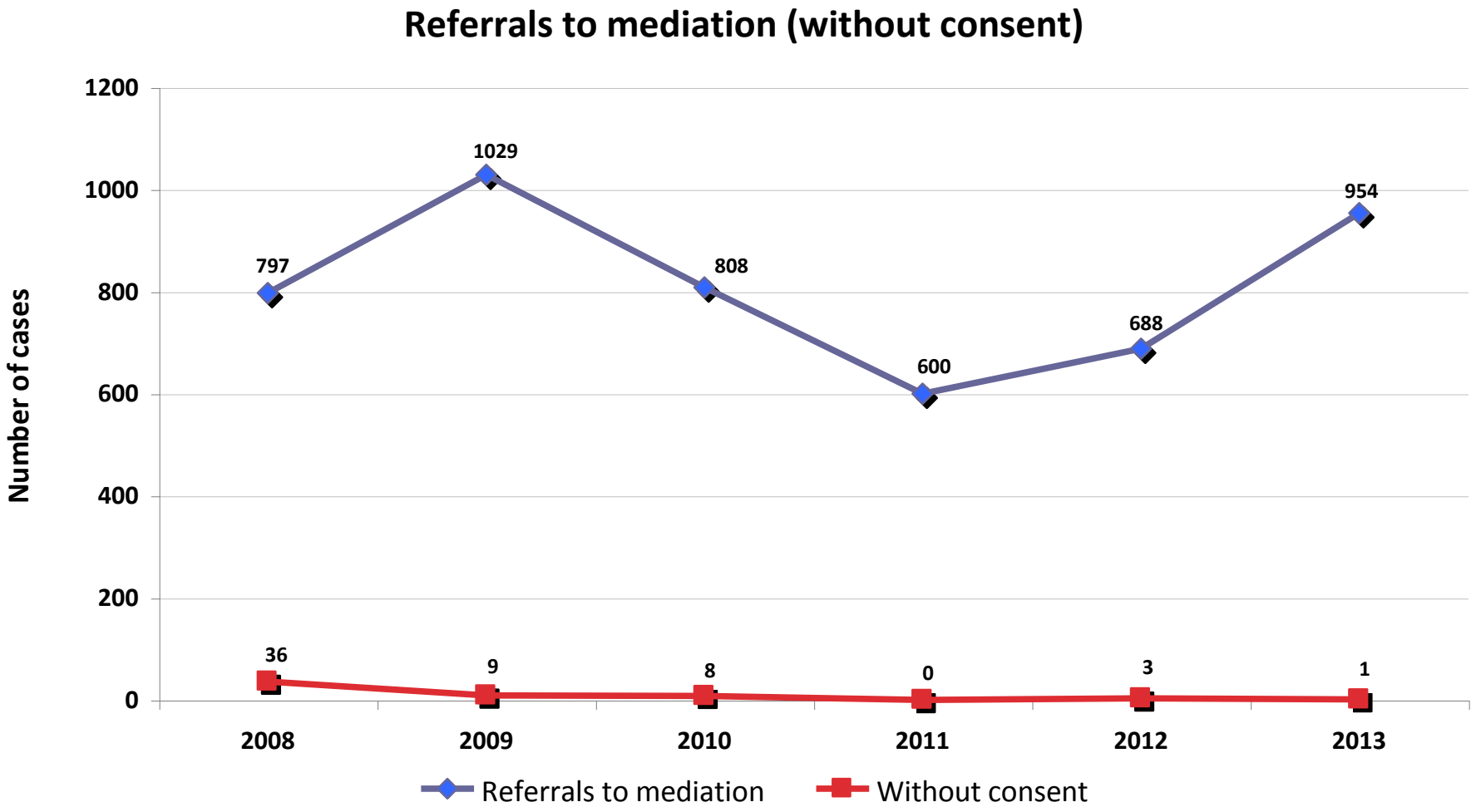
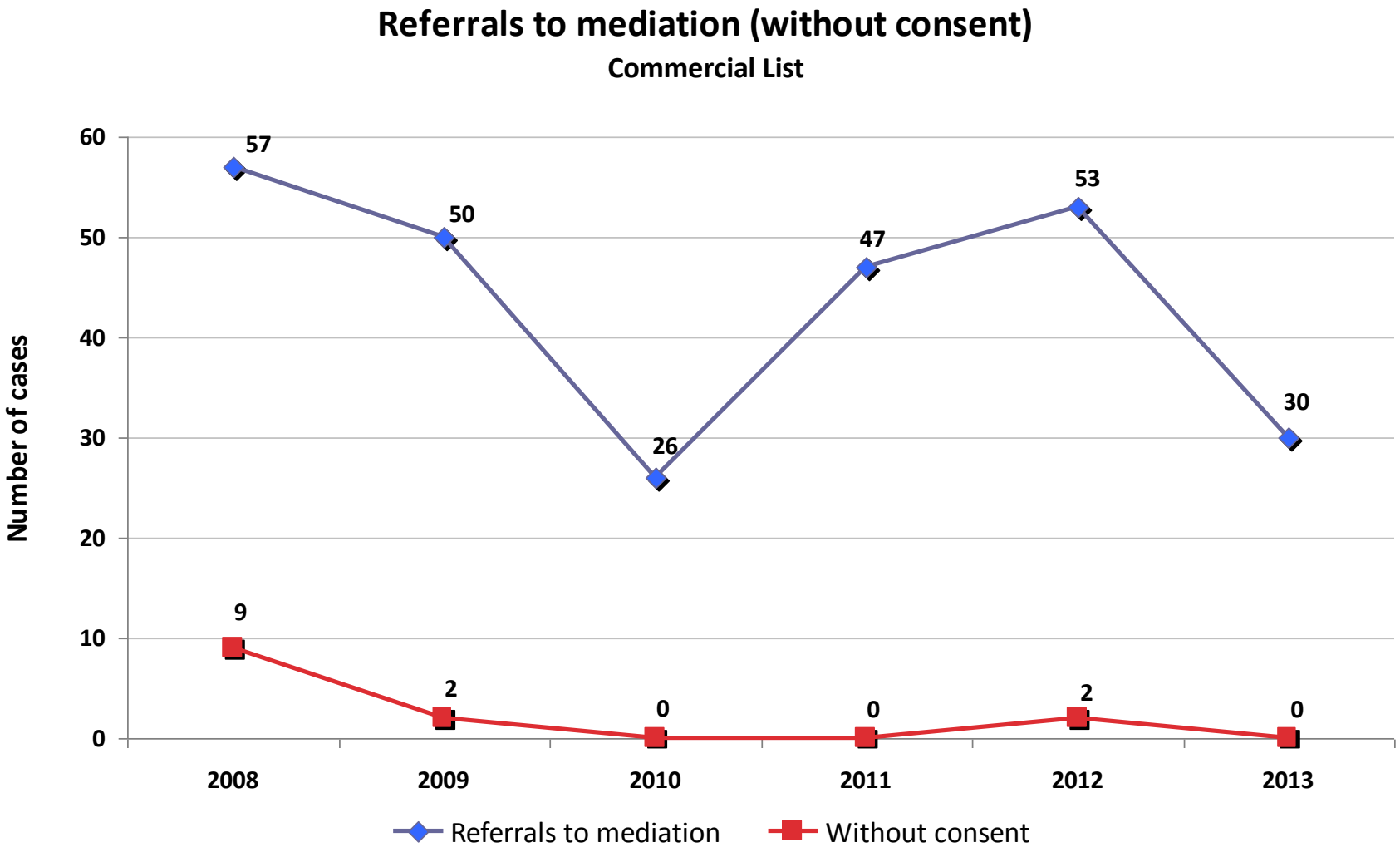
Queensland Supreme Court
New South Wales Supreme Court
Victorian Supreme Court
Federal Court of Australia
Western Australian Supreme Court
South Australian Supreme Court
Northern Territory Supreme Court
Tasmanian Supreme Court


Referrals to mediation (without consent)
Number of cases
1200
1000
800
600
400
200
0
797
1029
808
600
688
954
36
9
8
0
3
1
2008
2009
2010
2011
2012
2013
Referrals to mediation
Without consent


Referrals to mediation (without consent)
Commercial List
Number of cases
60
50
40
30
20
10
0
57
50
26
47
53
30
9
2
0
0
2
0
2008
2009
2010
2011
2012
2013
Referrals to mediation
Without consent

Experience of the Success of Mediation in the UK

Dr. Karl MACKIE, CBE[1]

Good morning everyone, it is good to be back in Hong Kong and to see such a well-attended conference. It is almost 25 years since the launch of Centre for Effective Dispute Resolution ("CEDR") in the United Kingdom (UK), with the backing of the Confederation of British Industry and major companies and professional firms. I became its first Director in 1990. CEDR was set up to promote mediation and Alternative Dispute Resolution (ADR) in the UK and Europe and to provide training and dispute services in support of that mission. It has been a privilege not only to be part of the leadership in the development of CEDR and to contribute to ADR developments in the UK so significantly, but also during that period CEDR has had major international exposure and activity. We have been active in over 50 countries, either in training judges and lawyers in ADR, or consulting on the introduction of ADR to civil justice systems or how to develop ADR centres, or conducting mediations and other ADR procedures in multiple cross-border cases.

The result of this is not only the privilege of having participated in so much interesting and important work internationally, but also in giving us a better perspective on what makes the UK developments different from many other jurisdictions.

Perhaps the main distinction is that over time it has become clear that, whereas in many other countries ADR is driven by more formal legislative foundations in term of statutes and other formal mechanisms, in the UK developments have been more informal. ADR in the UK is very much guided by a web of rules and practices, relating back to common law understanding, for example, of confidentiality and without prejudice privilege in negotiations, as well as the action of individual judges and sections of the court.

Much of the evolution was pragmatic and driven by early pioneers – both

[1] Chief Executive of Centre for Effective Dispute Resolution, United Kingdom

CEDR and other ADR organisations - and individual judges, lawyers and other enthusiasts.

The judges were amongst the most important contributors to the evolution of ADR in the UK. Perhaps the first was a judge in the Technology and Construction Court who, on his own initiative, had decided to begin directing cases to ADR or at least for the Parties to consider ADR, modelling his court direction on some practices he had observed in a US study tour.

This was followed fairly soon after by judges in the Commercial Court beginning also to promote directions to ADR. These were initially in the form of requesting the Parties to consider ADR, but quickly became more robust directions, staying cases for the Parties to attempt ADR, or if they failed to do so, to report back to the court as to why not. They also included offers of assistance in mediator identification or other support. Because of this proactive activity by the judges on the Commercial Court, lawyers specializing in commercial work – and the Commercial Court was, of course, a very influential Court in London both for UK and International cases – lawyers active before that court quickly developed a culture of anticipating a court order and determining that they would be more proactive in adoption of ADR themselves. Therefore, by the late 1990's many commercial cases were already actively considering and applying ADR techniques.

Alongside this, the Ministry of Justice or Lord Chancellor's Department, as it was at the time, was also active in exploring pilot schemes in the courts such as the County Courts to test the applicability of mediation for smaller claims. Many of these early experiments were difficult because they relied very heavily on voluntary referrals of cases by lawyers and clients and, of course, those of us who specialise in this field know that is not a particularly fruitful place to start in encouraging the mediation of conflicts.

The real thrust for ADR development in the UK, however, came with the Civil Procedure reforms implemented after a widespread review and consultation

exercise by Lord Woolf, the Lord Chief Justice. His reforms introduced the new Civil Procedure Rules, the CPR, which for the first time, formally identified ADR as part of the Civil Justice system in England and Wales. It emphasised the value of settling out of court and litigation as a last resort as part of a proportionate approach to justice. Within the rules, it was possible for parties or judges to refer cases to ADR. There were also sanctions incorporated whereby judges could award cost orders against parties who had unreasonably refused mediation. This, in particular, became a powerful tool for encouraging the adoption of mediation in Civil Justice and also became one of the most important areas for case law development in refining the principles behind judgments on when it was reasonable or unreasonable to refuse to undertake mediations. The cases around this are still emerging even today.

Another mechanism in the Civil Procedure Rules used to encourage ADR activity was embodied within the Pre-Action Protocols. These were the first mechanisms by which there was a structured approach to encouraging parties to consider seriously whether to issue claims in the courts at all, embodying the idea of best practice in investigating claims and the basis for claims before issuing proceedings. As part of these protocols, it became common to encourage parties to explore also whether settlement was possible first through ADR or negotiation techniques.

Senior judges were also active in reminders to lawyers about the importance of the rules, with a series of important cases around unreasonable refusal to mediate. Lord Woolf himself, in a major public law case, had encouraged public authorities to take ADR seriously in order not only to reduce the impact on the public purse of unnecessary protracted litigation, but also better resolution of disputes in ways that could not always be achieved through court remedies. While there was some toing and froing in terms of how the effectiveness of some of the case law judgements are perceived by the ADR community, broadly the effect of the case law developments was to reinforce the fact of ADR being a standard and acceptable technique within the toolkit of the legal profession and of the courts for the earlier and cost-effective

resolution of litigated claims. There was also clear reference to the fact that ADR can produce different kinds of remedies than a court can offer in many particular human conflict situations.

Other important developments surrounding the courts and ADR, were the development of short duration or telephone mediation schemes in the small claims arena. In particular, a small claims service promoted by the Ministry of Justice with its own staff, led to one of the highest volume mediation schemes seen in the UK, handling some 10,000 cases in the year with a very high satisfaction and settlement rate success. At the other end of the scale, the Court of Appeal launched its own mediation scheme for appeal cases, which is still administered by CEDR some 10 years or so later. And at the level of Government, the Lord Chancellor also took note of ADR in terms of Government commercial dealings by issuing an ADR Pledge, whereby he stated the Government departments would always consider ADR as a more proportionate means of managing disputes between Government departments and other contractors.

Underpinning these court and judicial developments was already an acceptance of a web of legal rules and common law assumptions which supported the mediation process. In particular, mediation agreements between the parties and the mediation providers such as CEDR would incorporate terms relating to confidentiality around the negotiations within mediation and the without prejudice nature of these negotiations and other provisions concerning a degree of immunity for mediators. These kind of terms became common practice in mediation agreements generally within the UK and accepted by lawyers and courts alike, although there have been some cases concerning confidentiality provisions and the degree to which justice can oust these provisions. However, such cases have generally followed general principles of the English common law. The overall effect of this web of rules was to give again important recognition to the validity of the mediation process and its integral part in the civil justice system.

Further endorsement of mediation has also come from the European Union. A Mediation Directive was issued by the EU in 2008 which again confirmed the status of mediation as being on a par with other civil justice procedures within the European Union and again, gave more formal status to the confidential nature of mediation and its without prejudice status within civil procedures. The Directive also encouraged member countries to ensure standards of training and practice in the field of mediation which most European Countries have now begun to implement. CEDR is still very active in supporting the development of standards across the European Union by means of various projects.

What has been the overall impact of all these developments in ADR? I think it is fair to say now that ADR is a very accepted part of the professional toolkit of lawyers in the UK, and an integral part of the ways civil justice operates. Many in the ADR field of course would say that there is still a degree of resistance to adoption of ADR by many lawyers and judges, particularly in smaller claims, but as a culturally accepted practice it is a very well established. There remains a considerable amount of promotional work to develop it further in the civil justice system generally and specific sectors where its value can still be discovered. However, if you ask most commercial lawyers in the UK whether they use ADR, they will readily answer that it is a normal part of their practice and that ADR is considered in every case that they handle at one stage or another. This can, of course, conceal the fact that in many cases there are perhaps unnecessary delays still to the adoption of an ADR procedure, but certainly at a professional level it is seen as quite normal to have reviewed the possibilities for ADR.

There are also, of course, many cases which are going through ADR. CEDR conducts a Mediation Audit every two years, which has recorded the fact of growth in ADR in terms of the English and Welsh legal system particularly. In the last audit, we estimated that there are some 16,000 commercial cases – not small claims – a year at least, with major saving for British business.

The cases that go to ADR are also significant in that it is has managed to develop in relation to almost every sector of the civil justice system, whether trust and probate, shareholder disputes and IT/IP disputes, or the supply of goods and services.

It is also worth mentioning, of course, that alongside all of this there have been developments in the professionalization of mediation. CEDR was an early pioneer in not only an intensive mediation training, but also in assessment of competence as part of that training and as part of an accreditation process. Many of you in Hong Kong will have experienced the quality of the programme already, I am pleased to say. This has meant that there has been a ready foundation of lawyers and other disciplines with appropriate basic training in mediation so that it has been possible for a market to develop. In fact, some would say that there have been too many mediators trained and that it is very difficult for mediators to find a practice in mediation. However, the fact is that there is far greater awareness in understanding of mediation techniques through these training programmes and like any other professional discipline, individuals have to find ways to apply the techniques and practice in mediation within their own sectors and personal and professional aspirations. Certainly, within the arena of major commercial mediation disputes, lawyers and clients would appraise the use of mediators as they would in the employment of any other experts to provide services in the dispute, looking at qualities such as their professional background, their experience in mediation and the professional reputation they have through references or other recommendations.

Where mediation is provided on a more systematic basis, then of course clients can often rely on providers to provide reputable panels of mediators, or public bodies can engage in tendering processes between various mediation provider organisations in order to satisfy themselves that they have the appropriate balance of reliability, reputation and quality and cost effectiveness in the delivery of mediation service. For example, the provision of workplace mediation, where companies utilise mediators to resolve internal grievances, is

growing rapidly. This technique is often utilised by large organisations training in-house mediators to operate in different departments of the organisation or using external mediators, where appropriate.

The accumulative effect of all these developments have been wide spread usage of ADR. This has also been further promoted by increasing adoption of mediation clauses in commercial and public organisation contracts. In other words, as part of the dispute escalation procedure in the contract, parties agree in advance to refer a dispute to mediation before going to court or arbitration. This ensures that cases come early to mediation before proceedings are even contemplated. The parties can require this before any proceedings are issued or can allow in the contract for proceedings to be simultaneous with the referral to mediation. An early Commercial Court case, in fact, reinforced the validity of such contract clauses where the parties adopted a CEDR procedure clause, the courts decreeing that there was sufficient certainty about the procedure and public policy support for ADR for the court to require the parties to test ADR before taking proceedings any further.

The outcome of these various developments has been significant in terms of changing the usage and recognition of mediation. Perhaps the most compelling example of the power of mediation is in the range of different kinds of case where mediation applies, rather similar to the general nature of our civil court system which has a format to handle any number of kinds of case.

Let me finish with one personal example of involvement in a range of cases around a similar situation, showing the flexibility of mediation. One case involved a personal injury claim by a householder who had suffered from post-traumatic stress disorder because his property was in the vicinity of a major industrial complex where there had been an explosion and fire. He had been woken up in the middle of the night and in a scene of devastation and shock. This led to claims against the owners of the operation with associated

claims of negligence in order to recover for personal injury and stress. This claim ultimately came to mediation and was settled, an example of a typical case where the company and its insurers felt that they could adequately take into account the various risks in order to find a reasonable level of payment as a compromise of the claim. Interestingly, the claimant told me in private and off the record that he had found the legal system far more stressful than the original explosion which had led to his disorder!

Related to the same instance of the explosion, another commercial case came to mediation. This involved a public authority which had a storage system for very sensitive documents near the site of the explosion. The result of the explosion was not only damage to equipment but also loss of documentation and disruption of work operations for the authority. This led to a commercial claim under various headings to try to recover some damages from the companies who owned the site. Again the parties found a mutually agreeable compromise settlement which allowed them to exit from litigation under an agreed settlement agreement.

Finally, sometime later, the joint owners of the site themselves came to mediation. They wanted to use mediation first because they had failed to agree on allocation amongst themselves of the responsibility for the explosion, and second because they needed to agree a joint venture deal as to how to rebuild the industrial site. Some seven companies and 40 people attended the first day of mediation, with a deal achieved after three days. An intriguing revelation for me at the mediation was to discover that my name as a mediator was down on the original joint venture agreement some 20 years earlier! I had forgotten I had been appointed in one of the first major 'deal' mediations in the UK.

I outline these cases not only because the organisers encouraged speakers to deal with practical cases, but also to demonstrate my main thesis that mediation is now seen as valid and applicable to whole a range of types of case. It is also widely used within the UK, although there is still much ground to

cover in terms of its growth and adoption, particularly in the earlier stages of disputes rather than in the later stages. It is an exciting challenge that we all face in improving our methods of handling social conflicts. It has been a privilege to be a part of it and I hope you will join me in enthusiasm for promoting its use here in Asia as well. Thank you very much.

The Vocation of Mediators in Today's World

Mr. Camilo AZCARATE[1]

Good morning. My name is Camilo Azcarate. I am a dispute resolution professional, working as the manager of Mediation Services at the World Bank Group. I have been in this position since 2008.

I have practiced and taught mediation in both the public and private sectors, I have also worked as Ombudsman, facilitator of environmental and public policy processes and designer of dispute resolution systems in organizations. I have worked mainly in the US and Latin America, but through my work at the World Bank have had the pleasure of working with mediators from every region of the world, including Danny who is kind enough to help our office with cases originating in the East Asia and Pacific Region.

I would like to start by thanking the Department of Justice and the Hong Kong Trade Development Council for inviting me to speak to you this morning.

When I started in this profession, it was still in the fringes of other professions such as law and psychology. I remember being advised by some of my colleague lawyers against becoming a full time mediator. They said I would waste my education and in the process starve due to lack of work.

Thankfully that has not happened and the profession has experienced continuous growth over the last two decades. This is particularly true in situations in which the parties are highly inter-dependent such as family and workplace cases. For instance, mediated divorces are now main stream in the US and workplace mediation is following behind. Mediation or similar processes are used as a matter of routine to handle environmental and public policy situations in the US. Other areas, such as commercial mediation have also seen growth, but they are yet to reach their full potential.

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[1] Manager of Mediation Services, The World Bank Group

I don't think mediation is a panacea. Many cases need to be litigated, and mediation is best when it works side by side with an efficient and honest judicial system as well as a robust arbitration practice. However, I also know that mediation is more than a faster, less expensive alternative to those systems, but a better way of handling situations of high interdependency.

Now, despite all this growth and success, becoming a professional mediator is still not an easy task. You need a fair amount of patience, flexibility and creativity, which in turn requires deep commitment to the principles of mediation. I like to call this our vocation.

Today I would like to talk about this, about our vocation, and what I consider the underlying trends that might propel this profession in the future.

Aristotle defined vocation as the place where our talents and the needs of the world meet.

Now, I would ask: if we are asked to explain why mediation is necessary in today's world, do we have a clear answer? Moreover, can this go beyond the traditional answer of mediation being just an 'alternative' to other processes that have become too lengthy, too costly or too difficult? Can we connect our talents to the essential needs of today's world? These are important questions. In their answers lies not just the core of our profession but also its future.

So let's start by talking about the needs of today's world. Some of these are old problems, such as poverty, inequality or violence. Others are more recent, like environmental degradation or increased conflict in international trade. There is however, a new urgency attached to these needs that comes from a central feature of today's world, which are unprecedented levels of interdependency among countries and societies and between humans and their environment.

I know that we hear about globalization every day, particularly in a place as

global as Hong Kong. However, I think that the extent of the consequences of this reality has yet to fully reach our consciousness. We are yet grappling with the fact that we are becoming one: one economy, one environment, one society.

Now, we know that highly interdependent relations need some form of legal framework. We have developed a complex, sometimes cumbersome, legal framework to do just that one that includes international treaties, national codes and regulations and individual contracts. Most of these have mechanisms available to handle conflicts, such as the courts, arbitration and (sometimes) mediation. However, these mechanisms are often time consuming, expensive and may get entangled in jurisdictional fights.

Most of us know that larger trade and lower tariffs have benefited economies around the world. We have also become painfully aware of the risks associated with globalized financial markets. However, there is one consequence of globalization that is still largely hidden from view. I would like to call your attention to it.

Social psychologists know that human being have powerful needs that they try to satisfy through their interactions with others within their communities. These basic social needs are universal, because they are part of the instinctual repertoire that makes us humans. They also demand satisfaction, meaning that we long to satisfy them, at least at a minimum level, and we react badly if we believe they are being threatened or denied. The power that these needs exercise on us prompted some 18th century philosophers to call them “inalienable” and to give them the stature of God-given rights. They declared that the legitimacy of a country’s laws and governments depended on their capacity to support and protect the realization of these needs. Later, they became the core of the Universal declaration of Human Rights. Thus, for some time now we have been making efforts to create laws that reflect these human needs.

Such needs include the sense of belonging to something larger than ourselves, the sense that we are being treated in a fair and respectful manner and the sense that we have some control over what happens to us and a minimum level of security.

Now, since there are instinctual needs, the perception that they are being threatened or denied triggers an instinctual reaction in an area of our brain known as the Amygdala. The job of the amygdala is to help us react rapidly to perceived threats by either running away or trying to overcome them, the well know flight and fight response. The amygdala uses emotions such as fear and anger to mobilize our attention towards this ends.

The accumulated effect of perceived threats or denial of these social needs can be quite damaging, and lead to social unrest erosion of trust and violence. They also undermine the legitimacy of the law, trust and cooperation all of which are essential in interdependent relationships.

There seems to be a gap between the needs of a global community and the legal instruments available to its members. It is a gap that is slowly being closed by a growing sense of connection and accountability among individuals, groups and nations. More and more of us feel responsible for the impact that our actions and omissions have on other people around the world, and more of us are also aware of the impact that others have on us. This mutual preoccupation is, I would say, the hallmark of community. Mediation can help this process.

Let's go again over these basic social needs: belonging, fairness, security autonomy (or freedom) and respect. When we consider them all together we often talk about human dignity.

Which takes us back to the second part of our definition, that is, to the special talents that we bring to the table. What are those talents, and how are they different from those of other professions, particularly law?

I believe our first contribution is our awareness of the situation I just described. Our specialized knowledge and experience provides us with an understanding of conflict and its complex levels of analysis: from biology to cognitive and the affective that motivates parties and create patterns of behavior.

We also bring these powerful frames of reference to shed light to the often perplexing conflicts facing individuals and groups.

We can model good communication, effective problem-solving and cooperative skills to those we work with.

And, of course, we provide processes that help people engage effectively in conflicts that may have remained latent for too long or may be destroying the trust and productivity in their relationships; processes like mediation, ombudsing, group facilitation, consensus building partnering and dispute resolution systems design.

All of these processes aim to create a sense of mutual respect as well as the equal standing and self-determination of participants. In other words, we work hard to enhance the conditions that promote trust and collaboration between participants.

We have worked hard to create processes with ground rules and best practices that protect and promote the basic psychological needs of participants. We know that this increases the level of trust and the likelihood of collaboration and problem solving among them. This is our greatest contribution to an interdependent world.

Future trends would likely follow the trajectory I have been describing. The higher the levels of globalization, the higher levels of interdependency, the higher the need for processes like the ones we have to offer.

Notice I am using the word “need”, not actual use of mediation. One of the

most important lessons of my career is that one of the most common mistakes, certainly one of the most expensive mistakes, parties make is the failure to recognize the level of interdependency in relationships. They ignore this reality for many reasons: lack of accurate information, worldviews and ideologies that stress the view of "we versus them" and simple fear of facing the reality of depending on others.

Nobody likes depending on others. Yet, we have set ourselves to depend on others. This dissonance between reality and our perception of that reality, between our need for mediation like processes and our illusion that we can get our way and impose our will on others indefinitely, can be quite destructive. Let me illustrate the point with an example: by early 20th century the nations of Europe had gone through a wave of globalization that, on the ground, had linked their destinies. They shared a common future, whether they realized or not. Their blindness to this reality produced the horrors of WWI and WWII. They set themselves for failure, clinging to nationalistic mind frames that cost them dearly. That catastrophic failure leads to the setup of a more robust international system that includes the UN and the World Bank. The design of that system may be already too constricted to the overwhelming needs of today's world. Yet, many of us still cling to the illusion of separation and total autonomy.

I truly hope the global community avoids similar mistakes.

Other advancements in our field are qualitative in nature, that is, they are improvements in the quality of our services. Many of these improvements come from research conducted in the last decade, applying concepts developed in other fields.

For instance, Complexity Science is a new field in mathematics that explains how the properties of entire systems arise from the self-organization of their parts. The variables that describe the state of the system are dynamic, that is, they evolve over time and they influence each other in non-linear ways

(meaning they are both cause and consequence of each other). One way to visualize this is through the way that forces interact in a magnetic field. Similarly, the different elements of a social system at different levels of that reality (micro, meso and macro) influence each other in sometimes unexpected ways.

Complexity science is being used to better understand social systems and conflicts by encoding social mechanisms into equations and using mathematics to solve these equations and thereby learning the consequences of those social mechanisms. However, we are still a long way from the type of predictive power that we have developed in studying other systems, such as the weather.

In the meantime, this approach can help us other ways, for instance by providing us new ways to think and talk about the complexity inherent to conflicts. They provide us with useful metaphors, such as the “attractor landscape”, which is based on mathematical equations. An attractor landscape represents some characteristics of the conflict, like the parties’ behaviors, by using hills and valleys. The valleys are stable endpoints that result from the parties’ behaviors, the hills represent unstable points, that is those that tend to be only temporary. The ball represents the current state of the conflict moving between potential states. As you can see in this graphic, gravity pulls the ball towards stable points at the bottom of the valley. This is an attractor, that is, a pattern of behaviors into which parties tend to fall over and over. These patterns are stable and resist small attempts to change. To avoid this and produce long lasting change, it is necessary to change the landscape itself, that is to change the behaviors of the parties long enough to flatten the surface of the landscape.

This metaphor is a helpful representation of something that we, as professional mediators, have always known, which is that a conflict is likely to resurface if the underlying conditions are not resolved. We know this but sometimes have a hard time explaining it. In the past we have talked about the

difference between settlements and resolutions. In the attractor metaphor a settlement is taking the ball out of the valley, leaving the valley itself intact. The risk here is that the ball would fall back into the valley. A resolution, on the other hand, would go beyond taking the ball out of the valley. Additionally it would attempt to flatten the valley itself.

So these are the future trends of our profession, as I see them. I believe that both of them point in the same direction, that is, towards the growth of the profession both in quantity and in quality. Hopefully we will count with the support necessary to realize its immense potential.

Now, I don't get me wrong: the path ahead won't be easy. Our profession has still many challenges to overcome including the need to institutionalize and professionalize. We also have to overcome in our practice some very strong emotions and ideologies that drive individuals, groups and countries to try to impose their preferred solutions to others. However, the complex highly interconnected and interdependent world is making this contentious approach more and more difficult.

Someone once said that the arc of the moral universe was long, but it bends towards justice. I believe our profession is here to help that trajectory.

In a world that is being both enhanced and challenged by rising levels of interdependence, a complex legal system whose legitimacy depends ever more on its capacity to satisfy the social needs of larger groups of people, we can provide the processes and the tools to help people realize their dignity. This is what lies at the center of our vocation.

Some Thoughts on the Development of Judicial Mediation in the Mainland of China and the Prospects for the Development of a Harmonious Regime for Cross-border Commercial Mediation

Dr. YANG Fan[1]

Thank you, Danny, for your kind introduction.

It is my great pleasure and indeed an honor to join this distinguished panel as a speaker here today. I would like to first express my heartfelt thanks to the organizers for inviting me and giving me such an opportunity to share with you some of my research. I would also like to congratulate the organizers on putting together such an impressive conference and the successful organization of the whole mediation week, which recognizes and, indeed, witnesses the important role played by mediation in the continuing and further development of the rule of law in Hong Kong.

Given that the rest of today's and tomorrow's conference will cover almost every aspect of mediation law and practice in Hong Kong, with the indulgence of the Chair of this panel, I would like to simply focus my presentation on some recent developments of mediation law and practice in the Mainland of China.

OUTLINE

Here is an overview of my presentation today. I will first briefly introduce the People's Court Mediation and People's Mediation and the differences between the two;[2] I will then focus on the recent development of the so-called judicial confirmation proceedings that connect litigation and the ADR process through the People's Court's confirmation of the mediated settlement agreements. Last but not the least, I will reflect on the practice and development of judicial

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[2] The contents in Slides 3-6 are mainly based on the author's recent article: Fan Yang, 'Attitudes of Mainland Chinese Judges towards Mediation' (July 2013), *The Vindobona Journal of International Commercial Law and Arbitration*.

mediation in several Asia-Pacific jurisdictions[3] and share with you some thoughts on the way forward to promote mediation in resolving cross-border disputes and come to my conclusion at the end.

Introduction of mediation in the Mainland of China

As many of you may know, or have heard, as far back as Confucius's time, mediation has been used for resolving disputes in China.[4] With the fast development of the Mainland Chinese market- economy system, both the range and number of civil disputes has increased dramatically.[5] In response, the Chinese government has put considerable energy into the implementation, and continuous improvement, of a range of different forms of mediation including People's Court Mediation, People's Mediation, Administrative Mediation, Commercial Mediation and Arbitration Mediation. This process of implementation and improvement has been supported by the promulgation of a series of related laws and regulations, as well as judicial opinions and interpretations issued by the Supreme People's Court.[6]

What currently appears to be lacking is the so-called private mediation service, that is, mediation not annexed to a court or any governmental organisation.

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[3] The contents in Slides 10-13 are mainly based on the recent book, Guiguo Wang and Fan Yang (eds.), *Mediation and its Impact on Legal Systems in Asia-Pacific*, (Wolters Kluwer Law & Business and CCH Hong Kong, 2013).

[4] Confucius (551-479 BC) educated people to mediate disputes and to cherish harmony (Lunyu-Xueer 《论语-学而》：“礼之用，和为贵”。)

[5] According to the Supreme People's Court Annual Reports, in 2006, all levels of people's courts, excluding the Supreme People's Court, heard 7,940,549 cases in total; this number increased to 10,711,275 in 2009, 11,370,000 (approximately) in 2010, 11,700,263 in 2011, and 12,204,000 (approximately) in 2012. The Central People's Government of the PRC, http://www.gov.cn/test/2008-03/21/content_925627.htm

[6] For People's Mediation, *see, e.g.,* People's Mediation Law of the People's Republic of China (2010) and Several Provisions of the Supreme People's Court on the Judicial Confirmation Procedure for the People's Mediation Agreements (2011); for People's court mediation, *see, e.g.,* Civil Procedure Law of the People's Republic of China (2012 Amendments); for Administrative mediation, *see, e.g.,* Patent Law of the People's Republic of China (2008 Amendments) and Administrative Reconsideration Law of the People's Republic of China (1999); for Arbitration mediation, *see, e.g.,* Arbitration Law of the People's Republic of China; for Special mediation laws, *see, e.g.,* Law of the People's Republic of China on Labor Dispute Mediation and Arbitration (2008) and Law of the People's Republic of China on the Mediation and Arbitration of Rural Land Contract Disputes (2010).

People's Court Mediation

The practice of People's Court Mediation can be traced back to the 1930s in China. Today, People's Court Mediation can be conducted not only in civil proceedings, but also in administrative and certain criminal proceedings.

People's Court Mediation conducted in civil proceedings is regulated mainly by the PRC Civil Procedure Law and the relevant judicial opinions and interpretations.

People's Court Mediation is conducted on a voluntary basis. The most recent Civil Procedure Law amendments 2012 has spelled out the principle of "mediation first" in all civil proceedings.

The resulting People's Court Mediation settlement agreements are directly enforceable as judgments.

People's Court Mediation (civil)

Mediation, which is sometimes referred to as conciliation,[7] is essentially evaluative and advisory in nature when conducted by judges in the people's courts. Firstly, the judge-turned-mediator is required to conduct the mediation according to the principles of voluntariness and legality.[8] This means: (1) the court-mediated settlement agreement must be agreed to by the parties on a voluntary basis and the parties must not be forced or coerced into settling during the court-conducted mediation process; and (2) the court-mediated settlement agreement must not contravene any law.

Secondly, the judge-turned-mediator should conduct the mediation on the basis of ascertaining the facts and distinguishing between right and wrong.[9] Thus, in practice the judge-turned-mediator often evaluates the merits of the

[7] *See, e.g.*, UNCITRAL Model Law on International Commercial Conciliation (2002)
[8] PRC Civil Procedure Law (2012 Amendments) article 9.
[9] *Ibid.*,, article 93; see further discussion *infra*.

case and gives parties proposals for settlement, which may or may not be accepted by the parties.

Thirdly, the judge-turned-mediator has the power to invite relevant units or companies and individuals to assist in the mediation.[10] This raises concerns about a potential lack of confidentiality in the court-conducted mediation process, although the parties can request the People's Court to conduct the mediation in private.[11]

Fourthly, the court-mediated settlement agreement is not only binding on the parties but also, more importantly, directly enforceable as if it were a court judgement.[12]

Last, but not the least, the judge-turned-mediator can conduct mediation at any stage during the civil proceedings.[13] Under the current law and practice in the PRC, judges can conduct mediation up to any point prior to judgement being rendered and during any appeals proceeding as well. However, the parties are always able to refuse mediation if they so wish.

Attitudes of Mainland Chinese Judges towards People's Court Mediation

Over the years, much has been written on the subject of judicial mediation in the PRC. For those of you who are interested in this subject and in particular the attitudes of the judges of the people's courts toward court-conducted mediation or their attitudes toward, or awareness of different styles of or approaches to mediation (for example, facilitative versus evaluative)[14] or their

[10] PRC Civil Procedure Law (2012 Amendments) article 95.
[11] *See* Provisions of the Supreme People's Court on Several Issues Concerning the Civil Mediation Work of the People's Court (2004) article 7.
[12] PRC Civil Procedure Law (2012 Amendments) article 97.
[13] *Ibid.*, articles 142 and 172.
[14] For discussions on evaluative mediation versus facilitative mediation, *see e.g.,* Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques* (1994) 12 *Alternatives to High Cost Litigation* 111; Leonard L. Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 *Harvard Negotiation Law Review* 7, at 23-24; Kimberlee K. Kovach & Lela P. Love, ''Evaluative' Mediation Is an Oxymoron' (1996) 14 *Alternatives to High Cost Litigation* 31 (1996); Lela P. Love 'The Top Ten Reasons Why Mediators Should Not Evaluate' (1997) 24 *Florida State University*

views on the different impacts that different approaches may have on the outcome and effectiveness of mediation conducted within the people's courts, I am referring you to my recent article: YANG Fan, 'Attitudes of Mainland Chinese Judges towards Mediation', *The Vindobona Journal of International Commercial Law and Arbitration* (July 2013).

People's Mediation

This form of mediation is now regulated by the People's Mediation Law (2010) and relevant judicial opinions and interpretations. It is conducted on a voluntary basis and by people's mediators of People's Mediation Commissions free of charge. According to the People's Mediation Law (2010), there is no accreditation requirement for people's mediators; local bureaus of the Department of Justice shall provide them with regular training and local people's courts provide guidance and instructions on the work of the People's Mediation Commissions.

Without further investigation and research, it is unclear whether People's Mediation is mainly conducted in evaluative, advisory or facilitative styles.

People's Mediation settlement agreements are enforceable as contracts. In addition, People's Mediation settlement agreements can now be enforced via "judicial confirmation" procedures.

The current laws and judicial interpretations do not seem to pay much attention to, or stress on, the confidentiality in mediation proceedings. There are no clear rules on to what extent information disclosed in mediation is without prejudice or privilege in subsequent court/arbitration proceedings.

Law Review 937, 948; Joseph B. Stulberg 'Facilitative v. Evaluative Mediator Orientations: Piercing the 'Grid' Lock' (1997) 24 *Florida State University Law Review* 985-1005. *See also* Dr. E. P. McDermott and Dr. Ruth I. Obar, presentation at the Dispute Resolution Section of the American Bar Association, 21 March 2003, in San Antonio, Texas: "What Really Happens in the Mediation of Charges Before the EEOC" (providing some empirical evidence in the debate over facilitative versus evaluative mediation).

Judicial Confirmation Procedure

What I found most interesting is this recent development of the so-called judicial confirmation procedure.

Under Art 33 of the People's Mediation Law (2010), upon parties' consent, they can submit their mediated settlement agreement to be judicially confirmed. Application for judicial confirmation shall be submitted within 30 days from the date of settlement. Matters that cannot be judicially confirmed include: (1) matters outside the jurisdiction of the court (civil matters/territorial jurisdiction); (2) declaration/confirmation of identification of persons/personal relationships; (3) declaration/confirmation of adoption relationships; and (4) declaration/confirmation of marriage.[15]

Grounds for non-confirmation of mediated settlement agreements

According to article 7 of the Supreme People's Court's Provisions on the Judicial Confirmation Procedure for the People's Mediated Settlement Agreements (effective 30 March 2011), a mediated settlement agreement reached in People's Mediation will not be judicially confirmed on the following grounds: (1) it contravenes mandatory provisions of laws and administrative regulations; (2) it contravenes national interest or social public interest; (3) it infringes on third party's legal rights and interests, whereby they can apply for an annulment/setting aside the judicial confirmation (within 1 years' time); (4) its contents are so ambiguous or uncertain that they cannot be judicially confirmed; and (5) other circumstances.

Further research is needed to ascertain how this innovative mechanism operates in practice.

[15] Supreme People's Court's Provisions on the Judicial Confirmation Procedure for the People's Mediated Settlement Agreements (effective 30 March 2011), Supreme People's Court Opinion No. 5 (2011).

The practice and development of judicial mediation beyond Mainland China (1)

Having briefly introduced the judicial mediation practice and development in Mainland China, I would now turn to a quick review of judicial mediation practice in some other jurisdictions.

It is interesting to note that judicial mediation is by no means unique to Mainland China. Given the time constraint, I will just quickly review the practice of judicial mediation in six jurisdictions, namely, Canada, India, Indonesia, Japan, Republic of Korea and Singapore.

Canada:

According to Catherine Morris, in 1991, the British Columbia Small Claims Court introduced mandatory judicial settlement conferences; in 2012, a brief study by the BC government reported a settlement rate of thirty-five percent. Interestingly, while all judges of the Provincial Court undertake interest-based mediation training, mediation styles actually practiced by judges in settlement conferences do not appear to be documented.[16]

There are similar practices in other states in Canada; for example, Judicial Dispute Resolution in Alberta; Mandatory Mediation Initiatives in Ontario; an integrative Approach to Dispute Resolution in Quebec, to name a few. [17]

India:

According to Dr. Rajesh Sharma, *Lok Adalat,* (the so-called People's Court is effectively a mediation/arbitration process) and court-annexed mediation (where the court acts as the appointing authority and maintains lists of

[16] *See* Catherine Morris, 'Canada: The Impact of Mediation on the Culture of Disputing in Canada: Law schools, Lawyers and Laws', in Guiguo Wang and Fan Yang (eds.), *Mediation and its Impact on Legal Systems in Asia-Pacific* (Wolters Kluwer Law & Business and CCH Hong Kong, 2013), chapter 3.
[17] *Ibid.*

mediators) are currently practised in India.[18]

Indonesia:

According to Karen Mills, the mandatory court-annexed mediation is prerequisite to litigation in Indonesia. Judges are required to order parties to mediate, may assign mediators, and judges of the same court who are not sitting in the instant case may act as mediators.[19]

In Indonesia, the Deed of Settlement or *Akta van Dading* has the same effect as a final and binding court judgment and, if not implemented, may be enforced as such.[20]

The practice and development of judicial mediation beyond Mainland China (2)

Japan:

According to Professor Hajime Sakai, court mediation is the most popular and familiar form of alternate dispute resolution in Japan. A settlement agreement reached in court mediation has the same effect as a judgment, and can be enforced according to the terms of the Code of Civil Execution (Minji Shikko-ho).[21]

Republic of Korea:

According to Standing Mediator Hwang Deog-Nam, the Civil Mediation Law (1990) provides that trial courts have the power to assign parties to mediation before the case is heard by the appellate court, regardless of the parties' preference. Mediators come from mediation judges, mediation committees

[18] *See* Rajesh Sharma, 'India: Access to Justice for All through Mediation in India', in Guiguo Wang and Fan Yang (eds.), *Mediation and its Impact on Legal Systems in Asia-Pacific* (Wolters Kluwer Law & Business and CCH Hong Kong, 2013), chapter 7.

[19] *See* Karen Mills, 'Indonesia: Mediation in Indonesia', in Guiguo Wang and Fan Yang (eds.), *Mediation and its Impact on Legal Systems in Asia-Pacific* (Wolters Kluwer Law & Business and CCH Hong Kong, 2013), chapter 8.

[20] *Ibid*.

[21] *See* Hajime SAKAI, 'Mediation in Japan', in Guiguo Wang and Fan Yang (eds.), *Mediation and its Impact on Legal Systems in Asia-Pacific* (Wolters Kluwer Law & Business and CCH Hong Kong, 2013), chapter 9.

and the trial court itself.[22]

Under the Korean Civil Mediation Law, a mediated settlement agreement or finalized decision in a compulsory mediation has the same effect as a court-recognized settlement, that is, reconciliation in court, which has the same effect as a judgment (Civil Procedure Law, art. 220).[23]

The practice and development of judicial mediation beyond Mainland China (3)

It is worth noting that the Republic of Korea has recently established the Standing Mediator System and Court Mediation Centres (2009). The Minister of the National Court Administration first appointed eight Standing Mediators to work in Seoul courts and three in Busan and subsequently appointed two Standing Mediators each for Daejoen, Daeku and Kwangju. A mediation judge can let the Standing Mediator deal with the mediation. In such cases, the Standing Mediator has the same authority as the mediation judge.[24] The main purpose of this system is to minimize the shortcomings of mediation by the trial court, and to strengthen the original merits of mediation.[25]

According to Judge Cheung Chang-ho, a former Korean Judge and currently a UN judge, in his recent lecture delivered at the Centre for Judicial Education and Research of the City University of Hong Kong on 27 Feb 2014, he commented that in practice, most Korean judges still seem to prefer to mediate cases themselves than to pass them to other judges or standing mediators.

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[22] *See* Deog-Nam HWANG, 'The Impact of Mediation on the Culture of Disputing in Korea: Lawyers and Courts', in Guiguo Wang and Fan Yang (eds.), *Mediation and its Impact on Legal Systems in Asia-Pacific* (Wolters Kluwer Law & Business and CCH Hong Kong, 2013), chapter 10.1.

[23] *Ibid.*

[24] *Ibid.*

[25] *Ibid.*

The practice and development of judicial mediation beyond Mainland China (4)

Singapore:

Last but not least, Singapore also has court-based mediation. In Singaporean courts, neutral evaluation is provided for motor accident cases and personal injury claims, and mediation for all other civil matters.

According to Professor Joel Lee, court-based mediation in Singapore was initially conducted by district judges specially designated as settlement judges. The pool of mediators has since been expanded to include lawyers and other legally trained persons who have at least three years post-qualification experience.[26]

It is, however, unclear whether a court-based mediation settlement agreement is directly enforceable as a judgement in Singapore. With my very limited understanding of Singaporean law, personally, I doubt that a court mediated settlement agreement is directly enforceable as a judgement in Singapore. Though, perhaps, like here in Hong Kong, it should be always possible to apply for a consent judgement based on a mediated settlement agreement.

But as soon as any cross-border element becomes involved in a dispute, many uncertainties may well arise as to the effectiveness and in particular the enforceability, if any, of a mediated settlement agreement.

Suppose parties reached a mediated settlement agreement in Singapore and even if they have obtained a consent judgement based on their settlement agreement, to what extent can the parties seek recognition and enforcement of that consent judgement outside of Singapore, say in Hong Kong or in the Mainland of China?

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[26] *See* Joel LEE, 'The Evolution of ADR in Singapore', in Guiguo Wang and Fan Yang (eds.), *Mediation and its Impact on Legal Systems in Asia-Pacific* (Wolters Kluwer Law & Business and CCH Hong Kong, 2013), chapter 12.

Currently, according to the PRC Supreme People's Court's Interpretation, a mediated settlement agreement reached in Taiwanese courts, for example, will be recognised and enforced in Mainland Chinese courts, in the same way as a Taiwanese judgement.

This leads to the last part of my presentation here today.

Using mediation to resolve cross-border disputes

Why would cross-border parties submit to mediation in the first place if the enforceability of a mediated settlement agreement would be doubtful? This is perhaps where and why a standardized and harmonious system/practice of mutual recognition and enforcement of mediated settlement agreements would make mediation appealing to the parties involved in cross-border disputes.

What are the prospects for the development of a harmonious regime for cross-border mediation?

The first immediate question is, perhaps, what is it? What is a harmonious regime for cross-border mediation? Are we talking about harmonisation of the practice of mediation in the context of cross-border disputes? To harmonise between judicial (evaluative) mediation on one hand, and other forms, for example, facilitative mediation on the other hand? What are the differences between mediation conducted by judges and those conducted by professional mediators, for example? How effective are they? Should there be any time frame for an effective mediation session? Qualifications of mediators? Types of mediator training? Mediation styles?

Do we need to harmonise the practice of mediation at all? Or do we want that?

Given that my time is running out, I would simply jump to my concluding

remarks.

The practice and development of judicial mediation shows that mediation is a process that enables the disputants and neutral third party to use various techniques and skills to peacefully resolve disputes in a flexible and diverse manner. Mediation, as a process, can be usefully employed in different contexts and by anyone, including, of course, by our judges.I do not know how possible or desirable it would be to harmonise or standardise the practice of mediation and the skills and techniques used in the mediation process. Ultimately, it is up to the parties and the mediator to work out the most suitable mode/style/process of mediation for the particular dispute at hand.

The judicial confirmation mechanism in Mainland Chinese courts that provides parties with an additional option to have their mediated settlement agreements judicially confirmed, although still in its infancy, is innovative and inspirational.

Imagine, a mediated settlement agreement reached in Hong Kong can be recognised and enforced in Mainland China, Singapore, Republic of Korea and India one day! Is it possible to establish an international regime for recognition and enforcement of cross-border mediated settlement agreements? Do we need it? Do we want it? If yes, what can we do to achieve that?

With these questions, I thank you very much for your patience.

Some Developments in Mediation in the Asia Pacific Region, and Some Thoughts on Commercial Mediation Practice Irrespective of Location

Mr. Christopher Newmark[1]

I am going to talk to you about developments in the Asia-Pacific region as viewed by a European with a common law background. That said, my visit to Hong Kong is the third leg of my trip to Asia, launching the new ICC Mediation Rules, and I have been very interested to learn first-hand about developments in Singapore and in Malaysia on my visits there earlier this week.

After looking at local developments, I will offer an observation or two about the development of commercial mediation internationally.

Commercial mediation now has some sort of footprint in most business centres around the world. A significant factor in the growth of commercial mediation has been the influence of the practice that has developed in other countries. To take the example I am most familiar with, the development of commercial mediation in the UK, as in many countries, has been heavily influenced by its growth and influence in the US.

But in addition to influence from overseas, many countries also have their own local practices which no doubt inform the way in which commercial mediation develops. So I have read about the panchayat system in Malaysia and other south Asian countries historically used for settling disputes between individuals and villages. Similarly, Indonesia has a strong cultural tradition for consensus, using customary forms of dispute resolution such as Jurai Tue or Sungut Jurai. And in the Philippines there is the tradition of pacification committees – Lupon Tagapamayapa – for the resolution of minor disputes between local residents.

Whilst these local practices demonstrate a strong settlement culture, they do

[1] Chairman of International Chamber of Commerce Commission on Arbitration & ADR, Partner, Spenser Underhill Newmark LLP, United Kingdom

not necessarily make it easier for new and different settlement procedures, such as commercial mediation, to take hold. Indeed, it appears that the growth of mediation in South Asia is driven mostly by government led initiatives and mediation centres, rather than the transfer of traditional dispute resolution practices into the commercial environment.

One such government led initiative was the establishment last year by the Ministry of Law in Singapore of an International Commercial Mediation Working Group (ICMWG) which was tasked with making recommendations to develop Singapore into a centre for international commercial mediation. The Working Group made its recommendations in November 2013 and they were in summary:

a) Quality Standards – Establish a professional body to set standards and provide accreditation for mediators;

b) International Mediation Services – Establish an international mediation service provider which will offer as part of its service offerings, a quality panel of international mediators and experts, as well as user-centric innovative products and services;

c) Legislative Framework – Enact a Mediation Act to strengthen the framework for mediation in Singapore;

d) Exemptions and Incentives – Extend existing tax exemptions and incentives applicable for arbitration, to mediation; and

e) Judicial Support – Enhance rules and Court processes to encourage greater use of mediation.

Singapore in 2014 is of course a significantly different dispute resolution environment to London in 1994, but if there is anything that the UK experience can offer as guidance, my view is that of the initiatives that have

been proposed, the two that are most likely to promote the use of mediation are firstly judicial support and secondly the availability of a quality group of mediators. The English experience has certainly been that the market has looked after mediator quality control, without the need for formal accreditation systems. And I believe that by far the biggest boost to mediation in the UK came with the first decisions of the English courts, actively implementing Lord Woolf's reforms and requiring parties to use mediation and penalising in costs those that unreasonably refused to do so. This is not to say that regulation is not an appropriate development in the current market – it is viewed by many as an essential step in creating a profession for mediators, a development which is likely to be good for mediators and good for users of mediation.

One of the Singapore Working Group's recommendations is to introduce a new Mediation Act, which is something that Malaysia did in 2012. That Act had a number of features which were designed to create an effective framework for mediations – for example clarifying the rules on mediation confidentiality and the binding nature of mediated settlement agreements. Interestingly it did not introduce any mandatory accrediting system for mediators, not did it make mediation itself mandatory – the latter, I am told, as a result of strong objections from the legal community.

Of course, these developments in Singapore and Malaysia may seem old hat to you as a Hong Kong audience, given that your Secretary for Justice headed a working group which issued its report as long ago as 2010 with recommendations on increasing the use of mediation for higher-end commercial disputes as well as smaller local disputes.

Further to that report, and as you are no doubt aware, Hong Kong has promulgated a Mediation Code, a Mediation Ordinance and has established an accreditation body for mediators called the Hong Kong Mediation Accreditation Association Limited. As in Singapore, there is clearly felt to be a need for clear rules to guarantee mediator standards, as well as new law to

ensure an unambiguous framework for the conduct of mediations.

Before I change topic slightly, I also wanted to note the initiatives taken by locally based arbitration institutions, not least because I am here wearing an ICC hat and of course the ICC has taken a number of important steps to promote mediation alongside its well established arbitration services. Similarly arbitration institutions in South Asia have also introduced mediation services – prominent examples include the Hong Kong International Arbitration Centre (HKIAC), the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the Indonesia National Board of Arbitration (BANI), the Japan Commercial Arbitration Association (JCAA) and the Korea Commercial Arbitration Board (KCAB).

Personally, I think that having taken the first important step of introducing mediation rules and offering administered mediation services, the next challenge for the arbitral institutions is to improve the interface between arbitration and mediation proceedings – for example, making it more likely that arbitral tribunals will facilitate the use of mediation by the parties in the course of arbitral proceedings (i.e. by building a mediation window into the arbitration procedure established at the first case management conference). I therefore feel that the specific reference to such settlement techniques in Appendix 4 to the 2012 ICC Arbitration Rules was an important step in the right direction.

And whilst I have serious reservations about the use of Arb-Med (where an arbitrator can become a mediator and return to being arbitrator all in the same dispute) there is no doubt benefit in ensuring that parties are aware of available safeguards should they be determined to use such a procedure. In this regard, a very interesting recent development that I have seen are the revised Rules of the Japan Commercial Arbitration Association which contain some express provisions on Arb-Med which are aimed at protecting the parties and any arbitral award where such a process is used.

I want to finish with a few points about international mediation practice and what we might learn from the harmonisation process that arbitration has gone through in the last few decades.

Commercial mediation is not a complicated process, but it is nonetheless practiced in very different ways around the world. In some places, joint sessions are the default way of working, with the mediator meeting rarely if ever with the parties in private. In other places, mediators shuttle between the parties, hardly ever bringing the parties together during the course of a mediation day. Some mediators will avoid at all costs expressing any view on the merits of the dispute, whilst others will be willing to be 'evaluative' and indeed use their own evaluation of the merits as an important tool to encourage settlement.

International arbitration also had significant differences in the way it was practised around the world. Although some of those differences remain, harmonisation through the efforts of organisations such as the IBA with its various rules guidelines, and indeed the ICC Commission on Arbitration and ADR with its publications, have led to certain techniques being viewed as 'best practice' with others being rarely used. For example, the system for submitting witness evidence, which involves a witness statement being prepared and submitted before a hearing, that statement being treated as the witness's direct evidence and the oral evidence limited to cross examination has become very much the norm in international arbitration proceedings all over the world.

This harmonisation has helped arbitration practice become more predictable for users, and predictability is very important in a procedure that is going to produce a binding outcome and cost hundreds of thousands of dollars.

I think the need for harmonisation is very different in the context of mediation. In order to develop mediation and make it the most effective process that it can be for resolving commercial disputes, I do not believe we should be

looking to home in on a single 'best practice' approach.

On the contrary, we should be looking to accumulate all of the different practices that exist around the world, and to make mediators aware of and skilled in as many of them as possible. So, to use the example I gave earlier, a mediator should understand the benefits of working in extensive joint meetings, without recourse to private meetings, but should also have the skills to use private meetings effectively. I see no need for one model to become the dominant model, and in fact, I think it will be very detrimental to the power of commercial mediation if that were to happen.

So I encourage all of us from different legal cultures to embrace the different ways in which we all go about our mediation practices, to learn the skills that others have, and to use them to enrich the way in which we all work.

Confidentiality in Mediation

Mr. Camilo AZCARATE[1]

The Uniform Mediation Act was produced in 2003 by the American Bar Association and the National Conference of Commissioners on Uniform State Laws. The Act was intended to be, as its name implies, a model for uniform legislation on mediation across different states, so it requires explicit adoption from each state legislatures. To date, UMA has been adopted in 11 states and the District of Columbia and is being considered by legislatures of 4 other states. In addition, eight other states approved bills largely inspired by UMA and containing many of its provisions.

The Uniform Mediation Act has the support of the American Bar Association the American Arbitration Association, the Judicial Arbitration and Mediation Service, CPR Institute for Dispute Resolution and the National Arbitration Forum.

Today I would like to talk about some of the characteristics of the Uniform Mediation Act, particularly those provisions of the act intended to protect communications shared during a mediation process. I would like to highlight the special approach used by UMA to the subject, and how if may or may not be replicated in other parts of the world.

Let's star from the beginning: The Uniform Mediation Act defines mediation as a *"process in which a mediator facilitates communications and negotiation between the parties to assist them in reaching a voluntary agreement regarding their dispute"* (UMA Section 2 (1)).

There is a notable absence of the word "confidentiality" in this definition. In fact the word "confidential" is mentioned only once in UMA. This reflects the approach that the drafters of the act had towards the subject, and the priorities they placed between the different principles of mediation.

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There is no question that the drafters of UMA recognize the importance of confidentiality in mediation: the state that one of the main purposes of the act was to promote the candid exchange of information that encourages constructive and creative solutions.

They know that such exchange will happen only if participants *"know that what is said in mediation will not be used to their detriment through later court procedures and other adjudicatory processes".*

However, it is important to note the limitations that the UMA drafters introduced in their protection of mediation communications from disclosure, which are three:

First, UMA does not provide the mediation process with a blanket protection to its confidentiality or create a duty to confidentiality among participants, like other statues do. Instead, UMA uses an evidentiary tool known in the US legal community as a "privilege" to protect the participants in mediation from having to disclose information in a court process. This follows the tradition of other communication privileges in US law, such as attorney-client, doctor –patient and others hold by counselors and priests. I would also include Ombudsman in this list, although it is less established than others.

This procedural protection provided by the use of the figure of a privilege has many advantages for court, judges and lawyers litigating in US courts. One advantage is the clarity of the protection. Professor Richard Reuben from University of Missouri- Columbia School of Law notes that before *UMA "there were hundreds of confidentiality laws that were very different, which demonstrated a pretty critical need for uniformity in the treatment of mediation communications".* Another advantage is the strength that it provides to the protection, which is unequivocal. Everyone who participates in a mediation is protected at some level. The direct parties can refuse to disclose and also prevent others from disclosing any communication that take place during mediations. Mediators can also refuse to disclose any communication

made during mediation and block others from disclosing the mediator's communication. Non-party participants may refuse to disclose and prevent others from disclosing but only their own communications during mediation.

There are many advantages to use of the evidentiary figure of "privilege" and it seems to be working well as a solution within the US system of laws and court procedures. However, since this is an evidentiary rule it only applies to cases being considered by a court. It does not extend to other areas. A wider level of protection requires the parties to sign an agreement to mediate containing such prohibitions. Absent such agreement between the parties, there is nothing that would stop a party from disclosing information gained during mediation. As one commenter noted, absent some additional agreement between the parties, the protections created by UMA "would not prevent a mediation participant from holding a press conference and describing to the world the entirety of what was said and done by other participants."

Second, the UMA made the principle of confidentiality subservient to the principle of self-determination by making it possible for beneficiaries of this privilege to waive (explicitly or implicitly) such protection. This is not uncommon on most US rules and regulation, and may reflect the drafters stated intention to avoid diminishing the *"creative and diverse use of mediation",* which apparently may include forms of mediation in which communication is not confidential.

Finally, the Drafters of the Uniform Mediation Act balanced the need for confidentiality against larger issues of justice, possibly in an attempt to pre-empt future judgments in these matters. This is the reason behind the many exceptions to the confidentiality of communications during mediation contained in Section 6.

These exceptions include not just traditional ones such as the final agreement between the parties, information otherwise available to the public (which is

not made confidential by the fact that it is shared in mediation), threats or plans to inflict bodily harm or commit a crime of violence or use the mediation to plan, attempt or conceal a crime and when disclosure is needed to prove or disprove abuse, neglect, abandonment or exploitation in which a child or adult protective service agency is a party.

Additionally, the act includes exceptions for cases related with professional misconduct or malpractice against the mediator, a mediation party, another participant or a representative. A controversial exception is the one contained in literal b of Section 6 which states that communications may not be considered confidential if the communication are sought in a felony proceeding or a proceeding challenging the validity of a mediated agreement and the court, agency or arbitrator finds that there is need for the evidence that out-weights the interests in confidentiality.

We would also need to note that the provisions of the act do not apply to mediation conducted by a judge who might make a ruling in the case. Also excluded are collective bargaining disputes, peer mediations between students under the auspices school programs and those conducted in correctional institutions for youth in which the parties are resident of the institution.

The points made above, including the limitation of UMA's confidentiality protections to judicial proceedings and the need for private agreements between the parties to expand the scope of the confidentiality as well the possibility of participants voluntarily waiving these protections are all in line with the specific characteristics of the US legal system as well as cultural traditions stressing individualism, self-determination and the relative equality between parties.

These are characteristics that may or may not be part of the traditions of other countries and in that respect translating the provision of the UMA to other context may not be advisable.

The Skills and Training required of a Mediator to ensure that Confidentiality is Protected and how the Exceptions to the Confidentiality of Mediation Communications may impact on the Mediation Process

Mrs. Robyn HOOWORTH[1]

To maintain and enhance the professionalism of mediation and assist parties to reach 'win-win' solutions the quality, transparency and integrity of mediation must be safeguarded. To do this, it is essential to ensure the professionalism and high standard of mediators. This is primarily dependent on the training of mediators; not just training about process and skills but training about principles, ethics and codes of conduct for mediators. Confidentiality is one such important and multifaceted basic principle underlining mediation.

My paper will examine the teaching of confidentiality to potential new mediators such that it is de-mystified so that parties to the mediation and the mediator/s themselves are able to observe confidentiality in all aspects of the pre-mediation, mediation joint sessions and separate meetings and post mediation stages; including how to manage release of sensitive information in separate sessions and the potential breaches to confidentiality or inappropriate use of information from the mediation.

As stated, mediation is based on many fundamental principles and abstract concepts that need defining and understanding before mediators can perform their role and conduct mediations in an ethical and professional manner. Such concepts and principles include: impartiality, neutrality, empowerment, self-determination, without prejudice communications and confidentiality.

When I first studied mediation in 1987, these terms were more or less

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skimmed over and assumptions were made by trainers that mediation trainees and mediators in the field understood these concepts and had a common definition. How many of us were taught to say in our mediator's opening; "Mediation is confidential as far as the Law will allow"? How many of us really understood what that meant? I can recall hoping I would not be asked by the parties to explain this as I rushed to the next topic of my Mediator Opening Statement.

These were the good old days when mediation was a new Alternative Dispute Resolution Process. Mediators did not concern themselves particularly with being sued or subpoenaed to Court and parties were so pleased to be part of a less adversarial process that they accepted the mediation rhetoric and asked few clarifying questions. Even today it is the brave or inquisitive party who asks about the meaning of these concepts before embarking on the process.

We are now 30 years down the track and mediation is a well-established part of Dispute Resolution across many disciplines and dispute resolution areas. Now, mediation is often referred to as the Primary Dispute Resolution process[2] and parties are encouraged to "Mediate First". For mediation trainers in this new age of well-educated professional mediators and sophisticated parties, in a new age of mediators starting to be held more accountable for their service delivery and a new age in which mediators are open to being sued, reported to professional bodies and subpoenaed to appear in Court or produce mediation documentation, the challenge is to ensure that mediation training equips mediators well to prevent ethical issues from arising and to know how to manage these if and when they do arise during the mediation or after.

The challenge for mediation trainers is to ensure that all mediation terminology and abstract principles are taught appropriately, understood in a theoretical knowledge based manner, understood in context of ethical codes of conduct for mediators and understood in a practical application context in

[2] Boulle, L. (2011) *Mediation: Principles, Process, Practice 3rd Edition*, LexisNexis Butterworths, Chatswood, Australia

the process, including the impact of these and any exceptions or breaches to these on the process, parties and the mediator. The teaching of the principle of confidentiality is one such challenge for mediation trainers.

To be able to do this, the starting point is to teach clear definitions of mediation confidentiality, including exceptions to confidentiality and the meaning of Without Privilege communications in Mediation. This will need to reflect the jurisdiction in which the mediation training is being conducted; any statutory provisions and the relevant professional Codes of Conduct. For this paper, I will do this in the Hong Kong context where we now have a Mediation ordinance and Mediation Code of Conduct. These Statutory Provisions and Codes of Conduct should be reviewed and discussed in Mediation Training courses to familiarize the trainees with their terms and relevance and to provide the context for the trainees' future ethical practice as a mediator.[3]

Once confidentiality has been defined and put in context, the practical application can be more easily taught in Mediation Training Courses and understood and practically applied by way of exercises and role play scenarios of potential 'sensitive information' and 'breach' situations that may arise during the course of a mediation or subsequent to the mediation. As an experienced mediator, I can assure trainees and accredited mediators that 'ethical' situations regarding confidentiality do arise in real mediations. It is from this experience that I will also highlight cases and challenges I have encountered in my mediation journey.

Definition of Mediation Communication as per Section 2 of the Hong Kong Mediation Ordinance and exceptions to same:

Definition: [4]

"(a) Anything said or done;

[3] Refer to Hong Kong Mediation Code: www.hkmaal.org.hk ; and Hong Kong Mediation Ordinance (Cap. 620; Sections 2 and 3) on the Department of Justice's website: www.doj.gov.hk

[4] Refer to the Hong Kong Mediation Ordinance (Cap. 620; Sections 2, 3, 8, 9 and 10) on the Department of Justice's website: www.doj.gov.hk

(b) any document prepared, or
(c) any information provided, for the purpose of or in the course of mediation, but does not include an Agreement to Mediate or a mediated settlement agreement."

Section 3 states that one of the objects of this ordinance is to "protect the confidential nature of mediation communications."

Exceptions:

Section 8 – Confidentiality of Mediation Communications states

"(1) A person must not disclose a mediation communication except as provided by sub section (2) or (3).

(2) A person may disclose a mediation communication if –

(a) the disclose is made with the consent of –

(i) each of the parties to the mediation;

(ii) the mediator for the mediation or, if there is more than one, each of them; and

(iii) if the mediation communication is made by a person other than a party to the mediation or a mediator – the person who made the communication;

(b) the content of the mediation communication is information that has already been made available to the public, except for information that is only in the public domain due to an unlawful disclosure;

(c) the content of the mediation communication is information that is otherwise subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or power;

(d) there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of injury to a person or of serious

harm to the well-being of a child;

(e) the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates;

(f) the disclosure is made for the purpose of seeking legal advice; or

(g) the disclosure is made in accordance with a requirement imposed by law.

(3) a person may disclose a mediation communication with leave of the court or tribunal under section 10 – a

(a) for the purpose of enforcing or challenging a mediated settlement agreement;

(b) for the purpose of establishing or disputing an allegation or complaint of professional misconduct made against a mediator or any other person who participated in the mediation in a professional capacity; or

(c) for any other purpose that the court or tribunal considers justifiable in the circumstances of the case.

(4) in this section – *child* means a person under the age of 18 years."

Section 9 – Admissibility of Mediation Communication in Evidence states
"A mediation communication may be admitted in evidence in any proceedings (including judicial, arbitral, administrative or disciplinary proceedings, only with leave of the court or tribunal under Section 10."

Section 10 – Leave for Disclosure or Admission in Evidence states

(1) "The court or tribunal specified in sub section (3) may, on application by

any person, grant leave for a mediation communication to be disclosed under Section 8(3) or to be admitted in evidence under Section 9.

(2) For the purposes of sub section (1), the court or tribunal must take into account the following matters in deciding whether to grant leave for a mediation communication to be disclosed or admitted in evidence –

(a) whether the mediation communication may be, or has been, disclosed under Section 8(2);

(b) whether it is in the public interest or the interests of the administration of justice for the mediation communication to be disclosed or admitted in evidence;

(c) any other circumstances or matters that the court or tribunal considers relevant.

(3) The court or tribunal specified for the purposes of sub section (1) is –

(a) If the mediation communication is sought to be disclosed or admitted in evidence in proceedings in the Court of Final Appeal – the Court of Final Appeal;

(b) If the mediation communication is sought to be disclosed or admitted in evidence in proceedings in the Court of Appeal – the Court of Appeal;

(c) If the mediation communication is sought to be disclosed or admitted in evidence in proceedings in the District Court – the District Court;

(d) If the mediation communication is sought to be disclosed or admitted in evidence in proceedings in the Lands Tribunal – the Lands Tribunal; or

(e) In any other case – the Court of First Instance."

It is important to teach new mediators how these exceptions to confidentiality may impact on the mediation process and how they could inform clients appropriately regarding these points in real mediations. If trainee mediators do not understand the impact of these points on the process then they will not be able to manage and use these appropriately in real mediations. Instead of dealing with them at the time, many new mediators just 'hide' behind the cloak of 'confidentiality' rather than address these sensitive and difficult matters. For example: 8(2)(a)(iii) needs to be clearly explained; 8(2)(b) could be explained as information that could be available on the internet or in documentation or advice by experts; how 8(2)(c) would form part of normal discovery for litigation; how 8(2)(e) would be organized in the mediator's organization or training or for their research or statistics in order to protect party confidentiality ; 8(2)(g) would require examples so parties understand what 'requirements imposed by law' means; for example: fraud or illegal proposals.

Exclusion point 8(2)(d) is one that often causes mediators concern as it usually arises out of information or 'allegations' from a private separate session and can be subjective in nature. It is important for these situations to be discussed and practiced in exercises and / or role plays which contain potential treats of harm to a person or a child's well-being. For example, the training course role play could have one party sharing information with the mediator in a separate private meeting that the pool they wish to build is not safe as the ground is unstable. The mediator could then practice, with the assistance of a coach, how to manage this release of sensitive information situation in the process and as per their ethical obligations under their Code of Conduct and Mediation Ordinance obligations.[5]

It is also important to train new mediations to understand that confidentiality

[5] Bond University, Dispute Resolution Centre General Mediation Training Course Materials, DVD and Role Play Scenarios

in mediation applies to all persons working with the mediator; for example a co-mediator or intern, and to any person who may be observing the mediation or there as a support person for a party, either personally or professionally. Confidentiality also applies to the parties to the mediation and to all members of a party's team and to their representatives and all experts involved in the mediation.[6] As mediation training courses often limit role plays to 3 people (the 'mediator and 2 role players for the 2 'parties', it is easy for those being trained and for new mediators to overlook these additional people in a real mediation and to not include them in signing a confidentiality agreement. This would be negligent on the mediator's part and would be against their Code of Conduct.

The other important teaching point in a mediation training course is that confidentiality obligations are on several levels. The first level refers to whether it is confidential or public knowledge that a particular mediation took place. Confidentiality in this respect is hard to achieve in reality. As the signed Agreement to Mediate document is not covered by confidentiality in the Hong Kong Mediation Ordinance Section 8(2), if the parties do not wish this document to be public knowledge or for it to be able to be produced in Court, it would be necessary for the parties to have a specific clause to cover this in their signed Settlement Agreement.[7]

The second level of confidentiality that needs to be taught to new mediators is that Mediators and all parties and those present in the mediation have obligations throughout the whole of the mediation, including pre and post mediation to prevent public disclosures and to exclude any oral or written admissibility of mediation into evidence in litigation, except if this is one of the confidentiality exclusion criteria.

The third level of mediation confidentiality that needs to be taught to new

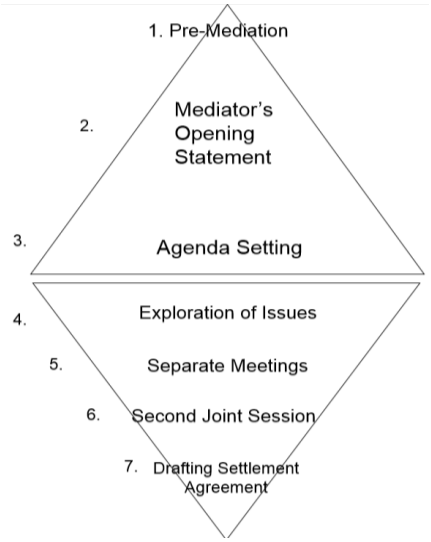
[6] Turnbull, C. & Stachura, M. (2009) *United Kingdom: Just How Confidential is a Confidential Mediation?*, MacRoberts

[7] McFadden, D. (2013) *Mediation in Greater China: The New Frontier for Commercial Mediation*, CCH Hong Kong Limited, Wanchai, Hong Kong, p.229

mediators is often referred to as the 'double layer' of confidentiality in that whilst all of the mediation process is covered by confidentiality; within the process, the private separate meetings held by the mediator with each of the parties are also accorded an additional confidentiality protection. The mediator cannot share or divulge any of the information from one private separate meeting with the other party in a private separate meeting or in any joint mediation session, without express permission from the party concerned.[8] If permission is given to divulge this information, it is often wise, particularly for new mediators to write down whilst with the party giving permission what can be said to the other party or in joint session by the mediator, or to encourage the party to present this information themselves in joint session. This is a clear way to train new mediators to prevent an inadvertent breach of confidentiality by the mediator or to safeguard against an accusation of this by a party.

Given the above, it is clear that it is also important to teach trainee mediators when in the process to highlight the confidentiality of mediation and draw the parties' specific attention to this. I will illustrate this by way of the following diagram and explanation:

Stages to Highlight Confidentiality in the Mediation Process



[8] Boulle, L. (2011) *Mediation: Principles, Process, Practice 3rd Edition*, LexisNexis Butterworths, Chatswood, Australia, p.673-674

Confidentiality and Teaching Trainee Mediators when and how to Highlight this in the Mediation Process:

1. Pre-mediation- 4 aspects of confidentiality:

(a) All initial contact with parties or referring persons in order to organize the mediation, whether oral or written, is confidential and any emails from the Mediator should be marked 'without prejudice for mediation'. I have had the experience of a party trying to use these emails from a family mediation in Hong Kong and place them before the Court to try to prove that the other party was not showing good faith to mediate.[9]

(b) The Pre-mediation Intake session, whether conducted in person or by phone, is confidential and the Mediator has an obligation to inform the parties and their representatives, if present or contacted by the mediator, of this in advance of commencing the Intake session. This should be reminded at the end of the session.

(c) The Agreement to Mediate Document should be signed by both parties prior to the Intake session commencing. If there is no Intake session then it should be signed prior to the mediation commencing. This document represents the contractual regulation of the mediation. As such, all terms including Without Prejudice communications and Confidentiality and Exceptions to same, should be clearly defined.

(d) As this Agreement to Mediate document itself is not covered by confidentiality under the Hong Kong Mediation Ordinance, the mediator should make the parties aware of this and the fact that they may need to add a confidentiality clause regarding this document into their agreement if they

[9] Axe, M. (2013) *How to Avoid…Losing Privilege and Confidentiality*, Rawlinson Butler LLP, www.rawlisonbutler.com/news/22831

wish it to be confidential.[10]

2. Mediator Opening:

(a) Without Prejudice Communications and Confidentiality and exceptions to same should be explained clearly in the Mediator's Opening and the mediator should check to ensure both parties understand these concepts they are agreeing to. All three levels of confidentiality as outlined above should be explained.

(b) Mediator should check that all recording devices and mobile phones are turned off. I have had mediations where one party has asked to check the other party's phone to ensure this. In an environment of little trust the need to do this should be normalized by the mediator so as to prevent an escalation of emotion at the beginning of the mediation.

3. Agenda Setting:

(a)Any agenda that is produced for the purposes of the mediation will be covered by confidentiality. If this is not erased at the end of the mediation it should have 'without prejudice' attached as should any summary of the agenda items sent to the parties or their representatives following the mediation. Agenda items already declared in advance of the mediation will not be subject to confidentiality. The mediator needs to inform the parties of this distinction.

4. Exploration of Issues:

(a) To encourage parties to be open and forthcoming with additional information regarding the agenda issues and their interests in this regard, it is a positive step for the mediator to again remind the parties of the confidential

[10] Refer to the Hong Kong Mediation Ordinance (Cap. 620; Section 2) on the Department of Justice's website: www.doj.gov.hk

nature of the mediation when introducing this step in the process.

5. Private Separate Meetings and 'Double' Confidentiality:

(a) Prior to breaking into separate meetings one of the tasks of the mediator is to remind the confidentiality of the separate meetings and explain that no information will be given to the other side or raised in the next joint session without express permission of the party involved in the disclosure.[11]

(b) The mediator should remind each party again regarding confidentiality at the commencement of each separate meeting. This is important if the party is to feel confident to tell the mediator confidential information not divulged in the joint session or to feel comfortable to discuss options and settlement offers openly with the mediator.

(c) At the conclusion of each separate meeting, the mediator should again remind each party of the confidential nature of these meetings. The mediator should clarify and summarize what information is not confidential and can be shared with the other party by the mediator or raised in the next joint session. The mediator should also reassure each party that all other information and communications during these separate meetings is confidential.

(d) The mediator should make sure no recording devices or mobile phones are left in a joint mediation room if these separate meetings are being held in the same room. They should also ensure that any writing on the whiteboard or flip chart from a separate meeting is erased. It is also important for the mediator to ensure that rooms are soundproof and that glass walls are not transparent. It is ideal to have three rooms for the mediation if possible and affordable: one for each party and one for joint sessions.

[11] Boulle, L. (2011) *Mediation: Principles, Process, Practice 3rd Edition*, LexisNexis Butterworths, Chatswood, Australia, p. 673

6. Second Joint Session:

(a) The mediator needs to be careful at the commencement of the second joint session to not breach confidentiality by informing one or both parties that the other has an offer to make or by putting one party on the spot to share their offer. This could compromise one party's position in the negotiation. It is important to start this session with an open invitation to both parties to speak if they wish, but not to direct them to do so.

(b) When inviting the parties to generate options or present conditional offers at this stage in the process, the mediator should remind the parties that these discussions are confidential and any settlement offers are on a without prejudice basis. This will assist to encourage the parties to be forthcoming with potential options or settlement offers.

7. Drafting of Settlement Agreement:

(a) The mediator should inform the parties that everything being drafted is confidential and on a without prejudice basis until the Mediation Agreement is signed by both parties, or both their representatives.

(b) For general mediation cases, the signed Mediation Agreement is not covered by confidentiality in Hong Kong and the parties should be informed of this by the mediator prior to their signing of same. If they wish the Mediation Agreement to be confidential, or some terms contained therein to be confidential, this needs to be specifically addressed and written into the agreement. In such cases, it is also important for the mediator to assist the parties to agree contingency clauses or penalty clauses to cover non-compliance with confidentiality terms.[12]

(c) For Family Mediation cases in Hong Kong, the mediator should inform the

[12] McFadden, D. (2013) *Mediation in Greater China: The New Frontier for Commercial Mediation*, CCH Hong Kong Limited, Wanchai, Hong Kong, p.229

parties that the initial Mediation Agreement drafted will be on a Without Prejudice basis so that the parties may obtain legal advice on same before signing a Family Mediation Agreement.

8. Process administrative matters:

(a) All documentation produced for mediation, including emails, letters, summaries of progress or offers, draft Heads of Agreement should be marked "Without Prejudice for Mediation" by the mediator. The mediator should also inform parties and representatives that all oral discussions or phone calls should also be on a without prejudice basis.

(b) The mediator should securely store all mediation documentation and ensure that electronic communications or documentation is protected to ensure confidentiality of same.

(c) There is debate in the mediation community as to whether mediation documentation should be kept or destroyed following the conclusion of a mediation. There are precedents now that by destroying documentation and citing a poor memory as reason not to give evidence as a mediator, will not necessarily be accepted by the judge. Eg. *Farm Assist Limited (now in Liquidation) v/s the Secretary of State for the Environment, Food and Rural Affairs (DEFRA)*.[13]

The final point I wish to address in this paper, is that it is important to teach new mediators in their mediation training that it is appropriate to terminate the mediation if parties wish to use the cover of confidentiality to misuse the process. For example, if one party informs the mediator in a separate session that they are using the mediation as a 'fishing expedition' to gain information for future litigation or that they have non- disclosed information that would vindicate the other party's position or that they wish to discuss settlement

[13] Pendell, G. & Bridge, D. (2009) *United Kingdom: Mediator to Give Evidence on Mediation*, CMS Cameron McKenna LLP

offers that may constitute fraud or illegal behavior. It is important for trainers to discuss these circumstances with mediation trainees and assist them to develop the necessary skills to encourage the party to disclose this information to the other party; to risk assess their current position and weigh this against the downsides of proceeding to court and to turn their energies to looking at creative options that could be both legal and acceptable to the other side. In the event the party refuses to change their behavior, the trainee mediator needs to be given permission to exercise their right to terminate the mediation and to understand how to do this so as not to breach confidentiality themselves when delivering this message to both parties.[14]

Confidentiality is an important complex and multifaceted basic principle underlying mediation. It is also one of the fundamental reasons why many parties wish to mediate rather than litigate their matters. For mediation's good name and to enhance service delivery by experienced and by newly trained and accredited mediators, it is essential that mediation trainers clearly teach the many fundamental principles that underlie the mediation process and skills, including Confidentiality and Without Prejudice communications so all mediators can perform their role and conduct mediations in an ethical and professional manner.

[14] For example refer to sample Agreement to Mediate document of The Law Society, New South Wales, www.lawsociety.com.au

The ABC of Mediation: Mediation as the First Choice of Dispute Resolution Process

Dr. Karl MACKIE, CBE[1]

One of the questions I have been asked many times over the years, as has Centre for Effective Dispute Resolution (CEDR), is exactly when is mediation suitable? This comes in various guises as a question. Sometimes organisations and insurers want to have a checklist so that their people can tick off which cases should be routed through mediation and which cases should stay on the formal tracks. However, selection of cases for mediation is not such a simple science. The question of suitability is often driven by an assumption there is only a small category of cases which are suitable for mediation, whether large claims or small claims or cases where there is an obvious interest or win-win solution for the parties, and soon.

Equally, many people without much knowledge of mediation assume that it has to be very voluntary process where people who really want to negotiate come together. However the reality again is that mediation is not so simple. There are many cases where parties feel that they have reached a complete deadlock or impasse, or that the other side is never going to reach a deal with them, which have been successfully resolved in mediation.

The starting point is to know something about conflict and why disputes end up in deadlock, and why people find it difficult to have a sensible discussion when there is a legal claim or negotiation difficulty that they are facing. This last is a major reason why voluntary schemes for parties to come voluntarily to mediation, have been much less successful than predicted. The reason is that in conflict people very often avoid having a sensible discussion with the other side because they see them already as unreasonable so find it difficult to imagine that they could have a reasonable conversation with them. So the many pilot schemes that have been attempted in courts where lawyers and other clients are encouraged to come to mediation voluntarily have generally

[1] Chief Executive of Centre for Effective Dispute Resolution, United Kingdom

been unsuccessful. Parties have to be incentivised or even directed to sit around the table. It is at this point that the power of mediation becomes more apparent as many of such cases do settle as has been proven time and again in the development of mediation practice.

The reality is that many more cases are suitable for mediation than people without the experience would appreciate. It is far easier in fact to spell out when cases are not suitable for mediation. The acid test for when a case is suitable for mediation and in my view, is to ask whether theoretically it is capable of a negotiated outcome. If it is capable of such an outcome rather than needing a judgement in a public court or other formal proceedings, then it is perfectly suitable for a mediation process. Whether the case will actually settle or not is another issue, but the suitability will have already been judged.

So which cases are not suitable? Clearly if you need a legal precedent in court, for example in relation to a legal right over property or where you wish to use a precedent in relation to sex discrimination for a wide range of employment cases, then mediation may not be suitable. (This does not mean that it could not be used to give some earlier guidance or to reduce the issues at stake before the formal legal judgement, but this is a more sophisticated approach to mediation.) Aside from precedent, there will also of course be issues where principles between the party need to be spelt out in a public law context. For example, whether someone holds intellectual property rights against third parties may need a public judgement rather than a privately negotiated settlement. Sometimes also, it has been alleged that fraud cases are unsuitable for mediation. Even here, I have to say that I have seen many cases where fraud allegations have been used which have gone to mediation successfully. The real question is whether there is an element of criminality which needs public investigation and judgement. But there are many civil cases where fraud allegations are relatively common place and so long there is a potential negotiated settlement, then mediated negation may also be applicable.

It is really best to consider mediation as a general umbrella, rather like the civil courts, within which flexible support can be applied to a range of types of civil and commercial conflicts. The power of mediation is in bringing in a more objective and fresh pair of eyes and ideas, as well as a new process, to assist the parties to find a different negotiation dynamic than they would otherwise face across the table. Lawyers therefore do need experience in mediation to know when this technique is of greatest value, but in general they tend to be slower to realise just how more advanced a mediation dynamic is compared to normal direct negotiations.

To give one example of lawyers finding the value of mediation, let me tell you a story of a lawyer who attended one of our earlier mediation courses. He was representing two brothers in a family dispute and decided having done the mediation course that it would be worth exploring whether all the brothers would agree to mediation. He told his own two clients, two of the brothers, about what he had learnt on the mediation course and suggested they speak to their third brother with whom they were in dispute to explain how it worked and see whether he will be willing to come to mediation to see whether a settlement was possible. This was a case that had been running for several years and everyone felt they were completely deadlocked. However, the two brothers took the lawyer's advice and invited their third brother to a drink in a local pub. They sat down with their brother and began to explain how the process would work in order to achieve a way forward from their deadlocks. In fact, the third brother was so impressed that his two other brothers were showing interest and enthusiasm in a negotiation, that he was able to reach a resolution with them on the night. He had in fact given up hope about their reasonableness and interest in achieving an accommodation with him. It took a mere discussion of an alternative process to show him the reality of the situation and his two brothers' intentions for him to feel that there was a constructive way forward. How much more powerful then, for many commercial parties who have had fairly peremptory negotiations in an attempt to settle a complex commercial dispute, or who have not had the full story from their project managers about what has gone wrong on a project, to

come to a more disciplined forum where they can spend a good few hours and usually at least a day trying to get to the heart of the dispute, trying to understand how it evolved and the contribution of the various personalities and organisations causing difficulties. By these means senior managers can achieve a structured approach which will help them gain new insight and an understanding of what is causing a problem and also bringing them closer to the realities of what they need to do to manage the risks they are facing in the litigation process in order to find a sensible way forward -which is what most commercial parties want to achieve.

That is why there is such a prevalent statistic across the mediation world that the majority of cases that were previously apparently completely deadlocked, can still be unlocked and achieve settlement within a day of mediation. A mediator who is highly experienced or very skilled in the techniques of course will bring extra value to the negotiation, but it is also the process itself which helps parties achieve more ways forward than previously. It sets up a more disciplined framework where parties have to treat seriously the idea of negotiation, where they have to spend a day at the table with the other party, where they have to hear from the other party their views on the case and what their advisors think. And they have the opportunity to have some space to explore ideas and variations in offers and settlement approaches which might work for them. This is very different from a typical commercial negotiation where parties may spend an hour or two and then find they are too distrustful of the other parties' intentions or too annoyed with direct comments to find a way forward for settlement.

Lawyers, too, find that mediation has more advantages than they often appreciated before experiencing it. It gives them a chance get closer to how their own clients see the case and what their needs are, which may go beyond legal issues and principles, and it also gives them a chance to really understand where the other side are coming from so that they can appraise their own risks much more effectively. It also gives them, in many ways, much more satisfaction than going through formal court processes in term of being

a part of serious negotiations where they are partnering well with the client rather than fronting for the client on esoteric principles before an adjudicator or a judge.

I have been asked to give some examples of the effectiveness of mediation in practice. I can say that some 70% plus of cases that CEDR handles settle in mediation, usually on the day itself. But if you take into account cases which settle within three months of a mediation then the statistic rises to a much higher level because parties are much closer after leaving mediation, usually, than they were on entering the mediation.

Let me give you two examples from opposite ends of the scale that demonstrate the power of mediation in different settings. The first case concerns a simple commercial dispute which I mediated many years ago but still amuses me. This was a case involving a wall cladding firm. You probably do not have many of such firms in Hong Kong, but it is common in the U.K. for many house owners to clad their brick walls with a special stuccoed surface so that it can be painted and give a different effect from the underlying brickwork. This particular wall cladding firm was beginning to grow and wished to extend its services throughout the south of England. It therefore hired a marketing firm to send out a postcard to households throughout the south of England where it would exemplify its virtues as a high-quality service. On the postcard, in addition to the contact details, there were to be two photographs, one with a picture of a house 'Before', and one 'After' treatment by the firm. This was to make sure there was a strong visual statement about the quality of company and its work.

Unfortunately, somewhere in the process, someone had managed to mix up the two photographs. Therefore, the postcard now suggested that this was a company which would provide you with a severe deterioration in the state of your property, as the 'Before' state of the photograph was of a well-clad, well-painted house and the 'After' photograph was of a rather unsatisfactory and ugly fragmented brickwork facade.

The outcome of this marketing campaign was, of course, rather unsatisfactory, not least because the wall cladding company received many return mailings of the postcard telling them that they were a Mickey Mouse operation etc. They therefore felt justifiably aggrieved that they were put into this situation by the marketing consultants. However, the marketing consultants, for their part, said that the photographs had been checked and verified by someone from within the wall cladding company, therefore one already had the basis for a contentious legal dispute. Just to complicate matters further in a typical legal spin, the invoice under which the marketing company were claiming payment from the wall cladding company, was being managed by a factoring company (in other words, the invoices were being collected by a bank who took commission for the collection of the invoices). So it was actually the bank in the legal proceedings chasing the wall cladding company for payment of the invoice, and the wall cladding company were defending the legal action on the basis that the service had been unsatisfactory to say the least.

At the mediation there were representatives of all three parties and, of course, it made no sense for the costs of such a legal action to be pursued in this kind of commercial setting. There was ultimately a deal achieved where the marketing company would reissue more appropriate postcards, even though the question of evidence as to who finally confirmed the photographs, was never fully worked through. The wall cladding company, for its part, did pay its invoice but got the second run of publicity with some upgrading.

By contrast, let me switch to almost the other end of the scale of cases that one see in mediation to one of the more moving mediations in which I was a co-mediator. This was a case involving a hospital where a doctor had been withholding organs of dead children for research purposes. The only problem was that he had been doing this for a considerable period of time without informing any of the parents. This practice came to light and naturally led to significant grievance amongst many families, that they had not been informed of the practices in relation to their children. Matters were made worse because of difficulties in communication between the hospital and the

families and intermittent communications as different specimens and parts were discovered in researching the warehouse where the parts were held.

The difficulties around this case were not just the deep emotions felt by the families involved – almost one thousand families were involved. It was also the fact that the law on who owned the body parts in circumstances such as post mortems was not at all clear at the time. Therefore the families did face a legal risk that they could pursue actions against the hospital without any recovery of costs or even being liable to cost themselves. However, the families felt so aggrieved that this was an action they were determined to pursue through some seven or eight firms of solicitors. The hospital, for its part, was represented by the National Health Service Litigation Authority in the U.K. which acted, effectively, as an insurance arm for a range of hospital Trusts in claims of clinical negligence or other failures of medical procedure.

Ultimately, the parties had agreed to mediation because of all the uncertainties around litigation and the sense by both sides that there needed to be a better way forward for the families, who were patients of the hospital, pursuing such as difficult legal action in order to redress what they felt was a deep wrong to their families and their children.

The logistics of the mediation had to be the first key factor after the agreement to mediate. With some 1,000 families involved and several claimants' solicitor firms, there had to be agreement on who would represent the families at the mediation and how long the procedure would last. The mediation was set down for several days and took place in a country hotel with a lead firm of solicitors and counsel representing the families. It was also agreed that a focus group of families, in other words a representative cross section of different kinds of families within the proceedings, would be present at the mediation. On the other side, the hospital was represented by the litigation authority and by solicitors and counsel.

We had fairly intense discussions over several days. My most memorable moment in the mediation was one of the families, at the end of the mediation, saying to me that they wished every one of the families involved had been able to come to the mediation. What it gave them, at the very least, was an opportunity to have their grievances heard first of all by the neutrals, the co-mediators, who were present at the mediation and could hear the whole issue talked through. They were also able to deal directly with the hospital administrators in a longer procedure than they had previously so that they could again both share their emotional upset and concerns, and also hear from the hospital that it regretted some of the things that had happened. Alongside this, of course, the lawyers were also able to have intense discussions about legal risk and how to measure compensation in such circumstances and other issues surrounding the families' concerns and the hospital's interests. As a result of this process an agreement in principle was reached where there was a trust fund set up for sharing amongst all the families with a degree of compensation for each family. In addition, however, the mediation was able to achieve what no court judgement could have offered, which was to have the hospital commit to building a garden of remembrance and a plaque for the families for all they had endured. There were also to be ministerial statements about the case and some commitment to new legislation. All of this was available in mediation in a way that would not have been possible in a court judgement. There were also special provisions within the trust funds for families which had been particularly afflicted by the emotional distress in terms of their particular circumstances in relation to the history of this issue. Subsequently, there was further legislation and another mediation involving the cost of actions around this practice in other hospitals around the U.K.

So, I thought it might be useful to illuminate two very different kinds of mediation and different kinds of outcome involved. I hope this is sufficient to demonstrate that mediation is a highly flexible process which can have sometimes remarkable results in terms of managing commercial and social conflicts. It is a process which is suitable in many, many different areas of

blocked negotiation, and one that should be adopted as a default mechanism, in my view, for many kinds of situations where difficult conversations have to be conducted and ways forward found in our complex society.

Mediation in Hong Kong Construction Industry – A Professional Engineer's Perspective

Ir Prof. LAU Ching Kwong[1]

Abstract

Construction industry is very important to the economic growth and sustainable development of Hong Kong. Due to project complexity and involvement of international consultants, contractors, plant and material suppliers, arguments and disputes are therefore often arising in the construction industry. This paper describes the development of mediation as an alternative mode for resolving disputes in the construction industry in Hong Kong. Particular references to author's knowledge and experience are made. Review on future mediation prospect from a professional's perspective is also presented.

1. Introduction

Over 100 years ago, Hong Kong was a tiny fishing village hardly with any house on it but now it becomes the world-class modern city. Over the years, the economic growth of Hong Kong is very much depending on the infrastructure and urban development which in turn enhance the construction activities that contributes a fair percentage to the Gross Domestic Product of Hong Kong.

2. Traditional Form of Construction Contract

The traditional form of construction contract is often termed as 'the oldest form of contract that any of us can remember and is well received by the clients, consultants and contractors.

The contract procurement method is simple, straightforward and effective. Figure 1 shows the standard set-up in which the client is often the project

[1] Chairperson of the Alternative Dispute Resolution Committee of the Hong Kong Institution of Engineers; Past President, The Hong Kong Institution of Engineers; & Council Member of Hong Kong Mediation Accreditation Association Limited

proponent and could be the Government organisations, public bodies or private developers, etc. The client usually employs consultants to carry out feasibility studies and develop detailed design, then prepare contract documents including working drawings in accordance with the client's requirements. A suitable contractor will be selected after a fair and competitive tender process. The contractor will normally appoint sub-contractors to carry out different kinds of works.

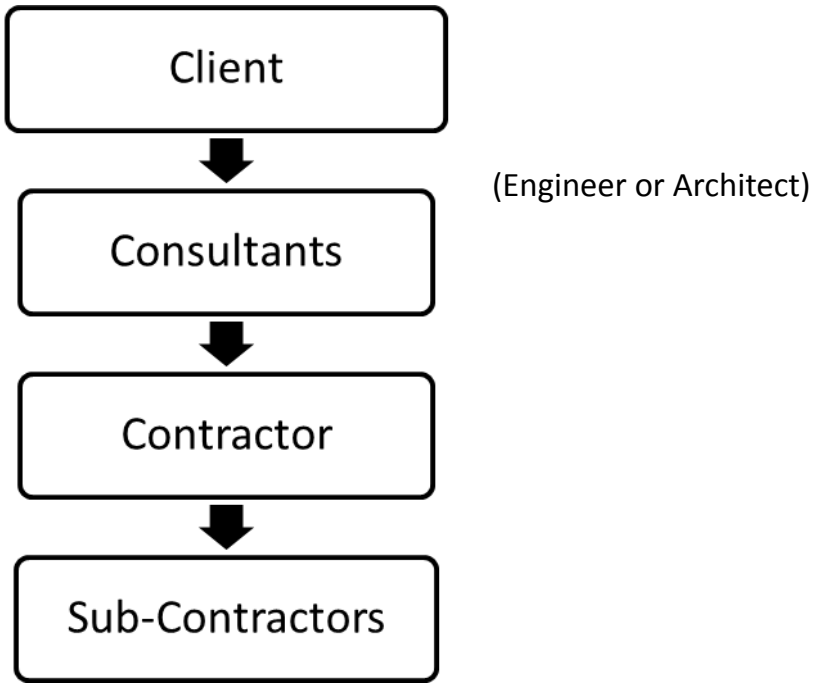


Figure 1 – Traditional Form of Construction Contract

During the construction of works, the consultants will act on behalf of the client to supervise the contractor with a view to ensuring that works will be constructed in accordance with the client's requirement as stipulated in the contract documents.

3. Construction Disputes

The advantages of the traditional form of construction contract are that the client and the consultants retain direct control on the contract and communication among parties concerned is simple and effective. However,

the contractual arrangement for the consultants to supervise the contractor naturally puts the two parties on opposite sides, hence confrontational situation may arise and sometimes causes disputes.

There are circumstances which may lead to adversarial situation, such as:

- Project complexity - requires close coordination and communication among parties concerned and creates job difficulties;
- Highly technical - often requires new technology and advance machinery resulting time and cost input;
- Keen competition - contractors will have to allow just enough resources in the tender in order to bring down the tender price;
- Uncertainty - poor information and poor risk apportion may create difficult situation;
- Contractual problems - such as design changes, unforeseen site conditions, change in quantity of work and difference in interpretation of acceptable workmanship and standard, etc;
- Behaviour - people from different countries with different culture.

4. Multi-tier Dispute Resolution in Construction Work

Once a dispute arises, the normal process of resolving it requires an engineer's or architect's decision. So the engineer or architect for the contract will first consider the issue and make a decision by his/her professional judgment. If the decision is disputed, negotiation will normally take place. If the negotiation is unsuccessful, in some contracts, there is a mandatory provision requiring parties to go through mediation. If mediation is also unsuccessful, any party has the right to refer the dispute arising under the contract for

adjudication. If the right is exercised, adjudication is then compulsory for the other party. If either party is not satisfied with the decision of the adjudicator, it has the right to refer the dispute to an arbitrator. One can see that the whole idea for having a long process is to have as many 'peace talks' as possible before embarking on an arbitration (or war). This is no exaggeration as the scene and costs of arbitration are as horrible as those found in a war. In most cases, settlement agreements can prove to be a sensible solution for resolving complex and highly technical disputes because costs involved in full blown arbitration are very high[2].

Although arbitration has been used to resolve many disputes in construction contracts, the vast majority of disputes are settled by other means before full hearing. Mediation is by far the most popular alternative dispute resolution (ADR) method and it has a success rate of over 80% in many parts of the world[3]. ADR methods are not binding and they aim at providing bilateral agreements between parties.

5. Practical Experience in Engineering Works Dispute Resolution Case Studies

5.1 Litigation

In the past, litigation was the only means of resolving construction disputes in Hong Kong. Change in quantities and the proper way to measure and value these are quite common. Pricing of works where quantities alter from billed quantities is often the job of the project consultants. In 1986, *Mitsui Construction Co. Ltd v the Attorney General of Hong Kong* has been well known in the construction industry. The contract is a waterworks tunnel construction works and Mitsui claimed that they were entitled an adjustment of rates to account for the time and disruption involved as the measured quantities differed substantially from the billed quantities. There was a long

[2] 劉正光, 劉耀乾, "Some important Considerations for Major Arbitrations of Complex and Highly Technical Disputes in Large Civil Engineering Contracts", 劉正光, 香港橋樑設計及工程管理 , p487-493[M], 清華大學出版社, 2008 年 1 月.

[3] Kaplan N, Spruce J and Moser M J, 'Hong Kong and China Arbitration', Butterworths, 1994.

battle and finally the matter fell to be decided by the Privy Council. The final decision was that the differences between the measured quantities and the billed quantities were such as to give jurisdiction to the engineer to agree a suitable rate with the contractor, if he was of the opinion that the nature and amount of these differences were such as to render the bill rate for any item unreasonable or inapplicable.

Litigation is basically an open process with presence of press and audience from the general public and parties might not want to disclose commercial secrets or technological know-how in public apart from vast time and cost to be spent.

5.2 Mediation and Arbitration

Since 1980s, mediation and arbitration have been the popular methods of resolving construction disputes. Under the Conditions of Contract of the Hong Kong Government Airport Core Programme (ACP) Contracts for the ACP projects embarked in 1990s, the disputes should be first referred to mediation and arbitration which could only be commenced after the completion of works.

I was the Chief Engineer of the Tsing Ma bridge in 1990 and later the Project Director of the Lantau Fixed Crossing Project Management Office in the Highways Department responsible for the implementation of the three world-class cable supported bridges, namely the Tsing Ma bridge of span 1,377m, being the world's longest suspension bridge carrying both rail and road traffic (Figure 2); the Kap Shui Mun bridge of span 430m, being the world's 2nd longest cable stayed bridge carrying both rail and road traffic at the time of completion in 1997; and the Ting Kau bridge of spans 448 and 475m respectively, being a triple tower, single-leg cable stayed bridge (Figure 2).

In the Tsing Ma bridge contract, there were disputes which were settled in accordance with the multi-tier dispute resolution procedure for the ACP projects. For the mediation, adjudication and arbitration cases, the service

was administrated by the Hong Kong International Arbitration Centre which was established in 1985 to provide advisory and support services for the resolution of local and international disputes.

A dispute on the Tsing Ma bridge cable saddle was successfully concluded by mediation. However, an arbitration case lasted for few years as the Contractor blamed main designer's concrete specification for the bridge towers for the delay, alleging that special new clauses on chloride penetration were impossible to meet[4].

Figure 2 – Tsing Ma bridge with Ting Kau bridge in the background

Disputes in the Kap Shui Mun bridge and Ting Kau bridge (Figure 2) contracts were dealt with in the similar manner.

6. Dispute Prevention Initiative – Dispute Resolution Advisor (DRAd) System

The proverb 'prevention is better than cure' has been well known and accepted by the society. This principle can well be applied in resolving construction disputes so as to nib the problem in the bud.

[4] Costain wins Tsing Ma Slipform ruling, NCE, Institution of Civil Engineers, UK, 3 September 1998.

It has been stated in the *Environmental, Transport and Works Bureau Technical Circular (Works), ETWB TCW No. 32/2004 – Reference Guide on Selection of Procurement Approach & Project Delivery Techniques*[5] about the use of DRAd in the construction contracts as follows:

> "A neutral advisor is appointed to the project to resolve problems as and when they arise, but before they become formal disputes or claims.
>
> The Dispute Resolution Advisor (DRAd) becomes part of the project team and attends all the regular project meetings and offers on-going advice.
>
> These advisors are usually highly experienced and qualified construction and/or legal professionals."

Normally, the DRAd will be appointed under the circumstance when the nature of work is estimated to be complicated and disputes are likely to arising during the course of the contract. For public works at contract value of HK$200 million or above, one DRAd should be appointed but one DRAd can only serve four contracts concurrently.

7. Summary

- Mediation is a voluntary, private and non-binding dispute resolution process, with the help of a neutral person for parties to reach their own negotiated settlement;
- Mediation is by far the most popular ADR method;
- It has a success rate of over 80%;
- The use of mediation in construction industry has proven to be highly successful;
- There will be a considerable increase in the use of mediation in future; and
- Dispute prevention is important – prevention is better than cure – the use of DRAd System should be encouraged.

[5] Environmental, Transport and Works Bureau Technical Circular (Works), ETWB TCW No. 32/2004 – Reference Guide on Selection of Procurement Approach & Project Delivery Techniques. 2004.

When "Sorry" is the Hardest Word to Say, how might Apology Legislation Assist?

Prof. Robyn CARROLL[1]

"To apologise is simply to say sorry. An apology is a regretful acknowledgement of a wrong done."[2]

1. Introduction

In the words of the former Chief Justice of Hong Kong, an apology can be defined in simple terms. To apologise is simply 'to say sorry'.[3] And yet within this simple explanation lies a complexity that has attracted the attention of many scholars and practitioners over the years. In recent decades we have witnessed attention from lawmakers to apologies as to why it is so hard for a person to say sorry in a (potentially) legal setting. This Chapter examines legislation that provides protection to a person who offers an apology from it being used as an admission of fault or wrongdoing in civil litigation. It is written against the backdrop of consideration by the Department of Justice, Hong Kong Special Administrative Region Government, to the introduction of apology legislation.

I begin by outlining the areas of debate surrounding the introduction of the legislation, its purpose and the key areas where the legislation operates. I then refer to some evidence from studies and decided cases to evaluate the effectiveness of apology legislation. Drawing on the experience of legislation and other initiatives in Australia, the US, the UK and Canada which are aimed at removing barriers to apologising, I suggest a number of matters that need to be considered when introducing apology legislation to assist in the resolution of legal disputes.

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[2] *Ma Bik Yung v Ko Chuen* [2002] 2 HKLRD 1, 14(Li CJ).

[3] Sociologist Nicholas Tavuchis concludes that there is a second requirement of an authentic apology: 'a person has to be sorry and has to say so', Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press, 1991) 36.

It is important at the outset to consider the meaning of 'apology' and the ways that apologies are defined in a legal setting. The focus of this Chapter is on the effect of apology legislation on the decisions and behaviour of parties, lawyers and mediators engaged in dispute resolution in a legal setting. I do not elaborate on the psychological and social value and meaning of apology in this Chapter. Instead I proceed on the basis that there is *potential* for apologies to be of value to parties to civil disputes. A distinction is sometimes made in the law and apology literature between 'full' and 'partial' apologies. There is consensus that a 'full' apology incorporates an expression of heartfelt regret and remorse for what has happened, sympathy for the person harmed and acknowledges the apologiser's wrongdoing. For some people, a full apology must also offer some form of compensation and a commitment to change in the future. A 'partial' apology will consist of some but not all of these components. A partial apology might include an expression of sympathy alone (eg 'I'm sorry you were hurt when my car hit you'), an expression of regret for the act or its outcome alone (eg 'I regret that my car hit you'), or an expression of sorrow alone (eg 'I'm very sorry for what happened when my car hit you'). A full apology would include some expression of sympathy, regret or sorrow and also acknowledge wrongdoing and accept responsibility or fault (eg 'I am truly sorry that you were hurt when my car hit you. I regret that you have suffered as a result of my actions. It was my fault. I am responsible for your injuries and will make it up to you.')

While the distinction between 'full' and 'partial' apologies helps us to appreciate that there are components to an apology, it is less helpful if it leads to the assumption that only a full apology has any value to the recipient. For this reason it can be more helpful to speak about the components of an apology and types of apologies instead of adopting an 'is or is not' definition of apology.[4] Recognition that there are components of an apology reflects the reality that what constitutes an apology in a particular situation and context is

[4] Nick Smith, *I Was Wrong: The Meanings of Apology* (Cambridge University Press, 2008)12.

highly variable. Which components will need to be present for an apology to be beneficial in any particular circumstances will depend on many factors.[5]

The fact that an apology is given in a legal context impacts on what people are willing to accept as an apology.[6] Further, in a legislative context, the meaning attributed to 'apology' will depend on the intent behind the particular legislation. In this Chapter 'partial' apology will refer to an apology that offers an expression of regret or sympathy but does not incorporate an admission of fault or wrongdoing whereas a 'full' apology will incorporate both.

2. What is apology legislation?

Apology legislation refers generally to statutory provisions that remove legal disincentives to offering an apology in the context of civil disputes. The legislation clarifies and, in many cases, alters what would otherwise be the legal consequences of an apology, principally by reforming the law of evidence. In common law jurisdictions an apology can amount to an admission against the interest of the apologiser and potentially be admitted as evidence under an exception to the rule against hearsay. The legislation is not always titled 'apology' legislation: nonetheless this term will be used in this Chapter to refer to statutory provisions enacted the US, Australia, England and Wales and Canada introduced for the explicit purpose of removing or reducing the legal significance of an apology. [7] The legislation encourages but does not compel apologies. Apology legislation is also distinguishable from legislation that

[5] Debra Slocum, Alfred Allan and Maria M. Allan, 'An Emerging Theory of Apology' (2011) 63(2) *Australian Journal of Psychology* 83.

[6] Alfred Allan, Dianne McKillop and Robyn Carroll, 'Parties' Perceptions of Apologies in Resolving Equal Opportunity Complaints' (2010) 17(4) *Psychiatry, Psychology and Law* 538, (a study based on interviews with 24 complainants and respondents to complaints brought under the *Equal Opportunity Act 1984* (WA)).

[7] For references to legislation see Prue Vines 'Apologies and Civil Liability in the UK: a View from Elsewhere' (2008) 12 *Edinburgh Law Review* 200. See Table 1 (Analysis of legislative provisions protecting apologies from civil liability) and Table 2 (List of legislative provisions protecting apologies from civil liability). For a table of legislation applicable in the US, see, Benjamin Ho and Elaine Liu, 'What's an Apology Worth? Decomposing the Effect of Apologies For comment on a proposed Apology Act for on Medical Malpratice Payments using State Apology Laws', (2001) 8 *Journal of Empirical Legal Studies* 179, 183. For Scotland, see, Charlie Irvine, 'The Proposed Apologies Act for Scotland: Good Intentions with Unforeseeable Consequences' (2013) 17(1) *Edinburgh Law Review* 84.

encourages apologies in other ways, for example as part of an offer to make amends as a defence to a defamation action,[8] even though a similar legislative goal can be discerned in both.

Legislation that renders inadmissible evidence of what was said between the parties to settlement proceedings, mediation and other dispute resolution processes also operates indirectly to protect and, potentially, to encourage apologies. These provisions are not generally referred to as 'apology legislation' and will not be referred to in this way in this Chapter even though they can also operate to exclude evidence of apologies in court proceedings.

2.1 History and aims of apology legislation

Legislation aimed directly at encouraging apologies by providing that benevolent gestures and expressions of sympathy are inadmissible in specified civil proceedings was first introduced in Massachusetts in 1986. Thirty six US states have now enacted legislation that protects apologies.[9] Apology legislation has been enacted in each state and territory in Australia, England and Wales,[10] in most Canadian provinces and territories,[11] and has been considered in Scotland.[12]

The aim of apology legislation, in general terms, is to encourage apologies by removing legal disincentives to apologising. Other aims of encouraging apologies referred to in parliamentary debates and by commentators are to promote the settlement and resolution of disputes and to reduce litigation.[13] This Chapter makes a number of generalisations about apology legislation. Note however that there are dangers in generalizing about the application and

[8] This defence is available in each of the Australian states and territories by uniform legislation. See, eg, *Defamation Act 2005* (WA), s 15(g)(iii).
[9] Ho and Liu above n 6.
[10] Vines above n 6.
[11] Craig Brown, 'Apology legislation: Oiling the wheels of tort law' (2009) 17 Tort L Rev 127.
[12] Irvine, above n 6.
[13] See, eg, Johnathan R. Cohen, 'Legislating Apology: The Pros and Cons' (2002) 70(3) *University of Cincinnati Law Review* 819; John C. Kleefeld, 'Thinking Like a Human: British Columbia's Apology Act' (2007) 40(2) *University of British Columbia Law Review* 769; Prue Vines, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' (2005) 27(3) *Sydney Law Review* 483.

effectiveness of the legislation because of the diversity in the provisions that exist across the jurisdictions. Australia exemplifies this diversity of apology laws.

2.2 Scope and operation of the legislation

There is considerable variation across jurisdictions as to:

- the area(s) of civil liability to which the protective provisions apply
- what 'type' of apology is protected
- the ways in which legal protection is provided

There is considerable variation in the civil claims to which the legislation applies. The legislation with the broadest scope applies to any civil matter and is not confined to an area such as medical liability. For example, section 3 of the *Ontario Apology Act 2009* applies to 'any civil proceeding' as well as 'any administrative proceeding or arbitration'. Other legislation applies to 'negligence or beach of statutory duty' (section 2, *Compensation Act 2002 (UK)*, which applies in England and Wales) or more generally to civil actions except those specifically excluded by the legislation.[14] The legislation most limited in scope applies only to apologies offered in a medical or health care setting, which is the case in a number of US states.[15] Apologies are also given evidentiary protection in defamation legislation in all states and territories in Australia, (for example, section 20 of the *Defamation Act 2005* (WA).)

Most, but not all of the legislation (most notably the *Compensation Act 2006* (UK)) defines 'apology' for the purposes of the legislation. Variation in the 'types' of apology protected reflects the fact that the legislation in some jurisdictions only excludes as evidence an apology that does not include an admission or acknowledgement of fault, (a 'partial' apology), while other legislation excludes evidence of an apology whether or not the words or

[14] This is the case in most Australian apology legislation. See, eg, s 3B of the *Civil Liability Act 2002* (NSW). For comprehensive tables setting out the scope and operation of legislation in Australia, the US, Canada and England and Wales as at 2008 see Vines, above n 6, Tables 1 and 2 at 224-230.

[15] Vines, above n 6, Tables 1 and 2 at 224-230.

actions admit fault or liability or imply an admission of fault or liability, (a 'full' apology).

The manner and extent to which the legislation provides protection also varies between jurisdictions. Amongst the jurisdictions providing the most extensive protection are the Canadian provinces, including British Columbia, where section 2 of the *Apology Act 2006* provides that, in addition to rendering an apology inadmissible in any court as evidence of the fault or liability, it does not (a) constitute an express or implied admission of fault or liability; (b) an acknowledgment of liability for purposes of limitations periods; (c) void, or otherwise affect any insurance coverage that is available, and (d) must not be taken into account in any determination of fault or liability in connection with that matter. In Australia, there is variation by jurisdiction as to whether an apology is (a) not an admission of fault or liability, (b) not relevant to a determination of fault or liability, and, (c) inadmissible in civil proceedings as evidence of fault or liability.[16]

In jurisdictions that have apology legislation, an apology relating to proceedings to which that legislation applies that is made in mediation may also be inadmissible as a mediation communication. In jurisdictions which do not have apology legislation at all, or have legislation that only protects an apology that does not incorporate an admission of fault or liability, a full apology relating to civil proceedings will only be legally protected if it is offered in mediation and the mediation communications are inadmissible by operation of legislation or agreement between the parties. As explained in 4.5 below, the purpose of making what is said in mediation inadmissible is broader than the purpose of apology legislation but the legal mechanism is the same. To the extent that apologies offered in mediation are protected, the same issues and debates arise about protecting apology legislation. The next section reviews these issues.

[16] Ibid. An analysis of the key dimensions of state and territory apology laws in Australia, by jurisdiction, is also provided in David M. Studdart and Mark W. Richardson 'Legal aspects of open disclosure: a review of Australian law' (2010) 193 *The Medical Journal of Australia* 273, 274.

2. The issues raised by apology legislation

A number of issues have been raised in debates about the benefits, effectiveness, and need for apology legislation. These issues, which raise questions about the purposes, scope, and justification of apology legislation, include:

- Whether the legislation is undermining the social value of meaningful apologies which is said to occur;
    - Where full apologies are protected, by removing the legal consequences of admission of fault or wrongdoing and creating a ‘safe harbour’ for apologies which cannot be used in civil legal proceedings by the person to whom the apology is offered.
    - Where only partial apologies are protected, by failing to encourage people to offer full apologies.
    - Generally, by encouraging apologies by quantity rather than by quality.

- Concerns that clients will be advised by their lawyer to apologise for strategic and instrumental purposes of settlement and to protect admissions rather than to meet the psychological needs of the person who has suffered harm and the wrongdoer, and to act according to social and cultural norms.

- Concerns that a person who has received an apology in a legal context will feel obliged to accept it and possibly accept less compensation than they might otherwise have sought.

- That an apology that is not given freely and regardless of the legal consequences lacks sincerity and is meaningless.

- Whether there is sufficient empirical evidence to support the claims that (a) apology legislation actually encourages apologies where (potentially) there has been civil wrongdoing and harm, (b) these

apologies reduce the likelihood of litigation, and (c) apologies encourage settlement of disputes.

- In view of the paucity of evidence to date, whether it is possible to conclude that the stated aims of the legislation are being achieved. If not, what can be done to further the aims of the legislation?

If we assume that it is a worthwhile goal of the law to encourage meaningful apologies and we accept that there will be a range of motives for apologising which includes taking advantage of the legislation to make an admission of fault inadmissible, the next step in a discussion of the ability of apology legislation to assist in the resolution of civil disputes is to look at what we know about the effectiveness of the legislation from empirical studies and decided cases.

3. The effectiveness of apology legislation

What does 'effectiveness' of the legislation entail? This section sets out ways of evaluating the effectiveness of apology legislation in its various forms and points to some of the difficulties that arise in doing so. Following this, a number of questions that reflect the issues referred to in Part 2 are set out. To address these questions, I refer to some empirical studies and decided cases where attempts have been made to rely on apologies as evidence of admissions of fault or liability in civil proceedings.

The introduction of apology legislation in numerous common law jurisdictions over the past three decades is one indication that legislators see benefit in the legislation in one form or another. I suggest that evidence of the following facts, to the extent they could be proved to be true, would indicate in other ways that apology legislation is effective in achieving the aims of encouraging apologies and reducing litigation:

- reductions in the number of civil suits brought after an offer of apology has been made
- reduced civil litigation costs resulting from settlement of claims which include offers of apology
- higher satisfaction with the outcomes of settlement by parties to legal disputes who receive an apology than those who do not
- successful exclusion of apologies from admission as evidence of fault in civil trials
- the ability of lawyers to recognise the benefits to their client of their psychological needs being met by apologies and other non- financial outcomes of settlement and to advise their client accordingly
- a willingness of parties to civil disputes to consider the value and appropriateness of apologies in the process of resolving their dispute

There are obvious difficulties associated with measuring the impact of these indicators. Few people are likely to regard an increase in the frequency with which apologies are offered on its own to be an indicator of legislative success. It can be argued that 'the giving of apologies does not lend itself to legislation'.[17] Some argue more generally that within Western society, apologies have become 'reflexive' and 'theatre'[18] and often lack sincerity.

With these points in mind, the next parts of this Chapter refer to some recent published studies that provide some objective basis for assessing the effectiveness of the legislation and to a small number of decided cases. Before doing so, the artificiality of singling out apologies from other civilised responses to accidents and harmful conduct, which also have potential to mitigate psychological harm as part of the settlement process, needs to be acknowledged. Other responses include disclosure of facts and other information, explanations, admissions of liability and undertakings to change practices and procedures to avoid future harm. Studies show that these can be

[17] Irvine, above n 6, 89.

[18] Andrew Ross Sorkin, 'Too Many Sorry Excuses for Apology', *The New York Times* (New York), 2 April 2014, http://dealbook.nytimes.com/2014/02/03/too-many-sorry-excuses-for-apology/?_php=true&_type=blogs&_r=0, accessed 10 June 2014.

equally if not more important to meeting the needs of civil claimants and encouraging settlement of disputes.[19]

3.1 Empirical data relevant to the assessment of the effectiveness of apology legislation

It is difficult to assess empirically the extent to which a particular piece of legislation achieves its express or implied aims and objectives. Not surprisingly there is a paucity of such research. Among the many impediments to research into the effectiveness of apology legislation is the difficulty of showing conclusively a nexus between the enactment of a piece of legislation and changes in people's behaviour and attitudes. For example, if it can be proved empirically in a jurisdiction that has enacted apology legislation that there has been a rise in the frequency with which apologies are offered when civil claims arise, can it be proved that this is directly attributable to the legislation? Or is it attributable to a current trend in social behaviour in what some refer to as 'the age of the apology'? Notwithstanding these challenges, there is some evidence that supports the enactment of apology legislation and addresses the following questions:

1. *Do civil claimants want apologies and is there an unmet need for apologies in civil dispute resolution?*

Evidence that victims sometimes want apologies comes from a number of sources. Firstly, there is anecdotal evidence from lawyers and mediators that apologies have been important to parties to civil complaints and disputes.[20]

[19] For the important of explanation to parties to health complaints, see, Christian Behrenbruch and Grant Davies, 'The Power of Explanation in Health Care Mediation' (2013) 24 Australasian Dispute Resolution Journal 54. The authors conducted a study of 10 years of complainant data arising out of conciliation in the Office of the Health Services Commissioner in Victoria, Australia. They concluded that analysis suggests that healthcare service providers may resolve complaints effectively and at lower risk with an effective and timely explanation.

[20] See, Deborah L. Levi, 'The Role of Apology in Mediation' (1997) 72(5) *New York University Law Review* 1165; Donna L. Pavlick, 'Apology and Mediation: The Horse and Carriage of the Twenty-First Century' (2003) 18(3) *Ohio State Journal on Dispute Resolution* 829.

This is consistent with the role that apologies play within restorative justice processes in criminal justice and reports by ombudsman and bodies charged with the management of complaints against government and other service providers. Second, there is evidence that people seek apologies as a term of settlement or as a court order in jurisdictions where a defendant can be ordered to apologise, most notably in discrimination cases.[21] This tells us that people will seek apologies in a legal setting where it is a possible outcome of a contested hearing. No doubt it also reflects the low amount of damages recoverable for non-pecuniary loss in this jurisdiction. Another area of law where an apology is a common term of settlement is defamation. In this jurisdiction a published apology serves an important role to mitigate the damage to reputation caused by a defamatory statement. Third, there are empirical studies on point. In personal injuries claims and negligence cases, where apologies have no formal remedial role to play, there is often an unmet need for apologies. A study using interviews with personal injury victims and their relatives found that even if the most important reason for taking action is financial in nature, non-pecuniary needs, including the desire for an apology, can play an important role.[22] This is consistent with anecdotal reports by lawyers and mediators and other dispute resolution professionals.

One area where the desire to receive apologies is well documented is where there have been adverse medical events. In one study, Relis reports on data from interviews, questionnaires and observations of parties, lawyers and mediators in 64 mediated fatality and injury cases in medical disputes that 'wanting defendants to admit fault or accept responsibility pervaded

[21] See generally Robyn Carroll 'You can't order sorriness, so is there any value in an ordered apology? An analysis of apology orders in anti-discrimination cases' (2010) 33(2) *University of New South Wales Law Journal* 360. Orders of this type have been made under pursuant to Hong Kong legislation, for example, *Yuen Sha Shi v Tsi Chi Pan* [1992] 2 HJLRD 28 (Sex Discrimination Ordinance). In this setting it is not uncommon for an apology to be a term of settlement of a complaint, although these will more often be a partial apology in a letter of regret than an admission of wrongdoing.

[22] Arno J Akkermans, 'Reforming Personal Injury Claims Settlement: Paying More Attention to Emotional Dimension Promotes Victim Recovery', Amsterdam Interdisciplinary Centre for Law and Health (IGER) Working Paper Series No 2009/01, available at <http://vu-nl.academia.edu/ArnoAkkermans/Papers/85711/Reforming_personal_injury_claims_settlement>, accessed on 2 June 2014.

claimants' discourse on their mediation aims (94%)'.[23] Many claimants said they sued to obtain apologies (41%), though more claimants said they wanted apologies at mediation (88%) with many (41%) saying that even a partial apology would help them.[24]

The evidence indicates clearly that parties to some civil disputes want apologies. What is less clear is whether and the extent to which their needs are unmet.

2. What is the impact of apologies on litigation and the settlement of civil disputes?

There is no data of which this author is aware that provides direct evidence that apology legislation results in parties receiving psychological benefits from apologies, reduced litigation rates and higher rates of settlement of civil claims. There is however, research that has shown apologies to impact on rates of litigation and settlement. In the medical field, it is reported that many patients expect to receive an explanation for what happened and an apology, and that if they receive them they are less likely to pursue legal action.[25] Researchers have found that people interviewed about their experience of medical adverse events who expressed satisfaction about the disclosure process are typically 'those whose expectations of a full apology ... and an offer of tangible support were met'.[26] There is also evidence that apologies can have psychological and health benefits.[27] It is no surprise that there have been concerted efforts in

[23] Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties* (Cambridge University Press, 2009) 142.

[24] Ibid 142-143.

[25] Charles Vincent, Magi Young and Angela Phillips, 'Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action' (1994) 343(8913) The Lancet 1609, 1611. See also Johnathan R. Cohen, 'Apology and Organisations: Exploring an Example from Medical Practice' (2000) 27(5) Fordham Urban Law Journal 1447, 1458.

[26] Rick Iedema et al, 'Patients' and Family Members' Experiences of Open Disclosure Following Adverse Events' (2008) 20(6) International Journal for Quality in Health Care 421, 430.

[27] Alfred Allan and Dianne McKillop, 'The Health Implications of Apologising after an Adverse Incident' (2010) 22(2) International Journal for Quality in Health Care 126.

recent years in Australia and in other countries to encourage medical and health care professionals to make disclosure and offer apologies in a timely way following an adverse medical event.

In the area of civil disputes more broadly, the work of Professor Robbennolt has provided significant insights into the psychological significance of apologies for parties to civil disputes and their lawyers.[28] Her empirical work on the effect of apologies on a claimant's decision to settle is of particular relevance to the potential for apology legislation to achieve its stated aims. Robbennolt conducted a series of experimental studies in which participants were asked to review a scenario involving an accident between a pedestrian and a cyclist and to evaluate, as the injured party, a settlement offer. One variable was the nature of the apology offered: full apology, partial apology and no apology. Based on the data, Robbennolt reports:[29]

> Apologies, particularly those that accepted responsibility for having caused injury, favorably influenced a variety of attributions made about the situation and the other party, including perceptions of the character of and the degree of regret experienced by the other party, expectations about the way in which the other party would behave in the future, and expectations about the relationship between the parties going forward. Similarly, apologies influenced the emotions that participants reported they would feel – decreasing anger toward the other party and increasing sympathy for the other's position. Full, responsibility accepting apologies showed these effects consistently. Apologies that merely expressed sympathy were more context dependent, favorably influencing these attributions under some circumstances, but not in others.

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[28] Jennifer K. Robbennolt 'Attorneys, Apologies and Settlement Negotiations' (2008) 13(2) *Harvard Negotiation Law Review* 349 ['Attorneys'].

[29] Ibid , 361-362. Robbennolt's research provides many insights into the ways that apologies influence parties' settlement decisions. See also Jennifer K. Robbennolt 'Apologies and legal settlement: an empirical examination' (2003) 102(3) *Michigan Law Review* 460; Jennifer K. Robbennolt 'Apologies and settlement levers' ['Settlement levers'] (2006) 3 *Journal of Empirical Legal Studies* 333.

> These studies also found that apologies influence judgments that are directly related to legal settlement decision making." (footnotes omitted).

Robbennolt also reports that the data does not appear to provide support for the proposition that apologies protected by evidentiary rules will be automatically devalued.[30]

In a subsequent study of lawyers, apologies and settlement, Robbennolt found that lawyers, like claimants, assessed full apologies more positively than partial apologies. Also like claimants, the greater the evidence of fault in an apology the higher the expectation by lawyers of winning at trial. Unlike claimants, who show a tendency to be more amenable to settlement following an apology, attorneys set their aspirations higher and expect more as a fair settlement when an apology is offered.[31] As Robbennolt observes, the divergence found in the data between lawyers and attorneys and laypeople in how they respond to apologies has implications for the attorney-client relationship.[32]

Robbennolt's work provides much valuable data and analysis – far more than can be referred to here. Overall, her findings support for the conclusion that apologies can facilitate legal settlement and that legislative protection for apologies does not necessarily devalue an apology. Both claimants and lawyers are found to evaluate full apologies more positively than partial apologies. Lawyers, however, appear to pay more attention to the legal effect of evidentiary rules than do claimants.

3. Are potential defendants concerned about the legal consequences of apologising?

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[30] Robbennolt [Attorneys] above n 27 363.

[31] Ibid, 396.

[32] Ibid.

The most common concerns and fears of potential defendants are the possibility that an apology will be used by a defendant as adverse evidence in subsequent proceedings or to void an insurance policy that prohibits admissions by an insured from admitting fault.[33] Although the fears might be unfounded, especially when an apology does not incorporate an admission of fault, they are not. As Professor Vines concludes, these are legitimate concerns.[34] This explains why some legislatures consider this a significant issue that needs to be addressed by apology legislation. Fears of legal risk and liability insurance coverage have been shown to be a significant barrier to Open Disclosure in the medical field. This is evident from a study conducted in Australia by Studdart, Piper and Ledema to gauge the perceived importance of medico-legal fears as a barrier to Open Disclosure. [35] They conclude that this fear is an obstacle that is at least partly fixable though law reform. What this and other studies on Open Disclosure do not show directly is whether, if the legal risks associated with apologies were removed, that potential defendants would be more likely to apologise. This is unfortunate because it is one of the assumptions underlying the enactment of apology legislation.

4. What is the level of awareness amongst the public and lawyers of apology legislation, its aims, scope and how it works?

We have little information about the awareness of the legislation amongst lawyers, their clients, and the general public. In a 2009 publication, *Apologies: A Practical Guide,* [36] the NSW Ombudsman reported that the apology provision in the NSW *Civil Liability Act* had only been referred to in a small number of cases in the ten years since it was introduced and it had no bearing

[33] Legal Implications of offering an apology were foremost in the minds of many participants in a study of parties to equal opportunity complaints in Western Australia. See above n 5, 548.

[34] Vines, above n 6, 212.

[35] David M. Studdart, Donella Piper and Rick Iedema, 'Legal aspects of open disclosure II: attitudes of health professionals – findings from a national survey' (2010) 193(6) Medical Journal of Australia 351, 352. More generally, fear of litigation and its consequences were cited as a primary reason for the practice of defensive medicine in a 2008 study in Australia. A small survey of NSW medical practitioners showed that 71% of practitioners had never heard of the *Civil Liability Act 2002 (NSW)* in which the apology protection provisions have been enacted, see Omar Salem and Christine Forster, 'Defensive medicine in general practice: Recent trends and the impact of the Civil Liability Act 2002 (NSW)', (2009) 17 *Journal of Law and Medicine* 235.

[36] NSW Ombudsman, *Apologies: A Practical Guide* (2nd ed, 2009) 26.

on the outcome of the those cases. Writing in 2013 Vines commented that 'there is relatively little evidence concerning the level of knowledge of the public of the apology protecting legislation ... but what there is suggests that the knowledge base is very low.'[37]

Research conducted with medical practitioners offers some insight into the awareness of this section of the community. A small survey of NSW medical practitioners conducted in 2008 showed that 71% of practitioners had never heard of the NSW *Civil Liability Act* (which contains the apology protection provisions). Encouragingly, more recent results of a survey of a sample of Australian health professions working in 21 sites where Open Disclosure Standards have been implemented show that knowledge that apology legislation will generally cover expressions of regret is 'excellent' amongst NSW and ACT practitioners.[38] Less encouraging are the results that show that knowledge is 'fair' among participants from Victoria and Qld and 'poor' among participants from the other states and territories.[39] These points to the effectiveness of public education on the topic in some states and the need for further education in others. It does not point to an understanding of the different types and levels of protection provided by apology legislation and the legal significance of the protection.

5. Has the introduction of apology legislation had an impact on the likelihood that an apology will be offered?

We know very little 'about how the rules of evidence that protect different kinds of apologies may affect the defendant's decision to make an apology'.[40] There is no empirical evidence of which the author is aware relating to civil disputes in general that establishes (a) a direct relationship between apology legislation and offers of apology, (b) that apology legislation has had an effect on the likelihood that apologies will be offered, or (c) that full apologies are more likely to be offered when they are legally protected. It is possibly

[37] Prue Vines, 'The Protected Apology as the Modern Response to the Moral Question at the Heart of *Donoghue v Stevenson*: What if Stevenson had Apologised?' (2013) 3 *Juridical Review* 483, 497.
[38] Studdart et al. above n 34.
[39] Ibid.
[40] Jennifer K. Robbennolt, 'Apologies and Reasonableness: Some Implications of Psychology for Torts' (2010) 59(2) *Depaul Law Review* 489, 495.

encouraging that a study in the medical area indicates that Open Disclosure and admissions of liability, apologies, and other terms of settlement have been implemented without increasing total claims and liability costs.[41] The researchers who conducted the study noted as a limitation, however, that the study design cannot establish causality between disclosures with compensation on the one hand and costs and liability claims on the other.

Recent empirical work of behavioral economists Ho and Liu provides valuable empirical data on the effectiveness of apology legislation on the economic effectiveness of apologies. Their research is conducted at a case level in the US and uses data from the National Practitioner Databank data set which contains detailed information on every malpractice case with positive payments made by medical practitioners in the US since 1991. Using a novel model of apologies and malpractice in order to examine whether state apology laws have an impact on medical malpractice lawsuits and settlements and a difference in differences estimation, they conclude that apology laws could expedite the resolution process.[42] They also find that apology laws account for a decrease in the size of malpractice payments.[43] Importantly for the questions asked in this Chapter, they find no significant difference in states with full versus partial apologies.[44]

The discussion of the five questions above, and the incomplete picture presented by the empirical research to date points to many challenges to evaluating the effectiveness of apology legislation across jurisdictions and areas of civil liability. These challenges include:

[41] Allen Kachalia et al, 'Liability Claims and Costs before and after Implementation of a Medical Error Disclosure Program' (2010) 153(4) *Annals of Internal Medicine* 213.

[42] Benjamin Ho and Elaine Liu 'Does Sorry Work? The impact of apology laws on medical malpractice' (2011) 43(2) *Journal of Risk and Uncertainty* 141, 163.

[43] Ho and Liu above n 6 180. In this study, Ho and Liu found that apologies are most valuable for cases involving obstetrics and anesthesia and for cases involving improper management by the doctor and failures to diagnose, 179.

[44] Ibid, 181.

- proving causality between apologies in Open Disclosure and dispute resolution processes on the one hand and reductions in claims and costs on the other
- drawing meaningful conclusions about the effect of apologies and apology legislation from the data collected in open disclosure studies and medical disputes and applying this to other legal disputes
- proving the extent to which the existence of apology legislation and the legal protection it offers is the reason for a defendant offering a full or partial apology as distinct from other reasons why a person does not apologise. Aside from fear that an apology may be used as adverse evidence against him or her, a defendant might not offer an apology for many other reasons including fear of losing face and personality. A number of these reasons might explain a refusal to apologise even when legal protection is available.
- avoiding assumptions about the value of apologies and the effectiveness of apology legislation based on frequency of offers and settlement rates. If it is shown that apologies are offered more often when they are legally protected what conclusions might be drawn about their psychological and social value to the recipient?
- building on the research to date as to the effect of an apology on its recipient and how it affects their litigation behaviour (and the attitude and advice of their lawyer), to study the effect of protective legislation on decisions about apologies for both recipients and wrongdoers.

Even if we are able to fill in the gaps over time in the research and establish that there is an empirical basis for saying that apology legislation that protect partial or full apologies or both, legal questions will continue to arise about the legal significance of an apology in civil proceedings and about the scope and applicability of individual enactments of apology legislation.

3.2 Case law on apologies and the application of apology legislation

An indicator of the *legal* effectiveness of apology legislation is to look at court decisions. When are parties to a civil action likely to attempt to put evidence of an apology before a court and for what purpose? One situation is where an offer of apology or the failure to offer a satisfactory apology will be relevant is when a court is assessing damages in cases where damages for injury to dignity and reputation is recoverable, for example in the torts of false imprisonment, trespass and defamation, and for civil contempt.[45] Although a defendant might contest the weight to be attached to an apology in particular circumstances, admissibility will not be a central issue and therefore apology legislation does not play a role in these cases. Courts clearly are able to distinguish between an apology that constitutes an admission by a wrongdoer and an apology offered in an attempt to mitigate damages.[46] Although apologies are not taken into account in the assessment of damages in negligence cases, apology legislation is particularly important for these tort claims because of the need to prove fault.

Apology legislation is primarily directed at circumstances where a plaintiff seeks to admit into evidence an admission of fault by the defendant to prove liability. It is instructive to see what the courts have said about apologies in this situation. The cases highlight the difficulty of advising with certainty whether a particular apology constitutes an admission of fault or liability or is in some other way evidence that is relevant to liability, for example as an admission of fact. The outcome in each case will depend on exactly what was said and the significance attached to it by the court.[47] The High Court of

[45] For examples and case citations see Robyn Carroll, 'Beyond Compensation: Apology as a Private Law Remedy' in Jeffrey Bruce Berryman and Rick Bigwood (eds), *The Law of Remedies: New Direction in the Common Law* (Toronto: Irwin Law, 2010) 323.

[46] *See, eg, R (On the application of Gaunt) v Office of Communications (OFCOM) [2011] EMLR 28, [2011] 1 WLR 2355, [40] (Neuberger MR) found an apology was broadcast to mitigate the offence caused by an interviewer but was not an admission of liability for breach of broadcasting obligations.*

[47] See, eg, *Hardie Finance Corporation Pty Ltd v Ahern* [No 3] [2010] WASC 403 where Pritchard J found that a published apology in that case did not constitute an admission of liability for trespass to land or conversion.

Australia made it clear in *Dovuro Pty Ltd v Wilkins*[48] that an apology, even if it contains an admission of fault, does not of itself establish liability in negligence because that is a finding of law for the court to make. This does not rule out the possibility, however, that words of apology may be relevant to findings of fact and to ascertaining liability.[49] Uncertainty as to the evidential significant of an apology is a major reason why defendants in many civil cases are advised not to offer apologies. It appears that caution also surrounds offers of partial apologies, that is, expressions of regret or sympathy, even when they contain no admissions of fact or fault. This is consistent with the fear of liability reported in the research referred to in the previous section.

Does apology legislation bring greater certainty to the legal significance of an apology that incorporates an admission of fault? The answer to this question depends on the legislation in question. Clearly it will be difficult to predict the outcome of a challenge to the admissibility of an apology that incorporates some form of admission if the intended scope of the protection conferred on apologies and admissions is unclear. Section 2 of the *Compensation Act 2006* (UK) that applies in England and Wales is a case in point.[50]

Certainty and predictability can be derived through case law. A decision from the Canadian province of Alberta, *Robinson v Cragg*, confirms the effectiveness of the apology legislation in that jurisdiction to exclude evidence of an apology from being admitted as evidence in a negligence case.[51] The court was required to decide whether words of apology written in a letter combined with an admission of fault was inadmissible. In that case, the plaintiff lenders made loans to a developer of a condominium project in Calgary. The plaintiffs' loan was secured by a mortgage against the development loans. The plaintiffs brought an action for damages against the lawyers they engaged to secure their interest in the land, alleging negligence in the discharge and

[48] (2003) 215 CLR 317.
[49] *Ibid,* per Gleeson CJ at 327 at [25]; Kirby J, at 356 at [116]; Hayne and Callinan JJ at 371-372 at [173].
[50] For detailed discussion see Vines, above n 6.
[51] (2011) 41 Alta. L. R. (5th) 214.

re-registration of a mortgage. The defendant lawyers wrote a letter to the plaintiffs saying that mistakes had been made and that steps were being taken to address those mistakes. The letter included the words “I assure you that our registration of the Discharges was through inadvertence and I apologise for doing so”.

The defendant made an application for a declaration that the letter in which the apology was made was inadmissible, relying on section 26(1) of the *Alberta Evidence Act* R.S.A. 2000, which states:

> (1) In this section, "apology" means an expression of sympathy or regret, a statement that one is sorry or other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate.
>
> (2) An apology made by or on behalf of a person in connection with any matter
>
> (a) does not constitute an expression or implied admission of fault or liability by the person in connection with that matter,
>
> (b) does not constitute a confirmation or acknowledgment of a claim in relation to that matter for the purpose of the Limitations Act,
>
> (c) does not, notwithstanding any wording to the contrary in any contract of insurance and notwithstanding any other enactment, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available, to the person in connection with that matter, and
>
> (d) shall not be taken into account in any determination of fault or liability in connection with that matter.
>
> (3) Notwithstanding any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter.

The defendant argued that the letter contained an expression of sympathy or regret or a statement that one is sorry, and that it contained an admission of fault. Master Laycock, who heard the matter, agreed. Having established that the letter contained an apology, the defendant asked for an order that the court declare the entire letter to be inadmissible in court. The plaintiffs argued that only the words "and I apologise for doing so" should be excluded.

The Master determined that the words of apology referred to by the plaintiffs, as well as other specified words in the letter that constituted admissions of fault (in particular 'mistakenly' and 'inadvertence') were inadmissible and should be redacted from the letter. In reaching this decision the Master noted that the legislature has determined that an expression of sympathy or regret combined with an admission of fault that is "unfairly prejudicial" and should be "kept away from the trier of fact".[52] The balance of the letter was ruled admissible because it contained factual admissions relating to liability that were not combined with the apology. This decision gives proper effect to the intent of the legislation. It remains to be seen though how closely connected the 'admission' and the other words of 'apology' will need to be before both will be redacted or excluded completely.

In summary, an apology that does not incorporate, or is not attached to an admission of fact or fault, lacks evidentiary value to establish liability. It follows that apology legislation is not necessary to protect a party who makes an apology that contains no admission of any kind. Where an apology does contain admissions, *Robinson v Cragg* confirms that apology legislation, depending on its terms, is effective to exclude evidence of words expressing emotion and admissions. If the facts of this case were to arise in a jurisdiction where protection is only available to an apology that does not contain an admission of fault, as in Western Australia,[53] only the words "and I apologise for doing so" would be inadmissible pursuant to the legislation.

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[52] Ibid [20].

[53] *Civil Liability Act 2002* (WA) s 5AF provides that "apology" means an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgement of fault by that person." This definition is relevant to s 5AH(1) (apology not relevant to determine fault or liability) and s 5AH(2) (apology not admissible as evidence of fault or liability).

To a large extent whether apology legislation is effective must be judged against the aims of the legislation. In turn, this depends on how far the legislator is willing to go to encourage full apologies, knowing that excluding admissions also excludes evidence that might be valuable to the plaintiff and to the court. The next section identifies and discusses various ways that apology legislation might be made more effective.

4. Ways to support the aims of apology legislation

A number of suggestions have been made of ways to better support the law’s aim of encouraging apologies in the hope that this will have social and psychological benefits and assist in the settlement of legal claims and disputes.

4.1 Legislation and legislative reform

The limited research available does not show that apology legislation has worked as a ‘magic wand’. To the contrary, the little data that exists as to the shift in behaviour of potential apologisers, from the field of medical practice, tells us that the legislation has been relatively ineffective. A number of suggestions have been made about ways to strengthen the effect of legislation in Australia to encourage apologies and reduce civil litigation. Vines advocates that Australian states and territories:[54]

- Legislate to protect apologies in stand-alone legislation, as in British Colombia
- Protect full rather than partial apologies
- Make the legislation applicable to all areas of civil liability.

In the context of disclosure of adverse medical events and the ability of apology legislation to guard against certain parts of open disclosure conversations being used against health professionals in legal proceedings, and

[54] Prue Vines, ‘The Apology in Civil Liabilty: Underused and undervalued?’ (2013) 113 Precedent 28, 31.

to support open disclosure, Professor David Studdart and barrister Mark Richardson recommend law reform, including changes that:[55]

- Provide 'strong, clear and reliable protections' against the use of conversations that take place as part of open disclosure, (including apologies)
- Are consistent protection across jurisdictions, (ie across states and territories)
- Educate health professionals about what the new laws say.

There is much merit in these proposals. If there is a serious concern that people are holding back from apologising when they would otherwise offer one, then legislators have to make a choice whether to protect admissions of fault or only protect what is not an admission and therefore not a full apology. Arguably, if the legislation only protects statements of regret or sympathy then is only serving a clarifying purpose and possibly an educative role. Based on the experience in Australia, rather than clarify the law, legislation that limits protection to partial apologies appears to create more confusion than clarity. The uncertainty is not helped by the facts that the legislation differs across the states and territories.

If the aim of enacting apology legislation is to encourage apologies, then in addition to the proposals listed above the following matters require attention:

- The need to have regard to the provisions in mediation legislation that may render apologies inadmissible in subsequent court proceeding in order to understand the 'big picture' in which apologies that incorporate an admission of fault or wrongdoing are inadmissible (see 4.5 below); and
- Education of legal practitioners, their clients and members of the public about the purpose and effect of apology legislation.

As to the scope of the legislation, I suggest that if apology legislation is

[55] Above n 15, 276.

enacted with the aim of encouraging apologies that are meaningful to the parties and to assist in the settlement of civil claims, then it needs to make it legally safe to offer a full apology. This does not preclude an expression of regret being offered some time prior to an offer of a full apology being given. As there are other legal implications of making a full apology, for example complying with the terms of an insurance contract, consideration will need to be given by the apologising party whether they are willing and ready to admit fault as well as to express regret. We know that the vast majority of civil claims are settled without a trial. Given that most claims will be settled later if not sooner, parties should be encouraged to consider the benefits of settlement from the outset. As part of that process they should be encouraged to consider the benefit of an apology; to themselves, to the other party and to others affected by the events leading to the claim being made.

4.2 Development of case law principles

Over time case law and commentary that distinguishes between apologies, admissions of facts, fault and liability and the evidential status of each of these under different types of apology will make it possible to advise with greater certainty civil defendants who want to apologise.

4.3 Education of lawyers, their clients and the public

There is an obvious need for lawyers to know about the apology legislation that applies in their jurisdiction and how it applies to matters on which they are giving legal advice, in particular on matters of evidence and liability. Beyond legal advice, it is important that parties to civil claims have access to information and advice about the role that meaningful apologies can play in settling disputes and promoting reconciliation of the parties. This includes information that will help parties to disputes understand why conventional legal remedies and litigation are unlikely to meet their emotion needs and expectations of the legal system. This is not to suggest that people should be

encouraged to apologise against their will or to accept an apology if it does not meet their needs.

4.4 Research and respond to the data

There is a need for further research into the awareness, understanding, application and impact of the legislation on decisions about apologies by parties to a wide range of civil disputes. Assumptions are made about the need for legislation in the absence of empirical evidence about why defendant's do or do not offer apologies. Many questions surrounding the debate about apology legislation are 'empirically testable, and future research examining them would be valuable to the debate'.[56] Even if the case is made that legislation is needed on the basis of observation, anecdotal evidence and studies conducted to date, serious consideration must be given to the question whether legislation that protects an 'apology' that does not include an admission of wrongdoing or fault not only creates uncertainty for lawyers and their clients but also sends mixed messages to the community about what the law regards as an apology.

4.5 Apologies and Mediation Privilege

> *Nowhere does the role of apology hold more potential in the legal arena than in ADR settings.*[57]

In mediation, parties have an opportunity to make decisions about the outcomes of the process which may include informal outcomes and formal terms of agreement involving retractions, corrections, statements of regret, apologies and other apologetic gestures. There are numerous aspects of the mediation process that make it conducive to apologising which include:

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[56] Robbennolt, above n 28 [Settlement levers] 373; Jennifer K. Robbennolt 'The Effects of Negotiated and Delegated Apologies in Settlement Negotiation' (2013) 37 *Law and Human Behaviour* 128, 134.

[57] Lee Taft, 'When More than Sorry Matters', (2013) 13(1) *Pepperdine Dispute Resolution Law Journal* 181, 203.

- The opportunity for direct party participation in the process and for confidential and meaningful interpersonal dialogue.
- The opportunity for parties to express their needs and how they believe those needs might be met.
- Mediators are trained to recognise when it is important to parties that their needs might be met in ways other than legal outcomes and remedies and can empower parties by assisting them to resolutions that may also meet their psychological needs.

Notwithstanding the features that make mediation a process conducive to apologies, this will not necessarily mean that parties will be willing to offer apologies and admissions. Their reticence might be based on unwillingness to admit fault and to settle on terms that admit liability. To the extent that it is based on fears that the apology will be used against them in court proceedings if the matter is not settled in mediation, party agreement to treat mediation communications as privileged and legislation has a role to play to address these fears.

Many common law jurisdictions have introduced ‘mediation legislation,’ that is legislation that is aimed at encouraging and supporting the use of mediation to resolve civil disputes. Typically, mediation legislation provides that communications between the participants in mediation are confidential and not to be disclosed outside of the mediation other than in stipulated circumstances. Mediation communications often are also conferred a status as privileged communications and are inadmissible in subsequent court proceedings between the parties that relate to the subject matter of the mediation. In this regard mediation legislation and apology legislation operate in the same way: to encourage people to express their thoughts and feelings and make offers of settlement freely knowing that what they say will not be used as evidence against them if the mediation does not bring their litigation to an end. In many instances mediation provides a broader safe harbour for apologies because it protects apologies that include an admission of fault or wrongdoing as well as statements of regret and sympathy that are not a full

apology. In contrast, apology legislation in many jurisdictions does not offer protection to all types of apologies or apply as broadly to civil disputes.

In some jurisdictions, Australia for example, mediation privilege is conferred by a tapestry of legislation that applies to particular settings in which mediation takes place. Communications during court or tribunal based mediation are made inadmissible by legislation applicable to the particular court or tribunal. For example, section 72 *Supreme Court Act 1936* (WA) applies to communications during mediations conduced in civil cases in the Western Australian Supreme Court. Even when no legislation applies, parties are able to bind each other to confidentiality and privilege by contractual agreement. In other jurisdictions legislation creates a mediation privilege that applies generally to mediation within the jurisdiction; for example the *Mediation Act 1997* (ACT) in the Australian Capital Territory and the U.S. *Uniform Mediation Act* (adopted by some US states).

Hong Kong recently enacted the latter, comprehensive form of mediation legislation when it enacted the *Mediation Ordinance* in 2012.[58] This legislation provides in section 8(1) that mediation communications are to be kept confidential. Disclosure of mediation communications is only permitted in the circumstances set out in subsections 8(2) and (3). Section 9 of the Mediation Ordinance provides:

> A mediation communication may be admitted in evidence in any proceedings (including judicial, arbitral, administrative or disciplinary proceedings) only with the leave of the court or tribunal under section 10.

Section 10 provides for court or tribunal to grant leave for a mediation to be disclosed, taking into account factors set out in subsection (2). In summary, these are: (a) where disclosure is permitted by subsections 8(2)(b) where it is the public interest or the interests of justice for the mediation communication

[58] *Mediation Ordinance* (Hong Kong).

to be disclosed or admitted in evidence, and (c) any other circumstances or matters the court or tribunal considers relevant.

The legal effect of sections 9 in combination with sections 8 and 10 is to render mediation communications inadmissible in court in most circumstances. This creates a safe harbour for apology except where grounds are made out under section 10. In each case it will be necessary to decide whether any of the grounds apply. An apology accompanied by words that give reasonable grounds for a party to the mediation to believe that disclosure is necessary to prevent or minimise danger of injury to a person or of serious harm to the well-being of a child (8(2)(d)) can be disclosed and could be admissible in certain subsequent proceedings. For example, a statement by a person in mediation “I’m sorry for hitting X in the past but I can’t promise that I won’t do it again” arguably would fall within section 10(2)(b) of the *Mediation Ordinance*. Whether this is an admission that would be evidence relevant to civil proceedings is a different question.

The scope of mediation privilege under Hong Kong law and its application to apologies is relevant to discussions about the introduction of apology legislation in Hong Kong in the context of civil disputes and its proposed scope and operation. As with apology legislation, mediation confidentiality and privilege balances the competing aims of (a) promoting full and frank dialogue in mediation and (b) ensuring that disclosure and admissibility is allowed in appropriate circumstances. This is not to suggest that the circumstances of disclosure or admissibly ought to be the same, only that apology legislation should be drafted with the Mediation Ordinance exceptions in mind.

Aside from the legal question of the scope of mediation privilege, it is also important to consider the non-legal question of the value of apologies offered in mediation if the recipient knows or subsequently might discover that the apology has been offered in circumstances where the legal significance of their words is removed by legislation. There is no simple answer to this

question: it is an important matter for lawyers, mediators and the parties to consider.[59]

5. Conclusions

This Chapter has posed the question: how might apology legislation assist a person to apologise and encourage settlement of civil claims? There are many assumptions surrounding this question, including the assumption that there is a role for legislation here and that it will be effective. The benefits of enacting legislation with the aim of encouraging apologies are easily stated and less easily substantiated. To a large extent, outside the area of medical malpractice, claims that the legislation makes it 'safer' in a legal sense to apologise are still based largely on anecdotal and experimental research. Even assuming that removing legal disincentives to apologising by enacting apology legislation does achieve its stated aims, the gains in this regard need to be weighed up against the perceived and possible negative effect of the legislation. Two particular concerns have been noted above. Firstly, from a legal perspective, excluding evidence of apologies in civil proceedings denies a litigant and the court of evidence that would otherwise be admissible to support a claim of liability. Second, from a social perspective, encouraging apologies to be made where there is no legal risk attached not only makes apologising safer; arguably it also makes it easier. This leads to concerns about insincere, casual and even cynical apologies being offered with legal impunity.

The way that some jurisdictions have balanced these gains and losses is to remove the legal consequences of expressing regret and sympathy only and to leave the law on admissions unchanged. Legislation that protects the 'partial' apology does not change the law. Courts already distinguish between admissions of fault, apologies that express emotions of regret, sympathy and apologies offered in order to mitigate damage caused by the apologiser. The legislation serves a symbolic purpose and possibly an educational purpose but

[59] For a framework for apologetic discourse in a legal setting involving lawyer, client and mediator, see Taft, above n 56, 200-202.

it does not reform the law. It can be argued that rather than clarify the law however, the legislation adds to the confusion about what can be said by way of apology without attracting legal consequences. Legislation in this form is also said to encourage partial rather than full apologies which sometimes do not go far enough to meet the needs of some people who want apologies. Yet, in reality, disputes are often settled without an acknowledgement of wrongdoing or fault, even though expressions of regret and sympathy might be conveyed.

Another concern is that legislation that defines an apology as not including an admission of fault is inconsistent with what people in the community typically regard as an apology. The gap between the legal and the social meaning of apology is not easily explained. I return to the words of the former Chief Justice at the beginning of this Chapter, ‘[a]n apology is a regretful acknowledgement of a wrong done’.

What does all this mean for Hong Kong as it considers this legislation? Firstly, as with legislation that supports and encourages mediation, legislation may assist to overcome inertia and fears of showing weakness and the legal repercussions of apologising, even if these fears are more illusory than real. Like mediation, apology legislation creates *opportunity* for meaningful apologies: it does not compel or require them. In all likelihood many defendants will continue to offer expressions of regret and words of sympathy and will only agree to settle a claim without an admission of wrongdoing or liability. Apology legislation is unlikely to change this. It does, however, have the potential to encourage apologies long before a civil dispute makes its way into mediation or some other evidentiary ‘protected’ dispute resolution process. Second, if the aim of the legislation is to change the legal consequences of offering a full apology then the legislation needs to define apology to include a statement of regret or sympathy that incorporates an acknowledgement of fault, in other words a full apology as, for example, in the Alberta legislation set out in 3.2 above. The legislation also needs to make clear the civil claims to which the apology protection applies. There are some

risks attached to protecting full apologies, just as there are risks with only protecting partial apologies. One risk is that a plaintiff will be unable to make use of an admission of fault to establish liability. They might not have even sought the apology that is offered.

Third, if there is other legislation that renders an apology inadmissible in court proceeding or admissible only in exceptional circumstances, for example, mediation legislation, consideration should be given to whether the admissibility rules need to be consistent. If a full apology made in mediation is privileged, it makes sense to offer the same protection before a claim or dispute makes its way to mediation.

Finally, further research is needed on the effect of apology legislation on decisions by both parties to civil disputes and to confirm and expand on empirical research that indicates the effectiveness of apology legislation in medical malpractice claims. The more we know about the impact of apology legislation on parties' settlement decisions surrounding apologies in all civil claims and about the advice given by lawyers and other professionals, the better we will be able to evaluate the effectiveness and benefits of the legislation.

Medical Disputes: Beyond Disciplinary Action

Dr. LAU Wan Yee, Joseph, SBS[1]

Background

It has been reported in the newspapers that:

1) Doctor and nurses wore helmets to go to work in some parts of the World. *Why?*
2) Doctors have been stabled to death by patients. *Why?*

In a recent survey conducted in mainland China on the question "After hearing that a doctor in Harbin was stabbed to death by a patient", 4,018 of 6,161 (65.2%) voted that they felt happy about the incidence. *Why?*

The answers to the above questions are simple:- If patients are unhappy about the treatment they received, there must be a venue for them to ventilate out their grievances. Grievances turn into anger if there is no outlet to ventilate, and in some cases, anger will turn into violent acts.

Resolution of Medical Conflicts

The best way to resolve medical conflicts is to have good communication between the medical/nursing staff and the patients/relatives.

Sometimes, medical conflicts cannot be resolved through this means. Then, there remain two approaches:-

(1) Mediation. I shall leave how a trained and qualified mediator helps to resolve some medical conflicts and whether there should be Apology Legislation in Hong Kong to the other speakers of this session.

(2) Confrontational approach.

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Confrontational Approach to resolve Medical Conflicts in Hong Kong

Using a confrontation approach to resolve medical conflicts is inadvisable as this is often a time- and effort-consuming struggle between the two parties. In some situations, such an approach may even be unlawful.

Confrontational Approaches:- Lawful ways to make complaints against a qualified medical practitioner in Hong Kong

There are many disciplinary sanctions and systems of accountability faced by the medical profession in Hong Kong:

(1)	Criminal Court – sanctions for criminal offences or severe medical negligence	
(2)	Civil Court – award of compensation through civil actions	
(3)	Hong Kong Medical Council – on professional disciplinary matters	
(4)	Ombudsman Office – for procedural error	
(5)	Hospital Authority (HA) Headquarters for HA hospitals	Disciplinary procedures at hospital levels
(6)	Department of Health for private hospitals	
(7)	Legco councillors	Trial by media
(8)	District Board councillors	
(9)	Press and Media	

Thus, the possibility of a claim or a complaint for professional misconduct by a dissatisfied patient is a risk which confronts all qualified medical practitioners in Hong Kong.

Such dissatisfaction can arise out of:

- Results of treatment not meeting expectations of patients
- Complications of treatment
- "High" professional fee
- "Bad attitude" of doctors
- Personal conflicts between patients and doctors

It is important to realize that dissatisfaction is not equivalent to medical negligence.

What is Medical Negligence

Medical negligence is a multi-faceted term. To the patient, the term just means a general inability for the doctor to perform his professional skills or carry out his responsibilities, which is an attack on the doctor's professionalism.

To the doctor, doctors consider themselves to be human beings and errors are inevitable, and a single lapse is an error which all individuals are prone.

There is a different meaning for the term negligence in Law. In Law, doctors have a legal duty to exercise reasonable care, and breach of that duty which causes damage to the plaintiff results in negligence. Breach of duty is measured by reference to the standards of the ordinary competent medical practitioners in their field.

Distinguishing Features of the Medical Profession

The medical profession deals with life and death. Treatment to patients can do good, but sometimes it can also cause harm. Harm can result from complications of treatment which can sometimes be unavoidable. On the other hand, harm can also be caused by careless mistakes made by doctors.

In the real world, everyone makes mistakes and everyone makes careless mistakes. Thus, not all mistakes should be regarded as negligence.

Medicine is still an inexact science. The rising complexity in modern medicine has come with startling levels of risks and harm to patients. Studies in USA, United Kingdom, Australia and Israel showed serious or potential serious errors in medicine was 6.7 out of 100 patients, and adverse events was 3.7% of hospital admission, over half of which were preventable and 13.6% led to death. Data like these, once published, generated sentiment, some of which channeled into harsh forms of surveillance and criticisms, with outcry for

punishment with an attempt to fix blame and to punish someone. Such an approach will not work!

We should take lessons from the stunning programs in safety in aviation. Studies have shown that fear, reprisal, punishment produce not safety but defensiveness, secrecy and enormous human anguish. If we want safer health care, we have to design a safer health care system. We need to add more successive layers of defence in the "Swiss cheese model" to prevent hazards to turn into accidents. Thus, streamlining complaints is one of the ways to a safer health care system (Figure 1).

Unfortunately, unlike aviation which can cancel air flight when the risk of flying is high, the medical profession still needs to operate or to treat patients who have high risks of dying despite treatment if the balance of probability is in favor of treatment. The practical meaning is that in medicine, things can go wrong in treatment of a patient even with the best available care. The medical practitioners cannot be blamed every time something goes wrong. We must protect the medical practitioners so that they can provide good medical treatment without fear. Otherwise, no medical practitioners will be willing to treat high risks patients, or medical practitioners will routinely be practicing "defensive medicine".

Role of the Hong Kong Medical Council

The number of complaints lodged through the Hong Kong Medical Council has been increasing. Some of these complaints can be resolved more effectively through alternative means. However, bound by the Hong Kong Ordinance, all complaints brought to the notice of the Hong Kong Medical Council have to be examined and to go through the specific procedures before any considerations can be given for dismissal. This includes groundless and frivolous complaints. Thus, this delays the process of dealing with more serious complaints against medical practitioners. The public sector under the administration of the Hospital Authority has an excellent complaint system which reduces the cases escalating to the Hong Kong Medical Council. Currently there are no channels

of mediation which can exist under the current provisions of Law for the Hong Kong Medical Council. Medical complaints are now commonly lodged simultaneously through the media, Hospital Authority Headquarters, Hong Kong Medical Association and Hong Kong Medical Council. Disputes which have been settled through mediation, may still find its hearing at the Hong Kong Medical Council because complainants need not inform the Council that a settlement has already been taken place. Thus, there are a lot of overlaps of work in the current system.

Thus, I am proposing a reform of the current system as shown in Figure 2.

The proposal is to set up a Central Medical Complaint Committee to deal with all complaints against doctors in Hong Kong, including all hospital doctors and non-hospital doctors. After a screening process, minor cases are settled by mediation or through better communications between the complainant and the doctor. Only more serious complaints are to be dealt with by the Hong Kong Medical Council. In addition to the Health Subcommittee and the committee dealing with normal disciplinary procedures, the Hong Kong Medical Council should add 2 more subcommittees to deal with complaints related to 'Medical Fee' and 'Below Standard Medical Practice'. This reform will make the Hong Kong Medical Council more efficient in dealing with future complaints.

Conclusion

A lot of progress has developed in many countries in introducing mediation into the system to deal with medical conflicts. It is time for Hong Kong to catch up with what the other countries have been doing and seriously consider introducing 'Mediation' and 'Apology Legislation' into Hong Kong.

* *Based on a talk on Logistics Updates: Mediation Conference (Day 1) on March 14, 2014*

Figure 1 Streamlining Complaints

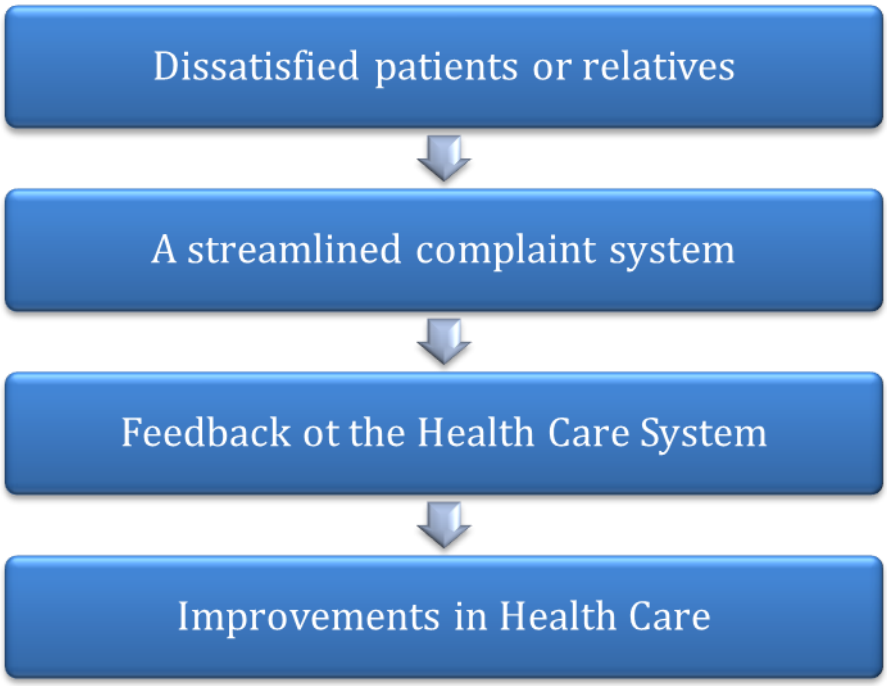
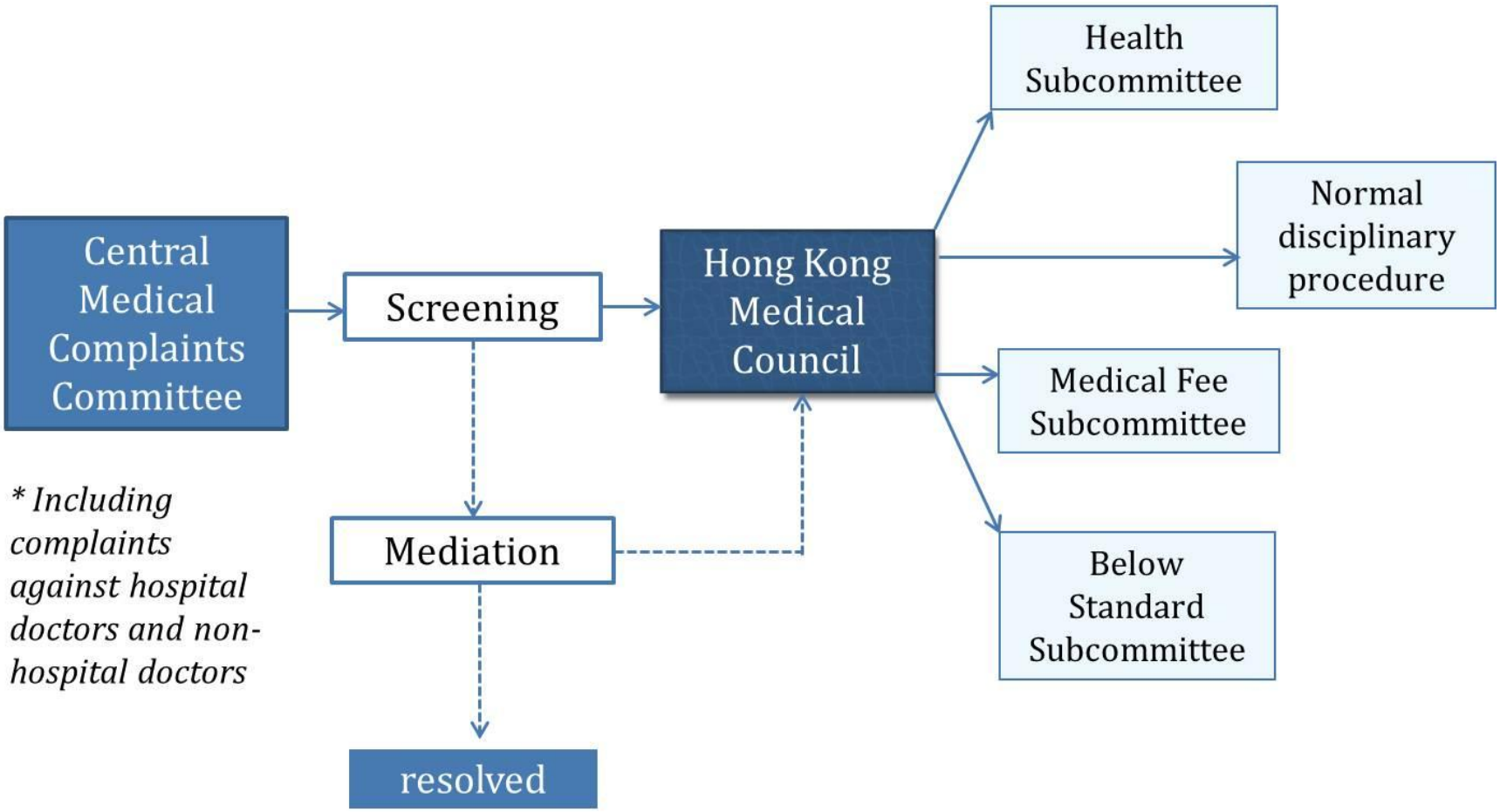


Figure 2


Central Medical Complaints Committee
Screening
Hong Kong Medical Council
Health Subcommittee
Normal disciplinary procedure
Medical Fee Subcommittee
Below Standard Subcommittee
Mediation
resolved
* Including complaints against hospital doctors and non-hospital doctors

A Practitioner's Perspective on Complex Disputes

Dr. Karl MACKIE, CBE[1]

Madam Justice Bergin made an excellent point that in considering this topic one has, of course, to define what we mean by 'complexity'.

From a mediation practitioner's perspective, the real interest is: what flows from this definition by way of an appropriate process to deal with the complexity?

Complexity can take many forms from emotional complexity through to logistical and project complexity, and each of these will have different demands on a mediator's skills and application of techniques and talents.

For example, if we take the obvious area of complexity of dealing with multiple parties, this can have serious logistical impact on how a mediation should be practised. It is not uncommon in such cases for a mediator to enter a room with at least 40 people present. It is obviously important not only to have thought of how best to manage a process with that number of people, but to have done the preparatory work necessary to prepare oneself and the parties for how the proceedings will run, including the basic question of the amount of time that will be spent on the mediation. There are obvious design questions within this that mediators should have anticipated. For example, if it is a mediation process where one values the ability to have private sessions are you as a mediator, really going to have, say, seven out of eight parties sitting, waiting for the mediator to rotate around the different rooms? Clearly, this would be an unsatisfactory and inefficient way of managing negotiations. What one does instead depends on the nature of the negotiation and the nature of the parties. It might involve separate preliminary sessions with each party before there is a joint meeting. Alternatively, it might involve, in some cases, meeting a party privately while giving the other parties some coalition or joint sessions to work with, so of course, some coalition or joint tasks to

[1] Chief Executive of Centre for Effective Dispute Resolution, United Kingdom

work on while the mediator is engaging with one particular party. There would have to be good reasons for adopting such procedure.

Equally, in such situations it is important to assess whether there would be additional value from having an expert or co-mediator who can manage some of the parties while you, as mediator, are focusing on other parties. There is not set answer to such questions but it is important to have anticipated the complexity involved and the kind of issues that such complexity raises for a negotiation process to be satisfactory and fruitful.

I was asked to give some practical examples of cases as a mediator where these kind of issues arose. One I remember very well was a case involving 40 parties and the insolvency of an oil refinery in the Middle East. That was a case where major issues came up as to who held ownership of the oil amongst seven or eight oil companies, not to mention banks which had been involved in credit facilities for the refinery, and ship owners who had been carrying oil cargo to and from the refinery and who were also trying to lay claim to a stake in the assets so that their fees might be paid. This was, of course, a very difficult case to handle and required quite significant project management to work out how to see the number of parties involved and where there was likely to be progress. As an illustration of the potential dynamic in such cases that can influence a mediator's management of complexity, my role was facilitated by the fact that amongst the oil companies there were some companies which had smaller claim and so could quickly appreciate that in an insolvency situation the value of the asset they were claiming could quite quickly be overtaken by the costs of the legal proceedings to recover the asset. Therefore, there was a common interest amongst a number of the oil companies in merely exiting from the litigation at minimal cost. This facilitated the mediation by introducing a coalition element where a number of the parties could work together on a common negotiation position *viz-a-viz* both the banks involved and the other major oil companies which had the much larger claim on the remaining oil in the refinery. As a result, the parties were able to achieve an agreement where most of the oil companies involved were

able to leave the ligation proceedings on an agreed payment for exit. (However, it still took almost a year for them to find a way of drafting appropriate legal terms for the situation to be resolved.) The other parties involved also eventually settled but it was naturally a rather protracted process to get to resolution.

Another kind of complexity one deals with as a mediator can be the challenge of how to deal with intransigent parties or emotional complexity. This can be almost more challenging than the question of numbers of parties or logistical complexity. I do remember, for example, one case where a businessman had become severely damaged by his experience of law firms! He had been let down by a first firm in relation to his business which, he felt, had led to his business collapsing and so he had hired a second firm to sue the first firm. However, the second firm mismanaged the proceedings and in such a way that he was out of time for bringing a claim against the first firm so he was forced to bring a claim against the second firm. He did so by hiring a third firm to conduct the proceedings but unfortunately the third firm succeeded in messing up his claim as far as he was concerned and to make matters worse, he also lost his wife to one of the partners through social interaction at the time.

By the time he came to mediation there were therefore three law firms, a complex legal and human history, and the law firms' professional insurers. He was also rather upset with lawyers as a class, to say the least. In fact, because his business had collapsed, it turned out that he spent most of his life now feeling aggrieved about the experiences he had had, and was taking every avenue he could, including writing to the Master of the Rolls, to the Queen and the Prime Minister in order to find a means of redress against the various lawyers he had interacted with. He was, sadly, so obsessed with this issue that it had taken over his life.

As mediators, these kind of settings are never easy to deal with because one has very different dynamics on both sides of the table. For the insurers

involved, it is generally a question of finance and risk, with much less consideration to a resolution of the individual's emotional difficulties – not even sometimes the lawyers' emotions. However, for the mediator to create an effective process, it is impossible not to find the means to deal with the emotional upset and sense of grievance that claimants would often have under these circumstances. In this particular case I had to adopt fairly dramatic techniques in order to help the individual begin to reassess his life and to try to help him put the problem into perspective so that he could move on from the legal proceedings and find other ways of coping with life beyond the mediation. As a mediator, of course, one is not a coach or a counsellor (although I am a psychologist as well as a lawyer, which helps), but as a mediator one is always looking for ways to encourage constructive problem solving. Even in what one may call 'standard' commercial cases, one finds that there is nearly always an emotional underpinning because of a grievance about the way a project has been managed or the way one's intellectual property has been abused and so on. So good mediators, I would argue, always deal with emotional complexity of some kind and hopefully, are alert to what is required to deal with it effectively.

Finally, to mention another complex case that arose in the early years of CEDR. A famous entrepreneur had died in mysterious circumstances. It emerged after his death that he had apparently been plundering pension funds from his various companies, leaving the funds deficient in terms of what they could pay out to the many thousands of pensioners from the companies. He had needed the funds to try to prop up some of his ailing companies during a difficult recession. The pensioners claimed, through various law firms, against the companies and insurers. The insurers resisted the claim on a number of legal grounds including whether the particular director had been acting outside the scope of his appropriate director duties and therefore, outside the scope of the normal insurance policies. Proceedings had been running for several years and the complexity was well evidenced by the fact that the lawyer who first approached me to ask for mediation was able to show 22 pages of closely-typed information about the various interim legal hearings in

which the legal advisers had tried to clarify various legal points of procedure before the courts. The lawyers were able to say to me that despite these 22 pages of procedures, the case had substantially not moved on at all in negotiation or legal judgement terms, and all that had happened was the funds had incurred millions of pounds in costs on a still-risky claim where the ones who would suffer, ultimately, would be the pensioners because of further loss of funds. In fact, the parties were able to agree to mediation because the lawyers' representing the pensioners' pension funds could see the value in seeking a commercial settlement on behalf of their communities of clients. The insurers, for their part, knew also that they faced legal risks in going to court, but also I believe, had some sense that it was not appropriate for insurance companies to be seen to be defending a this kind of case where so many thousands of pensioners could be afflicted by the outcome or the way the insurance companies were defending the case. So there was an agreement to mediate. The further complexity in the case, however, was that there were disagreements between the pension funds so this process required us to work out a formula where the pension funds would know how to allocate any proceeds they would receive from the negotiations with the insurance companies in advance of mediating with the insurance companies. They agreed a procedure where any sum that was achieved with the insurance companies would then be subject to a mediation followed by an expert determination if there was failure to agree amongst themselves. So thereby, they had certainty of an allocation mechanism for the settlement amounts that would go to each pension fund before they entered the negotiation with the insurers. The insurers, for their part, found that it was very helpful in the mediation process to find themselves faced with a variety of claimants who now had a more common negotiation position and effectiveness as a common negotiation front. Before the actual mediation they had found it difficult to negotiate with a variety of claimants who had very different interests and who also had disputes between themselves.

This, again, shows how mediation can be adapted flexibly to meet complexity in commercial as well as legal circumstances if there is sufficient thought given to good design which is the key to managing complexity.

Finally, in thinking about complexity I will just mention the question of appeal cases, in other words, cases that go to mediation after a court has already adjudicated on the issues between the parties. In the English and Welsh legal system CEDR runs the Court of Appeal mediation scheme and we see many appellate cases coming to mediation. These can sometimes be complex, but often fairly simple in that the judge has already adjudicated on legal principles between the parties. However, the parties still have to manage the risk that the Appeal may go against them, or that the Appeal may find in favour of the original judgement so, in fact, rather than being complex sometimes these cases are much simpler in essence in terms of negotiation dynamic between the parties.

In many of these cases too, there are settlements despite the parties already having a judgement and despite the polarization between the parties by that stage. It proves the power of mediation yet again, but also, I must say as a mediator, if given the choice I do prefer to choose to work with 'complexity'. There is a simple reason for this and that is to do with negotiation principles. If a case is complex, it generally means that there will be appreciation by the parties of greater risk, on the one hand. On the other hand there will also be more elements involved in the dispute which can be effectively 'traded off' or traded against each other in terms of compromises and concessions and different interests amongst the parties so that there can be a packaged settlement put together that meets a variety of interests amongst the parties. It is therefore, often easier to help the parties negotiate a solution in such complex negotiation circumstances, than where the issue is a simple polarized one between two parties.

So, as a final mantra for those of you engaged in this field, I would urge you to "embrace complexity"!

“調解為先 互利雙贏”香港調解研討會

2014 年 3 月 20 至 21 日

第二日:2014 年 3 月 21 日

(以粵語進行)

歡迎致辭

高永文醫生, BBS, JP[1]

張舉能首席法官、各位嘉賓、各位朋友：

大家好！我非常高興能夠出席是次調解研討會。

2. 調解是解決糾紛的其中一種途徑。參與調解屬自願性質，面對糾紛的當事人可以委任一位獨立的調解員，在他的協助下進行洽談，目的是希望在調解的過程中解決糾紛爭議或索償。

3. 當我仍在醫院管理局工作時，病人關係、處理醫療糾紛和投訴是我負責部門的主要工作之一。我的工作經驗，令我深信以調解方式處理糾紛的多項優點。

4. 醫生與病人之間的互信關係是非常重要的，雙方即使面對糾紛，亦應該在公平、保密及安心的環境下，尋求最佳的解決方案。在有關調解的法例及法庭實務指示在 2010 年實施前，醫院管理局(醫管局)已在處理合適的醫療申索個案時，採取各種解決糾紛的途徑，包括委派公証行，在案件的法律程序尚未展開時，與病人及其家屬進行直接面談及和解協商。醫管局在收到醫療申索個案時，會盡快進行調查，經調查及徵詢法律意見後向病人或其律師代表作出回應，並解釋醫管局對其申索的立場。視乎個別案件的情況及進度，醫管局會在適當的情況下，委派公証行或律師進行和解協商或進行調解。若法庭程序已展開，醫管局會根據個別案件的情況及發展委派律師作出答辯。

5. 剛才所述的法庭實務指示至今已實施了四年，醫管局一直支持並根據該指示就合適的醫療申索個案進行調解。就曾進行調解的個案中，有不少例子是於調解員的協助下成功達成和解。雖然部分個案未能在調解中達成和解，但當中部份個案在雙方律師繼續進行無損權益談判後，亦能和平解決。

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[1] 香港特別行政區 食物及衛生局局長

6. 在處理醫療申索個案時，醫管局將會繼續支持採用調解作為其中一種解決糾紛的途徑。在選擇個案進行調解時，醫管局明白到每個個案的複雜性、爭議的部份、搜集證據的過程及進度各有不同。從過往的經驗顯示，一般個案如已進行了較全面的調查及評估，而涉及爭議部份的證據比較齊全，則可好好利用調解的途徑來排解糾紛。醫管局會慎重考慮每個個案的性質及進度，以決定進行調解的適當時機。

7. 回應是次研討會的主題 – 「調解為先　互利雙贏」，調解是不可能單方面進行的。就醫管局而言，調解需要醫管局及病人或家屬同意才可進行。所以除醫管局外，病人或家屬，其律師及法律援助署的積極參與均十分重要。一般來說，在進行調解前，醫管局已就醫院所提供的治療向病人或家屬作出解釋及回應。在過往的調解會議中，雙方皆有代表律師出席，而當中通常亦包括對病人醫療情況有充分了解的醫院醫生在場。病人或家屬能在一個保密的環境下表達申索訴求或不滿的地方，醫管局亦有機會再次向病人解釋或詳細講解所接受的治療及回應病人或家屬的不滿、質詢及憂慮等。調解和溝通有助病人或家屬明白有關情況和安排，以及釋除他們的疑慮，或澄清雙方之間的誤解。醫管局每年接獲約 16,000 宗投訴或意見及約 40,000 宗讚揚。就所接獲的投訴或意見，不少糾紛已在醫院層面透過不同形式的「調解」得以妥善處理。

8. 解決糾紛如同保障健康一樣，防患勝於未然，加強各方面的溝通對於減少紛爭相當重要，更能大大減低雙方面對訴訟的機會。醫管局相信良好的投訴管理是優質醫療服務重要的一環，投訴機制的宗旨是改善服務及為投訴人解決問題。對於所接獲的意見，醫管局會認真檢視，在適當地方作出改善。經詳細分析後，醫管局瞭解到其實大部分投訴是由誤會或溝通問題引起。故此，最有效的策略是加強公眾及病人教育和改善醫患溝通。

9. 為推動病人教育，醫管局設立了一個名為「智友站」的一站式互聯網平台，以加深公眾對醫療的認識。此外，醫管局亦積極培訓各級員工溝通及調解糾紛的能力和技巧，減少投訴發生；即使出現投訴及糾紛，員工亦能作出恰當的處理。

10. 作為與市民接觸的最前線，醫管局明白訓練前線員工對於順利解決糾紛的重要性。在醫院層面專責處理投訴的病人聯絡主任，已全部接受調解訓練。醫管局會繼續鼓勵其他前線醫護人員接受相關培訓，協助他們應對日常工作中遇到的挑戰。此外，在 2013-14 年度，醫管局更推出全新

的溝通技巧培訓課程「高效病人溝通 － 新知。攻略」，課程包括如何在醫院環境中應用基本調解技巧，並設有經驗分享與實習的環節，迄今已有逾 800 名前線人員參加了是項課程。

11. 為更有效處理投訴和糾紛，醫管局一直有舉辦溝通技巧課程、資助員工參加調解訓練等，藉以加強他們溝通及處理紛爭的能力。自 2012-2013 年度起，醫管局每年提供 120 個名額資助前線人員報讀 40 小時的調解訓練證書課程。至今已有 600 名醫護人員完成相關的證書課程或調解技巧應用訓練。

12. 放眼將來，醫管局會繼續探索不同方法，善用調解處理爭議及衝突。調解能解決不少有關醫療的糾紛，亦可以令不同類別的糾爭獲得排解，減少雙方對簿公堂及不歡而散的機會。希望透過是次研討會，大家能對調解有更深入的認識，並了解對調解的種種好處。謝謝各位。

歡迎致辭

調解在民事司法制度改革後的發展

張舉能 高等法院首席法官[1]

袁國強司長、高永文局長、各位嘉賓：

今天我很榮幸來參與這次以「調解為先，互利雙贏」為題的調解會議。司法機構推行的民事司法制度改革於二零零九年四月二日開始實施。民事司法制度改革的基本目標是要在更快捷、更節省訟費的原則下協助訴訟各方解決爭議。在這個前提下，法庭會採取積極的案件管理去達致這些基本目標。

民事司法制度改革當中一項重要環節是促使訴訟各方就其爭議盡早達成和解，並在法庭認為合適的情況下採用另類排解程序，而調解亦被視為是最常見的另類排解程序。

司法機構早於二零零零年已經在家事法庭推行為期三年的家事調解試驗計劃，目的是協助分離的雙方就子女和財產分配的安排進行調解從而達成協議。二零零六年九月，司法機構就建築爭議引入調解試驗計劃，為期兩年。於二零零七年，司法機構更成立調解工作小組，目的是因應調解的經濟及社會效益和在其他普通法適用地區的發展，研究如何在高等法院原訟法庭、區域法院及土地審裁處的民事糾紛中，促進各方當事人在一致同意的情況下達成調解。其後司法機構於二零零八年在土地審裁處推行建築物管理案件調解試驗計劃，使有關個案可以更快和更具成本效益地解決爭議。同年，司法機構亦就公司案件推行為期一年的自願調解試驗計劃。以上各個調解試驗計劃的結果均令人滿意，各計劃隨後落實成為常設的程序。

民事司法制度改革其中的一項倡議，是推動更廣泛地使用調解。我們在民

[1]香港特別行政區司法機構

事司法制度改革中引入了《實務指示 31–調解》。此實務指示於二零一零年一月一日正式實施後，訴訟各方及律師均有責任協助法庭進行案件管理。在此，訴訟各方或其代表律師需向法庭呈交與調解有關的文件，亦需積極考慮透過另類排解程序（包括調解）解決爭議。我們強調調解必須是自願參與。調解實務指示表明若訴訟任何一方沒有合理解釋拒絕參與調解，法庭在行使酌情權裁定訟費時，會考慮該方在這方面的情況，才作訟費的命令。與此同時，法庭亦強調訴訟人的律師亦必須向其當事人提出適當的意見。

在實施調解實務指示的同時，司法機構於高等法院大樓亦設立了調解資訊中心，向訴訟各方及公眾人士提供有關調解的資訊，解答他們對調解的疑問，也會定期為法庭使用者舉行調解講座，藉以向參加者闡明調解的好處，提升他們對調解的認識，並鼓勵參與調解的當事人作出充足的準備。最後更協助他們向專業團體尋求調解服務和選擇合適的調解員。

《調解條例》於二零一三年一月實施。這可以說是調解發展在香港的一個里程碑，其目的是提倡、鼓勵和促進以調解方式解決爭議及使調解通訊得以保密，為調解在香港訂立了一套清晰的制度。《調解條例》界定，「調解」是由一名不偏不倚的調解員在不對爭議作出判決的情況下，協助爭議各方找出議題、探求和擬訂解決方案、鼓勵互相溝通，從而促進雙方達成經調解的和解協議。該條例肯定了調解在本港法律上的定義，規範了調解作為另類解決爭議的方法，並保障了調解通訊的保密性。在一般的情況下，參與調解的各方當事人和調解員都不得向外披露調解中的內容。

隨著調解在香港日漸普遍，調解員的質素及培訓亦日益受到公眾關注。公眾對調解的信心，往往是建基於調解員的服務質素。以往，在香港執業的調解員是由不同的海外或本地的調解機構各自培訓和評審並取得認可資格的。在律政司倡議下，由業界主導的香港調解資歷評審協會有限公司（“調評會”）於二零一二年八月正式成立。調評會的目標是制定標準給認可調解員及其他在香港參與調解的專業人員，並認可已符合標準的人士。調評會亦制定香港的調解訓練課程標準，和認可已達標準的訓練課程。調評會更會積極地推廣香港專業及可實踐的調解文化。加入調評會的機構成員，本身必須要放棄原有的資格評審制度，期望對調解員的質素起著統一的作用。

如前所述，經過司法機構、律政司及眾多業界持份者在這多年間齊心推廣調解，使香港社會各階層對調解的認識漸漸加深，而調解在香港民事爭議中亦日趨被各方接納並廣泛採用。在專業的調解員協助下，調解可以減少訴訟對各方當事人的壓力，亦可替他們節省用於訴訟的時間和金錢，並可維持彼此之間的良好關係。假使調解不能令大家在短時間內達成共識，也可以將爭議各方之間的分歧收窄，增加日後達成和解的機會。

「禮之用，和為貴」，無論是由於中國傳統文化，或是現代法律制度所需，調解的積極推廣，可以為建設繁榮安定的社會奠下穩健的基礎。寄望將來，調解發展能夠更進一步，成為香港的人文文化。

謝謝大家。

調解員的資格和技巧[1]

馮驊法官[2]

引言

調解是香港以至全球最有效的解決爭議方法之一。調解起初用以解決勞資糾紛、消費糾紛及促進國際協商，但時至今日，調解已成為與司法程序相輔相成的另一正式的解決爭議方法。調解廣泛應用於離婚、民事及商業法律程序，甚至公法糾紛，層面不斷擴大。調解的應用越益廣泛的其中一個原因，是很多人相信調解不但可更有效、更圓滿及更和諧地解決爭議，而且花費相對較低。

一直以來，調解都是一門神秘的學問。在閉門的商議過程中，各方可能就重要事項爭持不下，但高明的調解員仍能想到法子令他們妥協。調解員扮演著關鍵角色，積極設法使爭議得以解決。他們參與界定問題所在、訂立議程、安排會面，促使各方在受控的情況下彼此溝通及交換資料，對促成實際可行的協議有直接影響。調解員對調解過程甚具影響力，影響範圍則相當視乎其個人素質。

隨著調解日漸普及，調解服務提供者及調解培訓在香港湧現，數目急速上升。

香港調解資歷評審協會有限公司（“調評會”）於 2012 年 8 月組成，負責香港調解員的資格評審。調評會並非一所培訓機構。它透過轄下的調解評審委員會（“委員會”）制定標準，為調解員提供資格評審，以及認可相關訓練課程及其他調解專業人士，如導師、指導員、評核員及監督員等。

促進型調解

香港各界明顯有共識，認爲香港應採取促進型調解作爲規範或主流的調解

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[1] 本文件是與香港特別行政區司法機構調解資訊中心林雪兒女士及羅月歡女士合作編寫。

[2] 香港特別行政區高等法院原訟法庭法官；司法機構調解工作小組成員 及 香港調解資歷評審協會有限公司理事會成員

模式。這種調解模式的重點在於提供討論的框架和議題，從而幫助各方自行達成解決爭議的方案。有別於評估式調解，採用促進型調解的調解員即使對受爭議事宜具有專業知識，一般都不會在過程中評估各方的理據。他們不會擔當顧問角色，或預測訴訟結果，亦不可以指示各方達成某一特定的和解方案。相反地，調解員會促進各方之間的溝通和談判。他們負責控制調解的過程，不會過問爭議內容或干預結果。

香港一直沿用的調解訓練基礎是建立於促進型調解。任何人士如有意成為調解員，必須接受多方面的評估，包括：調解員應有的角色（如保持中立、不偏不倚）、保密能力（能否區分不可披露的機密資料及可公開的資料）、溝通技巧（如善用肢體語言、安撫情緒）、舉止態度（如有耐性、堅定自信）、過程控制（如處理衝突、應付質疑的能力），以及談判技巧（如了解各方利益、避免陷入僵局）等。

具有爭議所涉的專業知識

不少專業團體已在其專業領域內發展調解，於是常有人問道：究竟調解員應否是一位熟悉某類專業的專家？事實上，當事人經常面對這兩難的抉擇。

很多時候，當事人會選擇具備相關知識的調解員，以期望調解員能夠快速了解爭議，或與他們分享心得。但一些當事人會選擇沒有相關專業知識的調解員，這樣可避免調解員先入為主地主張應以何種形式達成和解，並讓爭議各方自行找出解決方案。有一個爭論經常出現，就是調解員對受爭議事宜的專業知識會否損害其客觀性？這問題沒有單一或簡單的答案，而在很大程度上須視乎爭議的性質，以及各方對調解員的期望。若爭議涉及較技術性或複雜的事宜，具備相關專業知識的調解員或可協助各方將焦點集中在重要議題上。

實證研究顯示，成功的調解員來自不同背景，例如商業、建築、法律、社工或學術界，也來自不同國家；但他們卻不約而同地認為，調解員對具爭議事項所涉的專業知識並非是必須具備的資格要求。

根據 *McEwen 和 Maiman*[3] 進行的研究，高度的和解率和高度的參與者滿意

[3] McEwen C.A. and Maiman R.M., "Small Claims Mediation in Maine: An Empirical Assessment", *Maine Law Review*, 1981

程度，似乎與調解員的風格或學派取向（如促進型調解或評估式調解）無關。反之，調解員是否有合適的培訓及其個人素質，對調解的過程和結果有更直接的影響。

美國一名經驗豐富的律師兼調解員 D. Hoffman[4] 指出，當他擔任調解員時，若當事人不斷向他追問有關離婚法的知識（如資產分割、管養和贍養安排等），他會要求當事人自行延聘律師，由律師解答他們的問題。他這樣做的原因，是基於專業的道德操守，他不可把調解員和律師這兩個角色混作一談，再者如果調解員本身不是律師，亦不得從事法律的工作。他深信若各方向調解員尋求法律意見或專家意見，會大大削弱律師和專家在解決爭議時的作用，為過程徒添激烈辯論，結果有違各方選擇調解的初衷。

委員會訂立的評審準則規定，調解員不得給予意見，不論是法律、行業慣例或科技方面的意見。換言之，調解員不須是熟悉某項專業的專家。他們的任務是鼓勵和協助參與調解的人士評估風險、好處和其他可供選擇的解決方案，以及建議參與者另行索取足夠的資料，藉此確保各方處於平等的位置。調解員如認為參與者不甚了解自己的權利，應鼓勵他們在簽訂協議前徵詢獨立的法律意見或專家意見。至於如何解決爭議，這決定最終是由各方參與者自行作出。

沒有相關專業知識的調解員

當研究調查發現調解員是否具備與爭議相關的專業知識並非至關重要，為何調解依然奏效？我們需要了解調解的箇中道理，方可回答這問題。

根據定義，調解是一種解決爭議的自願性過程，中立的第三方在參與者的同意下介入其中，協助他們談判，以便他們可以在獲得充分資訊下達成自願的和解。調解時，作出決定的權力完全掌握在參與者手中。調解員的作用包括：協助參與者界定問題所在，減少溝通障礙，探索替代方案，以及幫助他們達成公平、具效率且可持續的協議。

調解所依據的原則是溝通、談判、協作及自主。根據 *Bowling 和 Hoffman*[5]，感情用事幾乎是每宗衝突的根本原因，是妨礙各方客觀分析衝突的絆腳

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4 Bowling D. and Hoffman D, *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution*, San Francisco: Jossey-Bass, 2003. 第 176 頁

5 Bowling D. and Hoffman D, *op. cit.* 第 151 頁

石。因此，就性質而言，調解工作正正就是處理人際糾紛。通過調解，各方可以尋找那道連繫彼此的無形之橋，從而構建一個不同的未來。調解提供一個安全平台，讓參與調解的人士訴說苦衷和釋放情緒。調解員施展各種技能 — 積極聆聽、重組爭議、提出疑問、適當介入 — 幫助各方參與者自行作出為將來著想的決定。各方經過商討後所得的資料，可以引領他們邁向解決爭議之路。

調解的基本目標，是鼓勵各方以彼此整體利益為依歸，而不要專顧自身的利害關係。*Fisher 和 Ury*[6] 在其著作中指出，利益予人動力，在針鋒相對的局面背後悄然地推動著各人。每當大家的利益互有衝突時，各人應謀求互惠互利。這樣看來，調解員的個人素質及特質就是令調解有效可行的原因，而這亦是上述問題的答案。

勝任的調解員

從上述評論可見，調解涉及人與人之間的探索及互動。調解員為爭議各方建立關係，自己亦與他們建立關係 — 通過這一關係，調解員的個人特質勢必影響各方之間的協商是否成功。既是如此，調解員需有何個人特質才可令調解行之有效？

多位研究人員曾就勝任的調解員應具備的特質發表意見。他們的見解來自他們從事調解工作的體會，以及對其他調解員的觀察。曾經有實證研究文獻記載，稱職、勝任的調解員之間的共通之處比不同之處多，而調解員的個人特質會直接影響調解過程的成效及結果。

根據 *Bowling 和 Hoffman*（2003），調解員有三個發展階段：

1. 技能培訓及技巧學習階段
   調解新手接受的技能培訓包括積極聆聽、說話重塑、釐定問題的輕重緩急、把焦點集中在利益上，以及幫助各方增加可供選擇的方案。他們亦須努力爭取機會， 與資深調解員合作共同進行調解，並通過觀察、匯報和接受指導中學習。

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6 Fisher R., Ury W. and Patton B., *Getting to Yes: Negotiating Agreement Without Giving In*, New York: Penguin Books, 2011.

2. 知識層面的思考階段
   豐富經驗的調解員應該對調解的運作模式及調解奏效的原因有更深入了解，能夠為參與者編排調解過程，從而取得工作滿足感。

3. 持續的個人發展階段
   調解員發展出與當事人建立更深層個人關係的能力。調解員越來越清楚自己的個人特質可如何影響調解過程，他們不只做調解工作，甚至會“化成”調解及“創造”調解。這是最具挑戰性及至為重要的發展階段。

W. Simkin 和 N. Fisandis（1986）歸納出他們認為稱職的調解員需具備的素質：

1. 有耐心
2. 誠意
3. 機智
4. 體能耐力（儼如馬拉松跑手）
5. 探詢能力（儼如精神科醫生）
6. 智慧（儼如聖經裡的所羅門王）

Boulie（1996）認為成功的調解員均具備以下特質：具同理心、不妄下判斷、有耐心、樂觀、不屈不撓、可信任、機巧聰敏、有創新能力、靈活變通、有常識及富幽默感等。

Gary Gill-Auster 和 Lois Gold（1993）形容調解員的壓場感是影響調解過程的重要因素。其精妙之處，展現在調解員於調解過程中所發揮的影響力。調解員的重要性不僅在於親身上陣，他的壓場感能在調解會議中引發各方當事人之間的互動，以及當事人與調解員的互動，繼而帶來改變。若作進一步分析，“壓場”其實是由以下元素組成：

1. 冷靜理智；
2. 恪守主導價值觀、信念及最高目標；
3. 觸動參與者人性的一面；以及
4. 貫徹一致。

這些素質如運用得宜，可提升調解工作的成效，使調解過程中彌合分歧的

潛在能力得以發揮。

Stephen Goldberg[7] 曾就一些資深調解員加以論述，分析調解工作成功有賴哪些不可或缺的長處和技巧，結論是“融洽和睦關係”乃關鍵因素。他形容融洽和睦關係包含同理心、信任和諒解。更重要的是，調解員對當事人的真心關懷，並不是一種可以言傳的技巧，而是必須源自本性，從心而發。根據 Goldberg，“融洽和睦關係”是被定為調解成功的必備先決條件。

資歷與認證

調解員的資歷是指他曾接受的教育、培訓和所累積的經驗。最優秀而勝任的調解員視調解為思維的轉換。調解是一門與別不同的專業，任何人若有意成為調解員，必須通過學習方能成事，不能因已具有良好交際手腕的天賦才能而自居。此外，專業人員致力提升業內人士的能力，並與時並進，不斷學習與調解有關的嶄新知識、技巧和發現。專業培訓並不能由經驗和個人決心取代。

培訓

勝任的調解員應具有良好的調解理論知識和實踐經驗，妥善掌握解決衝突的方法。調解員應讓各方明白調解的性質，令他們自願投入調解過程，並有效促使互相之間的溝通。他們亦應在考慮各方權益的前提下，想出可能的解決方案，使最終能達成實際可行的和解。

專業發展

勝任的調解員應矢志令外界視調解為一門專業。因此，他們應樂意接受以認證方式確立其地位和能力，以期達到所須水平，和獨立的肯定他們的技能。

除學習關於調解的一般知識和接受程序培訓外，勝任的調解員亦應清楚了解相關的專業道德、標準和責任。他們應隨時因應準顧客或現有顧客的要求，透露自己的培訓情況和相關經驗。

此外，勝任的調解員應熱衷於持續進修，尊重調解專業和其他解決爭議的專業之間互相補足的關係，並為了專業發展而積極跟同業和相關專業人員

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7 Goldberg S., “The Secrets of Successful Mediators”, *Negotiation Journal*, July 2005

交流。部分調解員更藉著參與研究、評估和公眾教育，促進調解專業的發展。

個人特質

調解終究是一門「以人為本和性格主導的行業」[8]。培訓不能替代個人素質和經驗，而個人素質無疑會在很大程度上影響調解員的能力。成功而勝任的調解員均具備以下特質：

1. 熱愛調解

   勝任的調解員視調解為一種生活方式，無論生活、呼吸、進食和睡眠時亦以調解為伴。他們覺得自己是天生的調解員，在日常生活中每當遇上意見分歧，便本能地運用調解的技巧。勝任的調解員不把自己的工作只視為「一份工作」，而是「一種召命」[9]。

   勝任的調解員明白，在每次調解過程中，最重要是為各方營造有助解決問題的環境，並真心為他們創建適合他們的過程，而非施加壓力迫使他們和解。這種思維是勝任的調解員的一大長處。他們著重於「打好調解基礎，讓當事人自行決定結果」[10]。他們的出發點純粹是引導各方彌合分歧，促使調解過程向積極的方面發展，而非只為確保各方達成和解而努力。

2. 重視人際和諧

   調解通過促進溝通，處理人與人之間的糾紛。勝任的調解員能向「各式各樣的人伸出援手，又能理解、感受和關心他人所面對的事情」[11]。他們喜歡結交朋友，真心關懷他人的福祉，能夠代入他人的處境，從而與他人建立正面的關係。勝任的調解員是專業的聆聽者，能完全了解當事人的想法。

3. 體現信任精神

   勝任的調解員均認為，他們的成功之道，在於能夠取得顧客對他

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8 Krivis J. and Lucks N., *How to Make Money as a Mediator (And Create Value for Everyone)*, San Francisco: Jossey-Bass, 2006. 第 34 頁

9 Krivis J. and Lucks N., *op. cit.,* 第 19-20 頁

10 Bowling D. and Hoffman D, *op. cit*., 第 237 頁

11 Krivis J. and Lucks N., *op.cit.,* 第 200 頁

們的信賴。畢竟，調解員的角色獨特，能夠分別向對立的各方收集機密資料。最能勝任調解工作的調解員，往往能使人委以信任，而他們亦會對這份信任予以高度尊重[12]。勝任的調解員處事公正持平，態度不偏不倚，充滿自信。他們可在調解過程中協助當事人處理各項影響深遠的問題。

4. 高度情緒智商

製造表達情緒的機會有助解決衝突。調解員須具有高度的情緒智商，方可讓各方在調解中釋放情緒[13]。控制自己和各方的情緒對調解員的工作至關重要。他們應對情緒「感覺自如」，而不是懼怕它[14]。 勝任的調解員應該意識到，需要運用的方法應該因情況和人而異。此外，如有機會，他們應該善加運用「情緒」作爲一強而有力的調解工具。引述 Peter S. Adler 的一句話：沒有處理情緒的能力，就難以令解決方案持續有效。

5. 理解人與人之間的互動和推動力

理解人與人之間的互動，關乎到調解員個人對他人和社會制度的理解[15]。調解員必須明白他人的想法，並從他們的角度思考，或是設身處地替他們著想，才能管理他們的情緒。在大部分的情況下，有效的聆聽技巧可緩和緊張狀況。調解員始終是最先向當事人確認他們的話已獲聆聽的人。

勝任的調解員在調解過程中經常展現同理心，與此同時，教育各方更能明白對方的處境[16]。 他們不應語帶指令或指揮各方，反而要盡量留意非言語的訊號。這種能力取決於調解員那運用感染力的社交技巧，而這種技巧可讓他們向各方取得資料。另一方面，勝任的調解員不應只著眼於收集資料，而應設法解決各方所關注的問題。

6. 堅持和樂觀

勝任的調解員深明堅持和樂觀的態度對每宗調解的重要。他們能

12 Krivis J. and Lucks N., *op.cit.,* 第 201 頁
13 Bowling D. and Hoffman D, *op.cit.,* 第 155 頁
14 Krivis J. and Lucks N., *op.cit.,* 第 164 頁
15 Bowling D. and Hoffman D, *op.cit.,* 第 159 頁
16 Bowling D. and Hoffman D, *op.cit.,* 第 160 頁

忍受和包容含糊不清的情況。勝任的調解員重視自己「旁觀者清」的優勢，並不時意識到自己是調解中唯一相信總有解決方法的人[17]。因此，縱然各方對調解感到心灰意冷，調解員仍能憑著這種樂觀的態度堅持下去，並在過程中積極地帶動各方。調解員視衝突為一個歷險旅程，甚至是一個改變的契機。衝突或可為各人打開話題，而勝任的調解員總能從容面對衝突，並從中在任何情況下找到機會，及在所有人身上發現美善。

7. 接受不同的思維方式

情緒激動而又彼此對立的當事人，在調解過程中往往會感到思緒混亂、不知所措，無所適從，但勝任的調解員以其良好的聆聽和溝通技巧，能夠跳出對與錯、好與壞的框框，從看似不一樣的事件中，洞察出一個更深層次的模式或意義，為爭議各方找到走出困局的方向[18]。他們能令調解過程的進展變得清晰、順暢，亦能協助各方把看似毫無關聯的資料串連起來，從而建立基礎使各方可以進一步探討處理彼此爭議和權益的方案。

調解專業在香港的發展

調解專業在香港仍處於發展階段。因此，調解員在技巧和誠信方面的質素保證，對維持和加強公眾對在香港使用調解服務的信心，十分重要。

調評會的抱負

本港多個調解員資歷認證機構創立及加入了調評會，而司法機構和律政司亦對此表示支持。調評會的抱負是成爲本港單一的調解員資格評審組織。自成立以來，獲本港超過四分之三的調解員加入成爲其認可調解員。雖然調評會並非本港唯一的調解員資格評審組織，但調評會對本港調解員的培訓及所訂下的評審準則，均與國際認可標準看齊。此外，調評會設有紀律處分機制，令公眾對其認可調解員的水平和誠信更有信心。調評會一直在本港積極推廣專業及可實踐的調解文化，從而提升本港作爲國際爭議解決中心的地位。

17 Bowling D. and Hoffman D, *op.cit.,* 第 241 頁

18 Bowling D. and Hoffman D, *op.cit.,* 第 241 頁 7

調評會和委員會的工作包括：

(1) 為香港的認可調解員、督導人員、評審員、導師、指導員及調解工作涉及的其他專業人員訂立準則，以及檢討有關準則；
(2) 為香港的相關調解培訓課程和擬認可人士所須的經驗訂立準則，以及評估有關培訓課程和所須的經驗是否合適；
(3) 備存符合資格的調解員、評審員和家事督導人員的名冊；
(4) 檢討有關調解員、評審員和家事督導人員的發展和培訓事宜；以及
(5) 設立投訴程序及進行紀律處分。

調評會和委員會的成員來自各行各業，包括司法機構、律政司、調解界、法律界、工程界、建築界、測量界等的代表，以及社會人士。

核心技能

委員會發出的模擬評核表格 1，是評審員在推薦應試者能否獲認可成爲調評會名冊下的調解員時的評審基礎。

調評會關於調解員的學問和專業知識方面的評審準則，與國際認可標準及專業水準看齊。

從微觀層面來看，應試者應表現出他／她對調解程序的認識、能辨識和總結關鍵問題以決定議題的緩急輕重、能控制各方、能有效地運用有關積極聆聽、意義重構、說話重塑、促進溝通、處理質疑、促進和諧、協助各方集中在今後的利益和選擇上的種種技巧、能擬定應變計劃，以及能優化和解協議的條款等等。

從宏觀層面來看，應試者在調解過程中的整體技巧和行爲舉止都是評審員評核的對象。應試者通過擔任調解員的努力，預期可獲得以下幾個主要的目標成果：

a. 各方能明白調解的性質和願意全情投入參與調解；
b. 各方能有效地溝通，使他們更了解有待解決的問題、當中涉及的一些各自的利益和彼此之間的分歧；
c. 各方在下一輪的調解會議中，更有準備、更願意與對方商討，以

找出解決方案；

d. 各方能把各自的利益考慮轉化成一些可行的方案，以及在可能的情況下，在第二次調解會議中展開商討並達成和解；

e. 各方能確定和解的條款，又或者是，應試者能使各方考慮下一步的做法；以及

f. 各方獲調解員擬備一份切實可行的和解協議書。

評審制度

上述用以評審調解員水平的核心技能，是一套全面及高標準的準則，為準調解員了解現時調解專業的嚴峻挑戰提供了指引。這套準則參照了國際間的專業知識和經驗，以及關於勝任的調解員需具備的素質的當代文獻和研究結果。模擬評核表格 1 的各項準則乃是本地及國際調解權威一致認為優秀調解員應表現的技巧。

委員會的另一項工作是認可調解培訓課程，以確保有關課程的內容、指導員和導師均已達到所須標準。

應試者由合資格的評審員進行評審。學員在完成 40 小時的調解培訓課程（第 1 階段）後，可接受認可評審（第 2 階段）。自 2013 年 7 月起，調評會開始認可調解培訓課程和進行第 2 階段評審。

雖然法例沒有要求調解員必須獲得認可，但事實上，本港約 2,200 名調解員中，已有接近 1,700 名見證了調評會的地位獲得普遍接受。

持續專業發展

調評會認可調解員須符合持續專業發展的要求，以維持其認可資格。調解是一個瞬間萬變的過程。因此，對於調解員而言，持續進修和與同行之間的交流都是不可或缺的。

調評會的長遠發展

對於調解專業而言，一個嚴謹的資格評審制度，加上完善的紀律處分機制，至爲重要。這使公眾對使用調解服務來解決爭議更有信心。調評會的角色，在以另類排解糾紛程序的團體和其他專業組織中，已越益獲得認同。這將有助在本港推廣專業及可實踐的調解文化，以及營造一個有利於調解的環境。

結語

從本文可見，培訓、資格評審和發展調解專業對質素保證的重要性。雖然調解員可能來自不同專業和不同階層，但我們知道，一個成功的調解員最主要的特質，是他能把各方過去的怨忿不滿轉化成建設未來的力量、使他們能以共同的益處為依歸而收窄彼此的分歧，以及能使爭拗不休的各方和平共處。調解是一個關乎人的過程，個人的經驗和素質沒有別的東西可以取代，而與其他專業人員分享經驗，對大家都甚有裨益。因此，通過持續專業發展，與不同的人士交流心得是非常重要的。調評會亦堅信這點，並致力使本港更多人士認同調解，並將之視爲一個重要的解決爭議的過程。

調解員的資格 － 律政司的角色

馮美鳳女士[1]

律政司在推動調解工作一直不遺餘力，其中對調解員的評審資格的規管是律政司推動調解工作的重要一環。

調解工作小組

在 2007 年，行政長官在《二零零七至零八年施政報告》宣布成立一個由律政司司長領導的跨界別工作小組，籌劃如何更有效和更廣泛利用調解處理高層次的商業糾紛，以及相對小型但與社區息息相關的糾紛。

在 2010 年，當時的調解工作小組主席律政司司長在記者會上發言並發表工作小組報告：工作小組提出 48 項建議，涵蓋 3 個主要範疇－即規管框架、培訓和資格評審，以及宣傳和公眾教育。工作小組邀請公眾在為期 3 個月的公眾諮詢期，就報告所載結果和建議提出意見，諮詢包括對調解員的評審資格的規管。

調解工作小組報告

調解工作小組報告中的第 25 項建議，建議*"成立一個單一調解員資格評審組織是可取的，而且有助確保調解員的質素、使評審標準一致、向市民灌輸有關調解員和調解服務的知識、建立市民對調解服務的信心，以及維持調解的可信性。"*

調解專責小組的成立

在 2010 年，律政司司長成立了調解專責小組("專責小組")，因應公眾就工作小組建議所提出的意見，研究當中須予進一步考慮的建議，並落實已得到廣泛支持的建議。調解專責小組的成員包括司法機構人員、法律專業人

[1]香港特別行政區律政司副首席政府律師 (調解) 及 調解督導委員會秘書

士及主要的調解服務提供者。

專責小組由 3 個小組支援。該 3 個小組分別專責處理以下範疇的工作：

- 規管框架
- 資格評審和培訓
- 公眾教育及宣傳

促成香港調解資歷評審協會有限公司的成立

專責小組認為，成立一個由業界主導的非法定單一調解員資格評審組織，有助確保調解員的質素、使評審標準一致，從而建立市民對調解服務的信心。在 2012 年 8 月，律政司促成香港調解資歷評審協會有限公司(“調評會”)的成立。調評會是一個由業界主導的非法定組織，在 2013 年 4 月正式投入運作，負責調解員資格評審和處理紀律審裁的事宜。

調評會的創會成員包括香港律師會、香港大律師公會、香港國際仲裁中心及香港和解中心。到 2014 年 8 月 20 日為止，有 7 個額外的機構成員，包括香港仲裁司學會、CEDR 太平洋中心、香港建築師學會、香港測量師學會、香港工程師學會、香港營造師學會及專業和解顧問中心有限公司。調評會現已有超過 2,000 名認可調解員，為全港最大的調解員評審機構。

2014/15 年度施政報告及財政預算案演辭

行政長官及財政司司長分別在 2014/15 年度的施政報告及財政預算案演辭中，重申政府對推動調解的政策:-

- ***2014/15 年度施政報告－解決爭議服務***

“ 31. 香港有優良的法治傳統及完善的法律制度。政府將繼續積極推廣香港的法律及解決爭議服務，以提升香港作為亞太區國際法律及解決爭議服務中心的地位。政府會加強海外推廣，繼續透過「調解督導委員會」統籌調解服務的發展，以及設立諮詢委員會，就發展與推廣仲裁服務提供意見及協調。”

- ***2014/15 年度施政綱領－亞太區國際法律和解決爭議服務中心***

"律政司舉辦名為「調解周」的活動，並製作新的宣傳短片及聲帶，加深市民、政府人員及不同界別持份者對調解的認識，並提倡多加運用調解作為解決爭議的方法。"

- ***2014/15 年度政府財政預算案演辭 - 跨境專業服務***

" 97. *仲裁和調解近年已成為解決國際商貿爭議的主流方法。香港有良好的法律制度和傳統，政府一直積極推廣香港的法律和仲裁服務，並致力提倡和發展調解服務，強化香港作為亞太區國際法律和解決爭議服務中心的地位。"*

建立大眾對調解的信心－調解員的品質保證

調解督導委員會轄下的評審資格小組委員會成立的目的是為了協助調解督導委員會監察與香港調解員的資格評審及規管有關的事宜，並且就(包括但不限於)以下問題作出建議：

- 制定認可標準，規管調解訓練課程的方針及標準；
- 建立投訴及紀律處分的程序；
- 建立調解員、監督員、評核員、訓練員等的名冊；
- 組織及營運調評會；及
- 考慮應否成立一個法定認可機構以取代調評會。

調解技巧的培訓

- **律政司提供的內部調解培訓**

自調評會成立後，律政司協助其已獲認可資格的政府律師根據調評會的政策登記成為調評會認可調解員。另外，在 2013-14 年度，律政司資助了 11 名政府律師及 1 名律政書記參加了一個達調評會標準的調解員技巧訓練課程。

律政司在 2013 年 10 月舉辦了一個調解經驗分享會以提昇同事使用調解的成效。作為調解周的其中一個項目，另一個名為“調解論壇--成功的因素”的分享會亦已於 2014 年 3 月 26 日舉行。

- **推廣調解文化到公務員**

在 2013 年及 2014 年初，律政司與公務員事務局公務員培訓處合作舉辦了多個為公務員 (以首長級及中級人員為對象) 而設的調解研討會及經驗分享會。研討會主要簡介調解的程序及調解員的技巧，目的是為了提高公務員使用調解的意識及在政府部門間培養“調解為先”的文化。

長遠目標

香港要發展成為國際爭議解決中心，其中一項很重要的工作，是要統籌及組織調解業界的制度，統一調解員及調解課程的認可標準，減低良莠不齊的情況，從而令各界及海外的公司，有信心在香港使用調解服務。律政司會繼續推廣及鼓勵各界在香港使用調解服務，及研究如何可以進一步改善調解的運作。

醫療糾紛之調解 - 調解員的資格和技巧

賴寶山教授[1]

香港經常發生醫療事故，並且是傳媒熱衷報導的課題。可幸的是，對比國內，香港發生的醫療事故的情況相對溫和。國內醫院經常出現暴力個案，如有醫護人員被病人或病人家屬襲擊致傷或致死的情況。

根據香港醫院管理局的數據，每年收到的病人投訴信件約有 2,000 宗，而表揚醫護人員的信件卻有 30,000 多封。可見籠統來說，廣大市民大抵對香港醫院管理局的服務質素還是滿意居多。

即使現今醫學昌明，每項醫療程序仍帶有一定風險，難免出現未如理想的醫療結果，對此，部分病人或病人家屬選擇進行投訴，甚至向醫護人員提出訴訟。

一般來說，醫療糾紛的調解是相對比較困難，調解員需要特別注意四個方面。

其一，調解員態度需持平和公正

這一點其實是調解員專業訓練過程中經常強調的。當發生醫療事故後，病人和病人家屬在未如理想的醫療效果中受到不同程度的傷害，即是處於「苦主」的角色。調解員易因而傾側立場，對苦主生出憐憫心，並竭力幫助苦主索償或爭取利益。

調解員要謹記時刻保持持平的態度，放下任何預設立場， 以免影響協商過程中的理性判斷。

其二，調解員需用心聆聽

用心聆聽，Active Listening，即解構語言信息，調解員聆聽雙方立場時，需接收、整理、分析及回應所聽到的資訊。發生醫療糾紛的時候，病人或病人家屬通常提出要求金錢索償。因此，調解員需疏理訊息，探索金錢以外的調解方案，以免雙方糾纏於賠償金額，這樣一來，會面過程將演為街市議價的情況，難以達成和解。要時刻謹記，調解的主要目的是為雙方探索多方面的和解方面，締造雙贏局面。

[1]香港中文大學醫學院助理院長(常務)及外科學系系主任

其三，處理醫療糾紛的調解員宜對醫療運作系統和醫學法律有基本認識和了解

香港的醫療系統，基本上分為公營和私營，公營服務就是由香港醫院管理局和衛生署提供的。由於公營和私營和醫療服務有基本上的分別，也影響到如何處理醫療糾紛。

至於醫學法律的基本認識就是，不理想的醫療效果並不必然構成醫療疏忽或失誤。所謂醫療疏忽或失誤在法律上需符合多重條件。簡單來說，醫生有責任照顧病人，若醫生未能對病人提供照顧，或提供之照顧的未達適合的水平而導致病人受到傷害或死亡，才有可能被定義為醫療疏忽或失誤。

若調解員能掌握這個基本訊息，就能調解過程中進行適當的測試(Reality Testing)，協助病人或病人家屬自行評估事件被裁定醫療疏忽的機會率，以及要求索償的成功率，從而考慮索償以外的和解方案。

其四，調解員需具同理心

所謂同理心是指調解員應投入雙方的角色，了解雙方看事件的角度和重點，理解雙方的訴求，繼而抽離以中立的第三者的角色去促進協商。

現時，香港發生的醫療糾紛個案，能以調解達至和解的成功率偏低。我想藉這個機會向大家推薦一個新的模式作為參考。我認為，處理醫療糾紛宜採用由兩至三人組成的調解團隊，其中包括受過調解訓練的醫護人員。醫療糾紛的情況較複雜，受過調解訓練的醫護人員對業界有深入認知，故在調解過程中較易為雙方所接受，使能促進達至和解的目標。

最後，十分感謝律政司舉辦「調解為先、互利雙贏」的會議，我有幸能參與其中，了解各界的調解經驗。希望日後能有更多有關調解推廣方面的交流平台，促進經驗分享。謝謝。

調解員資格及技巧：各地情況與趨勢、案例分享及香港調解會之角色[1]

陳家成先生[2]

引言

如果在你生活的城市裏，駕駛者不需遵守任何交通規則，也不用通過考試便可隨便在路上駕駛，那麼你還敢隨意在街上散步嗎？你還可以在的士上輕輕鬆鬆地讓司機把你載到目的地嗎？如果有選擇的話，你會乘搭一輛由有受過訓練的司機還是一輛由沒有受過訓練的司機駕駛的汽車？假如要選擇調解員，你又會否有同樣的考慮？

在香港調解資歷評審協會有限公司（「調評會」）成立之前，香港並沒有一個統一的調解資歷評審機制。這些提供調解服務的機構都有自訂的標準，雖然百花齊放，但亦良莠不齊。有見及此，香港國際仲裁中心、香港和解中心、香港大律師公會和香港律師會便聚集一起商討，並且成立了調評會。

調評會的角色包括（一）制定認可調解員、監督員、評核員、訓練員、指導員及其他在港從事調解的專業人員的標準，並認可已符合有關標準人士；（二）制定香港的調解訓練課程標準，並認可已達標準的訓練課程；及（三）推廣本港專業及可實踐的調解文化，確保調解專業人員和調解參與者都能藉此受到保障。

作為亞洲國際城市，香港以成為「國際調解中心」為目標。為了響應推動調解服務，作者參考及研究其他國家的調解制度，寫成此文，以供有關當局參考。本文分為五部份：一、比較調解在香港、澳洲、英國、奧地利、加拿大和美國各地的情況；二、探討調解趨勢與相關資歷要求；三、案例分享；四、討論香港調解會之角色；最後以調解員資格及技巧作結。期望借鏡世界各地的調解情況，找出綜合調解員所需的質素和技巧。

各地調解員的情況比較

為了解世界各地調解的情況，本文研究了澳洲、奧地利、加拿大、英國、美國和香港六個地方對調解員這個名稱的立法保障、培訓、認證機構、管理架構等方面

[1] 特別鳴謝下列友好或團隊的鼎力支持：梁復基 及 香港調解會之綜合調解組成員包括：趙承平、吳思雄、梁亭欣、黃潔瑩、麥銘賢、余司虹、鄒惠滇及陳湘銓。

[2] 執業大律師及認可綜合及家事調解員；香港調解會 綜合調解組主席 及 大律師公會 仲裁及調解事宜委員會的成員

的異同，列表如下：

調解員的名稱及監管系統

	澳洲	奧地利	加拿大	英國	美國	香港
「專用」名稱，例如：	國家認可調解員[3]	註冊調解員[4]	特許調解員／合資格調解員[5]	民事調解局CMC認可調解員[6]	沒有,但個別州份對法院相關個案有專業要求	**調評會認可調解員**[7]
管理架構	調解員標準委員會–註冊調解員認證中心	聯邦司法部–培訓中心	加拿大替代性糾紛解決中心	民事調解局–合格培訓公司	沒有政府認證機構	**調評會**

表 1. 專業調解員的名稱及監管系統

「調解員」的名稱是否受保護？研究發現[8] [9] [10] [11]，六個地方都沒有立法保護「調解員」這個名字，所以任何人都可自稱「調解員」。同時，亦沒有趨勢顯示有任何地方會立法保護「調解員」這個名字。

1. 沒有一個地方有立法規定要通過認證才可成為「調解員」，所以任何人都可以成為執業調解員[12]。

3 Mediator Standards Board, The Approval Standards <http://www.msb.org.au/sites/default/files/documents/Approval%20Standards.pdf> accessed 25/02/2014.
4 Mediation: Principles and Regulation in Comparative Perspective by Klaus J. Hopt and Felix Steffek
5 ADR Institute of Canada, Inc., “Professional Designations - Qualified Mediator(Q.Med)” <www.adrcanada.ca/resources/designation.cfm> accessed 25/2/2014
6 UK CMC, “2014 Provider Accreditation Scheme Details” (p.9, para. 8(H)(23)) <www.civilmediation.org/downloads.php?f=50> accessed 24/2/2014
7 HKMAAL, How to become a mediator <www.hkmaal.org.hk/tc/HowToBecomeAMediator_G.php> accessed 26/02/2014.
8 Mediator Standards Board, The Approval Standards <http://www.msb.org.au/sites/default/files/documents/Approval%20Standards.pdf> accessed 25/02/2014.
9 https://e-justice.europa.eu/content_mediation_in_member_states-64-AT-en.do?clang=en
10 ADR Institute of Canada, Inc., “Principles Criteria Protocol Competencies for the designation CHARTERED MEDIATOR September 2011” <www.adrcanada.ca/resources/documents/CMedCriteriaSept2011.pdf> accessed 27/2/2014.
11 <www.legislation.gov.uk> accessed 24/2/2014
12 Mediation Bill, Notes, pp. 15, 20

2. 研究中的六個地方都沒有就認證外地調解員資格方面作出指引。[13] [14] [15] [16] [17]

研究中的六個地方都沒有就認證外地調解員資格方面作出指引。

1.1 各地專有的專業調解員名稱

- **澳洲**：全國調解員認可體系（NAMS）[18]於 2008 年 1 月 1 日起使用，並規定所有 「國家認可調解員」，必須要遵守國家調解員評審標準。

- **奧地利**：只要已符合包括特定的培訓在內的註冊要求，調解員可以自願登記為「註冊調解員」。聯邦司法部管有一份註冊調解員名單。[19]

- **加拿大**：「特許調解員」（C.MED）和「合格調解員」（Q.MED）是由加拿大替代性糾紛解決中心所擁有的商標。[20] 「合格的調解員」是對已完成足夠調解及替代性糾紛解決培訓的調解員認證，而「特許調解員」是加拿大執業調解員中的最高級別[21]。

- **英國**：只有根據民事調解會（英國 CMC）的程序下被認可的調解員才可使用「認可調解員」和「民事調解委員會認可調解員」。英國民事調解會會對濫用的人士採取打擊行動[22]。

- **美國**：在任何州，任何人都可以在私人地方，未經任何註冊或認證而充當調解員。但在一些州分例如加州，法院對執行法院有關的調解中擔當調解員有一定的專業要求。

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13 Mediator Standards Board <http://www.msb.org.au/> accessed 25/02/2014.

14 Mediation in Austria: The European Pioneer in Mediation Law and Practice by Markus Roth, David GherdaneP10

15 ADR Institute of Canada, Inc., “Professional Designations - Qualified Mediator(Q.Med)” <www.adrcanada.ca/resources/designation.cfm> accessed 25/2/2014

16 European Commission, “The Treaty of Rome 25 March 1957” (p.4, part 1, Art3(c))

17 HKMAAL <http://www.hkmaal.org.hk/en/index.php> accessed on 26/02/2014

18 Mediator Standards Board, About Us <http://www.msb.org.au/about-us> accessed 25/02/2014.

19 Mediation: Principles and Regulation in Comparative Perspective by Klaus J. Hopt and Felix Steffek

20 ADR Institute of Canada, Inc., “Principles Criteria Protocol Competencies for the designation CHARTERED MEDIATOR September 2011” <www.adrcanada.ca/resources/documents/CMedCriteriaSept2011.pdf> accessed 27/2/2014.

21 ADR Institute of Canada, Inc., “Professional Designations - Qualified Mediator(Q.Med)” <www.adrcanada.ca/resources/designation.cfm> accessed 25/2/2014

22 UK CMC, “2014 Provider Accreditation Scheme Details” (p.9, para. 8(H)(23)) <www.civilmediation.org/downloads.php?f=50> accessed 24/2/2014

- **香港**：要使用「HKMAAL 認可調解員」，必須遵守香港調評會（HKMAAL）的認證要求[23]。

1.2 各地對專業調解員和培訓認證機構的監管機制

- **澳洲**：調解標準委員會（MSB）制定了調解員標準和國家調解員評審機制（NMAS）。國家調解員評審機制是一個由業界自發管理，任何組織只要符合資格及註冊為「認可調解員資格評審組織」（RMABs），便可以進行調解員認證。

  奧地利：聯邦司法部只監督提供調解的培訓機構，而調解法案對調解培訓內容作出了指引。符合資格的調解員需自行在聯邦司法部註冊[24]。

- **加拿大**：加拿大替代性糾紛解決中心（ADR Canada）是一個全國性的非牟利組織[25]，並領導全國糾紛解決服務的開發和推廣，包括處理加拿大和國際間的糾紛。

- **英國**：英國「民事調解會」（CMC）通過「英國民事調解會供應商認可計劃」以評估，考核及認證調解培訓機構[26]。經認證培訓機構可以依照他們的訓練計劃，培訓及評核參與培訓的人士，並認證調解員。直至 2013 年，共有 61 個「英國民事調解會 CMC 認證培訓機構」[27]。（例如「英國調解會」，「牛津調解會」，「有效爭議解決中心 （CEDR）」等）。

- **美國**：沒有任何州或聯邦的官方認證機構，但調解員可能獲得國際認可的認證資格，以認證他們調解的專業。

  例如，直至 2014 年 3 月 1 日為止，有效爭議解決中心已經認可了 18 位調解員[28]。解決衝突協會（ACR）也確認了各種調解專業人員的名稱（如職間調解員）。

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23 HKMAAL, How to become a mediator <www.hkmaal.org.hk/tc/HowToBecomeAMediator_G.php> accessed 26/02/2014.

24 EU Mediation by ChristophLeon and Irina Rohracher, P15

25 ADR Institute of Canada, Inc., <www.adrcanada.ca/about/index.cfm> accessed 25/2/2014.

26 UK CMC, "2014 Provider Accreditation Scheme Details" <www.civilmediation.org/downloads.php?f=50> accessed 24/2/2014

27 UK CMC, "2013 CMC Accredited Provider Organizations" <www.civilmediation.org/downloads.php?f=50> accessed 24/2/2014

28 See <http://www.cedr.com/about_us/international/list.php?param=98> accessed 2 March 2014

- **香港**：香港調評會（HKMAAL）成立於 2012 年 8 月 28 日[29]，是一個由行業領導的機構，而不是一個法定機構，成立以來致力創造優秀調解資歷評審機制 ，履行評審，制定香港的調解訓練課程標準和紀律處分等功能。香港調評會設定調解訓練課程的標準，但香港調評會本身不會提供培訓課程。

1. 調解訓練的要求

	澳洲	奧地利	加拿大	英國	美國	香港
時間 (小時)	38	200 至 365	80	40+	各州份有不同要求, (如阿拉巴馬州是 20-40)	**40**
課程內容	促進式、過程與理論	理論及實踐部分	基本調解培訓及調解專科	包括:理論,道德,談判等	不統一，例如促進式,和協作式都有	**促進式調解過程,倡議保密,中立等**
角色扮演	9 個以上	32 小時	機構自行決定	20 小時以上	不統一	**8 個以上**
導師要求	3 年調解經驗	3 年調解經驗	機構自行決定	沒有特別指明	不同州份不同要求	**對導師、助教及輔導員有嚴格要求**

表 2：各地對調解訓練的要求

2.1 培訓的時間及內容

培訓時間大致為 40 小時到 80 小時，(奧地利是唯一例外，其培訓時間最長)。大部分地區都有統一機構管理培訓，但美國則沒有一定標準。在內容方面，各地都是以促進式調解的過程及理論為主，但美國及澳洲則加入協作式調解。

- **澳洲**：除了以「經驗認證」調解員外，從 2008 年 1 月 1 日起，認可調解員必

29 HKMAAL, How to become a mediator <www.hkmaal.org.hk/tc/HowToBecomeAMediator_G.php> accessed 26/02/2014.

須完成由調解標準委員會（MSB）認可的調解教育和培訓課程。並且 必須參照適用的實務指引，向註冊調解員認證中心（RMAB）證明他們有適當的資格、培訓和經驗[30]。

培訓內容主要是促進式調解，包括如何管理調解會議過程，和如何在參與者作出未來行動和結果的決策過程中，作出適當的援助與支持[31]。

培訓時間必須持續最少 38 小時[32]（如調解工作坊分階段，而多於一節地進行，整個培訓必須於九個月內完成）。

導師要求[33]：首席導教師必須有三年以上的調解員工作經驗，並在該期間遵守持續認證要求，及具有至少三年作為輔導員的經驗。

- **奧地利**：聯邦司法部只對調解的培訓機構作監督，而調解法案則為調解培訓內容提供了比較詳細的指引。有調解經驗的人士，要進行 220 小時的培訓，而沒有相關經驗的人士，則需接受合共 365 個小時的培訓。培訓內容方面包括理論和實踐[34]。

  理論培訓部分：包括調解的基本原理，程序和方法、溝通的原理、分析衝突的成因、調解方法、心理學理論、道德問題、法律法規、調解的商業基礎等。

  實踐培訓部分：包括個人的自我意識和群體自我發現，透過模擬及角色扮演了解調解的應用和程序、個人反思、小組討論、案例研究和參與實際調解的旁聽。

  導師要求：培訓班至少有三位具有 3 年以上調解經驗的導師，而其中應包括一位負責課程行政上的教練[35]。

- **加拿大**：加拿大替代性糾紛解決中心（ADR Canada）並不負責培訓。培訓通常是交予區域分支機構或由區域分支機構批准的機構進行。培訓並沒有統一

30 Mediator Standards Board, The Approval Standards (n 1).
31 Mediator Standards Board, The Approval Standards (n 1).
32 Mediator Standards Board, The Approval Standards (n 1)
33 Mediator Standards Board, The Approval Standards (n 1)
34 Mediation in Austria The European Pioneer in Mediation Law and Practice P47
35 Civil law mediation training regulation

的具體模式。培訓課程可以由培訓機構設計或按客戶的需求而制定[36]。

以「合資格調解員」培訓為例，該培訓為期 10 天（約 80 小時），包括 5 天（40 小時）的基本訓練，及 5 天（40 小時）的專業培訓。

內容包括基本調解培訓（如關注式談判)為基礎的技巧，解決衝突，談判技巧，倫理學等）；及專業調解和相關培訓（如多方協商、仲裁－調解、案例研究、家事調解、法庭程序等等）。

導師要求：認可培訓機構的培訓導師沒有統一資格和要求。

- **英國**：英國民事調解會認可培訓機構（CMC）提供培訓及評核參與培訓的人員，並作出調解員認證。

  英國民事調解會沒有制定具體的調解培訓模式，這意味著個別培訓提供者可以在他們的訓練中使用不同的調解培訓模式[37]。

  可是，培訓課程必須包括：職業道德、調解理論、調解實務、談判和角色扮演練習。此外，調解員如果想處理民事或商業糾紛，就必須具有基本的合同法知識[38]。

  自 2011 年 4 月 1 日起，英國民事調解會訂立了關於培訓課程所需時間的新標準。它規定調解員培訓課程應包括不少於 40 個小時（不包括午餐和茶歇時間）的面授學習和角色扮演，並需於課後接受正式的評估[39]。

  導師要求：英國民事調解會服務供應機構認可計劃並沒有為培訓導師資格訂出指引。只是指出，培訓機構應為其培訓的調解員提供足夠和適當的監督、指導和觀察[40]。

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36 ADR Institute of Canada, Inc., "Training, Handbook and Correspondence Course Programs" <www.adrcanada.ca/resources/designation.cfm> accessed 27/2/2014

37 UK CMC, "2014 Provider Accreditation Scheme Details" <www.civilmediation.org/downloads.php?f=50> accessed 24/2/2014

38 *Ibid*

39 UK CMC, "2014 Provider Accreditation Scheme Details" (p.5, para. 8(B)(5)(iv)) <www.civilmediation.org/downloads.php?f=50> accessed 24/2/2014

40 UK CMC, "2014 Provider Accreditation Scheme Details" (p.3, para.7(d)) <www.civilmediation.org/downloads.php?f=50> accessed 24/2/2014

- **美國**：沒有任何州或聯邦的官方認證機構，亦沒有統一標準。不過有些州規定調解員在處理法庭的個案前，必須先完成調解培訓，而這些培訓可以由第三方提供。例如調解培訓學院（MTI）聲稱提供滿足所有州所要求的調解培訓課程。

  在美國，學員可接受包括促進、變革和協作式調解的培訓，而且調解培訓內容亦沒有統一的模式。例如調解培訓學院（MTI）提供的培訓是促進式調解[41]。

  培訓調解員的課程及所需持續時間都沒有統一的標準。

  調解員如要納入法院的調解員名冊，在有些州的要求是曾接受不少於其特定最短培訓時數的培訓。例如阿拉巴馬州就至少需要 20 小時的一般調解培訓。如果要處理離婚個案，則必須先接受一個最少 40 小時的離婚調解培訓課程[42]。

  導師要求：導師資格並沒有統一的標準。

- **香港**：香港調評會(HKMAAL)致力創造優秀調解資歷評審機制 ，履行評審，制定香港的調解訓練課程標準和紀律處分等功能，。要成為香港調評會認可調解員，必須完成香港調評會認可的第一階段調解培訓課程。

  培訓課程應以促進式調解為原則，內容包括使用綜合方法解決衝突、過程的保密性、調解員的中立性、糾紛雙方直接談判、和自決訂立解決爭議的條件及條文。培訓課程的建議內容已清楚列於香港調評會出版的《調解課程提供機構第一階段調解課程指引》[43]。

  培訓課程不得少於40小時，並在8個星期內完成。課程必須在有關委員會批准之日起計 6 個月內進行。

  導師要求：首席導師必須具有以下經驗（一）在最近三年內進行了至少 30

41 Klaus J. Hopt and Felix Steffek, “Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination”, Mediation: Principles and Regulation in Comparative Perspective, (2012 Oxford Scholarship Online), 48; Department of Justice, Report of The Working Group on Mediation (February 2010), 181

42 <http://www.alabamaadr.org/web/roster-documents/documents/applications/2014-2015_ADRC_Mediator_App_140109_Form_Fillable.pdf> accessed 2 March 2014

43 HKMAAL, Guidelines for HKMAAL Stage 1 Mediation Course Providers <http://www.hkmaal.org.hk/admin/Editor/assets/20131211%20Guidelines%20for%20HKMAAL%20Stage%201%20Mediation%20Course%20Providers_Final.pdf> accessed 26/02/2014.

宗調解個案，或進行至少 300 小時的調解；（二）曾於第一階段擔任 10 場或 200 小時助理導師 及（三）指導 20 次不少於一小時的角色扮演。

助理導師必須（一）在最近三年內進行了至少 10 宗調解個案，或進行至少 100 小時的調解及（二）指導執教 20 次不少於一小時的角色扮演。

教練必須在最近三年內進行了至少 5 宗調解個案，或至少 50 小時的調解。

2. 調解員的專業認證及持續進修

	澳洲	奧地利	加拿大	英國	美國	香港
資格評定	完成培訓 筆試 模擬個案	完成培訓 申請	2 個真實或 模擬個案	由民事調解局 CMC 評審員作 正規評審	不統一	完成培訓及 2 個模擬個案合格
執業行為守則	調解員標準委員會 MSB 執業標準	非規定 奧地利調解網	加拿大替代性糾紛解決中心	民事調解局 CMC 要求不低於歐盟行為守則標準	不統一 法院相關案件 比較嚴格	香港調解守則
調解形式	促進式 為主 / 評估式	促進式	不可提供法律意見，但可提供非法律意見	沒有指定	沒有指定	促進式
重新認證	2 年內 25 小時調解/否則 20 小時專業進修	5 年內 50 小時專業進修	專業進修 合資格:3 年 60 小時；特許:3 年 100 小時	1 年內參與兩個調解	不統一	3 年內 15 小時專業進修

調解員的專業評定：各地對認證均有一定要求，一般包括完成課程及通過考核。但奧地利只要求完成課程後，自行提交註冊證明。而美國則沒有統一標

準。

- **澳洲**：除了以「經驗資格」認證的調解員外，調解員必須完成 38 小時的培訓，並且需要就調解能力作書面的技能評估 (即筆試)（例如過程、道德、保密等認知）及接受至少一個 1.5 小時模擬調解能力評估，而該評估要由獨立人士或培訓團隊中另一不曾為該調解員評估的成員進行。

  最後的考核評估可用視頻或 DVD 進行模擬調解的評估，或是以一個模擬調解作考核[44]。

- **奧地利**：調解法案並沒有對考核作出指引，聯邦司法部將在調解員的登記過程中評估調解員的專業資格[45]。

- **加拿大**：「合格的調解員」[46]（Q.MED）必須具有實踐經驗，包括申請人已進行兩次受監督和評估的調解，或者進行兩個真實的調解個案（不管是否收費）。而且，申請人必須在獲授予「合格的調解員」資格後的 3 年內完成 3 個真實的調解個案（不管是否收費）。這調解個案可以是單獨調解或是多於一個調解員一起進行的共同調解。

- **英國**：根據英國民事調解會（英國 CMC）培訓供應商認可計劃，2014 年起，認可的培訓課程必須包括一個正式評估[47]，並且該評估必須滿足一定標準（於一個適當的環境，例如設置，堅持保密性和中立性等原則下進行）。

  評估員必須符合英國民事調解會 CMC 認證計劃的標準（包括培訓、觀察、持續進修條款），而且評審員必須是獨立於那些提供訓練的培訓人員。

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44 Mediator Standards Board, The Practice Standards <http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf accessed 25/02/2014

45 Mediation in Austria: The European Pioneer in Mediation Law and Practice

46 ADR Institute of Ontario, Inc., “Qualified Mediator Designation” (Q.Med) <www.adrontario.ca/> accessed 27/2/2014

47 UK CMC, “2014 Provider Accreditation Scheme Details” (p.5, para. 8(B)(6)) <www.civilmediation.org/downloads.php?f=50> accessed 24/2/2014

- **美國**：在不同州分有不同的標準。

- **香港**：尋求調評會 HKMAAL 認可的人士，必須有至少 3 年全職工作經驗，並且完成調評會認可的第一階段培訓課程，及順利通過調評會第二階段評估，在兩個模擬的調解個案中，表現達到調評會表 1 所列舉的核心能力和準則的規格[48]。

3. 執業行為守則

各地認證／管理機構為調解員設定了不同的專業守則。 只有美國因為沒有統一的認證機構，所以亦沒有任何統一的標準。

- **澳洲**：註冊調解員認證中心(RMAB)要求認可調解員：(一)品行良好、(二)承諾遵守行業標準和其他法律的規定、(三)購買相關的專業保險、(四)支付調解標準局(MSB)登記費、(五)是一個合適調解組織的成員，及(六)已在註冊調解員認證中心獲得認可資格。 同時，「國家認可調解員」也一定要遵守調解標準局（MSB）的實務指引[49]。

- **奧地利**：奧地利調解網根據歐盟的調解員行為守則（2005），編寫並發佈了奧地利調解員行為守則。該守則適用於調解，但沒有強制性要求遵守[50]。

- **加拿大**：加拿大替代性糾紛解決中心（ADR Canada）調解員行為守則適用於該中心或其分支機構的每一個調解員，亦適用於接受該中心委任為調解員的成員。最低要求為每一個調解員必須遵守該中心的守則。加拿大替代性糾紛解決中心有權調查涉嫌違反守則的調解員，並可以暫停任何調解員的認證[51]。

48 HKMAAL, How to become a mediator (n 1).
49 Mediator Standards Board, The Practice Standards <http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf> accessed 25/02/2014
50 Code of Conduct for Mediators (Ethikrichtlinien für MediatorInnen)
51 ADR Institute of Canada, Inc., “Code of Conduct for Mediator”

- **英國**：根據英國民事調解會 CMC 供應商認可計劃，2014 起，認可調解供應商必須擁有一套適當的行為守則，而行為守則必須沒比歐盟 2004 年出版調解員標準守則那麼嚴格。

  如果調解員沒有具備專業資格(如法律)，調解員要處理民事或商業調解時，必須展示已掌握基本的合同法知識[52]。

- **美國**：一般都沒有行為守則的要求。然而在一些州分，要處理法院相關的調解，調解員必須符合相關預設的要求，並在司法部門的名冊登記。(例如，在阿拉巴馬州，要在司法部門的名冊登記。)調解員必須品行良好，擁有一個註冊律師資格，及具有四年法律執業經驗，並且遵守阿拉巴馬州最高法院訂立的調解員道德守則[53]。

- **香港**：調評會認可調解員必須遵守香港調解守則[54]。

4. 各地對重新認證有要求

- **澳洲**：調解員必須在取得認證後的兩年內獲取至少 25 小時調解經驗（總時間），可以是單獨或共同聯合調解。否則，RMAB 可以要求調解員在每兩年週期內完成不少於 10 小時的調解（可以是單獨或共同聯合調解），或/並可以要求調解員參加"升值"培訓或重新評估，並在每一個兩年週期完成至少 20 小時的持續專業發展進修。

- **奧地利**：註冊調解員在五年內進行不少於 50 小時的持續專業發展培訓，並

<www.adrcanada.ca/resources/documents/CodeOfConduct2012August30.pdf> accessed 27/2/2014

52 UK CMC, "2014 Provider Accreditation Scheme Details" (p.4, para. 8(B)(3)) <www.civilmediation.org/downloads.php?f=50> accessed 24/2/2014

53 See: <http://www.alabamaadr.org/web/resources/resources_ethics.php> accessed 2 March 2014

54 HKMAAL, Hong Kong Mediation Rules, Hong Kong Mediation Code <http://www.hkmaal.org.hk/en/HongKongMediationCode.php> accessed 26/02/2014.

每五年一次提交證明予聯邦司法部[55]。

- **加拿大**：自 2009 年 1 月 1 日起，持有「合格的調解員」稱號的調解員須在三年時間內獲得持續專業進修 60 學分。 而特許調解員須在三年內獲得 100 學分[56]。

- **英國**：資歷淺的調解員須在被委任為主要調解員前的 12 個月中，處理了至少 3 個民事或商業調解個案（其中一個可以是角色扮演個案）。

  調解員在重新認證前，必須於前 12 個月內，進行了至少兩個民事或商業調解。如沒有實際的民事或商業調解，亦可以通過至少 1 小時或 1 個社區調解，或兩個模擬電話調解的練習得到認證[57]。

- **美國**：因為沒有任何聯邦或州的認證機構，所以沒有統一標準。亦因此，各州的法院調解員的名單，對重新認證做法亦沒有統一標準。例如，在阿拉巴馬州並沒有詳細列明調解員入了名單後的持續進修規定[58]。

- **香港**：調評會的調解員認證為期三年。調解員要在三年內累積 15 個持續進修學分[59]。

以上都著眼於較為量化的資格及技巧。

以下之篇幅，以另一角度出發—嘗試分別從一些趨勢及案例，觀察及討論一些較為非量化或較抽象的資格及技巧以作參考。

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55 Mediation in Austria: The European Pioneer in Mediation Law and Practice

56 ADR Institute of Canada, Inc., "Professional Designations - Continuing Education and Engagement" <www.adrcanada.ca/resources/continuing.cfm> accessed 25/2/2014

57 UK CMC, "2014 Provider Accreditation Scheme Details" (p.5, para. 8(E)(2)) <www.civilmediation.org/downloads.php?f=50> accessed 24/2/2014

58 See: <http://www.alabamaadr.org/web/roster-mediators/index.php> accessed 2 March 2014

59 HKMAAL, CPD <http://www.hkmaal.org.hk/en/CPDCriteria.php> accessed 26/02/2014.

首先，以下是從趨勢去瞭解這些資格及技巧。

調解趨勢與相關資歷要求

調解/仲裁雙軌模式 (Med-arb)

「調解/仲裁雙軌模式」是調解和仲裁交替進行的爭議解決模式。 在仲裁進行期間，尤其當爭議始末逐漸明朗的時候，當事人可協議暫停仲裁並嘗試調解，若調解失敗便恢復仲裁審訊。在美國，採用「調解/仲裁雙軌模式」個案的數字於 1999 年至 2005 間明顯上升[60]；中國大陸的情況亦是一樣[61]。有見及此，中國國際經濟貿易仲裁委員會（CIETAC）於 2012 年在其仲裁規則中加入相關規條[62]，而香港的仲裁條例亦特別容許仲裁員在仲裁中同時兼任調解員[63]，可見此類爭議解決模式已日趨普及。

「調解/仲裁雙軌模式」給予當事人相對大的空間尋求和解，同時省卻分開進行仲裁和調解時無可避免的重複開支（如不同仲裁員和調解員審閱相關文件的時間和功夫）[64]。其缺點在於容易混淆仲裁及調解員的角色，香港上訴庭在 2011 處理的 Gao Haiyan 案便是一例[65]。當中仲裁後裁決的敗方，指控仲裁/調解員在調解過程中的單獨會面（caucus）期間對其施加不當的壓力而導致裁決不公。雖然上訴庭最後因應此案的情況否定該指控，但顯然在調解單獨會面中的單向保密要求與仲裁中公開及公平審訊原則有一定衝突，需要小心處理。

因此，長遠而言，參與「調解/仲裁雙軌模式」的仲裁/調解員應接受相關的特別訓練。正如加拿大的「合格調解員」資格（Q.Med）要求中便有此一項[66]。除此

60 James R. Coben and Peter N. Thompson, “Mediation Litigation Trends: 1999-2007”, (2007) 1(3) *World Arbitration & Mediation Review* 395, 410-411

61 Weixia Gu and Xianchu Zhang, “The Keeneye Case: Rethinking the Content of Public Policy in Cross-Broder Arbitration Between Hong Kong and Mainland China”, (2012) 42 *Hong Kong Law Journal* 1001, 1004

62 Article 45; Song Lu, “The New CIETAC Arbitration Rules of 2012”, (2012) 29(3) *Journal of International Arbitration* 299, 310

63 香港仲裁條例（609 章）第 32 及 33 條

64 James T. Peter, “Med-arb in International Arbitration”, (1997) 8 The American Review of International Arbitration 83, 89

65 *Gao Haiyan & Anor* v *Keeneye Holdings Ltd & Anor* [2012] 1 HKLRD 627

66 ADR Institute of Canada, Inc., Requirements for Q.Med Status, <http://www.adrcanada.ca/resources/documents/NationalQMedRequirementsFinal.pdf >, accessed 27 March 2014

之外，擁有仲裁專業資格[67] 、仲裁學歷[68] 或仲裁經驗[69] 的認可調解員亦會較有優勢。

非針對解決爭議的調解服務

調解的用途並不限於解決爭議。解決投資爭端國際中心（ICSID）在 1999 年時已提倡「商業交易調解」（Deal Mediation）的概念[70]。其目的是運用調解技巧幫助互不相識的談判雙方，克服不同背景和立場造成的分歧，專注於共同利益和方案創造，以此達成有長遠效果的商業協議[71]。這概念在西方國家得到普遍認同[72]，國際機構如英國的有效爭議決議中心（CEDR）已提供此類促進商業交易的調解服務[73]，估計這趨勢將來亦會在香港冒起。

事實上香港亦有非針對解決爭議的調解例子。在一宗牽涉網上遊戲知識產權糾紛的高等法院案件中，法庭頒令其中一方暫時（在訴訟完畢前）將所有關於該遊戲的軟件源碼和數據庫交予與訟的另一方。由於預計交收過程繁複及專門，而雙方基於案中敵對立場亦不會採取合作態度，故此法庭要求雙方共同委派一名中立調解員促成整個交收過程，並協助解決過程中衍生的爭議；如其中有爭議而調解不成功，可再交回法庭處理。這種「程序調解」和上述的「商業交易調解」理念基本一致，就是利用調解促進有建設性的合作關係，幫助當事人有效地達成共同目標。

除一般調解技巧外，處理非針對解決爭議的調解亦可能需要相關範疇的資歷。例如對於處理「商業交易調解」，擁有商務談判和業務發展經驗的調解員便會較容易理解交易雙方的戰術考慮和談判籌碼，從而幫助雙方發掘共同利益和雙贏方案。又如上述的「程序調解」，對於該程序牽涉的資訊科技有認識，和在人事或項目管理上有經驗的調解員，亦較有優勢。

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67 如 FCIArb, FHKIArb

68 如 LLMArbDR(CityU), LLM(Arb&DR)(HKU)

69 如仲裁員、法官

70 L. Michael Hager and Robert Pritchard, “Deal Mediation: How ADR Techniques Can Help Achieve Durable Agreements in the Global Markets”, (1999) 14 (1) *ICSID Review* 1

71 L. Michael Hager (supra), 2

72 E.g.: Scott R. Peppet, “Contract Formation in Imperfect Markets – Should we Use Mediators to Make Deals?”, (2004) 19 Ohio St. J.Disp. Resol. 283; Manon A. Schonewille and Kenneth H. Fox, “Moving beyond ‘Just’ a Deal, a Bad Deal or No Deal”, *ADR in Business: Practice and Issues across Countries and Cultures* Volume II, pp.81-116; Charles Middleton-Smith and Edward Moore, “Assisted deal making”, (2007) 3(1) *International Bar Association Legal Practice Division Mediation Committee Newsletter* 16

73 < http://www.cedr.com/solve/facilitation/ > accessed 24 February 2014

牽涉跨境爭議的調解

近年中港商貿往來日益頻繁，隨之而來的糾紛亦相應增加，可見調解員將會面對更多涉及兩地人、公司和資產的爭議；而兩地迥異的調解制度和文化背景不免會爲調解員的工作帶來挑戰。

首先，內地和香港的調解模式有系統性或固有性的差別。在內地，調解受《中華人民共和國人民調解法》[74]（簡稱爲《調解法》）管轄。對於調解員的責任，《調解法》有此要求：

> *「人民調解員根據糾紛的不同情況，可以採取多種方式調解民間糾紛，充分聽取當事人的陳述，講解有關法律、法規和國家政策，耐心疏導，在當事人平等協商、互諒互讓的基礎上提出糾紛解決方案，幫助當事人自願達成調解協議。」(底線另加，以示強調)*

根據以上規定，除促進協商外，調解員還需要爲當事人提供法律和相關的政策資訊，而《調解法》亦明文容許調解員採用各式各樣的模式進行調解，這和香港推行的單一「促進式調解」（Facilitative Model） 制度不同[75]，當內地人參與在香港進行的調解時，容易造成期望落差。長遠而言，兩地可參考如歐盟的《2008 調解指令》[76]，制定區內的跨境調解標準。

其次，爲應付兩地的文化差異，調解員需要具備多元的語言能力和生活經驗。不過現時香港的調解制度只提供運用英語和廣東話的訓練和審核[77]，未來應考慮加入針對處理跨境爭議和應用普通話的課程與及持續專業發展要求[78]。

以上已探索了，從趨勢的角度去瞭解一些較為非量化或較抽象的資格及技巧。

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74 See: http://www.gov.cn/flfg/2010-08/29/content_1691209.htm

75 香港調解資歷評審協會有限公司（HKMAAL）發出的認證指引 < http://www.hkmaal.org.hk/img/guidence_en.pdf >, accessed 5 April 2014

76 European Union, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF >, accessed 5 April 2014

77 HKMAAL Frequently Asked Questions, Answer to Q12: < http://www.hkmaal.org.hk/en/ faq.php > accessed 27 February 2014

78 http://www.hkmaal.org.hk/en/CPDCriteria.php

接著，換另一角度，嘗試從一些案例，觀察及討論一些較為非量化或較抽象的資格及技巧再作參考。

案例分享

1. 案例分享：個案一

背景

當事人為同村遠房親戚，甲乙雙方(共約十五人，另加法律代表)同時要求分配三層丁屋中的其中兩層。

甲乙雙方的祖父輩份屬堂兄弟，原本感情要好。其後子孫繁衍，各自成家，部分原居民為工作方便，早已遷離原村至市區居住。

甲方一直於原村居住，並以發展及買賣丁屋為生；而乙方早些年為工作方便，已遷往村外居住，而原村祖居只有年邁父母、家姐及姐夫一家留守。

乙方最近獲分配土地，准許在原村內興建丁屋，唯丁屋土地受相關土地政策及法例規管，即男性原居民在年滿十八歲後，可享有一生一次在村界範圍內的土地上興建一棟三層總高度不可超過 27 呎及每層面積不多於 700 平方呎的丁屋。為了物盡其用，乙方計劃在獲分配的土地上興建一棟三層丁屋，既可改善本身居住環境，又可一盡孝心與年邁父母一起居住，方便照顧晚年行動不便的母親。但由於手頭銀根緊拙，未有足夠金錢支付三層丁屋的建築費用，一時一籌莫展。

甲乙雙方在一次親友宴會中相遇。在親友拉攏下，雙方同意合作，由甲方出資在乙方名下丁屋土地建屋，待丁屋建成後，雙方共同持有此丁屋。由於雙方當事人均為同村遠房親戚，一心以為萬事可商量，故此，在建屋前未有詳細講述建屋後雙方權益的細節安排。可是，在竣工後，雙方也要求分配三層丁屋的其中兩層，並為此事多次爭持不下。

過程

- 上午十時，正式開始後不久，在第一次共同會議時，雙方差點動武 — 因為不滿另一方的開場白，一方甚至試圖爬越會議桌向另一方施襲，但被及時阻止…
- 午飯後，分別已經進行個別會議，當開始第二次共同會議時，雙方(除法律

代表外) 情緒波動，由咽哽飲泣至嚎啕大哭…

- 晚上約十一時，調解員協助他們找到解決方案，圓滿解決紛爭，結束訴訟 — 雙方搭膊頭離開會場，各人都展現滿意的笑容。

轉捩點

- 在各自個別會議裏，雙方都分別確認，大家不單只是遠房親戚，亦是同村的老街坊，更甚他們兒時都是青梅竹馬，一起玩耍，一起長大的…所以，始終大家都有一份鄉情…

- 亦分別在個別會議裏，發現當時爭執開始後，乙方常到甲方家中〝找晦氣〞，時有不同程度的衝突；剛巧，期間甲方剛有一長者病重及繼而離世，令甲方非常怨恨乙方之行動〝引致〞其長者辭世。而該長者當然亦是乙方之遠房長輩…此時，能夠將心比己、易地而處，可發揮一定的作用…

- 再者，在個別會議裏，雖然乙方爭取兩層丁屋，深究下發現他最關注的是獲取丁屋之地層，原因是其行動不便的母親倚靠輪椅活動；換句話說，其它事情他是不排取可以金錢解決…而甲方純粹因為見乙方爭取兩層丁屋所以跟隨爭拗…

就上述個案而言，如調解員擁有以下資格/技巧等會較有優勢：

- **土地測量資格/丁屋運作常識**

因丁屋與一般市區私人住宅物業的買賣及興建條款不一樣，受相關土地條例規管[79]，若調解員擁有這方面的認識，會更有效率地推動會議流程， 而且就雙方提出解決方案的可行性推敲更為精準。這大大提升調解員的專業形象，並增加甲乙雙方對調解員的信任程度。如果之前沒有這方面的經驗，便需加倍用功研究，找尋相關資料，並且請教行內人士。

- **新界鄉情/風土人情**

常言道：「各處鄉村各處例」。新界鄉村風土人情與市區大大不同，一些古老文化早已植根在原居民的生活模式上。原居民的生活態度及價值觀受傳統鄉情影響，

79 *Lands Administration Office Instruction, Section J - 1, Introduction, Definitions, Authority and Delegation (L.I.J-1)*

往往跟都市人不一樣。若調解員對這方面有深入了解，他們會身同感受，易地而處地從原居民角度思考，理解甲乙雙方的想法，對拆解雙方的歧見更事半功倍。若在常理外，適當時候使出一張鄉情牌，可能有意想不到的美妙效果。

- **溝通能力/將心比己**

在任何的調解過程中，調解員角色活像領航員。所以擁有良好的溝通能力（包括聽、講及觀察能力）便能精準及明確地引領甲乙雙方理解問題的成因和個案帶給他們的影響及雙方的訴求。當掌握雙方背後的關注點後，將心比己，才能找出雙方也能接受的解決方案。

2. 案例分享：個案二

背景

國際公司（A 公司）跟其廠家（B 公司-香港公司內地廠房）就一宗涉及數千萬元訂單及生產違規出現糾紛之案件。

A 公司為一跨國企業，擁有一系列國際知名品牌，極之重視公司及品牌形象，因此對選擇生產商非常嚴謹。A 公司要求生產商除了保証產品品質必須達標外，也要肩負起社會責任，例如生產商不能聘用童工、黑工或產品在生產過程中不得造成環境污染等等。

最近 A 公司有情報顯示 B 公司在內地生產線出現生產違規跡象，當中涉及聘用童工，B 公司並被私家偵探拍攝到不時有童工在其內地廠房外圍徘徊的情況出現，並搜羅了一些有污染水道的資料。

此舉，不單有可能摧毀 A 公司多年來建立在國際上的良好企業形象，更可能被公眾指為偽善機構。

A 公司為保企業形象及令其生意不受該事件影響，設法取消與 B 公司的生產訂單，試圖與 B 公司劃清界線。

B 公司當然力抗 A 公司的指控，並重申聲明生產過程並無違規，招聘人手及生產過程一切依從合約條款進行，亦同時符合國內勞動局及環保局相關指引.。

過程

A 公司差不多每個部門的亞洲區主管都出席調解會議，並進行了 27 小時談判，

當中涉及合作多年之恩恩怨怨…

轉捩點

- 在首輪共同會議，雙方都强調非常關注生產過程及產品質素，亦討論雙方在此事件之角色及看法，話題更觸及在此行業的客觀情況及處理方法；在此會議前，雙方從未有機會細心考慮對方之看法，更從未有機會考慮一些在行業裏之客觀標準…

- 進入個別會議，雙方分別開始明白自己之看法不是無懈可擊，從而引伸至訴訟及商業風險的增加及其它關注…

- 亦在個別會議裏，首先發現他們合作始於 A 公司的其中一位主管(當時亦有列席) 跟 B 公司的老闆認識於微時，亦由她作為介紹人穿針引線從而開始合作關係，而一直合作愉快；原先相隔千里之分歧，亦因為此介紹人開始收窄…

就上述個案，如調解員擁有以下資格/技巧等會較有優勢：

- **貿易/出入口知識/專長/經驗**

此個案受中港兩地貿易及出入口相關機制和條款影響，若調解員擁有此方面知識，定能在調解會議中發揮所長，有效地協調雙方在爭議中找出既符合中港兩地生產機制和條款而又能被雙方接受的解決方案。

- **工廠生產/國內工廠常識**

內地及國際舞台上工廠生產線運作模式存在差異，有相關知識的調解員能化繁為簡，直接及清晰地針對糾紛的成因及重點引領會議向前，提升會議效率，免除不必要的解說和節省時間。

- **拆解人脈/人事關係**

中國內地的處事方式與本港文化或國際商業領域存在差異，人脈/人事關係是商業和社交行為中不可或缺的重要因素。調解員若明白人脈/人事關係在各地的重要性，便能技巧地拆解人和事的瓜葛，引領爭辯雙方易地而處，從對方立場思考。適切的關顧能激發雙方換個另一角度看事件，明白事件帶給對方的影響，有軟化爭辯雙方堅持己見的功效。

- **耐性/鍥而不捨**

正如上文指出，調解員角色像領航員，在調解會議中引領爭辯雙方向前推進。但當會議流程未如理想，雙方出現疲態或信心動搖時，調解員更應發揮其耐性和鍥而不捨的精神，再度鼓勵雙方不要放棄。各方鍥而不捨的精神和積極的參與是調解成功的基石。

3. 案例分享：個案三

背景

數年前，有一宗交通意外身亡索償事件。事件涉及一名八十多歲婦人在橫過馬路期間給撞倒，其後送往醫院搶救，可惜最終証實不治。

事後其兒子及媳婦控告車主及司機疏忽駕駛，導致老婦死亡。而司機則指責她没有遵守交通安全規則，亂過馬路，引致該次意外。

過程

調解開始時，在第一次共同會議中，雖然其兒子表現傷心，但其媳婦不單淚流滿面更多次情緒失控，對他們表現仇視，不斷指責司機：「撞死人！我好慘呀！」...

同時，媳婦的衣著有點異常—那時侯正是炎炎仲夏，街外烈日當空，但媳婦穿的衣服竟然是長袖外套，及密密地包裹其右手...

轉捩點

- 進入個別會議，媳婦不停地欲言又止訴說當時之苦況，但兒子則數度中斷其陳述...原來，當奶奶遇上交通意外期間，媳婦不幸地遇上一嚴重工業意外，重創她右手，令其嚴重傷殘；而在奶奶身故後，媳婦亦不顧醫生的勸阻(因要接受多次外科矯型手術)，繼續處理各樣奶奶身故後的大小事情，包括舉殯、殮葬等等...換句話說，不單是奶奶待她好，她自己亦有當時非常困難的心結。最後，他們都願意在第二輪共同會議向車主司機訴說...

- 在第二次共同會議時，他們的情緒得到宣洩，雙方都用較平和的心情去解决分歧。明顯地，媳婦反過來主導和解...

就上述個案，如調解員擁有以下資格/技巧等會較有優勢：

- **觀察入微**

此個案引證了作為一個調解員要觀察入微，不單是情緒，即使是衣著一些細節也要留心。

此外，倫理關係也要注意。倫理就像一條繩子，當我們出生時便把我們與其他人連接上。在案件中，婆媳之間就有著緊密的倫理關係。

- **相關知識**

另外，持有駕駛執照或熟悉道路安全的調解員較有優勢。因為他們更容易理解意外發生的情況。

- **善後準則**

最後，調解員對善後準則也要有基本認識。一般在意外傷亡索償案件中，當事人通常會以一些客觀準則為參考依據，例如：本案中就參考了香港法例和普通法的賠償準則。

總結：調解員資格及技巧

綜觀全文，作為一個出色的調解員要具備不同的能力和技巧如下：

- 調解員不但要見識廣博、常識豐富，而且遇到某些類型的案件時更要具備有關行業的專門知識，例如：建築行業裡的判工運作等。

- 勤力是不可或缺的因素。調解員須要在調解會議前做好準備，例如：了解事情及雙方背景，爭拗關鍵和安排會議場地等等。這一點一滴的工序，都是調解員成功的因素。

- 維持專注力對調解員來說也是一項挑戰。調解員須要在整個調解過程中全情投入，就算是日以繼夜，亦不可分心。

- 調解員亦需要有洞察力。優秀的調解員不但要觀察當事人的神色和行為，也要洞悉其背後的動機和關注點。就好像偵探小說裏的福爾摩斯一樣，透過對周邊人物、事物和環境的细心觀察、了解和推敲，找出破案關鍵。

- 作為調解員亦要通情達理，明白當事人所處狀況，了解他們的需要。例如：上述交通意外例子中，媳婦的情緒被壓抑多時，需要疏導。若調解員能明白她的狀況，便能安排適合的時間和空間給她宣洩。

- 有時候調解會議停滯不前，雙方仍然堅持己見。一位優秀的調解員，必須要有耐性和鍥而不捨的精神。鼓勵爭議雙方不要放棄，積極思考，創造新方案，並盡力解決爭議。

- 調解員的誠信是決定他成功與否的重要關鍵。要成為一個可靠的調解員，他必須履行承諾，例如：遵守保密協議、守時等。另外，調解員要讓當事人打開心扉，把心裡的想法說出，誠懇的態度是不能缺少的。

- 法官用的是法例賦與他們的權力；調解員用的則是其親和力。調解員像個領航員一樣，用親和力帶領雙方走到他們想到達的目的地。

- 豐富的工作經驗及具備不同行業的專門知識，能夠令調解員理解社會上各行各業的運作模式，全面看清楚錯綜複雜的衝突因素，更能掌握當事人的心理。

- 調解員的角色是中立、獨立和不偏不倚。在調解過程中，調解員要自我抽離，客觀地分析人和事；要注意自己的思維和感覺，避免直覺及主觀的判斷。若調解員不知不覺地偏袒了某一方，那就是欠缺客觀和自控力的表現。

- 卓越的聆聽技巧可說是調解員其中一項核心技能。在整個調解會議過程中，調解員要靈敏地聆聽當事人的每句說話，不但要聽到說話裡的內容，也要聽到說話裡的情緒和感受。常常地，當事人說話時會有弦外之音，調解員也要把它識辨出來。另外，用心聆聽可顯示出調解員的同理心，能有效安撫當事人的情緒。

- 調解員與當事人的溝通模式大部份時間是以提問方法進行。哲學家蘇格拉底倡導以提問方式與人溝通。這樣可以避免直接對質，減少冒犯，並能喚醒對方潛意識的想法。

- 調解員要面對不同的當事人，而每位當事人都會有他們的特質。再者，當事人正面對著糾紛和衝突，他們的行為可能會異於常態。資深的調解員會摸索及適應各方的特質，延續談話，達至深層次的溝通。

- 調解是一門專業，所以調解員要有他的專業形象。作為一位專業調解員，無論是外表或言行舉止都要顯得大方得體，不損專業形象。

- 調解員要決斷、主動。因為很多時候，在調解會議中經常會出現突如其來的難題，例如：當事人情緒失控、雙方會談陷入僵局等等。那時候，調解員便要當機立斷，在電光火石間，主動想出方法嘗試把問題解決。

- 豐富的人生閱歷對調解員來說是種優勢。正所謂：『太陽底下無新事』。經歷，給我們累積了智慧，讓我們見到了模式。閱人無數的調解員總比初生之犢想得全面，看得透徹。

從各地的調解發展情況來看，香港在制定調解標準方面已取得了很大進展。調評會的成立將進一步協助統一本地調解員的資歷和相關技巧。現時，調評會正積極鼓勵各訓練機構加入成為會員，但現時是否加入成為一份子仍完全視乎機構本身的意願。要建立一個各界認可的系統，道路仍然是漫長的，另外在立法等方面亦存在不少需要突破的難關。看來，如果要做到將本地調解員的資歷和培訓統一和系統化，仍有待相關人士有智慧地發揮調解能力和技巧，而上述提出的各項調解員應具備的能力和技巧就可供參考。

「家事調解員的素質」及「調解教育」

鍾國盛先生[1]

我好榮幸參與是次「調解為先：互利雙贏」調解研討會，同時感到好高興有機會與一班對調解有興趣的朋友彼此交流，希望一齊努力讓香港調解服務發展更上一層樓。

香港家庭福利會於 1997 年開展家事調解服務，幫助面臨分居或離婚的夫婦，以和諧理智的方法處理離異後的安排，以達成雙方接納的協議，繼續合作教養子女。於 2001 年，本會更設立本港首間由非政府福利機構營辦的調解中心，致力推廣及提供各類調解服務，包括家事調解、社區調解等，同年也開展朋輩調解計劃，訓練學生成為「朋輩調解員」，協助處理朋輩衝突，締造和諧校園，至今已訓練超過 3000 名「朋輩調解員」。另一方面，本會也積極地推展調解訓練和調解教育，並於 2011 年推行「生命旅程」– 調解教育系列，讓不同的專業人士及市民大眾認識及應用調解的知識和技巧，助己助人，共同攜手建設更和諧的社會。

「家事調解」及「家事調解員的素質」

自從無過錯離婚概念 (no-fault divorce) 於上世紀 60 - 70 年代開始在歐美國家廣泛應用，為讓離婚人士對自身重大決定有參與的權利及獲得更好的專業服務，離婚調解的程序與方法逐漸被發展出來。於亞洲來說，香港在家事調解發展上已算是先行者，並且已累積相當豐富的經驗。

現時香港調解資歷評審協會有限公司(調評會)對家事調解員的培訓及資歷要求是合適的，並已參考歐美及澳洲等地方為家事調解員的資歷及道德操守制定指引，詳情可參考調評會的網頁。從本人的工作經驗中，在家事調解員的眾多任務當中，最重要有以下三項：

1. 確保過程的安全
2. 保障兒童的福祉
3. 提高調解成效

在整個調解過程中，離異雙方在調解室以外仍然有很多互動及衝突，當中亦會對

[1] 香港家庭福利會調解服務主任；註冊社工；香港調解資歷評審協會有限公司認可調解督導及家事調解員 及 認可親職協調員

其他家庭成員造成影響，世界先進國家普遍要求家事調解員須具備有關家庭衝突對各成員所造成影響的相關知識及實務經驗，當中包括：家庭與婚姻、婚姻過程對當事人的心理衝擊、發展心理學(尤其兒童發展)、家庭暴力及虐待兒童等相關知識，家事調解員絕不應對在調解室以外有關人身安危的情況掉以輕心。

同時，家事調解員亦須對離婚程序、家事調解相關之法規及知識，以及了解相關社區資源(可在那裏尋求法律援助、社工或綜合保障等等)，可更有效協助雙方處理離婚及往後生活的壓力，以幫助雙方更有能力達至合作照顧子女的安排。

評估家事調解的成效要比綜合調解複雜，協議簽訂只是其中一個成效指標。一個好的調解過程可以讓雙方放下怨恨，提昇合作及減低對子女長遠的負面影響。這些都不能單純用協議達成率作成效評估。在另一些情況，有經驗的家事調解員一定會遇過雙方透過調解過程，化解了彼此間一些誤會後(包括最常見的因衝突中放不下面子而提出離婚的個案)，在調解員巧妙地製造下台階的情況下，讓雙方自決復合，不作離婚，雖然這些個案未能簽訂協議，但調解的成效可謂更有價值。

家事調解員要保持專業觸覺是需要不斷接受在職訓練及與其他家事調解員、律師、法官等互相交流，從而提昇自己的能力及與其他專業的合作關係。因家事調解是受高度情緒衝擊的工作，遇到專業挑戰是必然的經歷，有需要時亦要尋求同儕的專業意見及督導。

現時在香港為合資格家事調解員提供督導服務的情況仍未成熟與普及，所以新進的獨立家事調解員在開始發展時常常感到困難重重，有些甚至在獲認可後未曾真正做過一個個案便放棄了。希望在未來的數年，行內能發展出有系統的督導服務，讓好的家事調解員能薪火相傳，提高行業之專業水平。

「調解教育」對調解發展的重要性

調解服務要健康發展除了需要有優秀的調解員外，還需要有對調解有正確認識及信任的普羅大眾，要是大眾明白調解是解決爭議的一種好方法而非在準備訴訟前的一個程序，爭議雙方將可以更正面及有效地使用調解服務。

要教育大眾，最好由小時候做起。我們相信讓青少年及早認識及接觸調解，不但可以提高他們自身解決問題的能力[2]，更可以建立和平解決衝突的文化。待他們

[2] Afshan, S & Hildy, R. (2004) Mediation as a Method of Parent Intervention in Children’s Disputes. In Journal of Family Psychology, Vol18(1), 147-159.

長大後，他們亦更懂得運用調解去解決人際間的矛盾。

本會在全港推動「朋輩調解計劃」十多年，綜合多年的服務使用者意見及計劃成效評估研究，結果令人鼓舞：

「朋輩調解員」方面

透過比較朋輩調解員參與此計劃前後的分別，很多朋輩調解員於以下各項均有進步：

- 對衝突的看法
  - 大部份的衝突可以靠和平理智的方法面對
  - 適當地處理衝突可以促進朋友間之感情，並帶來個人成長

- 對處理個人情緒及衝突的信心和技巧
  - 懂得處理自己的憤怒情緒
  - 以和平理智的方法去面對衝突
  - 可以有效地處理衝突
  - 在處理衝突時，嘗試站在對方立場，聆聽對方的感受

- 處理朋輩衝突的信心和技巧
  - 更有信心處理朋輩間的衝突
  - 溝通技巧有進步，例如聆聽、發問等
  - 懂得令兩個在憤怒的同學冷靜下來

- 對朋輩調解的認識

- 掌握朋輩調解每個階段所要求的調解技巧

「校內人士」方面

參與的學校對此計劃給予好評

- 「朋輩調解計劃」有助推廣和諧互助之校園文化
- 朋輩調解員處理衝突的能力，他們的自信心和幫助同學之熱忱都有進步
- 「朋輩調解計劃」能夠支援老師處理學生的衝突
- 他們支持在校內繼續推行「朋輩調解計劃」

- 這個計劃的宣傳及推廣活動令學生認識更多處理衝突的資源

整體來說，這個研究證實了「朋輩調解計劃」能有效地培養積極處理校園衝突的文化，而「朋輩調解」是一個預防及處理青年人衝突的有效方法。

身為調解員多年，大多數的工作都是自己一個人面對，偶爾會有感到孤單的時候；但在參與是次調解研討會後，我體會到有很多志同道合的朋友其實在一同努力推動調解發展，感覺非常鼓舞，希望與各同道繼續合作，為香港調解發展繼續努力。

從案例看調解在商業、保險及金融爭議中的作用

龍劍雲 司法常務官[1]

主題

1. 今天想同大家分享調解在商業、保險及金融爭議中的作用及法庭對以調解解決這些爭議所持的態度。

2. 因爲法庭不參與實際調解，所以，在技術上，本人不能與各位分享調解的經驗。這個題目，相信可以由其他經驗豐富的調解人員與大家分享他們的經驗。我只可以從以往的案例中，跟大家分享法庭對調解在上述爭議的看法和態度。

3. 民事訴訟改革委員會的最後報告中清楚説明調解在民事訴訟之中所能夠發揮的作用：
   a. 在適當情況下，調解可以節省大量訴訟費用；（第 788 段）
   b. 調解可以為當事人作出有彈性和建設性的結果，這是一般訴訟不能達到的結果；（第 799 段）
   c. 調解給與當事人快捷解決爭議的機會；當事人可以在保密、和平的氣氛下解決雙方的爭議，避免針鋒相對地向對方造成極大的傷害。（第 800 段）

4. 新的民事訴訟規則 1A(e)規定，法庭有責任促使雙方達成和解，解決雙方的爭議。司法機構還制定實務指示（實務指示 31 條），對調解的程序作出指引，使各方有所遵循。

5. 由此可見，法庭認爲調解在民事訴訟中確實能夠發揮有效而積極的作用。在下面的案例中，我們可以看到法庭的取態。

法庭認爲調解可以解決雙方的爭議

6. 在 *iRiver Hong Kong Limited v. Thakral Corporation (HK) Limited* CACV252/2007，8 August 2008 案件中，雙方爭議的數額為一百萬元，而案件所涉及的訟費卻大概是四百萬元，上訴法庭最後提出，雙方律師應該建議當事人用調解方式處理雙方的爭議。

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[1]香港特別行政區高等法院司法常務官；司法機構調解工作小組成員

7. 在 *Supply Chain & Logistics Technology Limited v. NEC Hong Kong Ltd.* HCA1939/2006 by Lam J.，29 January 2009 案件中，林文翰法官指出，調解是解決爭議的最有效的方法之一，假如任何一方不考慮調解，又或是不理會法庭的建議，採取調解來解決爭議的話，法庭在處理訟費時，必然考慮這個決定是否合理來決定訟費。當然，不合理的一方可能需要承擔這方面的責任。

8. 以上的原則，在 *Chong Cheng Lin Courtney v. Cathay Pacific Airways Ltd.* HCA898/2007 by Chung J.，27 January 2010 中體現了出來。原告於勝訴後向法庭申請，要求被告付彌償性的訟費。本來，原告是有理由提出這個申請的，但是，由於原告不理會被告之前提出調解的建議，所以法庭便拒絕了原告的申請。

9. 在 *Golden Eagle International (Group) Ltd. v. GR Investment Holdings Ltd.* HCA2032/2007 by Lam J.，25 June 2010 案中，林文翰法官指出，法庭會考慮案件的性質來判斷什麼是拒絕調解的合理理由。拒絕一方有責任提出拒絕調解的理由。單單說基於商業上的決定、雙方的勝訴機會均等、或者是說對方的勝訴機會不高等等，都不算是合理的理由。假如拒絕調解一方基於案件的本質上看來勝算機會很高的話，這點可能構成合理理由。但是，決定案件本質的問題，是由法庭從客觀的角度來判定的，而不是基於拒絕一方的主觀判斷。

10. 在 *Pacific Long Distance Telephone v. New World Telecommunications Ltd.* HCA1688/2006 by DHCJ Houghton, SC，23 May 2012，暫委法官不單同意上述的決定，還更進一步指出，假如拒絕調解一方認爲同意調解將會被視爲弱勢的一方，這個理由法庭不能接受。雙方在訴訟的各個階段都應該考慮調解的可能性；尤其是案件進展中可能出現變化的情況之下，更加應該考慮用調解的方式來解決爭議。

調解中的問題和困難

11. 以下案例討論調解過程中出現的問題和困難。先說概念問題。

12. 上面提過的案例 *iRiver Hong Kong Limited v. Thakral Corporation (HK) Limited* CACV252/2007，上訴法庭指出，與訟雙方應該擺脫傳統訴訟解決爭議的觀念，而應該考慮用調解方法解決雙方的爭議。上訴法庭還指出，民事訴訟改革後，法庭有責任促使雙方用調解方法來解決雙方的爭議。

13. 在 *Chevalier (Construction) Co. Ltd. v. Tak Cheong Engineering Development Ltd.* HCA153/2008 by Lam J., 8 June 2011 案中，原告原本向被告提出以十五萬元解決雙方爭議，但被告不接納這個建議。最後，法庭審理案件後判原告勝訴。被告除了要賠償原告的申索外，更要付原告的訟費。法官在判詞中指出，案件的訟費遠超過案件索償的數額。被告不接受原告建議的決定是非常不智的。法官還強調，在調解之前，律師有責任向當事人清楚解釋案件的理據、訴訟的費用和所涉及的風險，以及訴訟與調解的優點和缺點。

14. 正確解決爭議的概念有的時候不容易實踐。不說一般的訴訟當事人，就連受過訓練的律師有時也經不起考驗。在 *Lam Chi Tat, Anthony & Another v Kam Yee Wai, Andrew* [2013] 1 HKLRD 1206 Lam VP，28 January 2013 的案件中，雙方當事人都是律師。他們爲了約八萬五千元的爭議在區域法院開展了訴訟。訴訟不但未能通過調解解決，還一直進行到上訴法庭。單就上訴法庭的訴訟費用已經超過七十萬元。相信總的訟費用會超過一百萬元。所以，上訴法庭在其判詞中告誡當事的律師，應該自我調節，理智地執行其專業任務，正確地處理當事人的爭議，否則，他們將無法履行其律師的專業任務，以符合民事訴訟規則中第 1A （3）條及民事訴訟改革的精神。悲夫!

15. 下面討論關於調解中的其他問題。

16. 就如何決定調解員的問題上，在 *Upplan Co. Ltd. v. Li Ho Ming & Ors* HCA1915/2009 by Registrar Lung，5 August 2010 案件中，法庭提出了一系列的考慮因素以決定什麼人才是最合適的調解員。其他在這個問題上爭議的案件，雙方都可以根據這些因素自行決定調解員的問題而無需求助於法庭，因此而節省時間和訟費。

17. 就調解的最低參與程度和應否因調解而暫時擱置訴訟的問題上，在 *Resource Development Ltd. v. Swanbridge Ltd.* HCA1873/2009 by Master Lung，31 May 2010 案中，法庭主張雙方應依照實務指示中的建議，由調解員決定雙方調解的最低參與程度。至於應否因調解而暫時閣置案件的訴訟程序，則必須視乎將案件擱置會否對案件帶來實質利益。假如擱置訴訟程序對案件有實質利益的話，法庭會命令在調解前暫時擱置訴訟程序；否則，訴訟程序應繼續進行。

18. 就這個議題上，法庭在 *Hak Tung Alfred Tang v. Bloomberg L.P. (a firm) & Others* HCA198/2010 by Master Lung，16 July 2010 一案中進一步提出，在調解過程中，雙方應採取靈活和合作的態度，信任調解員，因爲調解員在案件中並沒有任何利害關係，他只是盡力履行調解員的責任，協助雙方達成和解協議而已。調解是雙方同意解決爭議的決定，當事人應該盡量避免衝突。

19. 至於如何分擔調解員的費用，尤其是在多個原告而被告只是一位的情況之下，在 *C Y Foundation Group Ltd. v. Leonora Yung & Ors.* HCA933/2011 by Registrar Lung, 13 April 2012 的案例裏，法庭主張根據各方在案件中所持有的利益和所需要調解員的服務來釐定。雙方應採取協調的態度，不應該斤斤計較。

20. 最後，在如何草擬和解協議合約的問題上，在 *Champion Concord Ltd. & Another v. Lau Koon Foo & Another* FACV16 & 17/2010, 23 November 2011 的案例裏，可以看到，假如和解協議合約的內容不清楚的話，往後雙方執行和解協議的時候，可能出現比原來的爭議更麻煩的問題。

總結

21. 以上的案例明確地看到，法庭認爲調解的確能夠幫助當事人解決雙方的爭議。法庭更主張雙方應考慮通過調解解決雙方的爭議，只有在迫不得已的情況之下才訴諸法庭。律師也應該配合這個新的思維，在履行其專業責任的時候，協助雙方當事人盡量利用調解的方式達成和解。

商業糾紛 － 金錢背後的玄機

冼伽妤女士[1]

簡介

商業糾紛中的爭拗雙方，往往都以爭取最大的金錢利益為目的，不是嗎? 君不見營商者、律師、甚至是調解員，在解決商業糾紛時，無不集中計算金額如何攤分，於是談判時雙方堅守底線、各不相讓，更不時表示「這口氣我說什麼也吞不下！」。

談判雙方說這樣的話究竟是什麼意思，會因為其說話的上文下理、言外之意而有分別；說出這樣的話，其意思可能是心中感到冤枉、或因事情極不合理而感到極為困惑，甚或指事情對自己造成傷害及違反公義。雙方表面上是求財、為討回財產、或其經營的生意或公司等，但實質上是更深層矛盾及衝突的反映；而歸根究底，爭拗時所受的傷害，更需要彌補，這比爭拗本身更重要，更值得關注。此外，糾紛的當事人往往心中都感到自己是事件中的受害者，心態上有特別的需要。另外，他們本身的自我形象和身份象徵，或他代表一個機構的集體形象，在調解會議中往往是影響決定的重要元素，實在不容忽視。單單依賴物質上的妥協（如金錢、財物），往往便忽略了形象、身份、關係及過程等非物質的目標。以下是兩個由真實個案演繹出來的故事，可從中探視爭議雙方受害人的需要和個人形象及身份的重要性。事實証明，能關注這些需要，對症下藥，往往會達致出乎意料的過程和結果。

故事一 － 遺失的球鞋

A-class 公司（下稱「A-class」）為一家貿易公司，由 Fred 獨資全權擁有。Fred 於三年前在一個貿易展銷會認識了在大陸開廠的 Winnie，她的「實力製造廠」（下稱「**實力**」）位於東莞，以生產運動鞋為主，僱有 800 多個工人。兩年前，Fred 接到歐洲買家「Top Uniform」的訂單，生產 100,000 雙運動鞋，為其客戶作運動隊伍服裝之用。A-class 於是跟實力訂下合約以生產該訂單所需的運動鞋。由於時間倉猝，訂定合約時 Fred 跟 Winnie 都以電郵或電話忽忽落實條款，唯大家都協議產品將由第三方檢測人員去驗證貨物是否合乎規格。

這 100,000 雙運動鞋的生產共分 20 張訂單進行，然而首兩張訂單便出了質量的問題；不僅如此，就連鞋側條紋圖案的顏色及整體用料也出了偏差。Top Uniform

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固然不收貨，可是 A-class 跟實力的合約中並沒有條款容許 Fred 在 Top Uniform 退貨時終止交易。Fred 唯有跟 Winnie 商討需要時間另覓買家，Winnie 也同意，並願意減價求售。為了保證餘下的 18 張訂單的出品符合 Top Uniform 的規格，Winnie 不但需要更換原材料，實力的工人還需連續數週加班趕工以確保貨物能趕得上船期，生產成本因而上漲，故 Winnie 要求 A-class 在開始生產前先付每張訂單貨價總值百份之十的訂金，並於實力付運前繳清貨單全數。Fred 在沒有選擇下無奈答應了 Winnie 的要求。

為了彌補頭兩張訂單的損失，Fred 需另覓買家，他用了差不多十個月的時間才找到一個非洲買家願意付出貨價的三成接貨。Fred 於是要求實力出貨，但實力及 Winnie 卻一直未有回覆，直到兩星期後，Fred 才收到 Winnie 同事的回覆指該批運動鞋已全數賣出。Fred 大感震驚，但在迫不得已的情況下退款給非洲買家。

三個月後，Fred 竟然收到 Winnie 的電郵說該批運動鞋其實並未出售，並說他們可以立即送貨。Fred 悖然大怒，心想這不是騙局是啥？他當然不肯再覓買家，也不會接貨。事情變得越來越糟，雙方都開始找律師協助，準備訴諸法庭。從這刻開始，彼此都拒絕再作溝通。

A-class 及實力最終要對簿公堂，因而接觸到調解。雙方原本爭議的數額在 HK$300,000 至 HK$700,000 之間，在第一次調解會議之後，分歧已收窄至 HK$250,000。

調解會議後雙方由調解員穿針引線下再繼續談判，在 Winnie 數番讓步下，雙方分歧減至只是 HK$30,000 而已，可惜 Fred 仍然堅持不讓步，最終也未能達成協議。箇中障礙何在？

受害人的需要

爭議雙方參與調解，往往帶著受害人的心態。受害人的需求可分成六大範疇：受害人需要復仇，得到認同，辯明事情，需要別人的聆聽，找尋箇中意義及安全感（Noll 2013)。受害人往往帶着復仇的心態，所以會以牙還牙；此舉的結果是冤冤相報，沒完沒了，當中涉及的費用及開支迅速飆升，往往遠超過爭議之初的數目。受害雙方往往亦藉着駁斥對方，辯明自己是立於不敗之地的正人君子，此舉無非因為他們需要身旁的人所認同。

Top Uniform 拒收第一批貨後，Fred 用了很長時間才找到另一個買家；可惜，Winnie 及實力卻像失了蹤般沒有回覆，要他們交貨時又說貨物已賣出，人家退款

後該批貨物又突然出現，難怪 Fred 變得怒不可遏：那批貨剛好在他推掉非洲買家後便又再出現，他感到被陷害，中了圈套。

進行調解會議時，Fred 仍然怒不可遏，全因為他作為受害人的需求所致。他很想對 Winnie 作出報復，亦把內心被背叛、被冤枉的心情，不惜一切地發洩在 Winnie 身上。他也向 Winnie 重申，他是在正義的一方: 不但已按 Winnie 要求繳付訂金，及 100%的餘額，他亦在首兩張訂單出錯後盡力覓得買家以作出補救。因此，他在調解會議中要求 Winnie 賠償他九成律師費，皆因那些費用全都因 Winnie 無故失蹤，而他為了保障 A-class 的利益而花掉的，所以 Winnie 應該為 A-class 陷入這境地負上全責。

Fred 作為受害人需要報復、需要平反及得到認同；若不理會這些需要，情況只會每況愈下。可是 Winnie 並不理解及針對這些需要，認為一切都是賠償多少的問題，只要數目合理，問題便能迎刃而解。她更認為時間可讓一切丟淡，Fred 亦應該在一段時間後怒氣便會平息；可惜她並未言中，雙方偏偏就只差 HK$30,000 便談不攏，這就正正是因為未有照顧到受害人的需要的結果；只按一般談判的方法，全集中在討論數額，而引致糾紛未能平息。

Fred 身份認同的問題

個人身份形象的定義是「持久不變的自我感覺，及個人與世界的關係的感覺；是信念系統、或演繹世事的方法，使生活變得有跡可尋而非雜亂無章」(Northrup 1989)。Clark Freshman 在他的《身份、信念、情緒及談判成功》一文中提到身份認同有兩方面：一方面是人家怎樣看待我，另一方面是自己怎樣看待自己。我們看待自己時會問：「我是否能幹？」和「我是一正直的人嗎？」等問題；在處理衝突時，這往往是爭議雙方關注的重心。個人身份的認同，會影響一個人談判的方式，因為他的行徑應跟他的身份一致。此外，每個人在不同的場合、不同的朋輩間便有不同的身份形象（Creo 2013)， 故此，任何解決爭議的決定，必會反映，甚至會與當事人的身份形象之核心特性一致，也因其不同的身份的核心特性而異。

以此個案為例，談判的另一大障礙是 Fred 的新合伙人 Victor。Victor 在實力及 A-class 訂定合約後才加入 Fred 的公司成為合伙人，在整個調解過程中，Victor 似乎比 Fred 更憤憤不平，更寸步不讓。Fred 視 Victor 為伙伴，心態上必須尊重他，什麼事情他都應參與決定，他希望自己在 Victor 眼中是個誠實可靠的合伙人，大家共同作主，一同為公司做決定。而 Victor 因為新加入公司，所以急於展示自己的衝勁，故表現積極進取，處處為公司謀求最大的利益。這「忠誠伙伴」

的特性一直影響著 Fred 在事件上理性的處理及考慮，甚至影響到調解後的談判：Fred 一邊想著和解以減少經濟上的損失，但為了配合 Victor， 他不得不堅守原則。Fred 跟 Victor 的多重身份，相互牽引，完全抹煞了他們的理性判斷及決策的能力。

故事二 – 沈默的三年

這故事的主角是 Pam， 她是一個營銷總監，在國內工作超過十年。六年前，Pam 已快年屆 50，很希望回港工作，好讓她跟剛從英國畢業回港的女兒團聚。Pam 獲得 Atlantic Beauty 公司的 Clara 邀請加入其公司當行政總裁，發展公司在亞太區的業務。Pam 的合約為期五年，除了月薪外，她還可分紅，數目是公司每年營業額的 15%，此外，合約完結時還可獲取約滿酬金。

工作一直很順利，而 Pam 亦在首兩年收到年終酬金，雖然數額計算不太準確，不夠總營業額的 15%，也反映了公司的會計賬目的問題，但 Pam 卻不太在意，畢竟約滿酬金才是她的囊中物。怎知道晴天霹靂，到了第三年，公司的財務總監 David 竟在毫無先兆下突然把她解僱！Pam 盛怒下想找 Clara 說說理，卻不得要領。Pam 更被逼令帶薪休假六個月，不容她另謀高就。當 Pam 收到最後一份薪金時，更發覺公司未有支付她最後 18 個月任期內的年終酬金；Pam 於是開始法律訴訟，要求公司發還應支付的酬金，總共約 7 百萬。

個案先行以調解處理，Pam 帶同律師出席，而因為 Clara 不在香港，公司只有財務總監 David 出席。在共同會面之初，雙方為公司的營業額數目爭辯激烈；David 因為懷疑 Pam 的動機，拒絕提供公司全盤會計數據；Pam 當然反對，因為沒有數據，便不可能準確地計算出她應得的酬金數目。David 初部提出了幾個建議讓 Pam 考慮，但都與 Pam 心中的數目差距甚遠，不能接受。

在私下會面時，Pam 詳盡表述了自己本來對事業發展的期盼。她認為美容業界畢竟是一個狹窄的圈子，她被無理解僱的消息很快便廣泛流傳，行內人或會質疑為何她被解僱，疑團未解之際，人家又怎會大膽起用她？Pam 亦因為 Clara 缺席調解會議感到十分生氣，Pam 覺得 Clara 對她避而不見，根本一點都不尊重自己；Pam 極度需要向人傾訴，Clara 有否出席會議對她的意義重大。事情動搖了 Pam 的自尊：Clara 及公司都不珍惜自己的貢獻，被辭退的消息也讓她在朋輩之間丟臉，她不禁懷疑自己作為一個能幹的行政總裁的身份。那 7 百萬的酬金，說穿了，其實是因 Pam 的身份象徵演化成的實質要求。

在第一次調解會議後雙方決定安排續會繼續商討，這次，Clara 答應出席（她最終也相信，沒有她的參與，事情無法解決）。第二次調解會議開始前，大家都有共識，討論不以會計賬目為大前題，而應由 Pam 及 Clara 兩人私下會談開始。調解員在會議前已教導她倆如何使用 Ury 的「Yes！No。Yes？」的方法，使對話更為有效。她倆一開始都感謝對方願意參加第二次調解會議的誠意。調解員又鼓勵雙方去表達自己的需要：Pam 需要被重視，及確認她勝任管理企業一職；而 Clara 需要人家看在眼裡，認定她才是主席，全權掌管企業業務。之後她們又表達了在這件事上她們面對的挑戰，及探討可行的解決方案。一個小時後她倆已在調解員協助下開始草擬和解協議的框架，其內容均能全面照顧兩人的需要，也能修補雙方的關係。公司最終跟 Pam 訂定了一份全新的顧問協議，Pam 的工作將集中在發展亞太區的醫學美容業務，薪酬以佣金方式計算，視乎公司產品及技術銷售的收入而定。Clara 為表示誠意及對 Pam 的支持，還先支付一筆款項，讓她更好籌備新業務，亦協助她支付部份的訟費。

為何故事二的結果截然不同？

Pam 被辭退時，感到深深不忿，像受害者一樣感到被侮辱、傷害。被解僱一事對她的事業打擊沈重，她需要 Clara 明瞭她的不滿，也需要證明她有能力管理企業運作。整件事有損她資深管理行政人員的身份，還讓人質疑她的能力及領導才能。

至於 Clara，她一直不肯披露為何突然決定辭退 Pam。三年以來，她一直忍讓著表現平庸的 Pam，這也影響著她的身份形象：難道她得承認自己三年前邀請 Pam 加入是錯誤的決定？作為主席的她，能力會否被質疑？她是否監管不足？又或者是僱傭合約內容含糊，讓 Pam 有機可乘，控告公司？

Pam 跟 Clara 各有不同的目的或心態上的需要，都不是實質要求的問題，因此，第一次調解會議未能達成甚麼結果，毫不出奇。但會議過程讓雙方都體會到大家作為受害者的需要，及身份形象的關注，要達成協議，便不能忽視這些問題。Clara 願意出席第二次會議，和 Pam 面對面直接對話，照顧了 Pam 的需要，讓她得到認同之餘，也能向 Clara 訴訴苦。此外，討論新的顧問合約建議書，也有助肯定及認同 Pam 的素質，讓她在公司甚至在行內同輩間挽回面子，值得尊敬。雖然崗位變了，但她作為資深行政人員的地位卻再次得到肯定。

至於 Clara，事情得到和解，則公司可避免一場昂貴的法律訴訟，她亦不用擔心要支付巨額賠償給 Pam。賠償金錢往往被視為承認錯誤，但以顧問費用的形式支付，那樣 Clara 便不致丟臉。再者，她平息事件，公司又不用支付巨額賠償，這也表現出她作為主席出色的素質，讓大家更認同她是個善良、隨和、關懷下屬的

好上司。這樣，照顧了 Pam 及 Clara 身份形象的需要，就算索償金額遠比第一個故事為高，由於解決了受害人的需要及身份的問題，金額多少便變得次要，雙方仍能得到滿意的結果。

結論

我們常誤以為若爭議所牽涉的金額越大便越難解決問題，從上述兩個故事卻正正說明事實剛好相反。商業糾紛並非只限於金錢的爭議，受害人的需要及身份形象往往是影響雙方在談判桌上的決定的關鍵。在陷入商業糾紛時，先別決定是否應爭取到底，應先問問：解決事情的方式如何影響你作為企業領導人的身份？這決定有沒有處理到你需要得到的認同及尊重？只有正面透視這些問題的真義，才能達致雙贏的方案。

透過金融糾紛調解中心解決的金融爭議：個案分享

詹少弘女士[1]

金融糾紛調解中心（「調解中心」）於 2011 年 11 月 18 日以擔保有限公司的形式成立，屬一所非牟利機構，並於 2012 年 6 月 19 日投入服務。調解中心的成立旨在為香港的金融機構及其個人客戶提供一個訴訟之外，獨立又經濟的途徑，解決他們之間的金錢糾紛。

調解中心的成立建基於五個原則：

- 獨立
- 持平
- 便捷
- 有效
- 公開

調解中心負責管理一個獨立持平的金融糾紛調解計劃（「調解計劃」），並以「先調解，後仲裁」的方式，為金融機構及其個人客戶解決金融糾紛。調解計劃成員包括所有受金管局認可及／或證監會監管的金融機構（只從事提供信貸評級服務的機構除外）。

調解中心的調解服務均由本中心內部的調解員或調解中心調解員名單上的調解員進行。所有調解中心的調解員均需達到遴選委員會定立的要求，並須出席持續專業發展課程，如經驗分享會、技能提升課程及相關法規更新的簡介會。如調解不成功，申索人可以繼而選擇進行仲裁。

下述四個個案基於調解中心的真實個案編寫。為確保調解個案的保密原則，個案中某些資料，包括申索人、金融機構及其職員的名稱、具體申索及調解協議款項均已修改。

個案 1

楊女士為銀行甲的長期客戶。她在 50 歲那年決定為自己的退休作長遠計劃。她向銀行甲購買了一份供款期為 10 年的退休儲蓄計劃。她預期她可於 60 歲後的

[1] 金融糾紛調解中心行政總裁

10 年內，每年獲得港幣$30,000 的保證退休現金，及 70 歲時獲取一筆港幣$500,000 的現金及一份保障期至 100 歲，價值港幣$250,000 的人壽保險。

當該退休儲蓄計劃到期時，楊女士始發現如果她 10 年內每年收取保證退休現金，便不會得到港幣$500,000 的現金，縱使她依然能享有該免費人壽保險。楊女士極度失望，她認為銀行甲的職員於銷售時誤導她購入該計劃。

楊女士向銀行甲投訴。銀行向她解釋只有在她沒有提取保證退休現金的情況下，該港幣$500,000 的現金才會於她 70 歲時支付她。楊女士不滿銀行甲之解釋，遂向調解中心提出申請，以解決該事件。

調解員協助雙方確認爭議點及促進雙方明白對方的關注及需要。楊女士和銀行甲最終能找出雙方均可接受的解決方案，銀行亦詳細地向楊女士解釋她購買的退休儲蓄計劃的結構及內容。雙方的爭議在調解員的努力下得以解決，雙方都肯定調解員在拉近他們的距離所作出的貢獻。雙方均表示會向其他有需要人士推介調解中心的調解服務。

個案 2

李先生是一名專責處理銀行零售業務的高級銀行職員。一天，李先生經銀行乙的網上銀行處理自己的私人帳戶時，發現其中一個戶口中有數十萬元被人以支票形式提走，並轉至一個他不認識的人的戶口中。在追尋事情的因由時，李先生發現原來他其中一張支票被盜。李先生即時通知警方及銀行乙。警方於接報後數天已作出逮捕行動。

李先生嘗試與銀行乙直接談判，追討他的損失。銀行乙認為保管好支票是客戶的責任，李先生須就損失負責。銀行乙亦認為李先生未能於發現支票被盜時即時通知他們停止兌現。李先生則認為銀行乙應核對他於支票上的簽名，並於兌現大額支票前先向戶口持有人確認。 李先生向銀行乙的總行投訴，藉此向有關負責人施壓以解決事情。銀行乙向李先生提議賠償他部份損失以解決事情但遭拒絕。李先生遂向調解中心提出調解申請。

調解員傾力協助雙方聚焦於他們的需要，並促進雙方尋找不同方案。於調解中，雙方成功達成協議。李先生和銀行乙最終能找出共同方案。雙方均肯定調解員於協助他們創造方案及解決糾紛中的堅持和努力。

個案 3

陳先生獲數間金融機構批給幾項私人貸款。在 2012 年, 他聯絡銀行丙希望整合他的貸款以享受整體較優惠的利率。陳先生與銀行丙同意整合方案，已整合的私人貸款將以每月分期形式還款。作為協議的一部分，銀行丙同時為陳先生發出信用卡乙張及向其兒子發出附屬卡乙張。 該附屬卡是陳先生兒子在英國時作應急之用。

一年後，陳先生從他的銀行月結單中發現他的個人貸款利率比他與銀行丙協定的高出很多。他向銀行丙投訴並拒絕每月定期還款。因陳先生逾期還款，銀行丙終止了陳先生的信用卡及其兒子的附屬卡。然而，銀行丙並沒有就「停卡」一事前通知陳先生或其兒子。

直到一次緊急情況下，陳先生的兒子不能使用該附屬卡，陳先生始知他們的信用卡已被終止。陳先生感到非常失望、憂慮，更是憤怒。陳先生向銀行丙投訴，可是，他覺得銀行丙並沒有認真處理他的投訴。他及後決定向調解中心申請調解。

調解員注意到於是次爭議中夾雜的個人情緒，並讓陳先生在有序的情況下抒發他的情緒。銀行丙的代表用心聆聽、並耐心及真誠地嘗試解決事情，令陳先生留下深刻印象。陳先生感到銀行丙終於能用心聆聽，並恰當地關顧他的情緒，事件最終以重新制定陳先生的個人貸款還款安排及協定信用卡服務協議作解決。

個案 4

王女士是證券行丁的尊貴客戶。她在證券行丁擁有的投資組合中包括商品相關的投資，她一向依靠證券行丁的職員葉先生的個人服務及意見作投資決定。她很依賴葉先生向她提供適時的意見，葉先生亦實際操作她的交易買賣。王女士並沒有使用任何網上交易平台。

一天早上，王女士注意到商品市場價格大幅波動，她即時嘗試尋找葉先生，希望他建議她應否沽貨。她嘗試致電葉先生多次，但仍未能聯絡上他，有些電話由葉先生的同事接聽了。直到下午她終於聯絡上葉先生。由於商品市場的價格浮動，她以較早市低的賣出價沽出。王女士非常不滿這項交易，因為她深信只要她的電話能早一點轉駁給葉先生，她就不會招致損失。王女士深信證券行丁有責任對顧客要求作出迅速反應，特別是商品市場價格大幅波動時。

王女士投訴證券行丁延遲服務及要求證券行賠償她的損失。證券行丁拒絕為任何損失承認責任，並指他們已恰當地執行王女士的沽貨指令，他們不會作出任何形式的補償。王女士遂向調解中心提出調解申請。

葉先生作為證券行丁的代表之一參與調解。調解員促進雙方溝通及令雙方加深了解。葉先生向王女士解釋為何當天早上未能接聽她的電話，並承諾將來會改善。雙方同意以豁免王女士的投資戶口的一段時間內的部分交易手續費以解決事情，雙方均滿意該調解協議。

調解 － 訴訟以外的選擇

林雪兒女士[1]

選擇？

我常常都收到一些當事人的查詢，他們的疑問是：為甚麼司法機構要鼓勵訴訟人調解呢？法庭不是讓人「打官司」的嗎？其實訴訟的其中一個目的，是幫助當事人解決爭議。但解決紛爭，不一定是只有「打官司」這個途徑。

其實除了訴訟之外，調解是解決糾紛的另一途徑，讓爭議雙方尋求一個滿意的解決方案。

調解統籌主任辦事處之成立

家事調解服務

對司法機構而言，調解並不是一個新名詞。司法機構早於 2000 年推行一項《家事調解試驗計劃》，並為此於家事法庭大樓內設立了家事調解統籌主任辦事處（「調解統籌辦事處」），協助推行這項試驗計劃。試驗計劃於 2003 年 7 月結束，但由於這項計劃成效顯著，能夠幫助正在分居或離婚的夫婦，在無需花費大量金錢進行訴訟而把問題解決；有見及此，司法機構決定保留調解統籌辦事處，並繼續為辦理離婚的夫婦提供家事調解講座及調解前的諮詢服務，期望在多方面協助尋求調解的夫婦以非對抗的形式解決問題。

建築物管理調解服務

土地審裁處自 2008 年 1 月 1 日起就建築物管理案件引入調解機制。司法機構於 2008 年 1 月在土地審裁處成立了「建築物管理調解統籌主任辦事處」（「調解統籌辦事處」），目的是協助建築物管理案件中的訴訟人尋求調解服務，藉此解決爭議，同時期望和解有助維持同一大廈或屋苑業主之間和諧的關係。此調解統籌辦事處的成立目的，在於提供一個資訊中心，方便已入稟法院的訴訟人，查詢有關其建築物管理案件的調解事宜。調解統籌辦事處會舉辦調解講座，亦提供調解前的諮詢服務，以利便願意尋求調解的訴訟人選任合適的調解員。

爭議各方如有意尋求調解，兩間調解統籌辦事處均會提供一份調解員名單，名單上列出之前已表示願意參與調解服務的調解員資料，以供爭議各方選擇，並會把有關個案轉介至雙方同意委任的調解員進行調解。事實上，調解工作均由司法機

[1] 司法機構高級調解事務主任；公眾教育及宣傳小組委員會委員

構以外的獨立調解員或社會服務機構／非政府機構執行。

調解資訊中心之成立

為了配合民事司法制度改革，鼓勵訴訟各方嘗試以調解方式達致和解，司法機構於 2010 年特別設立了「調解資訊中心」，協助訴訟各方了解調解的性質、過程及目的，以便訴訟人向專業團體尋求調解服務。在一般民事案件中，爭議各方均可先參加由司法機構提供的調解講座。為避免角色上的衝突，司法機構的職員不會為爭議各方直接提供調解服務。爭議各方若同意嘗試調解的話，可以共同委任一位司法機構以外的獨立專業調解員，接受其調解服務。

調解講座用處何在？

雖然「調解」已比以往更廣泛地為大眾所認識，但有不少訴訟人士仍未能掌握到調解的過程及自己在當中扮演的角色。因此，司法機構為當事人提供的調解講座盼能增加他們對調解的認識，並提升他們對調解的信心及動機；而最重要的是讓當事人作好準備，使他們更投入調解的過程，以締造雙贏的局面。

自 2010 年 1 月起至 2014 年 2 月，調解資訊中心（「中心」）邀請參加講座的人士填寫一份「調解講座的意見調查」，提供意見的人士都是以不記名及自願的方式參與。中心在過去四年多共收到 1,279 份意見表，當中有 87%的參加者認為，中心開辦的「調解講座」能增加他們對調解的認識。另外，有 97%參加者表示，若他們有親友遇上同類事情的時候，會推介他們先參加此類調解講座。

整體而言，一個成功的調解講座，並不只是在於參加者是否出席聆聽，而是在整個講座中，調解主任能透過解說，帶出調解的訊息，從而減低訴訟人的抗拒心態，讓他們那種對抗的態度軟化下來。因為只有他們願意放下成見，才能找到更多可行及雙方滿意的方案。調解主任更鼓勵當事人在講座中發問，讓他們釋除心中對參與調解的疑慮，這樣更能令參加者主動投入，為他們參與正式調解時作出更好的準備。

人與人之間有不同意見乃平常事，因此有爭議，也並非絕症。如果我們把「爭議」看作是一種「病」，要治療這種「病」，也許有很多方法，就如選擇做手術、吃藥或自然療法，也未嘗不可，因為這種「病」有很多不同的療程選擇。但是，有一種「病」是最難「醫治」的，這種「病」稱為「對立態度」。如果有爭議的人士持著「對立態度」參與調解，縱使調解員有超凡的技巧，甚至事件中有無數的解決方案，雙方也難達成共識。因此，我們在調解講座及調解前諮詢面談中，均以軟化訴訟人「對立的態度」為其中一個重要目標。

是「強者」還是「弱者」？

曾有些訴訟人提問：若果他們主動向對方提出調解，是否「示弱」的表現呢？答案當然不是。試想想，參與調解的人需要面對那個曾經與自己對峙的另一方，雙方均須承擔某程度的壓力，要克服這個心理關口，殊不容易。所以願意參與調解的人，都是作出了勇敢的決定及願意付出代價，嘗試找出解決方案的人。他們才是「強者」。

最勇敢的決定 – 饒恕

我也常常看到怒氣沖沖的當事人，往往因為各種前塵往事，與「對家」積怨很深，放不低時又不知不覺傷害了自己。又有些家事案件的訴訟人，因為曾遭對方在情感上的傷害，害怕在調解時，傷口又再次被揭開，因此拒絕嘗試調解，但卻被那股怨恨繼續困擾。這些當事人帶着那股化不開之怨氣行人生的路，實在苦不堪言。

有些當事人向我反映，他們不是不明白「調解」的好處，也不是不相信調解可減輕他們在訴訟中之壓力，而是他們認為「訴訟」才可給對方一個教訓，為自己出一口烏氣。採用調解，豈不是便宜了對方？這些當事人的立場及感受是可以理解的。這些不願意原諒「對家」的當事人，往往不明白饒恕對方的第一個「受益人」是自己。況且，當事人不應把「法庭」用作私人報復的工具，而是以法律來解決雙方爭議。單單用「法庭」作爲私人報復的工具，就是濫用司法程序，對自己和大衆都沒有好處。而且，訴訟所帶來的精神壓力、時間及金錢的透支，往往是當事人始料不及的。

正如前文所提，參與調解需要勇氣，饒恕對方並非「示弱」，而是一個勇敢的決定，因為「強者」才能有這份勇氣及毅力去克服創傷，尋求共識，達至雙贏。雙贏的人生需要卸下包袱，放低自己。其實幸福的秘密，就是要懂得放低。最完滿的和解協議裏，少不了「饒恕」。

但願訴訟中不能原諒「對家」的當事人都能明白，饒恕是超越雙贏的選擇！

調解 － 促進社區和諧

羅偉雄先生[1]

香港不斷發展，社會大眾在日常生活中有着頻繁和緊密的接觸。由於生活習慣的差異，生活環境的改變或是在生活相關的事件上出現問題，我們經常會產生各種的磨擦，在社區中亦會出現大大小小的爭議。若然彼此之間缺乏溝通和了解，衝突很容易會愈變愈多，愈演愈烈，為個人、家庭以至社會帶來不同程度的壓力和危機。糾紛常常出現，嚴重的可能會發展到對簿公堂。凡此種種都會為大眾造成矛盾，社會的對立，影響社會和諧。這都是市民大眾不願意接受的。

我們認為關懷、責任與尊重是健康社會的主要元素，而和諧更是社會重要資產。只要大眾掌握溝通之道，而社區又能夠在關愛與責任兩者之間取得平衡，凝聚社會，便能支援個人發展及和諧進步。我們相信，若然以調解去化解衝突，學習互相尊重、接納和溝通、促進社區和諧，便能創造一個健康的社會，香港亦能繼續發展、繼續發亮。

社區調解的應用範疇十分廣泛。它可以妥善處理大部份出現在社區、鄰社之間的爭議。生活習慣差異引起的糾紛有很多，如噪音滋擾、棄置垃圾和燃點香燭。生活環境方面的糾紛有漏水事件、僭建物處理和工程糾紛等。而涉及睦鄰和家庭的關係，例如租務糾紛、勞資糾紛、學校糾紛、家庭成員糾紛等。調解員以專業知識和技巧，促進各方有效協商，達致共同接受的解決方案，以專業調解處理社區糾紛。與訴訟相比，調解是雙方自願參與，過程保密、程序相對簡單、快捷及費用較便宜。同時，專業的社區調解更可以共同創造一些連訴訟亦沒法比擬的解決方案。在勝負以外，按參與者的需要而考慮的各種方案。

社區糾紛往往都涉及複雜，密切而又長久的鄰里、家庭關係。從觀察所得，出現在社區的爭議和糾紛都有一些特點：所涉及的金錢爭議數額一般較少，完主不值得透過昂貴的訴訟方式去解決。但在關係修復和感情的處理上卻有很大的需要。這也是最直接，最影響民生，給大眾最大生活壓力的一種糾紛。因應這些特質，透過專業調解處理社區糾紛，一定比用其他方式更適合、更優越。事實上，對於重視關係的社區而言，為市民減壓、盡快處理纏繞大眾的糾紛，使市民直接得益，正是以專業調解處理社區糾紛的主要亮點。

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社區調解面對的挑戰

(一) 市民普遍對調解的認知不足

以調解解決爭議是新的觀念。雖然，政府近年大力推廣和積極宣傳調解，並以「調解為先」作為宣傳口號，加强市民對調解的概念，市民普遍對調解的認知仍然不足。儘管調解開始日漸發展，大眾對採用調解去解決糾紛的信心仍未穩固。香港在 2013 年已就調解條例立法以確立調解的法定地位，更成立了調解資歷評審協會「調評會」以評審調解員資歷和調解服務質素。然而，大眾仍未充份理解調解的法定地位、經調解的和解協議的執行性及法律約束力、調解對參與人士的保障等。此外，對調解的成效，調解服務機構和收費，調解員和調解服務質素等仍然不大清晰。

事實上，很多香港人只聽過調解，但未能充分了解調解的性質和工作。或許，有一些人會誤把調解員與和事佬混淆。 按理兩者的分別十分清晰，調解員是鼓勵積極面對，引導當事人理解自己和其他人的需要去共同創造多個解決方案。相對地，和事佬主要希望各自退讓、息事寧人。以迴避方式去處理爭議，將問題暫時擱置，把情緒壓下。結果非但沒有解決問題，反而可能加深誤解，破壞互信。

此外，當遇上爭議和糾紛時，較多的香港人第一個反應就是以法律解決。及至法庭建議需嘗試進行調解時，才查詢甚麼是調解。不求甚解以致調解的成效不彰。此外，大眾亦對調解存有下例的誤解:

誤解一：「商業糾紛所涉及的金額比社區糾紛大，所以調解較困難。」

調解的要點不是糾紛所涉及的金額的大小，而是各自的實際需要，對糾紛的感覺和壓力，與及當中可能涉及感情、關係的處理。一般的商業糾紛中的當事人對各自的需要和爭議的要點都十分清晰。相反，大多數社區糾紛的當事人卻未能清晰理解各自的實際需要。 糾紛已對他們做成巨大的壓力，加上一般都涉及鄰里關係，所以在社區調解所要處理的事情可能比其他的調解更多或更困難。

誤解二：「由於社區調解一般都是以義務形式進行，社區調解所需運用的技巧較少，調解員的經驗亦較淺。」

正如上述情況，社區調解所要處理的事件可能比其他的調解更多或更困難。因此，社區調解員應具備更豐富的調解經驗，當中尤以認知社區資訊，理解市民期

望和純熟運用適當的技巧以促進彼此的溝通和了解最為重要。現時，大部分的調解員都經調解資歷評審協會評審，所以大眾都可以有信心地選用調評會的調解員。如果希望再進一步確保社區調解的服務質素，大眾可選擇再經專業社區調解訓練的調評會的調解員協助。

(二) 調解會議場地不足

社區調解有別於一般的調解；由於當事人一般有自己的日常工作，市民一般會期望調解會在自己社區在工餘、晚間或假日的時間進行。現時，除個別專業調解組織如香港和解中心會提供免費調解會議場地外，只有兩個分別在太子和禮頓山的社區會堂提供免費調解會議場地。其他地區暫時仍未為市民提供這類服務。事實上，設施的不足已嚴重妨礙社區調解的發展，市民亦因而未能享用合適的調解服務。

(三) 專業社區調解員不足

在人才方面，社區調解需要處理的資訊和各種利益可能比其他的調解更多或更困難。社區調解員應具備更豐富的調解經驗、掌握更多的社區資訊、同時能更熟練地運用調解技巧。但更為重要的是一顆服務社市民的心和對解決爭議的熱忱。因為，專業社區調解員都非常理解社區調解的特點，使用收費模式的調解並不是最佳的選擇，所以社區調解主要是義務工作。對於大部分的專業社區調解員來說，他們服務的回饋並非金錢，而是在助人時，促成爭議各方的溝通和理解，甚至解決爭議所帶出的喜悅。目前，有經驗的專業社區調解員並不多。假如，市民普遍認識到調解的優點而選擇使用調解服務，現時的專業社區調解員將遠遠未能應付需求。

社區調解的發展方向

面對社會對調解的殷切需求，對市民的最佳回應是大力推動社區調解。我們建議從四方面發展社區調解：

(一) 加強對市民的教育、宣傳和推廣

要建立市民對以調解去解決糾紛的信心，必須加強對市民的教育、宣傳和推廣。政府可協助及統籌調解服務機構，推動社區調解。在各地區，向不同社區組織和

團體舉辦調解服務的介紹講座，以加深社區組織和團體及其會員對調解的認識，糾正各種謬誤。第二步可在各地區多元化地推廣調解服務活動，例如展覽會、同樂日等，以互動有趣的方式把調解帶入市民生活中，令大眾習慣在訴訟以外還可以有調解的選擇。

同時，要向各政府部門、公共機構及公務員推廣以調解方式處理可能出現的糾紛。我們建議把調解機制納入區議會各有關委員會的常規議程。讓政府機構及公務員帶頭以調解代替訴訟。此外，更可安排公共行政人員包括議員及其助理接受調解培訓課程。

此外，土地審裁處使用調解服務機制已有多年，成效顯著。我們建議仿效土地審裁處的處理方式，在小額錢債審裁處引入調解服務機制，使更多市民能享用調解服務。鼓勵市民運用法庭以外的社會資源。

(二) 增加調解會議的免費場地

我們注意到現時在各社區都有一些會議場地可暫借作調解會議場地使用。例如，民政事務處、社福機構或學校。短期及中期方面，政府可以向這些機構暫時借用場地，以舒緩調解會議的場地之不足。而長期方面，政府應在香港各區，按需要設立足夠的永久免費調解會議場地。同時，在規劃時更應就調解會議場地的需要和設施，諮詢調解業界和地區組織，以確保設施能真正滿足市民的需要。

(三) 培訓專業社區調解員

現時有經驗的專業調解員不足以應付社會發展的需要。調解業界和政府可考慮制定專業社區調解員的指引，開辦專業社區調解員培訓課程，提升社區調解知識和技巧。希望可以盡快訓練更多有素質的業社區調解員。同時，有經驗的社區調解機構更應提供協助及分享經驗。讓更多的調解員能透過專業培訓和分享，提升專業社區調解水平，服務更多有需要的市民。

(四) 調解業界推廣社區調解

香港調解業界在推動調解亦有很大的貢獻。不少的調解機構，在過去十多年來都在默默地推動調解。以香港和解中心 (“中心”) 為例，不斷努力推行社區義務調解服務計劃。計劃內容包括提供義務的專業社區調解員以協助當事人進行調解，更提供免費會議場地，計劃已推行多年，成效良好。此外，中心亦成立了超過

60 位社區調解員的專業社區調解團隊，拜訪各區議會，向各區區議員推廣社區義務調解服務計劃。中心曾在多個專業團體等舉辦推廣會，並開設諮詢熱線及諮詢站以解答市民就調解和糾紛等疑問。憑藉不斷的努力和服務，中心累積了大量社區調解的經驗、更加理解當事人及市民的需要。而香港和解中心亦積極和業界分享經驗，在 2013 年 5 月，舉辦了首屆「香港社區調解論壇」。論壇獲各個主要調解機構，律政司和多個區議會的鼎力支持。並吸引了 300 位參加者，共同研討及分享調解議題。透過是次論壇，參加者不單了解社區調解在本港的最新發展，更可藉此了解探討社區調解的發展方向。這無疑加深了參加者的專業知識，對香港社區調解的長遠發展亦有莫大裨益。香港調解業界的繼續參與推動是社區調解發展的主要方向。我們鼓勵各調解機構撥出資源，推廣調解；同時更可分享經驗，團結互補，為調解、為香港再添動力。

總括而言，調解可促進社區和諧。而推動社區調解發展，全賴政府各部門和調解業界的大力支持和合作。

樓宇管理維修與社區調解

胡子祥 工程師[1]

在社區，市民少不免會因為誤會、誤解，加上言語冒犯，而造成衝突。

衝突會隨著僵持的氣氛轉差，惡化，繼而蒙蔽了和平解決糾紛的理智。雙方各執一詞，互不退讓。若然在這時候，有一位調解員從中協助，用調解的技巧，釋除一切與糾紛無關的枝節，便可讓雙方可以集中處理爭拗的核心問題，有更充份的時間去瞭解彼此的觀點，令事情明朗化。而在這個時候，雙方的分歧有望收窄，甚至妥善解決。而大前題在於，在調解過程，雙方都能夠保持頭腦清醒的，仍然擁有和平解決糾紛的智慧。

調解員在當中是很有作用的，因為調解員在主持調解會議的時候，會作出適當的協助，且讓雙方積極地投入討論核心事項，令調解會在一個平和，公平的氣氛中順利進行。

簡單而言，社區調解的好處，可以歸納成以下幾個要點：

1) 有一個溝通平台。調解員將會建設一個氣氛平和、公平，同時讓雙方暢所欲言的平台。
2) 可以集中討論糾紛的核心問題，有系統地將問題講清講楚，令雙方都瞭解對方的觀點，從而合力想出解決的方法。
3) 可以達成雙方皆接受的解決方案。

能夠達成以上的目標，除了雙方願意進行調解之外，最重要是有一個稱職的調解員，而這亦是市民使用調解服務的時候，最關注的事項。在社區調解方面，以筆者的經驗，在市民的心目中，最普遍的憂慮有四項：

1) 調解員是否勝任今次的調解？
2) 調解員會否偏幫對方？
3) 調解後，會有些什麼結果？可會幫倒忙？
4) 有些深層次問題，可能連當事人也未必清楚；調解服務可真的能解決問題？

最近我曾經處理過一宗糾紛，爭拗雙方的關係雖然融洽，但面對爭拗，都各執一辭，互不相讓。其實，他們也知道調解的確可以幫助解決問題。然而，他們最渴望要知道的是調解員將會如何協助他們。

這宗糾紛牽涉一宗樓宇天台防水工程。頂層單位因天台防水層損壞，天花出現了嚴重的滲漏，天花結構亦出現石屎剝落。在未曾修復天台防水層之前，這位業主

[1] 公眾教育及宣傳小組委員會委員

確實無法進行所需的維修。經過商討之後，大廈業主立案法團決定進行天台防水工程，並有一張保用十年的證書。

防水工程完成之後，頂層業主便立即修葺天花石屎結構。但這位業主發現，天花仍然有水滲下，他便要求業主立案法團找承辦商處理。奈何這位承辦商認為造成天花的滲漏，是該業主在修葺天花石屎剝落的時候所導致的。他不但拒絕跟進，更收回十年保養的承諾。大廈業主立案法團因為失去十年保養期，便要求頂層業主承擔一切責任，包括修復天台滲漏的工程。頂層業主則感覺到無奈及無助，想起日後仍然要承受維修整個天台漏水的責任，不知如何是好。他們雙方都盼望，調解服務可以提供一條出路；但前題在於要聘請一位能勝任的調解員。

經過介紹，筆者去到這座大廈，大廈的法團主席及一眾委員，與頂層業主都一同出席會面。他們提出許多問題，首先要我詳細解釋調解服務的內容，調解員的角色，在這宗糾紛當中，調解員如何協助雙方推展調解工作等等。在溝通的過程中，我已經能夠運用調解技巧，瞭解到他們爭拗的核心問題：他們一致認為，用幾千元維修現時滲漏的缺陷，問題不大，但是日後的十年保養責任，才是今次爭拗的主項，因為法團方面，很難向其他業主交待，為何失去十年保養期。事情到此，雙方最關注的，還是責任誰屬的爭議。

雖然今次見面，只是短短不到兩個小時，但竟然在不知不覺之中，已經推動了調解服務，雙方達成了共識，由大廈業主法團的名義，出面與承辦商交涉，不容許白白失去十年防水保証。

這宗個案，再一次証明調解服務可以給當事人，一條有效率解決糾紛的出路，很迅速地解決彼此的矛盾，不用訴之法律；同時，我亦體會到，如果調解員對爭執的事，有專業的知識，會收事半功倍之效。就像今次事件，只不到兩個小時，就能提出彼此接受的解決方案，而他們的友誼不但沒有被削弱，將來一定會更加齊心合力，去處理大廈管理的事宜，日後當遇到糾紛，他們也樂意使用調解服務。

然而，調解員能順利推動調解服務，除了善於使用調解技巧之外，最重要的是，要得到雙方的信心及信任。市民其實很渴望得到調解服務，也需要有些組織從中配合，適當配對調解員，運用他們特定的專業知識協助雙方調解爭議。

香港調解服務若然要得到社區普羅大眾的支持，必先要令市民對調解制度有信心，對調解員信任。香港政府在 2013 年初已經推出調解條例，讓市民有非常清晰的保障；在調解員資歷方面，已經有香港調解資歷評審協會，確定調解員的質素。在過去一年，香港政府推出了許多宣傳，向普羅市民展示調解的益處，有不少市民甚至已經享受到調解服務。

記得一次，在去年十二月，我曾出席香港電台第一台，參與「好佬唔易做」的廣播節目。這是即場廣播，我為香港樓宇滲漏的問題作出分享，又建議用調解方法

去解決滲漏帶來的糾紛。當時我亦列舉了一則例子，是我曾經成功處理的個案。之後到聽眾來電詢問的環節，有市民表示有同感，因為調解的確有效，不但解決了爭拗，對方亦已成為有傾有講的好鄰居，這件事令節目一眾主持十分鼓舞。

挑選合適調解員是市民使用調解服務的先決事項，我們都應該以用家的角度去想，提供所需要的調解員。情況就好像司機一樣，有司機專門駕駛的士、小巴、大巴、貨車..，那麼，市民要搬屋便需要貨車的服務，他們必定不會找的士；有蛀牙便必定會找牙醫，不會向普通科醫生求醫的。

其實香港政府在調解服務方面，已經建立了一個框架，現時是否已成氣候，鼓勵業界及市民一起開拓調解服務市場的潛力？將調解服務進一步推廣，迎合市場的需要，讓市場多參與運作，情況就好像速遞服務一樣，雖然香港已經有一個十分健全的郵政服務，市場一樣有 DHL 與及 UPS。最重要者，市民可以得到及時的調解服務。因為我深信：『解決爭議，互利雙贏』

康和服務：受害者與犯事者調解

李冠美女士[1]

前言

話說有一天，你的錢包被人偷去，你即時最希望得到的結果是什麼？
是報警把賊人繩之於法，由法官裁決？
還是希望把錢包尋回，由賊人補償你的損失及傷害？

假若，偷竊你錢包者，被補後，希望向你道歉及作出補償，邀請你出席「受害者與犯事者調解」，你會出席嗎？

罪行發生，除了違反法例外，其實背後是傷害了人。

「受害者與犯事者調解」源於復和司法理念，意即罪行是人與人之間關係的違反，被告人與被害人若能夠共同協議，找出修復方案，並加以執行，就等同公義。在香港，「受害者與犯事者調解」比起「綜合調解」和「家事調解」，實是一項仍有待被認識及發展的一種調解範疇。

香港特別行政區政府轄下的律政司於 2010 年出版的《調解工作小組報告》建議（十五）[2]中提及：「應鼓勵進一步支持目前的復和司法和調解計劃，並予以擴展至香港社會各階層。」

這是香港第一次有政府文獻清楚表態支持復和司法及其調解計劃。

本文將以「康和服務：受害者與犯事者調解」為題，透視一項本土的「受害者與犯事者調解」計劃怎樣在縫隙中發芽，繼而向澳洲昆士蘭政府及澳洲格里菲斯大學借鏡，進一步為本港的青少年犯事者、案件受害人及雙方的家人/支持者提供調解，過程中如何促進各方關係，修補傷害，共建和諧；最後就是大膽假設，小心求證，與大家一起思考如何可以進一步支持目前的復和司法和調解計劃，甚至擴展到香港社會不同階層。

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[1] 循道衛理中心社區支援服務協調主任；香港調解資歷評審協會有限公司評審標準工作小組成員；東區撲滅罪行委員會委員；南區青年活動委員會委員 及 播道書院校董

[2] 《調解工作小組》(2010) 第五章 P.47 香港特別行政區政府律政司

康和服務：受害者與犯事者調解

警司警誡是香港的一種處理 (未滿十八歲的未成年人士) 刑事罪行的方式。當一名少年因初次犯案被拘捕，而警方有足夠證據對該少年作出起訴時，由一名警司或以上職級的警務人員行使酌情權，向該少年施行警誡，而無須交由少年法庭審理，這個好處在於讓犯事的少年無需負上因為刑事罪行而留有案底的污點。當然，為加強對接受警司警誡的少年犯事者的幫助，使其不再因為朋輩壓力或環境因素再次走上歧途，警方一般會與社會福利機構的社工進行多方面的合作。

作為提供警司警誡跟進輔導的「火鳳凰 — 社區支援服務計劃」的一方，我們循道衛理中心（以下簡稱「中心」）一直以來運用社會工作手法，針對青少年犯事原因，提供輔導跟進。

2007 年，我們成功訪問了 128 名被警司警誡的青少年，有接近 70%的受訪者同意他們的犯罪行為傷害了受害人，同時願意作出賠償及道歉。加上在跟進犯事青少年過程中，經常發現他們會因自己的行為耿耿於懷：店舖盜竊的害怕返回店舖遭人白眼、學校傷人的擔心老師、同學從此認定其為暴力者、刑事毀壞的厭倦被別人封為破壞王等等，凡此種種，傳統的輔導跟進手法，著實有其限制。

過去，我們一般很少聯絡案件的受害人，因為我們知道這個範疇比較敏感，也明白「調解」與「社會工作服務」有著兩套截然不同的理念及運作，我們不敢貿然由「社會工作員」充當「調解員」。

澳洲在調解方面有全面及深入的配套及培訓(香港律政司司長，2009)[3]，當我們接觸到復和司法理念，再引證到有近 70%的警司警誡青少年願意承擔責任，在中心支持下，由 2007 年開始，我們每年都派同工前往澳洲昆士蘭參加由政府舉辦的正規調解訓練，筆者及另一位同工更被邀請在澳洲參與教授調解工作，我們把所學的知識轉移回港，積極在現有的「火鳳凰 — 社區支援服務計劃」框架下及社區上推動「受害者與犯事者調解」。

中心有幸與澳洲昆士蘭政府及澳洲格里菲斯大學成為夥伴，由他們的調解培訓師提供海外及本地的培訓，中心於 2010 年初更跟澳洲政府成功簽署教材使用權協議，讓中心可於本港、內地、澳門及台灣擁有行使權；其後，我們更成功翻譯教材為中文版，整全的調解教材及培訓後盾，結合本土調解實戰經驗，著力為

[3]香港律政司司長黃仁龍資深律師 (2009) 《調解為先》簡介會致辭稿

犯事者、受害人及其支持者進行調解。

現在，當社工在初次接觸被警誡的青少年及其家長時，社工會了解青少年是否有意願為犯事行為負責任及作出補償，如青少年有這個意願，又獲其家長同意，他們便會被轉介至「康和服務：受害者與犯事者調解」，由合資格的調解員展開調解會議前的預備工作，當青少年清楚復和的理念，了解到調解會議的目的及確切希望透過康和調解會議為自己的行為作出補償的話；調解員隨後會嘗試了解受影響一方參加「康和服務」的意願。

礙於復和司法及「受害者與犯事者調解」在本港仍是較新的概念，加上現時又沒有司法制度的配合；故此，基本上我們未能有直接與案件受害一方聯絡，現時祇有靠迂迴的方法，例如：若青少年人與受害者是同學關係，當取得青少年同意後，我們會聯絡其老師或學校社工，再由他們初步了解受害同學是否有意願出席調解會議，若然回覆正面，老師便會把受害同學的聯絡資料給予調解員，之後我們再展開會前的預備工作，確立雙方及其家人均對出席會議有足夠的準備後，我們才展開正式「受害者與犯事者調解」會議。

調解員在過程中會保持中立，而當中又要具備敏感度，以減低受害人或青少年人因出席會議時情感上可能產生的傷害性風險，若然在會議預備的前期工作，已發現任何一方未有足夠準備，又或不同意調解會議的目的，調解員會建議暫延會議，甚或提出不適合召開會議的原因，以保障各方人士。

香港大學犯罪學中心於 2011 年 7 月至 2012 年 3 月進行了一項名為「刑事調解服務用於警司警誡青少年的成效研究」(Karen A. & Michael C., 2012)[4]，綜合青少年、受害者及雙方支持者的意見，他們的回應為：

1. 滿意調解會議
2. 調解前準備會有幫助，讓與會者明白其中的意義和風險，有心理準備；
3. 會議中達到有效溝通；
4. 能表達自己感覺(悔意和羞愧) ；
5. 明白青年人犯案原因；
6. 青年人明白犯案所帶來的傷害；
7. 能修補青年人與受害人的關係；
8. 調解員有效；

[4] Karen, A. Joe Laidler & Michael, C. Adorjan (2012), “Methodist Centre: Victim-Offender mediation Impacts on Police Superintendent Discretionary Scheme’s Youngsters”.

9. 認為香港需要「康和調解」服務。

受訪各方均認為香港需要「康和調解」服務，會議過程中受害人與青年人的關係有機會修補，這正是香港現行「懲罰性司法」沒有涉獵的層面。現時香港除了有受害人約章「象徵式」的權利外，似乎就沒有正式的制度或是渠道知會受害人，他/她是有權利參與「受害者與犯事者調解」此類服務。

如果我們一方面大力宣傳調解是解決爭議、衝突的優先好方法，為何調解不可以同時是罪行衝突後的修補好方案？所謂「解鈴還須繫鈴人」，有法例的保障，法官為我們的父母官是維持社會秩序的憑據，若然在此機制上加入「復和司法及調解」是否完全不可能？

向澳洲昆士蘭政府及格里菲斯大學借鏡

澳洲昆士蘭早在 1992 年已有青少年司法法案作為執行「青少年公義會議」法例的依據，此法案嚴格要求會議主持人(即調解員) 的資格和調解會議的原則。「青少年公義會議」是復和司法的過程，旨在讓青年犯事人有渠道修補因其犯事行為而造成的傷害。「青少年公義會議」由合資格的調解員主持，參與會議的人主要包括犯事青少年、受害人、雙方的家長/支持者、其他社區代表及警務人員，會後各方達成協議，並簽署作實，此文件是受法例約束的。

澳洲政府又於 1996 年立法，讓所有 10-16 歲犯上任何罪案並已認罪的青少年都有機會被轉介至青少年公義會議，轉介形式有三類：1) 警方轉介、2) 法庭無限定轉介及 3) 審判前轉介。至於受害人，他們會被通知有權參與此等會議，但必須出於自願。1997-1998 年度有 7,410 位青少年被法庭判決，122 位則被轉介至公議會議；2010-2011 年度則有 6,547 位青少年被法庭判決，2,851 位轉介至公議會議。當中轉介到公議會議在十多年間有 2,237%的巨大升幅；從 1997 年至 2012 年，有接近 30,000 青少年人被轉介至參與公義會議。澳洲格里菲斯大學一直是昆士蘭政府推行青少年公義會議的伙伴，前者負責推行公議會議及培訓、監管調解員，後者負責研究，多年的數據顯示有超過平均 98%的所有與會者(青少年、受害人及雙方家人/支持者、社區代表、警察等) 均滿意會議的過程及結果。(Queensland Government, 2012)[5]

澳洲昆士蘭「青少年公義會議」提供一個復和司法的平台，當中「明恥整合」

[5] Queensland Government (2012), “Youth Justice Conferencing Power Point.”

理論(Braithwaite, J ,1989)[6]對整個調解過程起著重大作用，「明恥」指的是，當事人能夠知道自己的過錯，而有悔改向上的決心；「整合」指的是，當犯罪人自知過錯，願意悔改向上時，社會可伸出接納的雙手，讓他們真正能夠回歸社會。

從研究及前線工作中均發現，一個人決定是否繼續從事犯罪行為的關鍵在於「羞恥」。如果一個青年人能受到「明恥整合」的洗禮，讓他對自己所作的行為感到羞愧，同時又獲得身邊人和社會的接納及給予原諒、改過的機會。據研究顯示，「明恥整合」於預防犯罪效果，會在當犯錯者承認自己的錯行、並自感羞慚之際達到最大，因此「受害者與犯事者調解」著實有助重犯罪案率的減少。

從「明恥整合」理論中，可以得出以下六大重點，促使一個調解會議能夠順利及成功進行，這包括有：

1. 受害者需被充權，讓他們可以在會議中描述曾經歷的故事，並鼓勵他們反映出在過程中曾受的傷害；
2. 青少年犯事者可以得到支持及得到受尊重的待遇；
3. 受到定罪的應是犯事者的行為，而不是其個人；
4. 不是刻意製造羞辱，而是透過調解會議，青少年可以聽到他們的行為如何傷害到他人，在會議過程中經歷羞恥感；
5. 青少年的社會支持及肯定（包括其家人、老師、同學及朋友等）有助他們重投社會，當然受害者及其支持者也可以有機會給予鼓勵；
6. 在適當時候，調解員可協助青少年的家人表達出欣賞青少年之地方，或其已改善之處，藉以增強對青少年的愛與關懷，鼓勵青少年繼續正面發展。

運用「復和司法及調解」於處理罪案是國際性的走勢，近數十年來除了澳洲、新西蘭、加拿大、美國、近年甚至東南亞的新加坡、台灣等地、近至澳門、內地亦積極推行相關服務，而大部份國家的經驗均屬正面有效。一項檢視全球復和司法 36 項計劃的成效性研究 (Sherman & Strang, 2007)[7]指出：

1. 當受害者參與過復和司法後，其創傷後的壓力得以減輕；
2. 復和司法能有效減低受害者對犯事者暴力報復的意慾；
3. 接受過復和司法的犯事者於重犯同類型案件中，較沒有經過復和司法者為低；

[6] Braithwaite, J (1989), “Crime, Shame and Reintegration.” Cambridge: Cambridge University Press.
[7] Sherman, L & Strang, H (2007), “Restorative Justice: The Evidence.” London : Esmee Fairbairn Foundation & The Smith Institute, London.

4. 復和司法於暴力案件中減低重犯率的功效，較輕微案件為高；
5. 受害者及犯事者對參與復和司法的滿意度較由法庭裁決為高。

縱然多項國際性及本地研究都顯示復和調解的有效性，但在香港現時並未有類似外國的法定青少年復和調解會議，香港在此方面似乎落後於大部份國家，特別是漠視受害人的參與；而在 2007 年司法及法律事務委員會就青少年司法制度提交的報告中指出：「政府當局認為，並無單一最好的刑事司法制度可適用於所有司法管轄區。」誠然，復和司法制度有其可取處，但並不代表它可以完全取代現有的制度，如何在合適的範疇加以引入復和司法及其調解，讓人與人之間的衝突得以有機會被修補，相信是 2014 年政府致力推動各類「調解」運動中，值得再認真探索的課題。

受害者與犯事者調解在港的發展與建議

在香港「受害者與犯事者調解」雖備受參與者推薦，但她的發展在沒有政府配套及社會支持下，其所能發揮的效益及接觸面始終十分局限；以「康和服務」為例，若然中心不是原本有另一個「火鳳凰 — 社區支援服務計劃」，可以接觸被警誡的青少年，並以此為起點，嘗試推行「受害者與犯事者調解」；一般的部門、機構即使認同復和司法的好處，也難以展開相關的調解會議。相反，一些經常接觸犯事人的部門，如：社會福利署感化部、懲教署、警務處、法院、律政司及其餘的社區支援服務計劃等，都具備先天條件開展此類別具意思的調解工作。

當然，能接觸到犯事人是第一個基本，第二個關鍵就是要有受害人願意參與。2010 年循道衛理中心進行了一項「社區調解調查」，成功訪問 473 名曾是案件受害人的市民，發現有超過 80%人願意參與「受害者與犯事者調解」。換句話，如果香港有制度或法制配合，讓案件受害人有渠道知道他們是有權參與此等調解，相信此類調解的數量一定明顯上升。

「康和服務」現時願意參加調解的犯事青年人數目遠遠超過願意參與的受害人，其中重要阻礙是我們沒有受害人的資料，要靠迂迴的方法才勉強接觸到部份受害人；因此，若政府願意制定措施及渠道，通知案件受害人可參與調解的權利，同時把受害人資料給予調解機構，讓他們向受害人直接解釋調解的意義及好處，再由他們自行決定是否參與；這些行政上的配套，可避免部門因擔心違反保密原則而婉拒進一步促成意義深遠的調解。

另外，大眾近年對調解開始認識，但多限於金融調解、商業調解、家事調解

等等，對「受害者與犯事者調解」鮮有聽聞，盼望政府在宣傳教育上也可多就此著墨，讓市民知道有爭端可先用調解；即使刑事案件，香港也有「受害者與犯事者調解」協助受害人與犯事人修補關係，讓犯事人承擔責任，使受害人得釋放。

筆者曾接觸懲教署人員，他們對復和概念很是認同，認為若有犯事人及受害人願意調解，又有充足的預備及合資格的調解員協助，對雙方面及整個社會來說都是一件美事；可是，目前私隱條例的限制，懲教署要試行此類調解又碰上關卡；若然，律政司能有行政或私隱條例的修訂，讓有意參與調解的犯事人及受害人可以接觸調解機構，經調解員評估，認為合適後，就可向當局取得另一方的聯絡資料，當然受害人參與調解必須要出於自願，因為我們不希望過程中有任何再傷害受害人(Re-victimize)的情況出現。

以上的討論都是一些較實際的建議，其實要體現「復和司法」的精神，較理想的做法是作全面檢視，特別是青少年司法流程。所謂萬事起頭難，但祇要我們有遠象、有決心為社會整體的和諧和關係的促進盡一份力，支持政府推動「受害者與犯事者調解」先導計劃，讓本土經驗可以累積及驗證，於稍後合適時間再推展至不同階層。

記得年前與一位律政司官員分享澳洲昆士蘭政府如何無條件地支持中心開展「康和調解服務」時，他語帶幽默，但又一矢中的說：「真有點尷尬，你說是澳洲政府支持你們推行調解，而不是香港政府。」他真摯的回應久久縈繞我的腦海.....

後記：特別感謝律政司調解團隊給予機會讓筆者能在調解周及這裡與大家分享，深信港府支持「受害者與犯事者調解」的舉措，由此已有聲無聲地開始。

法律援助與調解 － 統計分析

鄺寶昌先生[1]

(A) 為調解提供法律援助

- 自民事司法制度改革推行後，調解服務已成為民事訴訟的一部分
- 法律援助涵蓋受資助訴訟附帶的調解開支

(B) 委聘調解員

- 為鼓勵受助人嘗試進行調解，法援署印製了兩份便覽：
- "法援婚姻訴訟個案家事調解計劃"及"民事法援案件(非婚姻訴訟)調解計劃"
- 便覽提供的資料包括什麼是調解、透過調解可取得的成果，以及外委律師在調解所擔當的角色等
- 與法律援助證書一併發給所有受助人
- 備有英文、繁體中文及簡體中文的版本

外委律師須知

- 與法援個案委派信一併發給所有外委律師
- 載列法援署批准委聘調解員要求所需要的資料，包括：
  - 姓名；
  - 資歷；
  - 每小時收費；
  - 付款條件；以及
  - 受助人是否已獲告知第一押記的影響

[1] 香港特別行政區法律援助署署長；調解督導委員會及評審資格小組委員會委員 及 香港調解資歷評審協會有限公司調解評審委員會會員

(C) 統計分析

1. 按個案類別劃分的個案數目

個案類別	個案數目
ECC/SEC	285
M	171
MAT	477
MCE	9
MDA	6
MDN/SDN	5
MJR	1
MLT	114
MMN/SMN	78
MPI/SPI	1,510
MPN/SPN	11
MSA	3
RD/SRD	377
總數	3,047

2. 按月份劃分的個案數目

年份／月份	一月	二月	三月	四月	五月	六月	七月	八月	九月	十月	十一月	十二月	小計
2009	-	-	-	0	1	3	3	2	3	11	7	10	40
2010	10	18	46	39	50	38	79	70	77	41	43	59	570
2011	76	47	57	44	48	52	48	72	53	48	58	55	658
2012	40	58	71	63	65	68	62	80	58	77	69	59	770
2013	82	59	76	85	75	73	80	92	65	75	65	87	914
2014	95												95
總數													3,047

3. 調解員的收費率

每小時	$0	</= $500	$501 - $1,000	$1,001 -$2,000	$2,001 - $3,000	$3,001 - $4,000	$4,001 - $5,000	$5,001 - $6,000	$6,001 - $7,000	小計
個案數目	7	391	227	1,408	808	139	27	0	1	3,008

每宗個案	$5,000	$6,000	$7,000	$8,000	$10,000	$12,000	$13,000	$15,000	$18,000	$20,000	$22,000	小計
個案數目	8	1	2	2	2	5	1	4	1	2	3	31

4. *調解結果*

結果 / 個案類別	進行調解的個案									沒有進行調解的個案	總數
	成功				部分成功	不成功					
	有進行審訊	沒有進行審訊	已裁定	總數		有進行審訊	沒有進行審訊	已裁定	總數	沒有進行調解	
ECC/SEC		58		58	1	5	22		27	95	181
M	1	29		30	1	11	8		19	18	68
MAT			90	90	2			77	77	38	207
MCE		2		2					0		2
MDA		1		1			1		1	1	3
MLT		6		6		8	11		19	6	31
MDN/SDN		2		2					0	1	3
MMN/SMN		13		13		5	19		24	10	47
MPI/SPI		413		413	7	19	280		299	252	971
MPN/SPN				0			3		3	1	4
RD/SRD		97		97	3	12	42		54	102	256
小計	1	621	90	712	14	60	386	77	523	524	1,773
總數	**1,249**									**524**	**1,773**
進行調解的個案百分比	70.45%									29.55%	
成功率(不包括沒有進行調解的個案)	57.01%				1.12%	41.87%					

5. 訟費、平均所需時數及所支付的平均調解費用

結果 / 個案類別	進行調解的個案				
	招致訟費的個案	沒有招致訟費的個案	個案總數	平均所需時數	招致訟費的個案所支付的平均調解費用(港幣)
ECC/SEC	45	41	86	5.01	5,833.22 元
M	35	15	50	7.74	6,906.53 元
MAT	153	16	169	5.55	2,671.04 元
MCE	2		2	5.00	2,416.68 元
MDA	2		2	5.75	7,325.00 元
MLT	20	5	25	6.89	7,434.55 元
MDN/SDN	1	1	2	5.50	12,000.00 元
MMN/SMN	25	12	37	7.08	8,445.56 元
MPI/SPI	376	343	719	6.45	6,999.13 元
MPN/SPN	3		3	9.33	10,433.33 元
RD/SRD	88	66	154	5.86	6,729.92 元
小計	750	499	1,249	6.24	6,079.16 元
總數	**1,249**				
平均所需時數	**6.24 小時**				
招致訟費的個案所支付的平均調解費用	**港幣 6,079.16 元**				

(D) 未來路向

- 繼續提高公眾對調解的認識
- 為律師和律政書記安排內部和外間有關調解的訓練
- 繼續監察調解服務的使用情況，以及在法援個案的成效

醫療糾紛之調解運用：現今與未來的發展

戴樂群 醫生 太平紳士[1]

本文會就著以下的議題論述：

1. 病人旅程
2. 醫療事故的產生
3. 醫療糾紛: 投訴與索償
4. 投訴：應用調解技術
5. 索償：法律追究以外的途徑
6. 「道」與公義

1. 病人旅程 (Patient Journey)

病人由進醫院開始至出院其實都與醫者同路，有「共同的利益」(Common Interest)。可惜在這旅途中，並非每位病者都有完滿的經歷。例如，在急症室輪候時間很長，入病房後醫生初步診斷及治療方案可能解釋得不清楚；在治療過程中，病者的情況可能變得嚴重，又或者經深切治療部轉往普通病房後病情未有好轉甚至死亡；出院手續；出院後支援的安排未能使長者或其家人明瞭等，每個階段都可能產生誤會並且觸發投訴。

2. 醫療事故的產生

醫療是高度人為主導及操作的行為，目的是以病人的福祉及安全為依歸。可是「人誰無過」的確可以發生在使用於現代高科技的醫療服務上。能夠不犯錯而又達至最佳醫療效果，是我們每一位醫者及病人所期望的。有些情況， 雖然無錯，但效果未必理想，這可能是一些已知但未能預料到的嚴重併發症。當然由人為或系統產生的錯誤而導致的不良效果，而這些錯誤又很大程度上是可以預防及避免的，這些就是醫療失誤的事故。幸運地，這些錯誤未有在病者身上產生任何不良的效果，我們把這些事情稱為「幸免事故」。

「調解學」教導「觀感就是事實」；所以就算是「已知的」併發症也可被病者或家屬視作失誤事件。這些情況可能由於醫療情況突然轉差，突然的死亡，尤其是年輕的病者，複雜的醫療過程及療程需要經多個部門進行，或病者及其家人認為治療有延誤之嫌。

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[1] 威爾斯親王醫院內科及藥物治療學系老人科顧問醫生；香港醫學會病人投訴調解委員會成員 及 調解督導委員會及公眾教育及宣傳小組委員會委員

就舉藥物事故為例，其出現其實要經過很多關口的出錯，亦稱為「瑞士芝士」現象。做成最終藥物事故的緣故， 可能包括護士的人手問題，藥物輸送期間的錯誤，申請過程的錯誤， 護士借用另外一個病人的藥物，剛巧病人對此錯配的藥物產生嚴重敏感而死亡。錯誤不良效果，通常會被視為醫療疏忽。其實後者是有嚴格的法律定義，需要確定專業的責任，照顧的標準，失責及導致人身的缺損。

3. 醫療糾紛

MPS Casebook 2004 所示，三分之二的病人索償都不是與不良效果或疏忽有關。這些索償的出現與一些潛伏因素有關，例如：醫生的態度、拖延、不專注病人、溝通錯誤、缺乏同理心等。而觸發點是不良的效果出現，醫療程序產生的後遺症，未能提供適切的照顧，人為或系統的錯誤。

在英國，有文獻指出大部份「病人最關注」的地方是「關係」；例如醫護的同理心，愛心，對病者有回應、溝通、教育、情緒等的支援、減低驚恐、讓親友參與等。另外有研究亦指出 77-79%的醫療投訴是與溝通不足有關。醫療教育當然著重技術及知識的培養；同時溝通的培訓開始同樣受到重視。例如如何處理衝突，以聆聽處理投訴等。

4. 投訴：應用調解技術

「調解」學的技術運用很適用於醫療投訴的處理，因為這畢竟是「人與人」，「醫患關係」的問題上有關。「調解」學比較重視聆聽。中文字的「聽」字就包含了「調解」的一部份的技巧。例如「耳」是聽取觀感，令對方成為溝通的中心，以「簡述語意」(Paraphrasing) 去令對方知道明白他；以「**換框**技巧 」(Reframing) 去協助對方用另外的角度去看事件，以「歸納」 (Summarize) 去聚焦。最重要是懂得「同 理 心 」(Acknowledge)，即是表示你能感受到對方的情緒。用耳朵去聆聽的同時也以眼睛去觀察對方的身體語言，因為有七成的人際溝通都是透過身體語言去表達。共同找出治療目標，並產生解決問題的共同園地及方案。「同理心」最重要就是以「心」去「感受」，繼而用「腦袋」去「明瞭」。有一件有趣味的資料，「保時捷」跑車的設計師是一位中國人，賴平先生。他的設計理念是「外型」是情感的表達，車的內裏是「理性」的運用。也就是「同理心」的意思呢!

「調解」可以拆解為「程序」、「策略」、「技術」及「目標」。其中「技

術」如上文解釋， 以應用於醫療投訴是可以肯定的。

5. 索償：法律追究以外的途徑

伍爾夫勳爵 (Lord Woolf) 在他的著作《The Pursuit of Justice》，其中論述醫療索償事宜，就指出「法律行動」不適用於醫療事故的糾紛。法律程序之前應該予以機制維護病者與醫療人員的關係，並盡量解決紛爭。目的在於坦誠，適時在法庭以外和提供多樣化的解決方案。伍爾夫勳爵並提出法律程序未能滿足索償者的需求之五大原因：(1) 法律程序的費用高於索償的金額；(2) 時間的拖延； (3) 不應索償的個案； (4) 成功率偏低及 (5) 雙方不合作。當遇上不幸的過失事件，一個誠懇的「道歉」是很重要的，這也是一種學問，同時亦需要配合調解技巧的應用。

「醫療投訴」是病人關係負面的一方面，我們相信若醫護能掌握「調解技巧」，改變他們對醫患關係的「觀感」，從而改善關係及產生正面的行為。另外，在增進病者的正面經驗方面，調解技巧的應用能促進良好的溝通，能使醫患成為良好的伙伴關係，達至互相尊重及信任。

在 2012 年一個促進病人經驗的研討會上，就提出一個「病人經驗管理」的架構，最底層是醫療管理，跟著是資料管理，隨後是災難管理，而第四層便是「調解及糾紛化解」，可見後者是現代醫療體系中突顯了重要的一環。

「道歉」要包括事實的陳述，合適的人士和對象，適當的時刻及地點，明白不幸者所需要知道的事實，表現同理心及把事情辦得妥當。

6. 「道」與公義

「道歉」的意義在於修補一個缺損的醫患關係。所以「致歉之道」(Apology) 包括；(1) 公開事件的事實 (Disclosure)； (2) 「致歉」(Apology)及 (3) 「補償」(Offer) 的行動。有文獻指出 (DAO)「道」對於法律追溯及病人安全有補益。另外哈佛 2006 刊出一份「事故指引」，其中指出醫生的應變與患者及家屬溝通的重要。

活士(Woods) 2007 認為一個有效的「致歉」要有以下的元素：(1) 肯定 (Recognition)；(2) 抱歉(Regret)；(3) 承擔(Responsibility)；(4) 補償(Remedy) 及 (5) 跟進 (Remaining Engaged)。另外，一位學者舉出三個重要的原則：(1) 病人需要迅速及公道的補償；(2) 如果並非醫護的過失， 他們應該受到保障及辯護及 (3) 過失可以成為學習及進步的參考，此為「致歉之道」。

上文的目的為指出調解之道適用於醫療糾紛的處理，有助於優化醫患之溝通，積極化解糾紛及重建信任。而在於醫療事故後的索償，正式的調解程序可以提供法庭以外的公義，解決各種有關的問題及重建醫患的關係。從個案數目來看，投訴遠超索償的數字。

要達到(DAO)「道」，我們還需定義那一類的索償，例如金額數目，用調解程序處理的適當性，組織獨立醫療証人名冊 (Registry of Independent Experts)；醫療保險計劃要鼓勵調解，及更多廣泛的調解教育給予醫療及法律界。

這樣才可見「大道之行，天下為公」。

閉幕致辭

陳炳煥先生 銀紫荊星章 太平紳士[1]

1. 一連兩天的調解會議於 2014 年 3 月 21 日完滿結束。是次會議更獲各地學者熱心參與，貢獻出寶貴的時間、經驗及智慧，並藉由專業的討論，得出深具啟發性及前瞻性的共識，為調解在香港的持續發展作出了貢獻。

2. 律政司自 2007 年以來主辦調解會議，今年已是第三屆。今年的會議更是為首次在香港舉行的「調解周」揭開序幕。在這兩天的討論中，本地與外地的專家學者再一次聚首研究及討論調解在香港的發展方向。

3. 在兩天的會議裡，專家學者討論了解決爭議為何要以「調解為先」，以及調解如何在各行各業發揮作用。會議亦探討過調解服務的發展和一些外國的經驗。但綜觀兩天的議題，我認為最重要、且關係到調解可持續發展的議題，是關於調解員和調解服務的質素。

4. 這些議題正好呼應了前首席法官李國能於 2007 年第一次調解會議中的觀點。當時他提到：要成功發展調解服務，調解員的質素至為關鍵。調解員的質素越高，取得成功的機會也越大。隨著通過調解而達成和解協議的成功率增加，使用調解來解決糾紛的情況也會增多，調解服務會更趨普及。

5. 現在就讓我藉本文總結一下提升調解員質素的重要條件，以及當中的潛在困難和障礙。

6. 第一，是評審調解員的共同基準。

   自從 80 年代調解在香港開始萌芽之後，業界一向是奉行自我規管。由於政府及司法機構的推動，各界對調解逐漸產生興趣，甚至對調解員的資格趨之若鶩。可是在調解服務供過於求的情況下，由舉辦調解課程所得的收入，比起從事調解工作還要多。於是近 10 年間，調解課程於市面大量出現，有些機構更進一步自行訂立調解員的評審制度。這些機構都採用不同的標準作調解員的訓練和評審。這做成最少兩個問題：就是

[1] 聯合調解專線辦事處顧問及創辦主席；調解督導委員會委員；公眾教育及宣傳小組委員會主席；司法機構民事司法制度改革監察委員會成員 及 司法機構調解工作小組成員

調解員質素參差和對用家做成混亂。

雖然香港調解資歷評審協會有限公司（調評會）於去年正式運作，由業界參與制定評審調解員資格的共同基準，但這只是解決問題的第一步。原因是這套基準並非強制性，需要靠市場上的課程提供者及評審機構自願參與採用。若機構最終因無法達標而決定不採用，該共同基準則變得曲高和寡。加上如市民對調評會的工作不熟悉，則無從選擇由調評會認可的調解課程。所以並不是單單制訂評審調解員資格的共同基準便可一勞永逸，而是需要藉由主動的協助，使業界提升質素以達至該共同基準。我相信這將會是香港發展調解的一個重要方向。

7. 第二，是制定具約束力的專業操守和監管機制

二十多年前，當調解員數目只有二、三百人，且多為專業人士的時候，每間調解服務機構只須自行制定一些操守準則便已足夠，無需以法例規管。用家對調解員的信任亦可在近乎零的投訴數字反映出來。隨著培訓和評審調解員的機構不斷增加，調解員的人數亦相繼倍增。相信在未來數年，這數字仍會增加。可是調解個案數目的增長，並不足夠讓所有新晉的調解員執業。這導致香港出現大量缺乏經驗的調解員。

再者，隨著來自不同背景和職業的調解員數目日益增加，固有約定俗成的操守準則已不再是這新群組的共識。來自各個界別的調解員以自己的角度去理解調解員應有的操守，如果欠缺一個具約束力的監管機制，勢必影響用家對調解員及調解服務的信心，妨礙行業的發展。事實上，前線工作者屢屢聽聞各種對調解員操守的意見：包括在沒有足夠時間下接辦個案以至有拖延情況、亦有花過多的時間閱讀文件、懷疑利益衝突等等。會議中也有講者提及純粹為了避免不利的訟費令而進行的假調解。這些事的存在並非最大的問題，但缺乏具法律約束力的機制去處理這些問題才值得業界關注。

8. 第三，消費者教育

是次會議裡有兩個環節分別討論調解在商業及社區的應用。當眾多機構各自評審調解員，而市面上有超過 2000 名調解員的選擇時，公眾該何以適從呢？他們該在哪裡找到合資格且具質素的調解員呢？他們如何知道那些是執業的？那些是非執業的呢？有意接受調解培訓的人士，如

何知道那些課程才是優質的呢？這數年中，不同的調解服務機構紛紛成立，包括調評會、聯合調解專線辦事處，金融糾紛調解中心等，這些都是鼓勵更多人去認識及使用調解服務的渠道，也是業界花了很多年才能達至的成果。我們必須將這些成果深化，好使市場對調解有足夠的認知，透過自然淘汰讓調解員的質素進一步提高。

9. 總結

調解雖在香港發展了約 30 年，相對於外地而言我們仍屬早期發展階段，加上業界的持份者眾多，所以十分有賴政府支持業界面對各樣挑戰。相比其他司法管轄區，我們更先一步擁有統一的評審機制，而調評會亦正研究規管其下調解員的紀律聆訊程序。不過這些評審機制及規管架構要得到法律地位，才有更實在的效果。有不少意見指出，現在是一個適當的時候考慮將評審及規管架構制度化，讓業界有法可依。這些工作必須由政府，立法和司法機關、學術界以致整個調解社群共同努力，把現有的成果整合，讓調解在香港獲得持續的發展。

Mediation Conference 2014
"Mediate First for a Win-Win Solution"
Hong Kong Convention and Exhibition Centre, Meeting Room N101
20 – 21 March 2014

Conference Programme

Thursday, 20 March 2014 (Conducted in English)	
8:30 - 9:00	**Registration**
9:00 - 9:30	**Welcome Addresses** • **The Honourable Chief Justice Geoffrey MA Tao-li, GBM** *Chief Justice, The Court of Final Appeal, Judiciary* • **The Honourable Mr Rimsky YUEN, SC, JP** *Secretary for Justice, Government of HKSAR* *Chairperson of the Steering Committee on Mediation*
9:30 - 10:00	**Keynote Speech** • **The Right Honourable The Lord Woolf of Barnes** *Former Lord Chief Justice of England and Wales*
10:00 - 10:20	**Question and Answer Session with Keynote Speaker** • **The Right Honourable The Lord Woolf of Barnes** *Former Lord Chief Justice of England and Wales* **Moderator: Prof. Christopher TO** *Executive Director of Construction Industry Council, Council Member of Hong Kong International Arbitration Centre, Member of the Steering Committee on Mediation and the Accreditation Sub-committee*
10:20 - 10:25	**Première Broadcast of the 2nd Announcement in Public Interest** *"Mediate First for a Win-Win Solution"*
10:25 - 10:45	**Refreshment Break**
10:45 - 12:15	**Plenary Session: The Global Trend in Mediation** *Mediation is increasingly popular around the world as an effective alternative dispute resolution method in view of its advantages. A detailed review of the latest development of mediation in Australasia, United Kingdom, Europe, North America, China and the Asia*

	Pacific Region. **Moderator:** **Mr. Danny McFadden** *Managing Director of CEDR Asia Pacific* **Speakers:** • **The Honourable Madam Justice P A BERGIN** *Chief Judge in Equity, Supreme Court of New South Wales, Australia* • **Dr. Karl MACKIE, CBE** *Chief Executive of Centre for Effective Dispute Resolution, United Kingdom* • **Mr. Camilo AZCARATE** *Manager of Mediation Services, The World Bank Group* • **Dr. YANG Fan** *Assistant Professor, School of Law, City University of Hong Kong* • **Mr. Christopher Newmark** *Chairman of International Chamber of Commerce Commission on Arbitration & ADR; Partner, Spenser Underhill Newmark LLP, United Kingdom*	
12:15 - 12:30	**Question and Answer**	
14:00 - 15:15	**Confidentiality in Mediation** **- Applications and Exceptions** *Confidentiality is the cornerstone of the mediation process. How is mediation communications protected? Are there exceptions to confidentiality? If so, how does that impact on the process and whether it is contrary to the principle of confidentiality? The panel of speakers will provide their insights on how the fundamental of mediation is protected.* **Moderator: Prof. LEUNG Hing Fung** *Chairperson, Hong Kong Mediation Council, Associate Professor, Faculty of Architecture, The University of Hong Kong, Member of the Steering Committee on Mediation, the Accreditation Sub-committee and the Regulatory Framework Sub-committee*	**The ABC of Mediation: Mediation as the first choice of dispute resolution process** *Disputes may not be avoidable in our everyday lives and in business transactions. The ultimate goal of the parties is to reach finality and move on. Our panel speakers will reveal why and how mediation duly conducted is an **A**lternative Dispute Resolution method leading to a **B**etter **C**losure of disputes.* **Moderator: Mrs. Cecilia WONG** *Chairlady of the Mediation Committee of the Law Society of Hong Kong, Vice Chairlady of the Hong Kong Mediation Accreditation Association Limited, Member of Steering Committee on Mediation and Vice-Chairlady of the Regulatory Framework Sub-committee, Member of the Chief Justice's Working Party on Mediation*

	• **The Hon. Madam Justice P A BERGIN** *Chief Judge in Equity, Supreme Court of New South Wales, Australia* • **Mr. Camilo AZCARATE** *Manager of Mediation Services, The World Bank Group* • **Mrs. Robyn HOOWORTH** *Senior Teaching and Research Member, Dispute Resolution Centre, School of Law, Bond University, Australia; Director and Senior Mediator, Collaborative Mediation Service and Hong Kong Family Mediation Service; Chairperson of the Hong Kong Mediation Accreditation Association Limited on Accreditation Standards* • **Mr. Simon LEE** *Deputy Law Officer (Civil Law), Department of Justice, Member of the Chief Justice's Working Party on Mediation*	• **Prof. Robyn CARROLL** *Professor, School of Law, The University of Western Australia* • **Dr. Karl MACKIE, CBE** *Chief Executive of Centre for Effective Dispute Resolution, United Kingdom* • **Dr. Ming Keng TEOH** *Head of Medical Services - Asia, The Medical Protection Society, London* • **Ir Prof. LAU Ching Kwong** *Chairperson of the Alternative Dispute Resolution Committee of the Hong Kong Institution of Engineers, Council Member of Hong Kong Mediation Accreditation Association Limited*
15:15 - 15:30	**Question and Answer**	**Question and Answer**
15:30 - 15:50	**Refreshment Break**	
15:50 - 17:05	***"Sorry"* is the hardest word to say** - **How an apology legislation will assist in resolution of disputes?** *A sincere apology may soften up the parties so that they feel more able to move towards negotiation or even a settlement. However, how many times an apology is being held back for fear that it would attract legal consequences? Should legal protection against liabilities be available to the makers of apologies? How will apology legislation enhance the resolution of disputes?* **Moderator: Dr. Nadja ALEXANDER** *Director of the International Institute of*	**Advantages of using mediation to resolve complex Financial and Commercial disputes.** *More and more companies are including mediation clauses in their contracts as the first port of call when disputes arise. Why do companies find it in their favour to use mediation in resolving complex financial and commercial disputes? Audience may have experience in similar situations discussed in the case studies.* **Moderator: Prof. Christopher TO** *Executive Director of Construction Industry*

	Conflict Engagement and Resolution (IICER), Hong Kong Shue Yan University; Senior ADR Consultant, World Bank Group; Member of the Steering Committee on Mediation, the Accreditation Sub-committee and the Regulatory Framework Sub-committee	*Council, Council Member of Hong Kong International Arbitration Centre, Member of the Steering Committee on Mediation and the Accreditation Sub-committee*
	• **The Right Honourable The Lord Woolf of Barnes** *Former Lord Chief Justice of England and Wales*	• **The Honourable Madam Justice PA BERGIN** *Chief Judge in Equity, Supreme Court of New South Wales, Australia*
	• **Prof. Robyn CARROLL** *Professor, School of Law, The University of Western Australia*	• **Ms. Teresa CHENG, GBS, SC, JP** *Chairperson of Financial Dispute Resolution Centre, Chairperson of Hong Kong International Arbitration Centre, Vice-President of International Council for Commercial Arbitration*
	• **Dr. LAU Wan Yee, Joseph, SBS** *Chairperson of Medical Council Hong Kong*	• **Mr. C.K. KWONG, JP** *President of Asian Patent Attorneys Association*
	• **Mr. Michael BECKETT** *Teaching Fellow, School of Law, City University of Hong Kong, Member of Secretary for Justice's Working Group on Mediation, Member of the Hong Kong Mediation Accreditation Association Limited's Working Group on Accreditation Standards and its Family Mediation Sub-group and the Panel of Assessors, Member of the Mediator Admission Committee of the Law Society of Hong Kong*	• **Dr. Karl MACKIE, CBE** *Chief Executive of Centre for Effective Dispute Resolution, United Kingdom*
17:05 - 17:20	**Question and Answer**	**Question and Answer**
17:20 - 17:30	**Day's Closing Remarks** • **Mr. John BUDGE, SBS, MBE, JP** *Chairperson of the Hong Kong Mediation Accreditation Association Limited, Vice – Chairman of the Hong Kong International Arbitration Centre, Member of the Steering Committee on Mediation and the Accreditation Sub-committee, Member of the Chief Justice's Working Party on Mediation, Member of the Mediation Committee of the Law Society of Hong Kong*	

Friday, 21 March 2014 (Conducted in Cantonese)	
8:30 - 9:00	**Registration**
9:00 - 9:20	**Welcome Addresses** • **Dr. KO Wing-Man, BBS, JP** *Secretary for Food and Health, Government of HKSAR* • **The Honourable Mr. Justice Andrew CHEUNG** *Chief Judge of the High Court, Judiciary*
9:20 - 10:50	**Mediator's Qualifications & Skills** *What does it take to be a competent mediator? Is it necessary for a mediator to have the expert knowledge of the subject matter in dispute? What skills are required of a mediator? What qualities should clients look for in choosing their mediator?* **Moderator: Dr. Raymond Hai Ming LEUNG** *Founding President & Governor, Hong Kong Mediation Centre and Institute of International Experts, Member of the Steering Committee on Mediation and the Accreditation Sub-committee* • **The Honourable Mr. Justice Barnabas FUNG** *Judge of the Court of the First Instance of the High Court, Judiciary, Member of the Judiciary's Working Party on Mediation , Council Member of Hong Kong Mediation Accreditation Association Limited* • **Ms. Jenny FUNG** *Deputy Principal Government Counsel (Mediation), Department of Justice Secretary to the Steering Committee on Mediation* • **Prof. Paul B. S. LAI** *Chairperson & Professor, Department of Surgery, Assistant Dean (General Affairs), Faculty of Medicine, The Chinese University of Hong Kong* • **Mr. Vod K. S. CHAN** *Chairperson of the General Mediation Interest Group, Hong Kong Mediation Council of the Hong Kong International Arbitration Centre, Member of the Hong Kong Bar Association's Special Committee on Alternative Dispute Resolution* • **Mr. CHUNG Kwok Shing, Patrick** *Mediation Services Coordinator, Hong Kong Family Welfare Society, Registered Social Worker, Accreditation Family Mediation Supervisor and Family Mediator of Hong Kong Mediation Accreditation Association Limited, Parent Coordinator*

10:50 - 11:10	**Question and Answer**	
11:10 - 11:30	**Refreshment Break**	
11:30 - 12:45	**Mediation in the Business sector: Commercial/Insurance/Finance** *What sorts of disputes are suitable for mediation? Does the mediation process differ in different sectors? This session brings together reputable speakers to share their experience by using case studies from their respective sectors as well as practical tips in using mediation.* **Moderator: Ms. Sylvia W. Y. SIU, JP** *President of the Hong Kong Institute of Arbitrators, Member of the Steering Committee on Mediation and the Accreditation Sub-committee* • **Mr Registrar LUNG Kim Wan** *Registrar, High Court, Member of the Judiciary's Working Party on Mediation* • **Ms. Carol FUNG** *Committee Delegate, Accident Insurance Association, The Hong Kong Federation of Insurers* • **Ms. SIN Kar Yu Jody** *Solicitor, HKMAAL, HKIAC and Law Society of Hong Kong Accredited Mediator, Adjunct Lecturer, HKU SPACE, Vice Chairperson of Hong Kong Mediation Council*	**Mediation in Social and Community Enterprise** *Who doesn't want to live in a harmonious society? The effective use and practice of mediation skills can enhance better understanding and build better relationship with our family and friends. Let our panel of experienced speakers share with you how mediation can be applied in the social and community context.* **Moderator: Ms. Amarantha YIP** *Head of Service, Hong Kong Family Welfare Society, Member of the Steering Committee on Mediation and the Accreditation Sub-committee and Vice-Chairlady of the Public Education and Publicity Sub-committee* • **Ms. April LAM** *Senior Mediation Affairs Officer, Judiciary, Member of the Public Education and Publicity Sub-committee* • **Mr. Francis LAW** *President of the Hong Kong Mediation Centre, Director of the Hong Kong Mediation Accreditation Association Limited, Vice President of the Guangdong, Hong Kong and Macau Commercial Mediation Alliance* • **Ir. WU Chi Cheung, Raymond** *Member of the Public Education and Publicity Sub-committee*

	• **Ms. Sou CHIAM** *Chief Executive Officer of Financial Dispute Resolution Centre, Member of the Accreditation Sub-committee*	• **Ms. Mei May, LEE Koon Mei** *Service Coordinator of Community Support Service, Methodist Centre, Member of the Hong Kong Mediation Accreditation Association Limited's Working Group on Accreditation Standards, Member of the Eastern District Fight Crime Committee, Member of the Southern District Youth Programme Committee and School Manager of the Evangel College*
12:45 - 13:00	**Question and Answer**	**Question and Answer**
14:30 - 16:00	**Plenary Session: Mediation – Current Trends and Future Developments** *How successful is mediation in resolving disputes? What can be done to make mediation a more effective tool? Take a closer look and keep up with the current trends to find out how it may influence the future development of mediation in Hong Kong.* **Moderator: Mr. CHAN Bing Woon, SBS, MBE, JP** *Advisor and Founding Chairman of Joint Mediation Helpline Office, Member of the Steering Committee on Mediation and Chairperson of the Public Education and Publicity Sub-committee of the Steering Committee on Mediation, Member of Chief Justice's Civil Justice Reform Monitoring Committee, Member of Chief Justice's Working Party on Mediation, Past Chairman of Hong Kong Mediation Council* • **The Honourable Mr. Justice LAM Man-Hon** *Vice-President of the Court of Appeal of the High Court, Chairperson of the Judiciary's Working Party on Mediation, Member of the Steering Committee on Mediation and the Accreditation Sub-committee* • **Mr. Thomas Edward KWONG** *Director of Legal Aid, Member of the Steering Committee on Mediation and the Regulatory Framework Sub-committee, Member of Mediation Accreditation Committee of the Hong Kong Mediation Accreditation Association Limited* • **Mr. Antony MAN** *Chairperson of Joint Mediation Helpline Office , Past Chairperson of Quantity Surveying Division of the Hong Kong Institute of Surveyors (2010-11)* • **Dr. David DAI Lok-kwan, JP** *Consultant Geriatrician, Department of Medicine and Therapeutics, Prince of Wales Hospital, Member of the Patients' Complaints Mediation Committee , The Hong Kong Medical Association, Member of Steering Committee on Mediation and Public Education and Publicity Sub-committee*	

16:00 - 16:15	**Question and Answer**
16:15 - 16:30	**Closing Address** • **Mr. CHAN Bing Woon, SBS, MBE, JP** *Advisor and Founding Chairman of Joint Mediation Helpline Office, Member of the Steering Committee on Mediation and Chairperson of the Public Education and Publicity Sub-committee of the Steering Committee on Mediation, Member of Chief Justice's Civil Justice Reform Monitoring Committee, Member of the Chief Justice's Working Party on Mediation, Past Chairman of Hong Kong Mediation Council*

2014 年調解研討會
「調解為先 互利雙贏」
香港會議展覽中心會議室 N101
2014 年 3 月 20 至 21 日

研討會議程

第 1 日—2014 年 3 月 20 日（星期四）(以英語進行)	
8:30 - 9:00	嘉賓簽到
9:00 - 9:30	致歡迎辭 • **馬道立首席法官，GBM** *香港特別行政區終審法院* • **袁國強資深大律師，JP** *香港特別行政區政府律政司司長* *調解督導委員會主席*
9:30 - 10:00	專題演講 • **伍爾夫勳爵 (The Right Honourable The Lord Woolf of Barnes)** *前英格蘭及威爾斯首席大法官*
10:00 - 10:20	專題演講講者的問答環節 • **伍爾夫勳爵 (The Right Honourable The Lord Woolf of Barnes)** *前英格蘭及威爾斯首席大法官* **主持：陶榮教授** *建造業議會執行總監、香港國際仲裁中心理事會理事、調解督導委員會及評審資格小組委員會委員*
10:20 - 10:25	第二套宣傳短片及聲帶首播 *"調解為先 互利雙贏"*
10:25 - 10:45	茶歇
10:45 - 12:15	主題論壇：全球調解趨勢

	在世界各地，調解已成為一種日漸普及和有效的替代訴訟糾紛解決方法。會上會詳細檢視澳大拉西亞、英國、歐洲、北美洲、中國及亞太區在調解方面的最新發展。 主持： **范維敦先生, LLM, FCIArb** *CEDR Asia Pacific 英國有效爭議解決中心(亞太地區)執行董事* 講者： • **The Honourable Madam Justice P A BERGIN** *澳洲新南威爾士最高法院首席法官(衡平法)* • **Dr Karl MACKIE, CBE** *CEDR 英國有效爭議解決中心行政總裁* • **Mr Camilo AZCARATE** *世界銀行集團調解事務經理* • **揚帆博士** *香港城市大學法律學院助理教授* • **Mr Christopher Newmark** *國際商會仲裁與 ADR 委員會主席、英國 Spenser Underhill Newmark LLP 合夥人*	
12:15 - 12:30	問答環節	
14:00 - 15:15	調解的保密 - 應用與例外情況 *保密是調解過程的基石。調解通訊如何受到保障?保密可有例外情況? 若有，這如何影響調解過程，是否違反保密原則?多位講者會就如何保障基本調解原則提出真知灼見。* 主持: **梁慶豐教授** *香港調解會主席、香港大學建築學院副教授、調解督導委員會，評審資格小組委員會及規管架構小組委員會委員*	綜述調解：調解是解決爭議過程的首選 *在日常生活和商貿交易中，爭議可能無可避免。爭議各方的最終目標，是達致終局決定，繼續邁步向前。多位講者會講解適當進行的調解為何和如何成為更有效解決爭議的替代糾紛解決方法。* 主持: **黃吳潔華女士** *香港律師會調解委員會主席、香港調解資歷評審協會有限公司理事會副主席、調解督導委員會委員、規管架構小組委員會副主席，司法機構調解工作小組成員*

	• **The Honourable Madam Justice P A BERGIN** *澳洲新南威爾士最高法院首席法官 (衡平法)* • **Mr Camilo AZCARATE** *世界銀行集團調解服務經理* • **Mrs Robyn HOOWORTH** *澳洲邦德大學法律學院爭議解決中心高級教研人員、Collaborative Mediation Service and Hong Kong Family Mediation Service 主任及高級調解員，香港調解資歷評審協會有限公司評審標準工作小組主席* • 李伯誠先生 *香港特別行政區律政司副民事法律專員，司法機構調解工作小組成員*	• **Mrs Robyn CARROLL** *西澳洲大學法律學院教授* • **Dr Karl MACKIE, CBE** *CEDR 英國有效爭議解決中心行政總裁* • 張明經醫生 *倫敦醫療保障協會亞洲區醫療服務主管* • 劉正光教授工程師 *香港工程師學會解決爭議方式事務委員會主席，香港調解資歷評審協會有限公司理事會成員*
15:15 - 15:30	問答環節	問答環節
15:30 - 15:50	茶歇	
15:50 - 17:05	*"對不起"*這話最難啟齒 - 道歉法例對解決爭議有何幫助？ *真誠的道歉可緩和當事人的情緒，使他們更願意展開談判，甚或達成和解，但我們有多少次因害怕引致法律後果而不肯道歉？究竟應否為作出道歉的人提供免承擔法律責任的法律保障？道歉法例可如何有助解決爭議？* **主持:** **利珊雅博士 (Dr. Nadja ALEXANDER)** *香港樹仁大學仁大國際調解研究中心主任、世界銀行集團 ADR 高級顧問、調解督導委員會，評審資格小組委員會及規管架構小組委員會委員*	使用調解解決複雜的金融及商事爭議的優點 *愈來愈多公司訂立合約時會納入調解條文，以便在發生爭議時先行訴諸調解。為何使用調解來解決複雜的金融及商事爭議會對公司有利？個案研究中所討論的情況，與會者可能也有類似經驗。* **主持:** **陶榮教授** *建造業議會執行總監、香港國際仲裁中心理事會理事、調解督導委員會及評審資格小組委員會委員*

	• **伍爾夫勳爵 (The Right Honourable The Lord Woolf of Barnes)** *前英格蘭及威爾斯首席大法官* • **Mrs Robyn CARROLL** *西澳洲大學法律學院教授* • **劉允怡醫生，SBS** *香港醫務委員會主席* • **Mr. Michael BECKETT** *香港城市大學法律學院特任講師、律政司調解工作小組成員、香港調解資歷評審協會有限公司評審標準工作小組及其家事調解分組成員、評核員名冊成員、香港律師會 Mediator Admission Committee 成員*	• **The Honourable Madam Justice P A BERGIN** *澳洲新南威爾士最高法院首席法官 (衡平法)* • **鄭若驊資深大律師，GBS，JP** *金融糾紛調解中心主席、香港國際仲裁中心主席、國際商事仲裁會副總裁* • **鄺志強先生， JP** *亞洲專利代理人協會會長* • **Dr. Karl MACKIE, CBE** *CEDR 英國有效爭議解決中心行政總裁*
17:05 - 17:20	問答環節	問答環節
17:20 - 17:30	當日總結 • **白仲安律師，SBS，MBE，JP** *香港調解資歷評審協會有限公司理事會主席、香港國際仲裁中心理事會理事、調解督導委員會及評審資格小組委員會委員、司法機構調解工作小組成員及香港律師會調解委員會委員*	

第 2 日—2014 年 3 月 21 日星期五 (以粵語進行)		
8:30 – 9:00	嘉賓簽到	
9:00 - 9:20	致歡迎辭 • **高永文醫生，BBS，JP** *香港特別行政區政府食物及衛生局局長* • **張舉能首席法官** *香港特別行政區高等法院*	
9:20 - 10:50	調解員的資格和技巧 *要具備什麼條件才能成為勝任的調解員？調解員是否必須具備爭議事項所涉及的專門知識？調解員必須具備哪些技巧？當事人揀選調解員時應考慮什麼才能？* 主持： **梁海明博士** *香港和解中心創會會長及監事委員會委員、國際專家學會創會會長，調解督導委員會及評審資格小組委員會委員* • **馮驊法官** *香港特別行政區高等法院原訟法庭法官、司法機構調解工作小組成員，香港調解資歷評審協會有限公司理事會成員* • **馮美鳳女士** *香港特別行政區律政司副首席政府律師 (調解)，調解督導委員會秘書* • **賴寶山教授** *香港中文大學醫學院助理院長 (常務)及外科學系系主任* • **陳家成先生** *香港調解會綜合調解組主席，香港大律師公會仲裁及調解事宜委員會成員* • **鍾國盛先生** *香港家庭福利會調解服務主任、註冊社工、香港調解資歷評審協會有限公司認可家事調解督導及家事調解員，認可親職協調員*	
10:50 - 11:10	問答環節	
11:10 - 11:30	茶歇	
11:30 - 12:45	商界應用調解服務的情況：商業／保險業／金融業	社會及社區企業應用調解服務的情況

	調解適用於哪種爭議？各行各業的調解過程是否不盡相同？在本環節內，知名講者會以其相關行業的個案研究，分享他們應用調解的經驗和實用秘訣。 **主持：** **蕭詠儀律師，JP** *香港仲裁司學會會長，調解督導委員會及評審資格小組委員會委員* • **龍劍雲先生** *香港特別行政區高等法院司法常務官，司法機構調解工作小組成員* • **馮詠詩女士** *香港保險業聯會意外保險公會委員* • **冼泇妤律師** *香港調解資歷評審協會有限公司，香港國際仲裁中心及香港律師會認可調解員、香港大學專業進修學院兼任講師，香港調解會副主席* • **詹少弘女士** *金融糾紛調解中心行政總裁，評審資格小組委員會委員*	*誰不想我們的社會和諧融洽？調解技巧如能有效運用和實踐，可增進我們與親友的了解，彼此建立更融洽的關係。多位經驗豐富的講者會與你分享如何在社會和社區方面應用調解服務。* **主持：** **葉潤雲女士** *香港家庭福利會服務總監、調解督導委員會及評審資格小組委員會委員，公眾教育及宣傳小組委員會副主席* • **林雪兒女士** *司法機構高級調解事務主任，公眾教育及宣傳小組委員會委員* • **羅偉雄先生** *香港和解中心會長、香港調解資歷評審協會有限公司理事，粵、港、澳商事調解聯盟副主席* • **胡子祥工程師** *公眾教育及宣傳小組委員會委員* • **李冠美女士** *循道衛理中心社區支援服務協調主任、香港調解資歷評審協會有限公司評審標準工作小組成員、東區撲滅罪行委員會委員，南區青年活動委員會委員及播道書院校董*
12:45 - 13:00	問答環節	問答環節
14:30 - 16:00	**主題論壇：調解—現今趨勢和未來發展** *以調解解決爭議有多成功？怎樣才能使調解成為更有效的工具？就讓我們深入探討和掌握現今趨勢，以了解這些趨勢對香港調解服務的未來發展有何影響。* **主持： 陳炳煥律師，SBS，MBE，JP** *聯合調解專線辦事處顧問及創辦主席、調解督導委員會委員、公眾教育及宣傳小組委員會主席、司法機構民事司法制度改革監察委員會成員、司法機構調解工作小組成*	

	員，香港調解會前主席 • **林文瀚法官** *香港特別行政區高等法院上訴法庭副庭長、司法機構調解工作小組主席，調解督導委員會及評審資格小組委員會委員* • **鄺寶昌先生** *香港特別行政區法律援助署署長、調解督導委員會及評審資格小組委員會委員，香港調解資歷評審協會有限公司調解評審委員會會員* • **文志泉先生** *聯合調解專線辦事處主席，香港測量師學會工料測量組前主席(2010 -11)* • **戴樂群醫生** *威爾斯親王醫院內科及藥物治療學系老人科顧問醫生、香港醫學會病人投訴調解委員會成員，調解督導委員會及公眾教育及宣傳小組委員會委員*
16:00 - 16:15	問答環節
16:15 - 16:30	閉幕致辭 • **陳炳煥律師，SBS，MBE，JP** *聯合調解專線辦事處顧問及創辦主席、調解督導委員會委員、公眾教育及宣傳小組委員會主席、司法機構民事司法制度改革監察委員會成員、司法機構調解工作小組成員，香港調解會前主席*