

# **REPORT OF THE WORKING GROUP ON MEDIATION**

**Department of Justice  
The Government of the Hong Kong  
Special Administrative Region**

**February 2010**

# THE WORKING GROUP ON MEDIATION

## Report

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# FOREWORD

*“In China, mediation has remained vibrant and alive from antiquity to modernity not because of sound institutions and perfect legal provisions or because of mediation’s operational simplicity and low-cost effectiveness. Rather, it has done so because it offers a core value meaningful to every human being, one that is increasingly being accepted by modern society: harmony.”*

Professor Zeng Xianyi,<sup>1</sup>  
Dean, Faculty of Law,  
Renmin University of China

The time, costs, acrimony and uncertainty involved in traditional litigation raise hard issues as to whether the present dispute resolution process is adequate to meet the needs of justice and efficiency. Increasingly, mediation is considered the alternative or even the preferred method. In Hong Kong, whether the use of mediation can take off affects not only our status as a leading financial and business centre, but also our efforts to build a more harmonious community. Mediation has become a core subject in all my duty visits to the United Kingdom, Australia, Canada as well as Mainland China. The message given to me is overwhelmingly in favour of mediation forming an integral and prominent part of our dispute resolution mechanism and culture. Apart from improving access to justice, mediation fosters more varied and proportionate dispute resolution processes in our society.

With the support of the Chief Executive, the Working Group on Mediation was set up in early 2008 under my chairmanship. The Working Group has reviewed and considered many important issues that are fundamental to the greater use of mediation in Hong Kong. Recommendations have been made in this Report, and pending public consultation and further deliberation, decisions will be made on the way forward to facilitate the more effective and extensive application of mediation in both commercial disputes and those at the community level.

This Report is the collective effort of members of the Working Group and its three Sub-groups. The Sub-groups have looked into public education and promotion, accreditation and training as well as the regulatory framework for mediation. In addition to preparing reports and recommendations for the Working Group, the Sub-groups have also taken

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<sup>1</sup> Zeng Xianyi, “Mediation in China – Past and Present”, Asia Pacific Law Review, Vol. 17, Special Edition on Mediation, LexisNexis, 2009, at page 21.

concrete steps to promote mediation such as launching the 'Mediate First' campaign among the business and professional community, promulgating a Hong Kong Mediation Code as a voluntary code of conduct, as well as instituting a pilot scheme on Community Venues for Mediation. With these well-defined directions and concerted efforts, we believe a major milestone has been reached in the development of mediation services in Hong Kong.

We have had the good fortune of being able to learn from others who are ahead of us in the use of mediation. We are grateful to pioneers and veterans from all over the world who generously provided us with information, material and advice and shared their experience in developing mediation in their own jurisdictions. We are conscious of the need to generate demand for mediation in addition to formulating standards, rules and framework. While we are convinced that quality assurance and standard setting are essential, we are also mindful that the diversity of mediation services should not thereby be stifled.

The Civil Justice Reform, together with the various mediation pilot schemes introduced by the Judiciary, has transformed the legal landscape by encouraging litigants to consider mediation. The legal professions are embracing the new culture. Training and accreditation courses for mediators are being organised at a higher frequency to meet the demand and professional codes of conduct are being reviewed to incorporate mediation practice.

I would like to extend my sincere gratitude to the members of the Working Group and the three Sub-groups for their dedication and initiatives. I would like to thank in particular the chairmen of the Sub-groups, Mr Fred Kan, Mr Lester Huang and Mr Rimsky Yuen SC, for their able leadership. Thanks must also be given to Mr Christopher To, formerly Secretary-General of the Hong Kong International Arbitration Centre, for drafting the initial discussion document and sharing with us his insights. We are also much indebted to Ms Sou Chiam, the Secretary to the Working Group, and Ms Maria Choi, the Secretary to the Sub-groups for putting this Report together.

Wong Yan Lung, SC  
Secretary for Justice

# Chapter 1

## Introduction to mediation in Hong Kong

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*“If people were more ready to discuss their disputes frankly, to try to understand the other party to the conflict and to strive to find a solution acceptable to both; if the training, techniques and procedures for mediation and court-processed mediation were given more publicity and were to evolve to maturity through time and practice, mediation would assume a more important role in the resolution of disputes to the benefit of all and contribute towards a ‘Culture of Peace’.”*

Elsie Leung, ‘Mediation – A Cultural Change’<sup>2</sup>

1.1 Mediation is taking root in Hong Kong. It is already well-developed in relation to certain areas such as construction disputes. However, there is much more development required in areas such as community disputes. Mediation can result in settlements which go beyond the legal remedies that a court may allow. Mediation service providers are becoming active in the training and accreditation of mediators. Various professional bodies are also developing mediation within their own bodies. They include the Law Society of Hong Kong (“Law Society”), the Hong Kong Bar Association (“Bar Association”), the Hong Kong Institute of Architects, the Hong Kong Institute of Surveyors, the Royal Institution of Chartered Surveyors Hong Kong, the Chartered Institute of Arbitrators (East Asia Branch) and the Hong Kong Institute of Arbitrators. The Hong Kong Medical Association has a Patients Complaints Mediation Committee and members who mediate in medical disputes.<sup>3</sup> The Hong Kong Dental Association had a Patient Complaints Mediation Committee.<sup>4</sup> Law faculties in various universities are developing mediation courses and actively promoting mediation.

1.2 The Judiciary in Hong Kong has taken an active role in the use of mediation in civil cases. Mediation is recognised as an important supplement to court proceedings. Dame Hazel Genn, in her Hamlyn Lecture 2008 on ‘Judging Civil Justice’ said,

*“In my view, mediation has rightly become a feature on the landscape of dispute resolution – an option for anyone unfortunate enough to have become involved in a civil dispute. I believe that the public and the legal profession should be properly educated*

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<sup>2</sup> Elsie Leung, “Mediation – A Cultural Change”, Asia Pacific Law Review, Vol. 17, Special Issue on Mediation, LexisNexis, 2009 at page 46.

<sup>3</sup> Dr James Chiu, “Mediation for Doctors”, Hong Kong Medical Association News, November 2009 Issue (in Chinese).

<sup>4</sup> Dr William Cheung, “Mediating patient complaints: an alternative process for dispute resolution”, Hong Kong Dental Journal 2008 at page 54.

*about the potential of mediation from the earliest possible moment and I believe that mediation facilities should be made easily available to anyone contemplating litigation.”<sup>5</sup>*

1.3 During the last few years there has been a worldwide interest in Alternative Dispute Resolution (“ADR”). ADR is an umbrella term which covers a wide range of methods to resolve disputes other than traditional court adjudication such as arbitration, mediation, early neutral evaluation, neutral fact finding, med-arb and mini trials.<sup>6</sup> Jurisdictions as varied as the United States of America, Australia, the United Kingdom, Japan, Singapore and the People’s Republic of China have all developed ADR. Mediation is a widely used form of ADR. China has a long history of mediation.<sup>7</sup> Indeed it may be fair to say that there is something distinctly Chinese about mediation, as there is a strong element of compromise and harmony. However, the Americans have been at the forefront in the recent past in developing commercial mediation, which demonstrates the versatility of this type of ADR.

1.4 Many people still think that mediation is, in effect, an informal arbitration. Nothing could be further from the truth. Mediation does not seek to establish liability or fault. It is not a weapon for use in the ‘blame culture’ that is seen in so many parts of the world. Mediation is a process that seeks to help the parties find a solution to their problems that they ‘can live with’. Mediation is not tied to traditional judicial remedies. It can be, and often is, highly imaginative and can have the effect of bringing the parties back into a good relationship.

## **Chief Executive’s Policy Address 2007-2008**

1.5 In the 2007-08 Policy Address under ‘Investing for a caring society’, the Chief Executive of Hong Kong, Mr. Donald Tsang said that,

*“To alleviate conflicts and foster harmony, we will promote the development of mediation services. On many occasions, interpersonal conflicts need not go to court. Mediation can reduce social costs and help parties concerned to rebuild their relationship. This is a new trend in advanced regions around the world. The cross-sector working group headed by the Secretary for Justice will map out plans to employ mediation more extensively and effectively in handling higher-end commercial disputes and relatively small-scale local disputes.”<sup>8</sup>*

## **Civil Justice Reforms and mediation**

1.6 In February 2000, the Civil Justice Reform Working Party was

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<sup>5</sup> Hazel Genn, “Judging Civil Justice, The Hamlyn Lectures 2008”, Cambridge University Press, 2010, at page 79.

<sup>6</sup> Karl Mackie, David Miles, William Marsh, Tony Allen, “The ADR Practice Guide: Commercial Dispute Resolution, 3rd revised edition, Tottel Publishing, 2007, Chapter 3.

<sup>7</sup> Zeng Xianyi, “Mediation in China – Past and Present”, *ibid*, at page 2.

<sup>8</sup> Hong Kong Government, Chief Executive’s Policy Address 2007-08 at <http://www.info.gov.hk>

established and a Final Report was published in March 2004. In April 2006, the Civil Justice Reform Committee produced a consultation paper with draft legislation. In April 2007, the Civil Justice (Miscellaneous Amendments) Bill was introduced to the Legislative Council and in January 2008, this Bill was passed into law. On 2 April 2009, new rules of the High Court and District Court came into force.

1.7 The Civil Justice Reform (“CJR”) implemented in 2009 is in response to social change and technological advances which had resulted in a sharp increase in civil litigation. There had been criticisms that the civil justice system was too slow, too expensive, too complex and too susceptible to abuse. The CJR set out a number of underlying objectives as stated in Order 1A Rule 1 of the Rules of the High Court (“RHC”). These included objectives to increase cost effectiveness of civil procedure, to deal with cases as expeditiously as is reasonably practicable, to promote a sense of reasonable proportion and procedural economy, and to facilitate the settlement of disputes. Under Order 1A Rule 4(2) of RHC, active case management includes encouraging and facilitating parties to use an ADR procedure if the court considers it appropriate and helping parties to settle the case. This means that courts will be proactive in case management which includes exploring the use of ADR where appropriate.

1.8 In response to the underlying objectives, the Judiciary promulgated a Practice Direction on Mediation (“PD 31”) which was made effective from 1 January 2010.<sup>9</sup> The main feature of PD 31 includes the filing of a Mediation Certificate, a Mediation Notice and Response. The Mediation Certificate is to be filed together with the time tabling questionnaire under Order 25 Rule 1 of RHC within 28 days after close of pleadings. The Mediation Certificate helps to focus the minds of the parties on exploration of mediation, facilitates lawyers in advising clients on mediation and to provide information to the court for assessing whether mediation is appropriate and whether refusal is reasonable. The Mediation Notice and Response is a mechanism to facilitate parties to enter into dialogue on mediation, identify areas of agreement and disagreement, and to assist the court to facilitate mediation and decide on directions to be made.

1.9 The court will take the conduct of the parties into account in deciding on cost sanctions if any party unreasonably refuses to consider mediation. This is supported by Order 62 Rule 5(1)(aa) of RHC where the underlying objectives in Order 1A will be taken into account on costs and Rule 5(1)(e) of RHC where conduct of the parties are relevant, including the reasonableness in the manner in which an issue is pursued. The court has a duty to facilitate ADR and help parties to settle the dispute between them. The court is able to give directions on the mechanics of mediation including on issues relating to the appointment of mediators, the timing and scope of the mediation process and the minimum level of participation required. The court can also order an interim stay of proceedings.

1.10 PD 31 marks an important point in the development of mediation in Hong Kong as all civil litigants will have to consider mediation before trial. Otherwise, there may be costs implications for those who choose not to attempt

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<sup>9</sup> The effective date of 1 January 2010 was chosen instead of 2 April 2009 (the implementation date of measures introduced by the CJR). This was at the request of the Law Society to enable more time for solicitors to prepare for its implementation.

mediation. Both the Law Society<sup>10</sup> and the Bar Association<sup>11</sup> have amended their respective codes of conducts to embrace a duty to advise clients on mediation and have been very pro-active in encouraging their members to understand the practice of mediation within the CJR. The Chief Justice's Working Party on Mediation is monitoring the effectiveness of mediation in the CJR.

1.11 Much of CJR in Hong Kong is based on the CJR instituted in England by Lord Woolf in 1996. He promoted ADR because he was of the view that it could save scarce judicial resources and benefit litigants or potential litigants by being cheaper than litigation and produce quicker results.<sup>12</sup> In his "Access to Justice, Interim Report", Lord Woolf stated that the courts had an important role in providing information about ADR and encouraging its use in appropriate cases. In his Final Report to the Lord Chancellor on the Civil Justice System in England and Wales, he stated that,

*"The court will encourage the use of ADR at case management conferences and pre trial reviews, and will take into account whether parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR."*<sup>13</sup>

1.12 Professor Dame Hazel Genn, who has conducted empirical research on the use of mediation in the English courts, is of the view that even though Lord Woolf did not propose that ADR should be compulsory before or after the issue of proceedings, the inclusion in the civil procedure rules of a judicial power to direct the parties to attempt ADR, coupled with the court's discretion to impose a costs penalty on those who behave unreasonably during the course of litigation, has created a situation in which parties may feel they have no choice.<sup>14</sup> In her evaluation of court annexed mediation schemes, she found high levels of satisfaction among those who volunteer to enter the mediation process. She found that what parties valued is the informality of the process, the opportunity to be fully involved in the proceedings, the lack of legal technicality, the opportunity to be heard at the beginning, the speed of the process and among businesses, the focus on the commercial issues in the case. However, she found that parties do not like being pressured to settle.<sup>15</sup>

1.13 In relation to the CJR in England and Wales over the last decade, Dame Hazel Genn has argued that increased expenditure in criminal justice resulted in attempting to save in civil justice by diverting cases away from courts into private dispute resolution.<sup>16</sup> She is critical of the 'anti-justice, anti-adjudication' discourse which undermines civil justice and argues for a need to

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<sup>10</sup> The Law Society of Hong Kong, Guide to Professional Conduct, Commentary 3, Principle 10.17. (A litigation solicitor should consider and if appropriate advise his client on alternative resolution procedures such as mediation, conciliation and the like).

<sup>11</sup> The Hong Kong Bar Association, Code of Conduct, para. 116A (A barrister in appropriate cases should consider with client the possibility to resolve disputes by mediation).

<sup>12</sup> The Right Hon Lord Woolf, "Access to Justice, Interim Report", Lord Chancellor's Department, 1995, Chapter 8.

<sup>13</sup> The Right Hon. Lord Woolf, "Final Report to the Lord Chancellor on the Justice System in England and Wales," HMSO, July 1996.

<sup>14</sup> Hazel Genn, "Judging Civil Justice, The Hamlyn Lectures 2008", *ibid*, at page 95.

<sup>15</sup> *Ibid*, at page 112.

<sup>16</sup> *Ibid*, at page 73.

re-establish civil justice as a public good, recognising that it has a significant social purpose that is as important to the health of society as criminal justice.<sup>17</sup>

1.14 In embarking on the CJR in Hong Kong, one is mindful of the experiences of its implementation in England and Wales and that lessons learnt from other jurisdictions are kept in mind during the development of policies and initiatives to promote the use of mediation in Hong Kong.

1.15 The Chief Justice of Hong Kong Andrew Li Kwok Nang in his Opening Address at the 'Mediation in Hong Kong: The Way Forward' Conference in 2007<sup>18</sup> said as follows:

*"I believe that the promotion of mediation is plainly in the public interest. And I would like to take this opportunity to reiterate the unequivocal commitment of the Judiciary to its development. Hong Kong has been making steady progress in this area in recent years. Although we will have a long way to go, it is heartening to note that momentum is gathering pace. What we must now focus on is how we can develop mediation at a faster pace and at the same time ensure high quality."*

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<sup>17</sup> *Ibid*, at page 183.

<sup>18</sup> The Hon Mr Chief Justice Andrew Li Kwok Nang, GBM, CBE, JP, "Opening Address Mediation in Hong Kong: The Way Forward" Conference, edited by Katherine Lynch and Erica Chan, Faculty of Law, the University of Hong Kong, 2009, at page 1.

## Chapter 2

### The Working Group on Mediation

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2.1 The Secretary for Justice's Working Group on Mediation ("Working Group") was set up to review the current development of mediation and provision of mediation services in Hong Kong. The Working Group was established in 2008 following the October 2007 Policy Address of the Chief Executive of the HKSAR to map out plans to employ mediation more extensively and effectively in Hong Kong in handling higher-end commercial disputes and relatively small scale local disputes.

2.2 The terms of reference of the Working Group are as follows:

- (a) to review the current development of mediation and provision of mediation services in Hong Kong;
- (b) to make recommendations, taking into account overseas and Hong Kong experience in mediation, on ways to :
  - (i) facilitate and encourage a wider use of mediation in Hong Kong and, where appropriate, to introduce pilot schemes for selected types of disputes or cases, with or without elements of compulsion;
  - (ii) ensure the quality and standard of mediators;
- (c) to conduct, or to engage experts to conduct, such studies as reasonably incidental to the matters mentioned in (a) and (b) above; and
- (d) to co-ordinate with the Chief Justice's Working Party on Mediation for the purpose of carrying out the above work.

2.3 The membership of the Working Group is as follows:

Mr Wong Yan Lung, SC, JP, Chairman (Department of Justice);  
The Hon Mr Justice Lam Man Hon, Johnson (Judiciary);  
Professor Anthony BL Cheung, GBS, JP (Consumer Council);  
Mr Chan Bing Woon, SBS, JP (Hong Kong Mediation Council);  
Ms Sylvia Siu Wing Yee, JP (Hong Kong Mediation Centre);  
Ms Teresa Cheng, SC (Hong Kong International Arbitration Centre);  
Associate Professor Katherine Lynch (The University of Hong Kong);  
Professor Anne Scully-Hill (The Chinese University of Hong Kong);  
Mr Michael Beckett (City University of Hong Kong);

Mrs Cecilia K W Wong (Law Society);  
Ms Anna Wu Hung Yuk, SBS, JP (Shantou University Law School);  
Mr Rimsky K K Yuen, SC (Bar Association);  
Mr Thomas Edward Kwong (Legal Aid Department);  
Mr Ian Wingfield, GBS, JP (Department of Justice); and  
Mr Benedict Y S Lai, JP (Department of Justice)

2.4 The Working Group held meetings on 26 February 2008, 16 June 2008, 11 September 2008, 18 December 2008, 26 February 2009, 30 April 2009, 25 June 2009, 24 September 2009, 14 October 2009 and 14 December 2009.

2.5 The Working Group was assisted by its three Sub-groups in the following areas:

- Public Education and Publicity
- Accreditation and Training
- Regulatory Framework

Each of these Sub-groups was active in conducting discussions, consultations and deliberations on their respective terms of reference. They also organised promotional events and launched a mediation website and a Pilot Scheme on Community Venues for Mediation. They provided the Working Group with their respective Sub-group reports on which this Report is substantially based.<sup>19</sup>

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<sup>19</sup> The law and practice in relation to mediation as described in this Report is as available as at 14 December 2009.

# Chapter 3

## Mediation

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### Understanding Mediation and its Terminology

3.1 Mediation is guided by an assumption that parties can reach agreement, and that their solution will be unique and does not need to be governed by fixed principles of law. Mediation utilises negotiation techniques, with the mediator facilitating and guiding the parties' own negotiation process. The atmosphere in mediation is intended to be non-adversarial. The mediator manages the process in a way that allows the parties to show mutual respect for each other, but the mediator has no decision-making power. Ground rules will have been agreed in advance which minimise confrontation.<sup>20</sup>

#### ***General definition of mediation***

3.2 Mediation is generally used and promoted in Hong Kong as an efficient and effective cooperative and consensus oriented dispute resolution method which can be used within diverse practice areas, including both public and private spheres. Consequently, it is challenging to construct a definition of mediation that is applicable to all the settings in which mediation is used in Hong Kong. However, a useful general definition of the mediation process is offered by Folberg and Taylor as follows:

*"[Mediation] can be defined as the process by which the participants, together with the assistance of a neutral third person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs."*<sup>21</sup>

3.3 An essential characteristic of mediation is the involvement of a neutral third party voluntarily chosen by the parties to act as a mediator to help them resolve their dispute and reach a negotiated settlement. The role of the mediator is to assist parties to communicate with each other in a rational and problem solving way, to help the parties resolve any misunderstandings between them and clarify the issues in dispute, and to assist them in realistically negotiating a resolution of their dispute. The parties remain in control of the negotiations but the mediator helps the parties communicate with each other and may hold private meetings or "caucuses" with the individual parties which are strictly confidential.

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<sup>20</sup> This is not to say that mediation does not allow the ventilation of emotion; however, mediation can allow this to happen in a safe and non-threatening way.

<sup>21</sup> Jay Folberg & Alison Taylor, "Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation", 1984, at page 7.

### ***Different models of mediation***

3.4 The general definition of mediation has been further refined to identify different models of mediation, in particular, facilitative and evaluative models of mediation. “Facilitative mediation” refers to the primary role of the mediator being to objectively facilitate the parties’ communication and negotiation of their dispute. The mediator is not expected to express an opinion on the merits of the parties’ dispute but aims to help the parties reach an interest based solution. Many mediation practitioners, trainers and scholars in both common and civil law systems adopt the facilitative model of mediation. By contrast, “evaluative mediation” refers to a process whereby the mediator tries to persuade the parties to settle their dispute by offering opinions on law, facts and evidence relevant to their dispute. The mediator helps the parties reach settlement by evaluating the legal outcomes of the dispute. Other models of mediation have been suggested,<sup>22</sup> including the following examples:

- Therapeutic Mediation (parties use mediation to resolve inter and intra-personal conflicts in their relationship);
- Transformative Mediation (mediation is used to advance personal and social development within a community);
- Victim-offender Mediation (mediation is used to help bring the victim and perpetrator of a crime together);
- Co-Mediation (where there are two neutral third party mediators); and
- Settlement Mediation (to assist the parties to reach a compromise).

3.5 In Hong Kong, anecdotal evidence suggests that most of the mediation conducted for the family, commercial and court related matters is facilitative mediation, although other models of mediation are used in other areas. The primary (although not exclusive) focus of the discussion in this Report is focused on the facilitative model of mediation as used in various sectors in Hong Kong.

### ***Variations of mediation process***

3.6 The general definition of mediation can vary depending upon the context in which it is used in Hong Kong and the roles adopted by the mediator. In addition, the procedures followed in mediation are infinitely varied. This is not surprising given the flexible nature of mediation and its potential for adaptation in various contexts. Thus, there are numerous definitions and models of mediation that differ in terms of the scope, application, powers and degree of intervention assumed by the neutral third party. Moreover, some Hong Kong legislation requires the process of mediation (or conciliation) to be attempted but does not define or specify the form of the mediation (or conciliation) process. Other statutes define mediation (and conciliation) but those statutory definitions can vary. See **Annex 1**, Part I for a list of some of the legislative provisions in Hong Kong that

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<sup>22</sup> Hilary Astor & Christine Chinkin, “Dispute Resolution in Australia”, 2nd ed., 2002.

include reference to and definitions of mediation and conciliation and see further discussion below on the difference between mediation and conciliation.

### ***Differentiating between mediation and conciliation***

3.7 The terms “mediation” and “conciliation” are commonly used interchangeably and generally refer to a process in which a neutral third party assists disputing parties to communicate and negotiate a settlement of their conflict or dispute. However, this is often a source of confusion and the terms are also used in the variable ways in both mediation literature and statutory provisions in Hong Kong. Some attribute a more active role to the conciliator (e.g. expecting the neutral third party to be more proactive in rendering an opinion and an assessment as to the likely trial outcome) while some view conciliation as much the same as mediation, with the conciliator merely facilitating the negotiations between the parties and not giving any advisory decision or opinion on the merits of the dispute.

3.8 The term “conciliation” is also used in quite a distinct manner in Hong Kong to refer to a dispute resolution process that is provided for, or is required by, statute or supporting rules or regulations (e.g. in discrimination disputes before the Equal Opportunities Commission or in consumer complaints before the Consumer Council). Provisions of the relevant legislation may have greater importance in practice on the conciliator who has been trained and employed to work within the context of the specific statutory scheme. In some legislation, the term “conciliation” is used but not always clearly defined or may vary slightly in different Ordinances. In other cases, some legislative provisions refer to both “mediation” and “conciliation” but do not provide any clear definition of these processes or indicate the distinction between them. **Annex 1**, Part II lists out the relevant statutory provisions and the variable references to mediation and conciliation.

### ***Chinese terms for “mediation” and “conciliation”***

3.9 In Hong Kong, there are no uniform Chinese terms for the English terms “mediation” and “conciliation”. In Hong Kong legislation, where mediation is not governed by one uniform code or legislative framework but referred to in various legislative provisions, the Chinese terms for “mediation” and “conciliation” vary from provision to provision. **Annex 1**, Part II lists the various Chinese terms used in various Ordinances. As can be seen therein, the Chinese term “調解” applies to both “mediation” and “conciliation”. Although the Chinese term for “mediation” includes also “調停” and that for “conciliation” includes also “和解”, yet by far the most common Chinese term “調解” is used for both “mediation” and “conciliation”. The lack of uniformity, especially the interchangeable use of “調解”, inevitably leads to confusion and misunderstanding among the general public and the important stakeholders in the mediation process in Hong Kong.

## ***Private and public dimensions of mediation and conciliation***

3.10 There are also important private and public dimensions to the use and promotion of the mediation process and the provision of mediation services in Hong Kong. There is not always a clear distinction between them. This is reflected in the broad range of public and private bodies involved in mediation in Hong Kong, for example, the following:

- Judiciary and legal profession (e.g. courts, barristers, solicitors, Mediation Coordinator's Office, the Building Management Mediation Coordinator's Office, etc.);
- Administrative tribunals (e.g. Minor Employment Claims Adjudication Board, etc.);
- Government departments and statutory bodies (e.g. Labour Department, Consumer Council, Equal Opportunities Commission, Ombudsman, Office of the Privacy Commissioner for Personal Data, etc.);
- Mediation institutions and organisations (e.g. the Hong Kong International Arbitration Centre ("HKIAC"), the Hong Kong Mediation Council ("Mediation Council"), the Hong Kong Mediation Center ("Mediation Centre"), etc.);
- Private mediators (e.g. by members of the legal professions, social workers, engineers, doctors, dentists, etc.);
- Chambers of Commerce and private business and commercial enterprises (e.g. internal mediation schemes, etc.);
- Non-governmental organisations ("NGO") (e.g. Hong Kong Catholic Marriage Advisory Services, Hong Kong Family Welfare Society, Methodist Centre, etc.); and
- Educational bodies (e.g. primary and secondary schools, universities and other tertiary educational bodies, vocational training institutes, etc.)

## ***Other terms***

3.11 On proper terminology, a distinction has to be drawn between *Mediation Training* which prepares a trainee to be an accredited mediator, *Conflict Management/Resolution Training* which prepares a trainee to understand different strategy and skill sets to resolve dispute and the proper forum in which they apply, including mediation and other ADR, *Mediation Advocacy Training* which prepares a trainee to support disputants to take part in mediation, and *Negotiation Training* which prepares a trainee to negotiate effectively in an amicable manner, and is the foundation of mediation and collaborative practice.

#### **Recommendation 1**

**A clear and workable definition of mediation be agreed upon. Some degree of flexibility in the definition of mediation should be maintained so that future application and development of mediation in Hong Kong will not be unnecessarily restricted.**

#### **Recommendation 2**

**The use of the words “mediation” and “conciliation” within the Hong Kong legislation should be reviewed, in particular in the Chinese text, to remove any inconsistency.**

#### **Recommendation 3**

**An “Umbrella” mediation awareness programme which targets the general public with information on the modes and process of mediation be implemented through the use of sector specific mediation publicity campaigns such as those targeting the business and commercial sector, communities, youth and elderly. Such sector specific campaigns should focus on the modes of mediation that are effective and relevant to the specific sector.**

## **Merits of mediation**

3.12 The aim of mediation, like other processes of ADR, is to reach an accommodation, which may not necessarily reflect the exact legal standing of the parties but is a solution which the parties can accept. Compared to litigation or arbitration, the parties’ control over the process (including the choice of tribunal) is much greater and varies according to the procedure used.

3.13 Mediation enables parties to communicate, negotiate and eventually resolve their dispute amicably, through a trained neutral third party. The mediator, acting as a catalyst, provides supportive and practical steps to help the parties to discuss the areas in dispute; to explore each party’s needs and interests; to identify options and select the most suitable solution; and to draw up a detailed agreement setting out how parties have agreed to solve each problem.

3.14 In family mediation, the settlement or agreement reached is not only responsive to the needs of each party, but also to the needs of their children, and the continuing relationship as parents can also be enhanced. Mediation avoids the tension and conflict in the adversarial system, and may generally start or be

terminated at any time. Users save time and money in not having to contest matters in court. Mediations are conducted in a calm, constructive and confidential setting, which is a major consideration for parties involved in a family dispute.

3.15 In addition, mediation can result in settlements which go beyond the legal remedies that a court may be able to apply. As aptly described by Lord Justice Brooke in *Dunnett v Railtrack* (2002) 2 All ER 850,

*“Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve ... by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live.”*

3.16 The merits of mediation include allowing parties to a dispute with an opportunity to save:<sup>23</sup>

- time
- money
- risk
- dignity
- stress
- relationships

In addition, mediation may result in settlements which go beyond the legal remedies that a court may allow and there is a high rate of compliance.<sup>24</sup>

3.17 According to a leading mediator,<sup>25</sup> the envisaged impact of mediation include the following:

- Rapid solution: limiting costs in terms of time, money and stress
- Tailored solution that also serves a party’s own interest and broader solutions
- Preserve or respectfully terminate the relationship
- Final settlement
- Sustainable solution
- Problem free compliance with agreements

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<sup>23</sup> Danny McFadden, “The Development of Mediation in the UK”, talk delivered in capacity of CEDR Director for Asia at Hong Kong Club for the Chartered Institute of Arbitrators (East Asia Branch) on 3 November 2009.

<sup>24</sup> McEwen & Maiman, “Mediation in Small Claims Court: Achieving Compliance Through Consent,” in “Law & Society Review”, 1984 Vol. 18(1), at pages 11-50 and Pearson & Thoennes, “Mediating and Litigating Custody Disputes: A Longitudinal Evaluation” in “Family Law Quarterly”, 1984 Vol. 17, at pages 497-524. (McEwen and Maiman and Pearson and Thoennes found that parties are more likely to follow through with a mediated settlement than comply with those imposed by a third party decision maker like a judge).

<sup>25</sup> Machteld Pel, “Referral to Mediation – A practical guide for an effective mediation proposal”, Sdu Uitgevers, The Hague, 2008, at page 102.

## Chapter 4

### Overview of current development of mediation

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#### Introduction

4.1 In her book, “Global Trends in Mediation”, Professor Nadja Alexander described the world of mediation to be like an Olympic track in a global race to be the first, the best, the biggest and the most.<sup>26</sup> Austria has been the first country to recognise the profession of mediation through an Act of Parliament, the United States has the most laws of any one nation dealing with mediation. Australia has resisted the trend towards centralised regulation and institutionalisation and has adopted regulatory policies which reflect a desire to promote quality services within a decentralised and diverse mediation marketplace.

4.2 In common law jurisdictions such as Australia, New Zealand, England and Wales, the United States and Canada, mediation is applied in many courts but civil law jurisdictions such as Germany, Austria, Denmark, Scotland, Italy, France and Switzerland have displayed a greater reluctance to embrace mediation to settle legal disputes.<sup>27</sup> The Netherlands has been singled out as a civil law jurisdiction where mediation has been successfully used in resolving conflicts due to the cooperative efforts of private mediation service providers, the government (in particular the Ministry of Justice) and academic researchers.<sup>28</sup> Mediation is a world trend and Hong Kong is in fact a late comer in its use in certain sectors of public life. This Chapter provides an overview of the current development of mediation and the provision of mediation services in Hong Kong.

#### Construction Mediation

4.3 As early as 1984, the Hong Kong Government pioneered its landmark Trial Mediation Scheme to settle construction disputes from 16 selected civil engineering contracts which was administrated by the Hong Kong Institution of Engineers.<sup>29</sup> All major public work contracts such as the Hong Kong Government Airport Core Program (“ACP”) have since 1989 included provisions for the mediation of disputes.<sup>30</sup> Mediation has proved to be very effective in reducing the number of claims in public works contracts which would otherwise be referred to

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<sup>26</sup> Nadja Alexander (ed.), “Global Trends in Mediation” Second Edition, Kluwer Law International, 2006, at page xxvii.

<sup>27</sup> *Ibid*, at page 7.

<sup>28</sup> Annie J de Roo and Robert W Jagenberg, “The Dutch Landscape of Court-Encouraged Mediation”, Chapter 11 in Nadja Alexander (ed.), “Global Trends in Mediation”, *ibid*, at page 279.

<sup>29</sup> Professor David Sandborg, “Mediation in Hong Kong: Past, Present and Future”, in “Mediation in Hong Kong: The Way Forward”, edited by Katherine Lynch and Erica Chan, Faculty of Law, The University of Hong Kong, 2009 at pages 117-118.

<sup>30</sup> Peter Caldwell, “Dispute Resolution Mechanisms for the Airport Core Program”, International Dispute Resolution Conference, Hong Kong, 11-13 November 1998.

arbitration or proceed to litigation. Under the ACP contracts, mediation was a mandatory requirement of the dispute resolution process and 80% of all such disputes were settled by mediation or through negotiation at the mediation stage.<sup>31</sup> Mediation was introduced as a condition precedent in all Hong Kong Government Works Contracts before any other process such as arbitration, adjudication or litigation could be undertaken according to the Government Conditions of Contracts 1990. In 1992, mediation became mandatory in the form of a four stage dispute resolution process under the ACP General Conditions of Contract.<sup>32</sup> Mediation was found to be less time consuming and less costly than litigation or arbitration. The fact that mediation could commence before completion of contract was considered a significant advantage over arbitration (as this could assist a contractor's cash flow if it was a monetary dispute).

4.4 The mediation procedure under the Government's Construction Mediation Rules is designed to be flexible to enable the parties to tailor the proceedings to the requirements of the case. In practice, the Government Main Contract disputes are frequently multiple claims involving a wide range of construction activities often with complex programming and quantum implications which requires careful assessment.<sup>33</sup> The Government's mediation team requires time to conduct a detailed assessment of the legal and quantum issues (often with the assistance of independent consultant engineers) and this could try the patience of some contractors who are looking for a speedy settlement of their claims through mediation. The success rate for the Government construction mediations remains high, of the order of 70% to 80%, with relatively few cases proceeding from mediation to arbitration.<sup>34</sup>

4.5 In September 2006, the Judiciary introduced a two-year pilot scheme for the mediation of construction disputes. The pilot scheme was successful and in line with the CJR made effective from 2 April 2009, voluntary mediation became a regular feature for cases under the Construction and Arbitration List.<sup>35</sup> In general, parties in construction cases are encouraged to attempt mediation as a possible cost-effective means of resolving disputes. In order to promote the use of mediation, the court may impose cost sanctions where a party unreasonably refuses to attempt mediation.

4.6 The Mediation Council, a part of the HKIAC, introduced a pilot scheme for mediation of low value construction disputes that ran for a year until 31 August 2008 which was then extended to 31 August 2009.<sup>36</sup> Under this scheme, mediation was provided by an accredited mediator on a 'pro bono' or no fee basis for up to 8 hours for disputes up to HK\$3 million. A mediator fee of \$1,500 per hour was borne by both parties equally (unless otherwise agreed) for mediation

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<sup>31</sup> Wong Yan Lung, Secretary for Justice Speech, "The Benefits of Mediation" at Hong Kong Mediation Council Annual Dinner, 17 March 2006 at page 3.

<sup>32</sup> D. Bateson, "Mediation and Adjudication in Hong Kong, Are These Alternative Dispute Resolution Procedures Working?" 63 *The Journal of the Chartered Institute of Arbitrators*, 1997, at page 243.

<sup>33</sup> Kenneth Somerville, "The Hong Kong Government's Use and Experience of Mediation for the Resolution of Disputes in Public Works Contracts" in "Mediation in Hong Kong: The Way Forward", edited by Katherine Lynch and Erica Chan, *ibid*, at page 179.

<sup>34</sup> *Ibid* at page 180.

<sup>35</sup> Practice Direction 6.1 dated 12 February 2009.

<sup>36</sup> The Hong Kong Mediation Council (A division of the Hong Kong International Arbitration Centre), "Pro Bono Mediation Scheme for the Construction Industry", Introduction at page 1.

time beyond the 8 hours. The scheme encouraged organisations which were not familiar with mediation to consider mediation as the first means to resolve disputes. It was replaced by the Construction Dispute Mediation Scheme on 15 November 2009.

4.7 On 7 May 2009, the Royal Institution of Chartered Surveyors Hong Kong appointed the HKIAC the service provider for the Surveying Dispute Mediation and Arbitration Scheme.<sup>37</sup> The purpose of the scheme is to provide a platform for its members to settle disputes speedily and effectively through mediation and other ADR mechanisms. Under the scheme, cases are referred from the Institution to HKIAC for mediation. If the dispute cannot be resolved by mediation, the parties may agree to go to arbitration or, if necessary, to litigation. It is expected that in most cases the mediation will not exceed 6 hours and the mediator shall use best endeavours to conclude the mediation within 28 days after appointment as mediator.

## Family Mediation

4.8 It was the Non Government Organisations (“NGOs”) in Hong Kong which first started to provide family mediation in the late 1980s. These NGOs included the Hong Kong Family Welfare Society and the Hong Kong Catholic Marriage Advisory Council. The Society trained 24 family mediators and expanded family mediation in five Integrated Family Service Centres and Family Resource Centre under the Family Mediation Project from 2004 to 2007.<sup>38</sup> The Council as a pioneer for marriage counselling in Hong Kong launched the Marriage Mediation Counselling Project in 1988<sup>39</sup> and continues its marriage mediation work in a massive public housing estate in Kwun Tung.

4.9 The Judiciary introduced a three-year family mediation pilot scheme in May 2000. They set up a Mediation Coordinator’s Office in the Family Court Building. The Mediation Coordinator held information sessions to assist couples to consider mediation to resolve their matrimonial disputes. Data collected indicated that considerable success was achieved in the promotion of the use of mediation in family disputes. According to the Final Report by Hong Kong Polytechnic in 2004 of 933 cases where family mediation was completed in the period between 2 May 2000 and 14 May 2003, 69.5% reached full agreement and another 9.7% reached partial agreement.<sup>40</sup>

4.10 According to the findings in the Final Report, it took parties on average 10.33 hours to reach a full agreement, and 13.77 hours to reach a partial

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<sup>37</sup> Hong Kong International Arbitration Centre, “HKIAC to Provide Mediation and Arbitration Services for Royal Institution of Chartered Surveyors”, Press Release 7 May 2009 at page 1.

<sup>38</sup> Ms Ruth Wong Chan Tsz Ying, “Facilitation of Harmony and Co-parenting in the Process of Family Dissolution Through Family Mediation Service”, in “Mediation in Hong Kong: The Way Forward”, edited by Katherine Lynch and Erica Chan, *ibid*, at page 204.

<sup>39</sup> The Hong Kong Catholic Marriage Advisory Council, “Evaluative Research Report on The Marriage Mediation Counselling Project”, October 1991.

<sup>40</sup> The Hong Kong Polytechnic University, “Evaluation Study on the Pilot Scheme on Family Mediation”, Final Report, 2004, at page vii.

agreement.<sup>41</sup> Almost 80.5% of the respondents who used the service of the Mediation Coordinator's Office were "satisfied" or "very much satisfied" with the mediation service received. More than 60% of the respondents agreed that they were able to discuss disputed issues with their spouses through the mediation service in a peaceful and reasonable manner. In view of the high user's satisfaction rate and high agreement rate, the Mediation Coordinator's Office continues its operation. The pilot scheme was made permanent when the Judiciary issued Practice Direction 15.10 on Family Mediation.

4.11 In March 2003, the Law Reform Commission of Hong Kong published a Report on the Family Dispute Resolution Process<sup>42</sup> and recommended that providing access to mediation services should be an integral part of the Family Court system but did not consider that mediation should be made compulsory.

4.12 In March 2005, the Government launched a one-year pilot scheme to establish whether extending funding to mediation of legally aided matrimonial cases could be justified on cost-effectiveness and other implications.<sup>43</sup> Under the pilot scheme, both the legally aided person and the other party were invited to join the scheme on a voluntary basis. There was a panel of 72 mediators rendering service for the scheme at \$600 per hour. In 2009, the Legal Aid Department included costs of mediation in legally-aided matrimonial cases as a part of legal costs.

4.13 Family mediation is considered well established and some family law practitioners are working on collaborative practices to be set up in Hong Kong. The Family Law Association organised the first collaborative practice training for legal practitioners in February 2010.

4.14 However, the NGOs which provide family mediation services depend heavily on fund raising for charitable donations and volunteers as most do not have subventions or government funding to sustain their mediation services to the community. The Working Group sent a questionnaire to NGOs providing mediation services on the services provided and their sources of funding and found that most have to rely on donations and fund raising. One NGO relies solely on donations from churches and nominal fee charges for mediation. Another relies solely on running mediation courses to provide funding for their mediation services. One NGO could only provide mediation if it was described as 'added value' (and not in its own right) for subvented social services and does not have any other source of funding. One NGO reported that they had to drastically cut their family mediation services and let go of two of their experienced mediators during the recent economic downturn as donations decreased.

4.15 On a follow up question to the NGOs providing mediation services on the likely impact of legal aid for mediation on their funding needs, the Working Group was informed that most of them were unable to provide any views as legal aid for mediation is a recent development and they have yet to feel the impact.

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<sup>41</sup> For cases where parties failed to reach a mediation agreement, an average of 6.78 hours was spent in mediation.

<sup>42</sup> The Law Reform Commission of Hong Kong Report, "The Family Dispute Resolution Process", March 2003 at <http://www.info.gov.hk/hkreform>.

<sup>43</sup> See: Wong Yan Lung, "The Benefits of Mediation" *ibid* at page 5.

One major NGO providing family mediation services reported that the impact may be a negative one for their funding needs. They think that solicitors will corner the market as it is the solicitors who will make the application for legal aid and are likely to recommend solicitors who are mediators to mediate in the legally aided cases.

## Commercial Mediation

4.16 Hong Kong is an international financial services centre and the development of commercial mediation is an important part of a strategic proposal put forth by the Focus Group on Professional Services, Information & Technology and Tourism at the Economic Summit on China's 11<sup>th</sup> Five-Year Plan and the Development of Hong Kong in September 2006.<sup>44</sup> The specific measure to promote the greater use of mediation services is 'in order to reinforce and promote Hong Kong as a regional centre for the resolution of commercial disputes, in particular those involving the Mainland and foreign countries'.

4.17 The Mediation Council ran a Commercial Mediation Pilot Scheme from July 2007 to December 2008. This has now evolved into the Commercial Mediation Scheme 'to provide a general, standardised scheme to assist parties in commercial disputes to come to a negotiated settlement of their disputes amicably, economically and objectively through mediation'.<sup>45</sup> The aim of this scheme is to satisfactorily resolve commercial disputes in a reasonable time frame with minimal costs and inconvenience. The rules and procedures governing the mediation of commercial disputes have been kept simple and transparent to facilitate access to mediation and the aim is to have mediation take place within a month of the dispute being submitted to the scheme.

4.18 Mediation as a means of resolving investment products disputes were given a high media profile in the Lehman Brothers related minibond dispute.<sup>46</sup> After the collapse of Lehman Brothers, an estimated 48,000 investors in Hong Kong who had bought HK\$20 billion in investment products issued or linked to Lehman Brothers, complained to the Hong Kong Monetary Authority ("HKMA") about banks which sold the products. On 31 October 2008, HKMA appointed HKIAC the service provider for the Lehman Brothers-related Investment Products Disputes Mediation and Arbitration Scheme.<sup>47</sup> Over 200 requests for mediation were made under the scheme as at 31 October 2009.<sup>48</sup>

4.19 In October 2008, the Judiciary introduced a one-year pilot scheme for voluntary mediation in petitions presented under sections 168A and petitions for winding up on the just and equitable ground under 177(1)(f) of the Companies Ordinance (Cap. 32). On conclusion of the pilot scheme, the Working Party on Mediation appointed by the Chief Justice reviewed the result. PD 3.3 was revised

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<sup>44</sup> Hong Kong Government, "Report on the Economic Summit on China's 11<sup>th</sup> Five-Year Plan and the Development of Hong Kong", Attachment D, Strategic Proposal 3, 2007, at page 114.

<sup>45</sup> The Hong Kong Mediation Council (A Division of the Hong Kong International Arbitration Centre), Commercial Mediation Scheme, Terms of Reference, 6 July 2009 at page 1.

<sup>46</sup> The Standard newspaper, "Minibond investors urged to try mediation", 26 March 2009.

<sup>47</sup> Hong Kong International Arbitration Centre, "Mediation 100% Success for Lehman Brothers-Related Investment Product Cases", Press release 19 February 2009, at page 1.

<sup>48</sup> More details are set out in paras. 5.54 to 5.57 and Annex 3 of this Report.

on 2 December 2009. With effect from 1 January 2010, the practice under the pilot scheme became a permanent feature.

4.20 The insurance industry in Hong Kong launched a New Insurance Mediation Pilot Scheme (“NIMPS”) in 2007. The Hong Kong Federation of Insurers provided HK\$250,000 (“NIMPS Fund”) to the Mediation Council for the use of mediation to settle disputes involving work related personal injuries claims.<sup>49</sup> The aim of NIMPS is to encourage insurance companies and injured workers to resolve personal injury disputes in the most amicable, economic and objective manner. The Judiciary’s Working Party on Mediation has set up a Personal Injuries Sub-group to explore the facilitation of mediation in personal injuries cases.

## Community Mediation

4.21 Community mediation in Hong Kong is mainly conducted by NGOs such as the Mediation Centre and the Hong Kong Family Welfare Society. The community mediation services offered by NGOs are important and worthwhile but depend heavily on the availability of funding, charitable donations and volunteers. The Hong Kong Family Welfare Society set up its Mediation Centre in July 2001 with the aim of promoting the use of mediation and to provide mediation services to resolve conflicts between family members, colleagues and neighbours. This was the first Mediation Centre set up by an NGO to provide a range of mediation services.<sup>50</sup>

4.22 The Mediation Council and the Hong Kong Council of Social Service introduced a Pilot Scheme on Community Education in 2002.<sup>51</sup> The scheme was focused on disputes involving neighbourhood, employment, contract, urban redevelopment and environmental issues. When the scheme ended in 2003, it was found that different community disputes required different levels of expertise from the mediator.

4.23 Some community mediators found it difficult to find suitable and affordable venues in Hong Kong to conduct mediation. The Public Education and Publicity Sub-group enlisted the co-operation of two District Councils and launched a one year Pilot Scheme on the provision of community venues for mediation on 1 July 2009. Mediators from the Mediation Council, the Mediation Centre, the Law Society<sup>52</sup> and the Bar Association are participating in this pilot project. Mediators who conduct pro bono mediation are able to use rooms in the Leighton Hill and Yau Ma Tei community centres during specified periods free of charge. Mediators who charge fees would pay the normal costs of using the rooms. Up to 18 December 2009, 18 mediations have been conducted under the Pilot Scheme of which 12 involved building management disputes. Other disputes included workplace and

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<sup>49</sup> Hong Kong Mediation Council of the Hong Kong International Arbitration Centre, ‘New Insurance Mediation Pilot Scheme’ (“NIMPS”), at page 1. More details are set out in paras. 5.58 to 5.60 of this Report.

<sup>50</sup> Hong Kong Family Welfare Society, Peer Mediation Programme: Facilitators Training Manual, July 2003 at page ii.

<sup>51</sup> L.Yue, ‘Pilot Scheme’, The Quarterly publication of the Hong Kong Mediation Council, 15 August 2002 at 10.

<sup>52</sup> The Law Society Circular 09-545 (SD), “Free Venues for Mediation” dated 13 July 2009. More details are set out in paras. 5.79 to 5.85 of this Report.

family dispute. Feedback from the mediators and parties using the community venues for mediation will be reviewed at the end of the Pilot Scheme. The review will be helpful in assessing whether the Pilot Scheme ought to be made permanent or expanded into other community venues in Hong Kong.

## Building Management Mediation

4.24 In a city like Hong Kong where most of the population live in multi storey residential buildings, building management disputes are very common. In a public housing estate, the number of flats might well exceed 1000.<sup>53</sup> Multi storey buildings are the norm for residential buildings with the rights and obligations of unit owners, occupiers, tenants and the property managers governed by a deed of mutual covenant (“DMC”).<sup>54</sup> In these buildings, unauthorised structures, falling windows, obstruction to repairs, reluctance of owners to form Owners Corporations, problematic DMC, owner’s ignorance in monitoring renovation, potential corruption, owner’s incompetence in supervising management companies, conflicts among owners and differing opinions as to redevelopment all contribute towards building management disputes.<sup>55</sup>

4.25 The high profile Albert House dispute helped raised the profile of the use of mediation to resolve complex issues involving multi storey buildings. In 1994 a fish tank and 15 tonne canopy in Albert House collapsed and killed one person and injured 15 others. In 1999 the High Court ordered the six responsible parties to pay \$33 million to the victims. The Incorporated Owners Association (“IO”) refused to pay and this resulted in a series of lawsuits which culminated in the Court ordering the IO to be wound up in 2004. Emotions ran high and 80 Albert House flat owners marched to the Legislative Council and demanded the Government assist them. The lead mediator, Mr Chan Bing Woon of the Mediation Council, wrote that, “Government faced a hard decision whether to intervene in this civil dispute. If the case could not be resolved, hundreds of low-income, poorly educated people could very well become homeless”.<sup>56</sup> Mediation was used to successfully resolve the dispute as it facilitated problem solving through options generation in the case.

4.26 The Lands Tribunal ran a Pilot Scheme for Building Management disputes from 1 January 2008 to 30 June 2009. On review after a year by the Judiciary’s Working Party on Mediation, of the 63 cases when mediation was completed, 19 reached full agreement and 7 partial agreements. The success rate was about 41%. On 1 July 2009 the scheme was made permanent.<sup>57</sup> The aim of the scheme is to facilitate the more efficient, expeditious and fair disposal of building management cases. Parties involved in building management disputes

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<sup>53</sup> Chan Bing Woon SBS, JP, “Why Mediation Doesn’t Work in Building Management Dispute: Right or Wrong?”, The Hong Kong Association of Property Management Companies newsletter, Vol. 7, July 2008.

<sup>54</sup> Leung Hing Fung, “Mediation and Building Management in Hong Kong – The Way Forward”, *ibid*, in “Mediation in Hong Kong: The Way Forward”, edited by Katherine Lynch and Erica Chan, *ibid*, at page 156.

<sup>55</sup> Chan Bing Woon, SBS, JP, “Can Mediation Help Solve Problems of Aging Buildings in Hong Kong”, Housing Express, September 2009, Chartered Institute of Housing Asian Pacific Branch at page 4.

<sup>56</sup> *Ibid*, at pages 2- 4.

<sup>57</sup> Hong Kong Government press release on behalf of the Judiciary, “Lands Tribunal Pilot Scheme for Building Management Cases to be made permanent from July 1”, 30 June 2009.

such as water leakages, contribution of management fees and maintenance charges and the appointment of management committees are encouraged to consider mediation before a hearing at the Lands Tribunal. The Building Management Mediation Co-ordinator's Office of the Judiciary which is conveniently located in the Lands Tribunal Building provides information for parties who wish to consider mediation before or after they commence proceedings in the Lands Tribunal.<sup>58</sup>

## Mediation for Parents

4.27 The Education Bureau established a Parent-School Coordination and Mediation Mechanism to eliminate and prevent disability discrimination in school and ensure that students with special educational needs have equal opportunities for education.<sup>59</sup> If a school and a parent of a disabled student involved in a dispute fail to reach an agreement, the Regional Education Offices of the Education Bureau will render assistance by arranging mediation. It normally takes 1 to 4 months to resolve the dispute.

4.28 The Hong Kong Federation of Youth Groups set up a Parent-child Mediation Centre in Tsuen Wan in late 2008.<sup>60</sup> The Centre was set up after positive feedback from the Federation's 18-month Parent-child Mediation Project carried out in 2007 and 2008. The Centre helps parents and their teenage children handle and resolve their conflicts constructively. Better parent-child relationships are achieved with the assistance of professional staff trained in mediation. The Federation has put together a resource kit with four programme packages on self-exploration, effective parent-child communication, parent-child conflict management, and parent-child parallel groups. It has also published a book on Parent-child Conflict Management.

## Peer Mediation in Schools

4.29 The Chief Justice of Hong Kong Andrew Li Kwok Nang was of the view that the success of mediation will depend on wide acceptance by the public and to this end, training programmes, "should include the young at the school level so that they gain a good understanding of mediation at an early age."<sup>61</sup> There is a Peer Mediation training scheme in a number of secondary schools in Hong Kong conducted by the Hong Kong Family Welfare Society.<sup>62</sup> The scheme started in 2001 with the launch of a two-year Peer Mediation Project with 6 participating schools. The Society wishes to see the incorporation of the programme into the

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<sup>58</sup> President's Direction LTPD: BM No. 1/2009 and information booklet entitled, "Case Management and Mediation for Building Management Cases in the Lands Tribunal" can be found at [http://www.judiciary.gov.hk/en/crt\\_services/guide2cs.htm](http://www.judiciary.gov.hk/en/crt_services/guide2cs.htm).

<sup>59</sup> Education and Manpower Bureau leaflet "Elimination of Disability Discrimination: Parent-School Coordination and Mediation Mechanism", 2003.

<sup>60</sup> The Hong Kong Federation of Youth Group, "Annual Report 2008-2009", at page 46.

<sup>61</sup> The Hon Mr Chief Justice Andrew Li Kwok Nang, GBM, CBE, JP, "Opening Address", "Mediation in Hong Kong: The Way Forward", edited by Katherine Lynch and Erica Chan, *ibid*, at page 4.

<sup>62</sup> Hong Kong Family Welfare Society, "Peer Mediation Programme: Implementation Guide", July 2003.

school curriculum as part of Liberal Studies.<sup>63</sup> Peer mediation in schools is considered by many to be an effective way to get a mediation culture inculcated into the young.

## Victim-offender Mediation

4.30 There is growing interest and work on victim-offender mediation in Hong Kong. As early as 1999, the Evangelical Lutheran Church of Hong Kong launched a 2-year pilot scheme on Victim-offender Mediation Service in Hong Kong, for juvenile offenders under the Police Superintendent Discretion Scheme. In August 2000, Dr Dennis S.W. Wong set up the Centre for the Restoration of Human Relationships which provides professional support for mediation in schools and educational establishments. The Centre provides victim-offender mediation and training to resolve conflicts.<sup>64</sup> Between 2004 and 2006, Dr Wong conducted a longitudinal study into bullying in Hong Kong schools and one of the key elements identified to tackle bullying is training students as peer mediators.<sup>65</sup> Since 2005, the Youth Enhancement Scheme of the Evangelical Lutheran Church of Hong Kong has incorporated Victim-offender Mediation in their services for victims of crime and juvenile offenders who are cautioned under Police Superintendent Discretion Scheme. Keswick Chuk leads the very valuable service which gives juvenile offenders an opportunity to face up to their victims and turn over a new leaf.<sup>66</sup>

4.31 In 2009, the Queensland Government invited two staff members from the Methodist Centre to conduct formal Mediation and Youth Justice Conferencing Training in Brisbane, Australia.<sup>67</sup> They brought back their co training experience and have organised mediation skills training in Hong Kong. The Methodist Centre works closely with the Hong Kong Police in dealing with youth offenders. In November 2009, a Handling Sexual Offences Cases by Mediation Training was organised by the Methodist Centre with specialist Australian trainers from the Youth Justice Conferencing Programme at the Queensland Department of Communities. The aim of the victim-offender mediation is to get to an agreement where the young person can begin to accept responsibility for his offence and repair the harm caused by the offence.<sup>68</sup>

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<sup>63</sup> Amarantha Yip, "Peer Mediation Programme in Hong Kong Schools" Seminar paper presented at the Faculty of Law, University of Hong Kong, 17 June 2009.

<sup>64</sup> Wong, D.S.W. (2008) "Advocating the Use of Restorative Justice for Misbehaving Students and Juvenile Delinquents in Hong Kong", in K. Van Wormer (ed), "Restorative Justice Across the East and the West", Taoyuan, Manchester: Casa Verde Publishing, at pages 11-31; and Dr Dennis Wong, "Advocating the Use of Restorative Justice for Misbehaving Students and Juvenile Delinquents in Hong Kong", City University of Hong Kong, at page 21.

<sup>65</sup> *Ibid* at page 26; and Wong, D.S.W., R. Ngan, C. Cheng and S. Ma, "The Effectiveness of Restorative Whole-school Approach in Tackling Bullying in Secondary Schools in Hong Kong" City University of Hong Kong, 2007.

<sup>66</sup> Ho, H.M., W.H. Chuk, W.H. Leung, H.Y. Lam, L.C. Lai and W.M. Law, "Research Report on the Mediation between Victims and Offenders in Hong Kong, Social Service of the Evangelical Lutheran Church of Hong Kong; and Hong Kong Youth Enhancement Scheme, "Victim-offender Mediation" Service: Theory, Practice and Sharing, Evangelical Lutheran Church Hong Kong Social Service Department, 2007, at pages 71-85 (in Chinese).

<sup>67</sup> Methodist Centre, "The 2nd Concord Festival: Concord and Healing" leaflet, 2009.

<sup>68</sup> Queensland Government Department of Communities Youth Justice Conferencing Programme, "Youth Justice Conferencing Information leaflet", 2009 and website at [www.communityservices.qld.gov.au](http://www.communityservices.qld.gov.au)

## Chapter 5

### Public Education and Publicity

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5.1 The Public Education and Publicity Sub-group (“Sub-group”<sup>69</sup>) examined ways to promote a wider use of mediation and public education on mediation. This chapter looks at the work of the Sub-group. The Sub-group looked at efforts to promote peer mediation in schools which would assist to create a mediation culture among the young. It assisted mediators to find suitable and affordable community venues to conduct mediation through its Pilot Scheme on Community Venues for Mediation. It also promoted awareness and the use of mediation in the commercial sector through a ‘Mediate First’ campaign. Companies, trade associations and organisations were invited to subscribe to a ‘Mediate First’ pledge. A ‘Mediate First’ briefing reception which was supported by various organisations<sup>70</sup> was held on the 7 May 2009. A new website [www.mediatefirst.hk](http://www.mediatefirst.hk) was launched. A mediation booklet was prepared and distributed. Over 70 companies and 40 trade associations or organisations signed the ‘Mediate First’ pledges and affirmed their commitment to consider the use of mediation to resolve disputes before pursuing other ADR processes or litigation in court.

#### Promoting Public Education on Mediation

5.2 The terms of reference of the Sub-group are as follows:

To study and to report findings to the Working Group on:

- (a) how to promote a wider use of mediation;
- (b) how to promote public education on mediation; and
- (c) any other issues that may be assigned by the Working Group from time to time.

In particular, the Sub-group was tasked to consider, among others, the following specific issues:

- (i) Parties who should be involved in the promotion of and public education on mediation, and their respective roles;
- (ii) whether leading corporations (e.g. commercial enterprises) should be encouraged to sign a pledge supporting the use of mediation (cf the

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<sup>69</sup> All references to “Sub-group” in this Chapter refers to the Public Education and Publicity Sub-group.

<sup>70</sup> Including the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong Federation of Insurers, the Hong Kong Mediation Council, the Mediation Centre, the Consumer Council, the Hong Kong Federation of Women Lawyers and the Department of Justice.

- 'mediate first' pledge in the US); and if so, the way to achieve this;
- (iii) the appropriate pace of promoting mediation in Hong Kong;
- (iv) the types of disputes that are suitable for mediation and that are not. For those types of disputes that are suitable for mediation, whether pilot schemes should be introduced for some of them;
- (v) whether public or private funding should be provided to one or more mediation bodies to assist them in setting up dedicated centre(s) to handle mediation cases at the community level;
- (vi) whether mediation should be promoted at school; and if so, how it should be done;
- (vii) whether compulsory training should be provided to all practising members of the legal profession;
- (viii) whether training on mediation should be made a compulsory part of the PCLL course or of the undergraduate LL.B. (or JSD) curriculum at law schools; and
- (ix) whether an API (Announcement of Public Interest) or a film should be produced for promoting mediation.

5.3 The membership of the Sub-group is as follows:

Mr Fred Kan Ka Chong, Chairman (HKIAC);  
 Mr Chan Bing Woon, SBS, JP, Vice-Chairman (Mediation Council);  
 Ms Sylvia Siu Wing Yee, JP, Vice-Chairman (Mediation Centre);  
 Ms Valerie Cheung (Law Society);  
 Ms Susie S Y Ho (Department of Justice);  
 Ms April S Y Lam (Judiciary);  
 Ms Connie Lau (Consumer Council);  
 Ms Maria Lau (Social Welfare Department);  
 Associate Professor Katherine Lynch (The University of Hong Kong);  
 Ms Melissa Pang (Law Society);  
 Mr Tai Keen Man (Radio Television Hong Kong);  
 Mr Jonathan Yau (Hong Kong Federation of Insurers); and  
 Ms Fiona Yuen (Home Affairs Department).

5.4 The Sub-group met on 11 occasions (31 May 2008, 16 July 2008, 21 August 2008, 12 November 2008, 6 January 2009, 16 February 2009, 13 March 2009, 20 April 2009, 1 June 2009, 5 August 2009 and 21 October 2009) to deliberate and formulate views on matters on or relating to its terms of reference, promote the 'Mediate First' Pledge and organise the 'Mediate First' Briefing Reception launch, monitor the Pilot Project on Community Venues for Mediation, invite speakers on related topics to its meetings and to report to the Working Group.

## **Parties involved in Promotion**

5.5 Promotion is moving others into awareness of the benefits in acting or not acting (directly or indirectly) in a particular way. Hence, promotion of mediation and a wider use thereof entail a thorough understanding of the benefits of mediation and the ways and means of bringing such benefits to the minds of members of the general public or special segments of the general public. Public education about mediation is an important aspect of promotion.

5.6 The Sub-group considers that as mediation is a voluntary dispute resolution process, the primary target of such process is therefore disputants and potential disputants. The parties who should be involved in the promotion of and public education on mediation are naturally such disputants and those who can effectively reach and influence them.

5.7 Disputants and potential disputants, for the purpose of this analysis, may be regarded as members of the general public. They are affected by the general promotion of and public education on mediation. In view that they are the “main participants” in the dispute resolution process, they are the targets of the promotion exercises and not the ones to carry out the promotion.

5.8 The following parties could play very important roles in the promotion of mediation:

- Judiciary;
- Legal practitioners;
- Mediation service providers;
- Frontline conflict resolvers;
- Chambers of Commerce;
- Consumer Council; and
- Schools and universities.

### ***Judiciary***

5.9 On April 2, 2009 the CJR was formally launched by the Judiciary with objectives that included increasing the cost effectiveness and efficiency of court procedures, promoting reasonable proportion and procedural economy in the conduct of proceedings, ensuring fairness between the disputing parties, facilitating the settlement of disputes and a fair distribution of court resources (see Order 1A setting out the underlying objectives of the amendments to the RHC). The CJR stresses active case management by the court and encourages greater use of ADR procedures, including mediation. Pilot schemes on mediation were introduced in Hong Kong (e.g. in building management disputes and shareholder disputes in companies matters) following on from the successful pilot scheme for family mediation. PD 31 requires lawyers and their clients to participate in mediation with the risk of adverse cost sanctions if they unreasonably fail to do so.

5.10 The Mediation Information Office in the High Court could ensure that

sufficient materials relevant to court-related mediation (including information sessions, videos and leaflets) are freely available to the court users and the public. Before taking out legal proceedings, parties are encouraged to consider mediation for settling their disputes and legal representatives should advise their clients accordingly.

### ***Legal practitioners***

5.11 Legal practitioners (barristers and solicitors) are generally the first to be consulted by members of the public for help and assistance in resolving disputes.

5.12 The Law Society has a Mediation Coordinator (“MCO”) who provides updates to their members on the latest case law and best practices in mediation. The MCO is responsible for the Society’s mediation web-platform ([mediation@hklawsoc.org.hk](mailto:mediation@hklawsoc.org.hk)) which is accessible to their members as well as the general public. The MCO coordinates the training and accreditation of solicitors as mediators. The Society through the Academy of Law has organised and accredited mediator training courses in the general and family categories as well as mediation advocacy courses. It has established its own Accreditation Scheme with its mediation rules and a list of its accredited mediators. As to the provision of mediation venues, an agreement has been reached with the Joint Professional Centre for the provision of meeting rooms to solicitor-mediators at discounted rates.

5.13 The Bar Association is active in promoting mediation within its membership through mediator training courses run by the Centre for Effective Dispute Resolution (“CEDR”). It maintains a list of mediators. The Bar Association together with the Law Society and other mediation service providers are involved in the establishment of the Joint Mediation Helpline Office (modeled on the National Mediation Helpline in the United Kingdom)<sup>71</sup> through which the public may be assisted in proceeding with mediation and finding a mediator.

### ***Mediation service providers***

5.14 There is a number of leading mediation service providers in Hong Kong. A number of them are mediation NGOs. **Annex 2** is a non-exhaustive list of mediation service providers (including mediation NGOs) in Hong Kong.

5.15 By the provision of mediation service, the mediation service providers are *per se* promoters of mediation. In fact, the promotion of mediation, other than by the provision of mediation services, enhances the providers’ sustainability. To them promotion of mediation is therefore a matter of content, extent and robustness.

5.16 Mediation service providers that are directly involved in the promotion and/or public education on mediation include the Mediation Council and the Mediation Centre.

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<sup>71</sup> The National Mediation Helpline is operated on behalf of the United Kingdom’s Ministry of Justice in conjunction with the Civil Mediation Council. See [www.nationalmediationhelpline.com](http://www.nationalmediationhelpline.com)

5.17 The Mediation Council is a part of the HKIAC and was formed in 1994. Its aims include:

- promoting the development and use of mediation;
- encouraging collaboration amongst its members and with similar institutions or professional bodies;
- facilitating exchange of information and ideas in relation to mediation; and
- education and training in mediation;

To further its aims, the Mediation Council has set up 4 interest groups which are the General Mediation Interest Group, the Commercial Mediation Interest Group, the Construction Mediation Interest Group and the Family Mediation Interest Group.

5.18 Recognising that most potential mediation users are not familiar with the process and the steps of using mediation services, the Mediation Council has established a number of mediation schemes to offer a neutral platform on which step-by-step guidance is provided to disputants in a user-friendly manner so that disputes can be resolved amicably through mediation. These schemes include the Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme (see **Annex 3**); NIMPS to resolve insurance claims in personal injury cases, the Commercial Mediation Scheme (“CMS”) and the Pro-bono Mediation Pilot Scheme for the Construction Industry. Under these various mediation schemes, not only has the Mediation Council successfully secured initial funding from reputable organisations, it has also fostered co-operation among mediators and helped promote successful mediation cases as useful positive examples to various industries. Over the years the Mediation Council has taken an active part in organising local and international mediation conferences. It has held seminars and meeting on various aspects of mediation and conducted mediation training and awareness programmes for various groups, corporations, institutions and government.

5.19 The Mediation Centre was established in 1999. Its objectives include:

- to educate on mediation as a skill and a way of life;
- to research and develop mediation as a subject for study;
- to enhance the public understanding of mediation as a means to resolve dispute;
- to promote resolution of disputes through mediation;
- to train and accredit mediators;
- to encourage members to serve the society and participate in social service projects; and
- to foster greater links with the mediation and dispute resolution organisations in Hong Kong, the Mainland of China, Asia and other countries.

5.20 The Mediation Centre has been active in promoting mediation to the Hong Kong community. It has partnered with the Social Welfare Department, the Home Affairs Department, the Police Department and the Hong Kong Federation of Women in various *pro bono* mediation schemes. It has also partnered with a number of organisations in conducting mediation training in Chinese on a regular basis. It is launching its *Mediation Journal* (in Chinese) for promotion of mediation to readers locally and worldwide. It has provided over 100 different courses to various organisations and training to over 8,000 students. It has an accreditation programme with 300 accredited mediators. 10 of its mediators have successfully completed the Mediator Assessor Training Course conducted by CEDR. The Mediation Centre promotes mediation through free talks to the general public as well as promotion on radio, television and the press. It was the first organisation to provide the Dongguan Judiciary with a mediation workshop. It was a founding member of the Asian Mediation Association and will host the 3<sup>rd</sup> Asian Mediation Association Conference in Hong Kong in 2013.

5.21 There are substantial similarities in aims and objectives between the Mediation Council and the Mediation Centre. The two organisations have worked closely together for the 'Mediate First' Pledge Project and the Pilot Project on Community Venues for Mediation.

### ***Frontline conflict resolvers***

5.22 Frontline conflict resolvers are persons who, by the nature of their work, are often the first to be called in when family, community or other conflicts arise. They include police officers, social workers, family psychologists, correctional officers and legal practitioners. In the more traditional areas in the New Territories, frontline conflict resolvers may also include the village representatives. Their initial handling of the conflict invariably determines the tone and future direction of the disputes. Conflict management/resolution training and mediation training helps them in handling disputes and resolving them in an amicable way. Furthermore, in the case of police officers and social workers, they may provide information and act as mediation referrers about the availability of community mediation for the parties to help settle their disputes. Indeed they can be very effective as frontline promoters and referrers of mediation.

### ***Chambers of Commerce***

5.23 Chambers of Commerce are established to bring together people in the business community and their enterprises to better serve and promote their interests. There are general chambers of commerce and there are also those for specific segments of the business community.

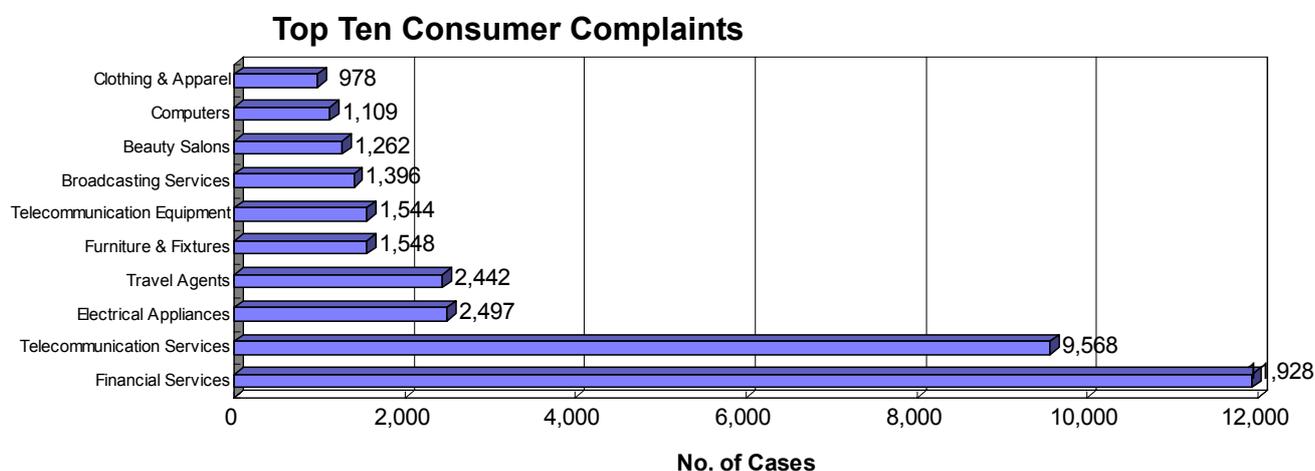
5.24 The leading chambers are the Hong Kong General Chamber of Commerce with around 4,000 corporate members and the Chinese General Chamber of Commerce with around 6,000 corporate and individual members. They are so important that the members of each are entitled to vote and return one member to the Legislative Council: (Commercial (First) Functional Constituency for members of the Hong Kong General Chamber of Commerce and Commercial (Second) Functional Constituency for members of the Chinese General Chambers of Commerce).

5.25 As Hong Kong is an international financial centre and a regional business hub, around 16 chambers of commerce have been established to serve business people and enterprises of various nationalities. They include the American Chamber of Commerce, the British Chamber of Commerce, the Canadian Chamber of Commerce, the French Chamber of Commerce, etc. The various chambers of commerce in Hong Kong are important in the promotion of mediation to the commercial sector. The Sub-group organised the 'Mediate First' Pledge Project to encourage the various chambers of commerce and trade organisations to pledge to consider mediation before considering litigation. The Hong Kong General Chamber of Commerce and the Chinese Chamber of Commerce are two of the signatories of the 'Mediate First' Pledge.

### **Consumer Council**

5.26 The Consumer Council is a statutory body established under the Consumer Council Ordinance (Cap. 216) and is charged with various statutory duties. One of the duties is to receive and handle consumer complaints. A team of Complaints Officers under the Council's Complaints and Advice Division is responsible for handling consumer complaints and settling the disputes between consumers and traders in order to resolve complaints.

5.27 The number of consumer complaints lodged with the Council has been on a continued rising trend. In 2008 – 09, it received 44,409 complaint cases. This is the highest number ever recorded representing 21% higher than the previous record high of 36,847 in 2007 – 08.



5.28 Handling consumer complaints is one of the main statutory duties of the Consumer Council. As a matter of principle, the Council encourages and supports mediation in complaint resolution. It envisages two areas in which the Council can play a role in support of mediation.

5.29 Firstly, the Council will encourage consumers to seek mediation particularly in complaint cases involving large amounts of money or complicated issues or in cases where the traders concerned refused to accede to the demands of the complainants or to co-operate with the Council in settlement. The Council will gladly make referral for mediation in such cases subject to the full consent of

the parties concerned. However, it must be understood that since its inception in 1974, complaint handling by the Council is free of charge to consumers. The consumer public is well aware of this free service and has come to expect it when lodging complaints. This may impact on consumers' readiness to pay for mediation.

5.30 Secondly, the Council fully endorses the merits and value of mediation in the Hong Kong community and sees itself playing a useful role in furthering the general public's awareness and understanding of the role mediation can play in consumer complaint resolution.

5.31 Through its monthly publication CHOICE, as well as its other channels of information dissemination, the Council also promotes the concept of mediation for resolution of consumer complaints.

### ***Schools and universities***

5.32 There is an important relationship between education, schools and community attitudes towards dispute resolution in Hong Kong. It is important to support formal educational efforts in Hong Kong (including curriculum developments and reform) to help foster and promote peaceful conflict and cooperative dispute resolution, but also to provide broader community education and training about the process of mediation for the general public in Hong Kong.

#### **Recommendation 4**

**Given the many parties involved in the promotion of and public education on mediation and the good work that they have been engaged in, it is recommended that these parties be encouraged to continue their important promotional and public education work. These diverse parties should actively seek to collaborate with each other and pool their efforts and expertise together where the opportunity arises, as concerted efforts would carry greater and more lasting impact.**

#### **Recommendation 5**

**Mediation information and training for frontline dispute resolvers (such as police officers, social workers, family psychologists, correctional officers and lawyers) should be supported as such training will assist them in their day-to-day work and having a good understanding of mediation will assist them to be effective dispute resolvers or mediation referrers. It will also assist them in promoting mediation as a means to resolve conflicts harmoniously at the community level.**

## **Leading Corporations and the ‘Mediate First’ Pledge**

5.33 As conflicts and disputes are inevitable in business and commercial activities, it is important to develop more efficient and cost-effective way to resolve disputes. Furthermore, many internationally prominent ADR institutions, such as CEDR in England, CPR Institute in the U.S. and HKIAC in Hong Kong, have been established through support from their respective business and commercial communities.

5.34 The Sub-group considered that there were three main aspects for the promotion of mediation to the business and commercial sector:

- Promotion and signing of the ‘Mediate First’ Pledge;
- The ‘Mediate First’ Briefing Reception; and
- A follow-up promotion and education programme of activities.

5.35 The ‘Mediate First’ Pledge is a statement of policy to encourage business and commercial organisations and corporations to use mediation as a preferred means to resolve both internal and external business related disputes. The ‘Mediate First’ Pledge became one of the major promotional initiatives of the Sub-group which considered that the signing of a ‘Mediate First’ Pledge within business and commercial enterprises would spearhead a new movement towards a fundamental cultural change in dispute resolution in Hong Kong. The ‘Mediate First’ Pledge strives to build bridges between the disputing parties by facilitating communication between them and encouraging them to use mediation to help negotiate a resolution of their disputes.

5.36 The Sub-group organised the ‘Mediate First’ Briefing Reception on 7 May 2009 at the Chinese General Chamber of Commerce. This event was supported by the Department of Justice, the Law Society, the Bar Association, Mediation Council, Mediation Centre, the Hong Kong Federation of Insurers, Consumer Council and Hong Kong Federation of Women Lawyers. The reception received good media coverage and over 100 persons attended the reception.

5.37 The Reception programme included speeches by the Secretary for Justice and the Honourable Mr Justice Johnson Lam as guests of honour. Mr Peter Tam of the Hong Kong Federation of Insurers provided an account of the success of the NIMPS for mediation in personal injury cases. It was considered that nothing was more convincing than a success story. Ms Sylvia Siu Wing Yee, Vice-Chairman of the Sub-group, introduced the pledges and invited representatives of companies and trade associations to go on stage and sign the pledge to ‘Mediate First’.

5.38 There are two types of ‘Mediate First’ Pledges: one for companies and the other for the trade organisations/associations. Parties pledge to first explore the use of mediation to resolve disputes that arise in business and commerce before pursuing other ADR processes or litigation before the courts. Under the ‘Mediate First’ Pledge, companies subscribe to the following statement of

principle: *“Should a dispute arise between our Company and our Hong Kong subsidiaries with a person or business, we are prepared to explore the use of mediation to resolve the dispute before pursuing other ADR processes or litigation before the courts. If either party considers that a dispute is not suitable for mediation, or if mediation is adopted, but does not produce results satisfactory to the parties, either party may end the mediation and proceed with other ADR processes or litigation. We further agree that our Company may be placed on a public list of companies supporting the use of mediation to resolve disputes.”*

5.39 The trade organisations/associations signing the ‘Mediate First’ Pledge subscribed to the following statement of principle: *“Should a dispute arise between our Organisation/Association with a person or business, we are prepared to explore the use of mediation to resolve the dispute before pursuing other ADR processes or litigation before the courts. Furthermore, our Organisation/Association shall promote mediation to our Members and shall encourage our Members to explore the use of mediation to resolve the dispute arising between any of our Members with a person or business before pursuing other ADR processes or litigation before the courts. If either party considers that a dispute is not suitable for mediation, or if mediation is adopted, but does not produce results satisfactory to the parties, either party may end the mediation and proceed with other ADR processes or litigation. We further agree that our Organisation/Association may be placed on a public list of Organisations/Associations supporting the use of mediation to resolve disputes.”*

5.40 By the reception on the 7 May 2009, more than 100 companies and trade organisations/associations had signed the ‘Mediate First’ Pledge. There was a live mediation role-play at the Reception, followed by a ‘Question and Answer’ session. The Chairman of the Sub-group Mr Fred Kan launched the website for ‘Mediate First’ Pledge ([www.mediatefirst.hk](http://www.mediatefirst.hk)) and a “Dispute Resolution and Mediation Guide” booklet written specifically for the business community. A distinctive banner and logo for mediation were created for the event which may be further developed and used for future promotional purpose for the ‘Mediate First’ Pledge.

5.41 The signing of the ‘Mediate First’ Pledge was an effective promotional mechanism. However, no matter what interest it has generated, it is only a small step forward. Sustained publicity efforts and follow-up action are necessary.

#### **Recommendation 6**

**Further promotion of the ‘Mediate First’ Pledge should be encouraged within the business and commercial sectors given its initial success.**

#### **Recommendation 7**

**The ‘Mediate First’ Pledge to be promoted to different sectors of the community and its website ([www.mediatefirst.hk](http://www.mediatefirst.hk)) be maintained, updated and made interactive in order to provide support to those who subscribe to the Pledge and interested members of the public.**

## **Appropriate Pace of Mediation Promotion**

5.42 The early stage in the development and promotion of mediation in Hong Kong has been summarised by the Department of Justice in a Working Group Paper of February 2009 as follows:

*“Mediation as a form of alternative dispute resolution process has been recognised as an effective means to resolve disputes and in use in Hong Kong for some time. A number of bodies such as the Hong Kong International Arbitration Centre (“HKIAC”), the Hong Kong Mediation Council, and the Hong Kong Mediation Centre have been actively promoting the benefits of mediation. Examples of such promotion effort include the Pro Bono Mediation Scheme for the Construction Scheme for the construction industry, the Commercial Mediation Pilot Scheme and the Insurance Industry Mediation Pilot Scheme of the Hong Kong Mediation Council and the pilot scheme for building management disputes offered jointly by the Hong Kong Mediation Council and the Hong Kong Mediation Centre in conjunction with the Building Management Resource Centre of the Home Affairs Department. While it may be said that the application of mediation in Hong Kong is relatively narrow compared to many other common law jurisdictions, mediation nevertheless has established a steady foothold in Hong Kong and in family and construction mediation in particular.”*

5.43 The CJR implemented in the courts of Hong Kong on 2 April 2009 has greatly expanded the areas of application of mediation beyond family, construction and building management disputes. Through the provision of adverse cost orders, CJR has positioned mediation as a necessary preliminary step before the hearing of any civil case. Public awareness of mediation has been much enhanced through the publicity surrounding the launching of CJR. The task at hand is to keep the pace of promoting mediation with the demands of CJR.

5.44 While it is natural to hope to see mediation being promoted at a quick pace in Hong Kong, effective and well-coordinated promotional activities need to take into account the current stage of development of mediation in Hong Kong. This will include consideration of the infrastructure supporting the current and future development of mediation in Hong Kong, including issues such as education and training programmes, availability of mediators within different sectors and availability of mediation venues at the community level.

5.45 The Sub-group considered that there are basically three stages for the promotion of mediation in Hong Kong:

- Stage 1 : Awareness Building
- Stage 2 : Intensified and Targeted Publicity
- Stage 3 : Mass Outreach

The table below sets out the actions that could be taken at each stage and describes what the focus of the activities should be:

	<b>Promotion and Publicity</b>	<b>Education and Training</b>	<b>Structural and Governance</b>
<b>Stage 1 Awareness Building</b>	<p>(a) General information on mediation. Such information should be readily available to those in need (e.g. disputants and litigants)</p> <p>(b) Information on 'Mediate First' Pledge readily available to members of the business community</p>	<p>(a) information on various mediation education and accredited mediation skills training programmes available to all interested parties, including members of the legal profession and frontline conflict resolvers</p> <p>(b) Mediation education and mediation skills training for the business and commercial community</p>	<p>(a) Mechanisms on mediation referral</p> <p>(b) Quality assurance for mediation education and training programmes</p> <p>(c) Code of conduct for mediators</p> <p>(d) Quality of mediators assured through accreditation and standard setting by one or more bodies.</p>

At this Awareness Building stage, education and promotion of mediation should focus on (a) provision of adequate information about the mediation process to the relevant parties; (b) training of mediators and mediation skills to lawyers and frontline conflict referrers and resolvers and (c) quality of mediators be assured through accreditation and standard setting by one or more bodies. Leaflets, booklets, website and APIs are the effective tools for mediation education and promotion. The District Councils, Chambers of Commerce and various professional bodies should all be involved in this Awareness Building stage.

<p><b>Stage 2</b></p> <p><b>Intensified and Targeted Publicity</b></p>	<p>(a) Lawyers and frontline conflict resolvers and referrers to assist in promotion of mediation</p> <p>(b) Organise mediation road shows targeting professionals (e.g. insurers, social workers, police officers, medical practitioners and in-house counsel)</p>	<p>(a) Education/mediation skills training in schools and universities (across various disciplines)</p> <p>(b) mediation competition in Universities</p>	<p>(a) Implement mediation pilot schemes in different areas of public life (e.g. complaints handling by public bodies)</p> <p>(b) Provision of community venues for mediation</p>
<p>At this stage, promotion of mediation should be broadened and intensified. In addition to the measures adopted in the awareness building stage above, the assistance of trained intermediaries, for example lawyers and front line conflict referrers and resolvers, should be enlisted. Such efforts should be supported by more extensive mediation pilot schemes and mediation venues should be made available in the community to meet the demand.</p>			
<p><b>Stage 3</b></p> <p><b>Mass Outreach</b></p>	<p>Media (TV &amp; radio APIs, internet platforms, community activities, etc), campaign targeted at general public</p>	<p>Mediation skills training and mediation competition in secondary schools</p>	<p>(a) Intensive collaboration between mediation bodies</p> <p>(b) regulatory framework set up for mediators</p>
<p>At this Mass Outreach stage, all the infrastructural support, for example mediation training programmes, collaborative and outreaching mediation bodies, effective regulatory framework, and readily available mediation venues, are all in place. In addition to the promotional activities in Stages 1 and 2, the promotional programmes at this stage would focus on further raising general public awareness of mediation and so members of the public would embrace mediation as a preferred way to resolve everyday conflicts.</p>			

5.46 The Sub-group considered that the boundary between the three stages is not necessarily distinct. Hong Kong is now somewhere between Stage 1 and Stage 2 and it is anticipated that as general appreciation of the benefits of mediation starts to grow; as the impact of the CJR begin to filter through the system; as the training programmes begin to take root and as the number of trained mediators increases, Hong Kong is ready to meet the increasing demand for mediation services. There is a case for speeding up the pace of promoting mediation. The Sub-group noted that sustained promotional activities require

resource support and the concerted efforts of all parties involved in mediation.

#### **Recommendation 8**

**The pace of promoting mediation should take into account the readiness of mediators, the maturity of the infrastructural support, and the needs of mediation users. The course of the promotion may be divided into 3 stages: Stage 1 (Awareness Building), Stage 2 (Intensified and Targeted Publicity), and Stage 3 (Mass Outreach). As development migrates from Stage 1 to Stage 2, the pace of promoting mediation should be stepped up. Given the competing demands for Government publicity resources, the support and concerted efforts of all parties involved in mediation should be enlisted.**

## **Types of Disputes Suitable for Mediation**

5.47 Mediation is a consensual dispute resolution process. Parties in mediation have to agree to participate. That being the case, almost all civil disputes can be mediated. However, some types of cases are more suitable for mediation than others. In Hong Kong the more common mediation cases are in family, construction and building management. But with the commencement of CJR, it is expected that many other types of cases will be mediated.

5.48 There are a variety of cases which by their nature do not lend themselves to mediation. Mediation requires consent from the disputing parties. So where the dispute is volatile and good faith is lacking between the parties, it is unlikely that mediation will be an appropriate dispute resolution process. Other examples of cases that may not be amenable to mediation include cases where one of the parties wants to establish a legal rule, precedent or principle, cases where one of the disputants thinks that he or she can win a huge settlement from the other and has unrealistic expectations, cases where there is a significant power imbalance between the disputants and cases where fraud or criminal activities are involved.

5.49 In the Interim Report of the Hong Kong Chief Justice's Working Party on Civil Justice Reform,<sup>72</sup> it is stated that ADR (which includes mediation) will not be appropriate for cases:

- raising constitutional issues;
- where rights are being tested, establishing principles and procedures;
- where successful invocation of ADR requires the parties to arrive at a contractual settlement but where one of the parties lack

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<sup>72</sup> Interim Report of the Hong Kong Chief Justice's Working Party on Civil Justice Reform at page 636.

- legal capacity to contract (e.g. because a minor or a patient);
- where the power imbalance between the parties is such that no fair agreement can be expected to result from the process; and
- where a party shows by conduct that ADR is being abused to the prejudice of the other party (e.g. where ADR is being used as a fishing expedition to discover the weakness in the other side's case or is being used only as a delaying tactic, with no real interest in resolving the dispute).

### ***Types of disputes that may be suitable for mediation***

5.50 The Sub-group considered various types of disputes which may be suitable for mediation. Pilot schemes are effective tools in testing out whether mediation works in certain areas of activities. Such schemes also provide us with pointers on areas for enhancements and pitfalls to avoid.

5.51 Some Pilot Schemes include the Pro Bono Mediation Scheme for the Construction Industry 2008 (operated by the Mediation Council), NIMPS and the Pilot Project on Community Venues for Mediation established by the Sub-group.

5.52 In fact, many former pilot schemes (for example, the Employee Compensation and Personal Injury Mediation Pilot Scheme 2005, the Pilot Scheme for Building Management Cases 2008, the Pilot Scheme for Voluntary Mediation in Petitions presented under Sections 168A and 177(1)(f) of the Companies Ordinance, Cap. 32, the Family Court Pilot Scheme 2000 and the Legal Aid Department's Pilot Scheme on Mediation in Legally-aided Matrimonial Cases) have been spent, replaced or turned into permanent schemes.

#### **Recommendation 9**

**Mediation pilot schemes be considered for disputes in areas such as in the workplace and employment, intellectual property, banking and financial services, medical malpractice and healthcare, child protection, environmental, urban planning, land use and re-development.**

### ***Future development***

5.53 To assist in understanding the future development of mediation in Hong Kong and schemes relating thereto, certain selected current mediation schemes are discussed.

#### ***Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme (see Annex 3)***

5.54 The collapse of *Lehman Brothers* in 2008 resulted in an economic

and political fallout affecting more than 48,000 investors in Hong Kong who had invested approximately HK\$20 billion in structured products issued or guaranteed by Lehman Brothers, which is colloquially known as ‘minibonds’. The minibonds lost most of their value and in some cases became worthless. The Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme (“Scheme”) was set up to help to resolve disputes between investors and banks by ADR, in particular, by mediation.

5.55 On 31 October 2008, the HKIAC was appointed by the Hong Kong Monetary Authority (“HKMA”) to be the service provider for the Scheme. The Scheme is available to qualified candidates under which the HKMA will pay half the fee and the bank concerned the other half. To qualify, an investor has to have made a complaint to the HKMA, and the HKMA reviewed and referred it to the Securities and Futures Commission (“SFC”) for consideration; or either the HKMA or the SFC has made a finding against the bank or bank officer concerned.

5.56 A Scheme Office was set up to perform several functions. The Scheme Office is the first port of call for enquiries in relation to the Scheme. Scheme Office staff have answered phone calls referred from the HKMA or banks and made appointments with the parties. In addition, the Scheme Officer has conducted pre-mediation briefings with parties and helped parties in submitting application forms. The Scheme Office collected statistics on the effectiveness of the Scheme. It is also responsible for the carrying out of case administration, including following-up with claimants and banks, and checking and filing mediation arrangements and their corresponding documents.

5.57 A total of 200 requests for mediation have been made under the Scheme as of 31 August 2009. The amounts involved range from HK\$40,000 to over HK\$ 5 million in each individual case. There were also 37 mediation cases initiated by the banks. Another 37 cases were settled by direct negotiations between the investors and the banks after mediation was requested. 81 cases proceeded to mediation and the settlement rate was 88%. A fuller report by the former Scheme Officer, Oscar Tan Khain Sein is attached as **Annex 3**.

#### **Recommendation 10**

**The experience and statistics from the operation of the Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme be analysed to identify the factors that are conducive to the success of this scheme, its limitations and the lessons to be learnt for the future.**

#### ***New Insurance Mediation Pilot Scheme (“NIMPS”)***

5.58 In an effort to encourage the use of mediation in the insurance sector in Hong Kong, the Hong Kong Federation of Insurers provided seed funding in the sum of HK\$250,000 to the Mediation Council for setting up a pilot scheme for

encouraging disputing parties to settle disputes by mediation in work-related personal injuries claims. NIMPS is further supported by the Hong Kong Workers Health Centre which promotes the welfare and interest of injured workers.

5.59 Since the commencement of NIMPS on 1 April 2007, a total of 26 cases have come to NIMPS for mediation under the Scheme. Among them, 9 cases are pending responses from insurers. The settlement rate for the mediation cases so far is 100%.

5.60 NIMPS sets out to encourage the parties to familiarise themselves with the mediation process and its advantages. It is hoped that an evaluation of the success of the Pilot Scheme will help convince the insurance industry and other interested parties to consider mediation as an alternative dispute resolution process in the settlement of insurance claims. The mediator receives HK\$15,000 from the NIMPS Fund for the first 16 hours of mediation. Parties wishing to extend the mediation beyond 16 hours will share, unless otherwise agreed, the mediator's fee of HK\$1,500 per hour. The injured worker is free to choose his or her legal representative who is paid a fee up to HK\$15,000 from the NIMPS Fund. In a post NIMPS mediation interview with an injured worker, the worker said that he was in control of the situation, was not pressured to settle and would recommend other workers to use NIMPS as it was 'less hassle than court procedures or trying to get legal aid for a court case'.<sup>73</sup>

#### **Recommendation 11**

**The initiative of the insurance industry in the establishment of the New Insurance Mediation Pilot Scheme ("NIMPS") is worthy of support. The Federation of Insurers should be encouraged to analyse and share its experience in operating NIMPS, in particular the factors that are conducive to its success and the lessons to be learnt. The sharing of success stories would be a very effective means of promoting mediation.**

### ***Promotion of Family Mediation Services in Hong Kong***

5.61 The Family Court in Hong Kong has been on the forefront of promoting the use of mediation to resolve family disputes. As early as May 2000, the Judiciary introduced a family mediation pilot scheme. This was successful and family mediation is now progressing well. The Judiciary also set up the Mediation Coordinator's Office in the Family Court premises. The office has a video on mediation and provides information sessions and leaflets to assist couples to consider mediation to resolve their matrimonial disputes. If the couple decides to proceed to mediation, the office holds a list of accredited family mediators for the couple to choose their preferred mediator.

<sup>73</sup> Louise Barrington, "Mediation Practice: Post-mediation Interview with Injured Worker" in Hong Kong Lawyer, 03, 2007, at page 60.

5.62 The NGOs providing mediation services for matrimonial cases have played a vital role in promoting the use of mediation. The Judiciary, NGOs, family law practitioners and other mediation service providers have worked together to create a dispute resolution process that serves to minimise the negative impact of divorce conflicts on families and children in Hong Kong. The further development and expansion of these existing family mediation services would benefit the Hong Kong community. Looking forward, consideration could be given to adapting the current process of family mediation which is “child-focused” to become more “child-inclusive” such as to enable the needs and preferences of Hong Kong children to be more directly heard and considered in family mediations.

### ***Less Adversarial Means of Resolving Disputes Involving Children***

5.63 The “Children’s Issues Forum: The Resolution of Issues Involving Children” held in September 2009 focused on the potential for minimising the adversarial impact of family proceedings so as to promote the best interests and well-being of Hong Kong children. The Forum also considered the development of a specialised less adversarial “Children’s Dispute Resolution” procedure within the formal court litigation proceedings in Hong Kong and the potential for the establishment of an independent Children’s Ombudsman.

### ***Development of Collaborative Practice in Hong Kong***

5.64 The Hong Kong Family Law Association is keen to see further development of less adversarial means of family dispute resolution processes in Hong Kong, including the development of Collaborative Practice (“CP”). CP is a multidisciplinary settlement oriented dispute resolution process in which a team of lawyers, child psychologists, accountants and financial planners assists the disputing parties in negotiating the terms of a legal and financial agreement which takes the priorities of both parties into account and seeks to protect the best interest of the children. Lawyers involved in CP are bound to withdraw from the case if parties fail to negotiate a settlement of their dispute and subsequently resort to litigation.

5.65 The International Academy of Collaborative Professionals (“IACP”) is an international organisation which sets professional standards and training curricula for CP. In early 2010 the Hong Kong Family Law Association launched its first CP training workshop with the intention of establishing the first CP group in Hong Kong and Asia. The Faculty of Law at the University of Hong Kong is developing a “Collaborative Practice” course to be offered to undergraduate and postgraduate law students. More information on CP is available on <http://www.collaborativepractice.com>.

## **Recommendation 12**

**Further promotion and expansion of family mediation services in Hong Kong should be supported. Consideration be given to support NGOs providing family mediation services to the community. Development of Collaborative Practice as a less adversarial means of resolving family disputes could be explored further.**

### ***Unrepresented Litigants in civil litigation***

5.66 Hong Kong has one of the highest numbers of unrepresented litigants in civil litigation in the common law world. As mediation is a form of dispute resolution, unrepresented litigants are likely to provide fertile ground for promotion of mediation. PD 31 Part C provides that in appropriate cases the court may give directions to unrepresented litigants to consider mediation by adopting the procedures for represented litigants with modification.

5.67 According to *paragraphs 6.56 to 6.71 of Chapter 6 of the Report of The Law Reform Commission of Hong Kong 2007*, the statistics on the numbers of proceedings (contested trials or substantive hearings lasting more than one day in respect of proceedings begun otherwise than by writ) involving unrepresented litigant(s) from years 2001 to 2006 are as follows:

- Civil trials in the District Court involving litigants in person remained at about 48% to 49% between the years 2001 and 2004. The figure rose to 54% and 52% in 2005 and 2006 respectively.
- Hearings before a Master (which include all chambers and court hearings before Masters with an estimated length of one hour or more), the percentage of hearings involving at least one unrepresented party has remained relatively stable: in 2001, the figure was 34% and in 2006, the figure was 33%.
- Civil appeals handled by the Court of First Instance, the percentage rose from the already high 45% in 2001 to 61% in 2003. Since 2003, however, there has been a downward trend, and in 2006, the figure stood at 49%.
- Trials in the Court of First Instance, the overall percentage of litigants in person dropped slightly from 33% in 2001 to 29% in 2006.
- Civil appeals to the Court of Appeal rose markedly, from 18% in 2001 to 34% in 2006. In absolute numbers, the figures increased more than four-fold, from 21 hearings to 97 hearings.

5.68 A paper entitled "*Response to the Consultation Paper of the Law Reform Commission on Conditional Fees*" prepared by the Law Society's Working Party on Conditional Fees referred to a survey conducted by the Steering

Committee on Resource Centre for Unrepresented Litigants in 2002. A total of 632 responses were received of which 54% were litigants in person and the reasons were as follows:

- 63% could not afford to engage lawyers;
- 30% considered that it was not necessary to engage lawyers; and
- 7% had lack of trust of lawyers or legal representation was not allowed by legislation.

5.69 Self-representation in civil proceedings is the subject of a research project entitled *“Investigation and Analysis of Issues Raised by Self-Representation in the High Court of Hong Kong”*. The initiative is known as *“The Litigants in Person Project”* and is headed by Professor Elsa Kelly of the Chinese University of Hong Kong. The litigants in person interviewed were asked whether they had applied for legal aid: 50.6% had applied and 49.4% had not. Of the 50.6% who had applied, 88.1% had had their application rejected.

5.70 In an article entitled *“Judges’ Perspectives on the Impact of Self-Representation in Hong Kong Civil Cases”* (Cameron, Kelly and Chui, AJAL 2006 8(3)) based on a survey and interviews of 10 selected Hong Kong judicial officers (2 masters and 8 judges), it was reported that several of the judges thought that greater use of ADR would be appropriate for cases in which there were one or more litigants in person:

*“One of the judges who proposed using ADR observed that much of the interest in ADR has been in relation to commercial arbitration and commercial mediation in large cases, rather than ‘the kinds of cases that are often the un-monied cases’ (Judge 4). Yet many of the features of facilitative mediation are potentially well suited to cases in which there are self-represented parties. Chief among these is a more informal process which, run properly, is not (necessarily) lawyer-dominated, can operate outside a traditional legal rights paradigm, and does not depend on detailed knowledge of procedure. Furthermore, mediation is not confined by the same rules of evidence that apply in an adversarial hearing. The mediator has greater leeway to communicate with and, arguably, to direct the participants and the process, than does a judge in an adversarial litigation setting.*

*The use of ADR as a response to the challenges of self-representation raises various issues. These include the kinds of cases that might effectively be dealt with by ADR, the credentials that ADR practitioners would be expected to have, and resource implications. It is important to remember that the willingness of self-represented persons to participate voluntarily in ADR processes might be affected by their suspicion of opposing lawyers or by a fear that they would be taken advantage of in a non-court process. ADR can be mandatory rather than voluntary, but this would not alleviate (and might exacerbate) the potential negative impact on the ADR process of a self-represented litigant’s concerns about relative*

*disadvantage. Some jurisdictions have taken the view that courts should encourage, not mandate, litigant participation in ADR processes (Hunter, Cameron and Henning, 2005, contrasting English and Australian cases). The authors of the Alberta report on self-representation reject a separate ADR stream or track for self-represented litigants, preferring instead one ADR approach that applies to all litigants (ALRI, 2005: 159)."*

5.71 Self-representation exists, with varying degrees of prominence, in most common law civil litigation systems. The challenges in Hong Kong are exacerbated by the fact that the language of common law is English while most unrepresented litigants are Chinese speaking.

### ***Resource Centre for Unrepresented Litigants ("Resource Centre")***

5.72 The Resource Centre was established in 2003 with the following objectives:

- To save the court's time in explaining rules and procedures to the unrepresented litigants, thereby expediting the court process and lowering legal costs.
- To ensure uniformity in the approaches where assistance is provided and explanations are offered to the unrepresented litigants.
- To avoid the perception of judges being partial to the unrepresented party.
- To consolidate, streamline and enhance the existing facilities and assistance for unrepresented litigants provided at different registries and offices of the Judiciary.

### ***Mediation Information Office***

5.73 The Mediation Information Office was established to assist parties in litigation to understand the nature of mediation and how it will help them resolve their disputes. The Office focuses on providing mediation information to parties and litigants. The Office has resources such as computers and websites to provide information on mediation. The Office does not conduct mediations and the handling of individual mediation cases will be left to mediation service providers.

5.74 As the Office is located next to the Resource Centre, it is expected to play a substantial role pertaining to the needs of unrepresented litigants in their choice of disputes resolution processes.

### **Recommendation 13**

**The challenges posed by unrepresented litigants in court should be further studied and more statistical data made available so that promotion of mediation to unrepresented litigants may be better supported.**

### **Recommendation 14**

**Special efforts should be made to promote mediation to unrepresented litigants in court including the provision of mediation information and the promotion of the ‘Mediate First’ website ([www.mediatefirst.hk](http://www.mediatefirst.hk)) to them through the Mediation Information Office and the Resource Centre for Unrepresented Litigants in the High Court.**

## ***Restorative Justice and Mediation Programmes***

5.75 Restorative Justice (“RJ”) consider that crimes result from a myriad of problems inherent in society and advocates that all members of the community, including the perpetrators, victims and law enforcement agencies, should work together on repair, reconciliation and rebuilding of relationships. Through the process of mediation, RJ opens a dialogue for victims to accept apologies from offenders and for offenders to voice their concerns respectfully. This helps to reduce the offender’s chance of re-offending in the future.<sup>74</sup>

5.76 A number of NGOs in Hong Kong provide mediation services for youth justice. They include the Centre for Restoration of Human Relationships, the Evangelical Lutheran Church of Hong Kong – Integrated Service Center for Reconciliation and the Methodist Centre. The Centre for Restoration of Human Relationships has trained 500 “Real Justice” conference facilitators with expertise in RJ, and it now provides mediation services for people in need free of charge. The Evangelical Lutheran Church also offers free mediation between juvenile offenders and victims, in which parties discuss face-to-face and are facilitated to sign a written agreement. In the past 11 years, the mediation service has handled over 500 cases involving youth offenders and victims, and conducted over 110 mediation meetings.<sup>75</sup>

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<sup>74</sup> Bazemore, G. “Young People, Trouble and Crime: Restorative Justice as a Normative Theory of Informal Social Control and Social Support”, *Youth & Society*, 2001, Vol. 33, at pages 199-226; Braithwaite, J. and S. Mugford “Conditions for a Successful Reintegration Ceremony”, *British Journal of Criminology*, 1994, Vol. 34(2), at pages 139-171; Harris, N. “Family Group Conferencing in Australia 15 years on”, *Child Abuse Prevention Issues* 27, at pages 1-19; and McCold, P. “A Survey of Assessment Research on Mediation and Conferencing”, in L. Walgrave (ed.), “Repositioning Restorative Justice”, Cullompton: Willan Publishing, 2003, pages 67-120.

<sup>75</sup> See: Ho, H.M., W.H. Chuk, W.H. Leung, H.Y. Lam, L.C. Lai and W.M. Law (2007), *ibid*.

### **Recommendation 15**

**Further support and expansion of the current Restorative Justice and Mediation Programmes throughout the community in Hong Kong should be encouraged.**

## **Public and Private Support for Community Mediation**

5.77 Mediation at the community level in Hong Kong is usually characterised by the following:

- the disputants are living in the same building or community or are close family members;
- despite their disputes, their connection to each other cannot be readily severed for economical, societal or filial reasons; and
- mediation is done by *pro bono* mediators or by charitable or non-profit organisations. Examples of disputes include building management disputes, neighbourhood disputes, elderly disputes (disputes between elderly parents and their children).

5.78 In relation to community mediation, the Sub-group considered it prudent to first explore whether the community can meet some of the needs of the pro-bono mediators who provided mediation services. To determine if there is a need in setting up dedicated centre(s) to handle mediation cases at the community level, the Sub-group established the Pilot Project on Community Venues for Mediation.

### ***Community Venues for Mediation***

5.79 Some mediation service providers such as the Bar Association, community mediators as well as some members of the Legislative Council voiced their concerns that many mediators who are willing to provide pro bono services for community mediation have difficulty in finding suitable places for meeting parties to the dispute and for conducting mediation. For example, the Judiciary is frequently approached by mediators, who have signed up to their mediation pilot schemes, for places to conduct mediation. It is recognised that community venues that are conducive for mediation include those that are in a comfortable setting, convenient for parties and provided at cost affordable to the parties. The provision of community venues is very important in facilitating the greater use of mediation. The certainty that a venue will be available at designated times each week is very helpful. In the review of the Pilot Scheme on Voluntary Mediation for Building Management cases it was found that most people who joined the Scheme preferred mediators who can provide venues.

5.80 The Sub-group established the Pilot Project on Community Venues for Mediation with the following objectives:

- to identify suitable venues for mediation available at very low or no cost;
- to promote such venues to mediators;
- to co-ordinate the usage of such venues; and
- to collect statistics on such usage.

5.81 The Sub-group through its two Vice Chairmen, Sylvia Siu Wing Yee and Chan Bing Woon made oral presentations to the Yau Tsim Mong District and the Wanchai District Facilities Management Committee to request for the use of community venues in their respective districts to be used in the Pilot Scheme. The Home Affairs Department which is responsible for managing a total of 51 community halls and 38 community centres in Hong Kong was also approached.

5.82 On 17 March 2009 the Yau Tsim Mong District Facilities Management Committee approved the launching of the Pilot Project at Henry G. Leong Yaumatei Community Centre for an initial period of 12 months starting from 1 July 2009. Block booking has been made for one classroom and one meeting room from 6 pm to 10 pm on Mondays and Wednesdays. Venue fees are waived for *pro bono* mediators and mediators rendering their service at a charge will pay the standard fee of HK\$54 per hour for each room (including HK\$10 for air conditioning charge). Application for *pro bono* mediators has to be submitted at least 7 working days in advance and at least 14 working days in advance for mediators rendering their service at a charge.

5.83 On 28 April 2009 the District Works and Facilities Management Committee of Wan Chai District Council approved the launching of the Pilot Project at the Leighton Hill Community Hall for an initial period of 12 months starting from 1 September 2009. Block booking was made for one conference room and one stage meeting room for Monday afternoons (1:30 p.m. to 5:30 p.m.) and Friday evenings (6:00 p.m. to 10:00 p.m.). Venue fees are waived for *pro bono* mediators and mediators rendering their service at a charge will pay the standard fee of HK\$51 per hour (including HK\$11 for air conditioning charge) for conference room and HK\$54 per hour (including HK\$10 for air conditioning charge) for stage meeting room. Application has to be submitted at least 14 working days in advance. A coordinator was appointed to process the booking of the venues by mediators.

5.84 A questionnaire was designed to be completed by each mediator using the two venues to gauge the users' feedback. This will be useful when the Pilot Project ends in 2010 to consider whether dedicated community centres for mediation are in demand.

5.85 Promotion of the Pilot Project has been made through the Law Society, the Bar Association, the Mediation Council, the Mediation Centre and the Mediation Coordinator's Office of the Judiciary. Although the Pilot Project is going through its teething period, the statistics so far demonstrate that community venues are valuable for *pro bono* community mediation. Given more publicity and flexibility in booking, community venues will help to alleviate some of the venue-needs of community mediation. Further study on the needs of the community to resolve conflicts is required and the need for community mediation to

be further developed in Hong Kong.

#### **Recommendation 16**

**Pending the outcome of the Pilot Project on Community Venues for Mediation, there should be at least one community centre in Hong Kong Island, one in Kowloon and one in the New Territories to be made available as community venues for mediation.**

### **Promotion of Mediation in School**

5.86 Given the importance of educating the Hong Kong community about the potential benefits of mediation, it is important to introduce the process of mediation to young people in Hong Kong at early age. As a result, consideration should be given to introducing mediation as part of the formal school curriculum at both the primary and secondary levels.

5.87 Students could be introduced to both the theory and skills of conflict management and dispute resolution throughout the formal primary and secondary school curriculum. Mediation education could form part of the moral education or integrated humanity programmes for both primary school students and junior secondary schools students. Mediation could also be introduced as part of the Liberal Studies of the new Senior Secondary Curriculum – under the module “Personal Development and Interpersonal Relationships”. This module deals with the interpersonal factors that facilitate adolescents to reflect upon and prepare for the transition to adulthood, including dispute resolution and conflict management.

#### ***Peer Mediation***

5.88 Peer mediation is a method of enabling young people to mediate conflicts and disputes among their friends and classmates in a constructive and peaceful manner. Peer mediation was first introduced in the United States school system in the 1980s. As trained peer mediators, young people act as neutral third parties helping schoolmates resolve conflicts and reach workable solutions in a rational and peaceful way.

5.89 The Hong Kong Family Welfare Society has run the Peer Mediation Project since 2001.<sup>76</sup> It has trained over 2000 students in more than 30 secondary as Peer Mediators to promote mediation and help resolve peer conflicts in the school environment. Over 96% of the cases handled reached agreement and the user satisfaction rate is over 90%. The research studies of this Project have shown that the Peer Mediators demonstrated significant positive changes on their attitudes and skills in peaceful conflict resolution. A pro-mediation culture has also been developed in the schools.

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<sup>76</sup> Hong Kong Family Welfare Society, “Peer Mediation Programme: Peer Mediators Training Manual”, 2003.

5.90 The Society has set up a Peer Mediators Alumni, which is called “P-mates”, to engage these Peer Mediators to continue to promote and apply mediation in their daily life. The P-mates also serve as mentors to the newly trained Peer Mediators to continue the development of this Project.

5.91 It is also noted that the Mediation Council has set up a membership category “Peer Mediator” to recognise the status of all students trained under the Peer Mediation Project by the Society.

5.92 The Mediation Project was presented at the Union Internationale des Advocates Conference in 2002 under the topic “Education of Mediators – The Hong Kong Experience”. The sharing and role-play demonstration by Peer Mediators at the conference convinced the legal and mediation professionals from different countries that young people can be trained as competent mediators through the Peer Mediation Project.

5.93 Due to lack of funding and time, only a few schools have participated in the Peer Mediation Project. As an alternative, the Society has developed a *Mediation Education Series* for more than 30 primary and secondary schools. This content is to introduce mediation to students and teach them how the concept and skills of mediation can be applied in managing interpersonal conflicts. This type of Mediation Education, though not as comprehensive as the Peer Mediation Project, has helped promote mediation among students and encourage the use of this ADR method in managing disputes.

**Recommendation 17**

**Recognising the competing demands on the school curriculum, the potential introduction of mediation education within the primary and secondary schools warrants serious examination and it is recommended that consideration be given to support the expansion of the Peer Mediation Project.**

## **Life Cycle Mediation Education**

5.94 The Hong Kong Family Welfare Society conducts a Life Cycle Mediation Education Project to foster a new mediation culture for the community to use in facing and managing conflicts in different life stages in a constructive and harmonious way. A Mediation Network consisting of a group of trained Mediation Ambassadors promotes and assists in mediation education to foster a pro-mediation culture in the community. Professional mediation knowledge and skills translated into layman terms as part of the Mediation Education materials is used to enable people from all walks of life to learn about the concepts and skills in mediation, as well as how to apply mediation in preventing and managing conflicts at different stages of life. Special training is tailored for different target groups including adolescents, couples, parents, working adults and senior citizens.

## Mediation Training for Legal Professions

5.95 The Hon The Chief Justice of Hong Kong Andrew Li Kwok Nang in his Opening Address at the 'Mediation in Hong Kong: The Way Forward' Conference in 2007<sup>77</sup> said as follows:

*"In particular, the legal profession has a very important role to play in developing mediation. Whilst the governing bodies of both branches of the profession support the promotion of mediation, the extent of understanding of the mediation process among lawyers is rather limited and is very far from satisfactory. Much work needs to be done to enhance their knowledge of mediation through training courses and the like. This should start with the law school where mediation should be a compulsory part of the PCLL course (the professional qualification course for lawyers). And there should be continuing education courses for practising lawyers."*

5.96 In light of the importance of gaining competence to resolve disputes and in particular with the implementation of CJR, training on general mediation principles and skills should be made available to all practising members of the legal professions as part of their professional development.

5.97 It must be made clear that not every practising lawyer needs to be trained as a mediator. It may be more beneficial that the lawyer receives mediation advocacy training. In this connection, the Bar Association and the Law Society should be invited to consider the content and coverage of such compulsory training.

### **Recommendation 18**

**The Bar Association and the Law Society should be invited to consider the content and coverage of mediation training for their members as part of their ongoing professional development and whether such training should be made compulsory.**

## Mediation Training in Law Schools

5.98 The Faculty of Law of the University of Hong Kong, the School of Law of City University of Hong Kong and the Faculty of Law of Chinese University of Hong Kong have each provided in writing to the Sub-group its views on the suggestion of having mediation taught as a stand-alone compulsory course. It

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<sup>77</sup> The Hon Mr Chief Justice Andrew Li Kwok Nang, GBM, CBE, JP, "Opening Address Mediation in Hong Kong: The Way Forward", edited by Katherine Lynch and Erica Chan, *ibid*, at page 4.

appears that the three law schools/faculties are committed to teaching mediation. There is an element of mediation training at the LL.B. /J.D. level although it is not a compulsory stand-alone course. None of the law schools/faculties is in a position to make any definite commitment at this time on teaching mediation as a stand-alone compulsory course in the LL.B. /J.D. or PCLL programme.

5.99 The Working Group wrote to the Standing Committee on Legal Education and Training. The reply was that the law courses offered by each of the three universities already had mediation as part of the civil litigation programme and there was neither a need for a compulsory stand-alone programme on mediation nor one to train law students to be mediators.

**Recommendation 19**

**In order to foster the further development of mediation knowledge in the legal profession, consideration should be given to revisit the question of mediation being incorporated into compulsory courses at PCLL, LL.B and J.D. programmes at a later stage when the mediation landscape becomes more mature.**

***Shift in Legal Education – Need for greater mediation education and training***

5.100 These recent developments in Hong Kong represent a perceptible shift in the delivery of legal services and the role of the legal professions in the Hong Kong community. Firstly, there is clearly an increasing emphasis and importance being placed on “out of court” dispute resolution processes such as mediation and negotiation. Secondly, the role of lawyers is changing from being adversarial advocates for their clients in courtroom litigation to being “dispute resolvers” or “dispute managers” offering a range of formal and informal dispute resolution processes to help their clients resolve their disputes.

5.101 There is an associated paradigm shift in legal education with the resulting need to train a new generation of lawyers in Hong Kong with the skills needed to help clients manage and resolve disputes efficiently and creatively. Thus, there is a need for the expansion of integrated education and training courses on mediation and dispute resolution within the University law school curriculum at both the undergraduate and postgraduate levels (e.g. within the LL.B., Mixed Law Degree and J.D. programmes).

***Expansion of mediation education and training in law school curriculum***

5.102 There is also a recognised need to provide increased mediation and dispute resolution training within the professional legal training programmes offered by the Universities (e.g. PCLL programme) and by the professional organisations of both branches of Hong Kong’s legal profession.

## **Recommendation 20**

**Subject to resource and curriculum constraints, the Universities should consider enhancing the current elective mediation courses and the mediation element in other courses within the Law Faculties at both the undergraduate and postgraduate levels.**

### ***Need to integrate mediation education across many academic disciplines of study***

5.103 Given the inherent multidisciplinary nature of conflicts and disputes in society, there is a need for increased mediation education and training courses more broadly within tertiary education in Hong Kong (and not just within the law schools in Hong Kong). At the University level, an integrated interdisciplinary approach to educating students about the process, theory and skills of mediation should be taken – both within existing courses in undergraduate and postgraduate law programmes – but also within and across many academic disciplines within the University (e.g. business, commerce and finance, engineering, humanities, social work, medicine etc.). All professional academic disciplines should be encouraged to consider the merits of incorporating a component of mediation education and training within their existing curriculum. The Universities should also consider introducing common core courses on mediation and dispute resolution within the first year undergraduate University programme.

### ***Mediation education and training within professional legal education programmes***

5.104 Given the significance of the commencement of PD 31 on 1 January 2010 for Hong Kong's legal profession, further consideration should be given to introducing compulsory mediation education and training within both undergraduate and postgraduate law degree programmes, as well as within the professional legal training courses offered by the law schools in Hong Kong (e.g. the PCLL Degree).

### ***Establishment of mediation clinical training programmes***

5.105 The establishment of mediation clinics also provides students with practical, real-world experience in the fields of negotiation, mediation and conflict management. Mediation clinics focus on developing law students' dispute resolution skills and address the mediator's role and ethical issues in the mediation process. Lawyers will become increasingly immersed in this process of mediation with PD 31, both as mediators and as representatives of clients whose disputes are subject to a mediation resolution. Many leading law schools have established mediation clinics, including The Harvard Negotiation and Mediation Clinical Program, University of Southern California Faculty of Law, University of Washington School of Law, and University of Pennsylvania Law School's Mediation Clinic.

### ***Establishment of mediation competitions for university students***

5.106 Representatives from Hong Kong's three Law Faculties at the University of Hong Kong, Chinese University of Hong Kong, and City University of Hong Kong are currently working on a proposal to establish a "Hong Kong Mediation Competition" which would be jointly administered by the three Universities from the 2010-2011 academic years onward. The proposed Mediation Competition has two main objectives:

- To help train students to become mediators and expose them to the mediation process; and
- To train students to represent and advocate for and on behalf of clients in the mediation process. This mediation competition will stress the use of the "facilitative" or "interest based" model of mediation rather than an "evaluative" or "directive" model of mediation. It is envisioned that the Mediation Competition would initially be open only to law students, however, in the future it is hoped that similar mediation competitions would be established to allow participation from students in other academic disciplines (e.g. business and commerce, engineering, medicine, and other areas).

### ***Development of "Early Dispute Resolution" systems within Hong Kong universities***

5.107 Many leading universities around the world have established institution wide dispute resolution schemes providing for an integrated "early dispute resolution" scheme for all members of the University community. Early dispute resolution ("EDR") is the concept and process of intervention in the formal dispute process using mediation and other informal dispute resolution processes to provide a quicker, simpler and more cost-efficient way to solve disputes. It takes into account a wider range of interests of the parties involved in a dispute and provides a greater chance of reaching an agreement which will be voluntarily respected by the parties involved. EDR systems have been introduced in universities such as Harvard University (USA), University of Auckland (New Zealand) and University of Dundee (Scotland) with mediation being the central process of dispute resolution.

5.108 The main objectives of EDR systems are to:

- Resolve disputes at an early stage and reach more satisfactory outcomes;
- Disseminate best practice in a University's modern and diverse workplace;
- Minimise the cost involved in resolving disputes;
- Set in place mediation skills and training facilities;
- Train and develop a credible, professional and high quality mediation facility at the University; and

- Enhance management skills by using innovative dispute resolution processes across the range of disciplines and staff categories in the University.

#### **Recommendation 21**

**The Universities should be invited to consider offering common core courses on mediation and dispute resolution within the first year undergraduate University programme through an integrated interdisciplinary approach to educating students about the process and skills of mediation.**

#### **Recommendation 22**

**The Law Faculties of the three Universities (University of Hong Kong, Chinese University of Hong Kong, and City University of Hong Kong) should be encouraged to proceed with the development of the proposed “Hong Kong Mediation Competition”.**

#### **Recommendation 23**

**Early Dispute Resolution (“EDR”) systems could be beneficial for organisations, universities and other tertiary institutions in Hong Kong to give due consideration in order to help resolve conflicts and minimise dispute resolution costs within organisations and institutions.**

## **Announcement in the Public Interest**

5.109 ‘Mediate First’ is a shift in culture and approach to solve disputes in society. Every means of media should be deployed in promotion and education of mediation. Television is one of the a most effective mode of promotion if aired in good time.

5.110 An Announcement in the Public Interest on television (“TV API”) is certainly useful in promoting the awareness of mediation. Moreover, other programme formats should be considered, such as television documentary, television drama, short information segments (one to five minutes), quizzes and infotainment programmes which could further disseminate the concept, skills and real-life cases of mediation in the community.

5.111 Other than television, the use of radio, printed media and new media platform could be considered, so as to maximise publicity for mediation. In particular, the new media services, (i.e. social media, short video clips) could be targeted at the youth sector of the public to understand the practices of mediation.

5.112 Television drama series are very popular and the Hong Kong television audience has a special liking for courtroom related drama. It is helpful to have mediation presented in popular television dramas as a necessary preliminary process before a case is heard in court or as a successful dispute resolution process.

**Recommendation 24**

**An Announcement in the Public Interest be produced and aired on television for the promotion of mediation. More publicity via radio, printed media and new media platform should also be pursued. Educational programmes on mediation targeted at youth should be strengthened and special efforts be made to approach television stations and script-writers to consider including mediation in their television drama productions.**

## Chapter 6

### Accreditation and Training

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*“To ensure the quality of mediators, all concerned should make a concerted effort to develop a common benchmark in this jurisdiction for accreditation as mediator. For this purpose, the benefit of overseas experience and the assistance of overseas expertise would be useful. The benchmark should be of high quality and should be comparable to the standard set in major jurisdictions where mediation is at a mature stage. When developed, the benchmark should be able to gain recognition in other jurisdictions. All mediation bodies should co-operate to develop this benchmark as soon as practicable.”*

The Hon Mr Chief Justice  
Andrew Li Kwok Nang<sup>78</sup>

6.1 The debate over accreditation and training of mediators is a wide ranging one and each separate jurisdiction has evolved differently. In 2001 the United States of America adopted the US Uniform Mediation Act which promotes the use and uniformity of mediation.<sup>79</sup> In Australia achieving the National Mediator Accreditation System (“NMAS”) took many years. The NMAS is an industry based scheme based on voluntary compliance by mediator organisations that agree to accredit mediators in accordance with the standards and commenced in 2008.<sup>80</sup> In England and Wales, there is no national accreditation standard and accreditation is on an organisational or sector specific basis.<sup>81</sup>

6.2 The Accreditation and Training Sub-group (“Sub-group”<sup>82</sup>) was tasked to review the accreditation and training for mediators in Hong Kong. Its terms of reference are as follows:

- (a) the accreditation standards of mediators;
- (b) the provision of training for mediators and other associated personnel who may be involved in the mediation proceedings (e.g. surveyors and technical consultants); and
- (c) any other issues that may be assigned by the Working Group from time to time.

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<sup>78</sup> The Hon Mr Chief Justice Andrew Li Kwok Nang, GBM, CBE, JP, “Opening Address Mediation in Hong Kong: The Way Forward” Conference, edited by Katherine Lynch and Erica Chan, *ibid*, at page 3.

<sup>79</sup> Felicity Hutcheson, “Current Trends, Process and Practice in Mediation and Alternative Dispute Resolution”, published by The New Zealand Department of Labour, 2008, at page 11.

<sup>80</sup> National Alternative Dispute Resolution Advisory Council (NADRAC) Australia, “National Mediator Accreditation System”, at [www.nadrac.gov.au](http://www.nadrac.gov.au)

<sup>81</sup> Nadja Alexander, “Global Trends in Mediation”, *ibid*, at page 456.

<sup>82</sup> All references to “Sub-group” in this Chapter refers to the Accreditation and Training Sub-group.

In particular, the Sub-group is tasked to consider, among others, the following specific issues:

- (i) whether there is a need to develop a standardised system of accrediting mediators. If a standardised system is required, whether it should entail a common benchmark applicable to all mediators irrespective of their practice areas (e.g. commercial cases or community disputes) or it should provide different benchmarks for different categories of mediators by reference to their practice areas;
- (ii) how to deal with those who are already accredited by an existing mediation organisation (local or overseas);
- (iii) whether accreditation of mediators should be conducted by a single body in Hong Kong; and if so, who that body should be;
- (iv) how to ensure the quality of mediators and to monitor their on-going standards;
- (v) how the judiciary can work with the legal and mediation professions to ensure the quality of mediators;
- (vi) whether there is a need to develop a common Code of Conduct applicable to all accredited mediators;
- (vii) whether there is a need for legislation to deal with any of the standard/ accreditation issues;
- (viii) whether assistance can be offered to new mediators who gain mediation accreditation in Hong Kong to obtain practical mediation experience; and
- (ix) whether mediators should be required to receive on-going training.

6.3 The membership of the Sub-group is as follows:

Mr Lester Huang, JP, Chairman (Law Society)

Mr Robin Egerton, Vice-Chairman (Bar Association)

Mr John Budge, SBS, MBE, JP, Vice-Chairman (HKIAC)

The Hon Mr Justice Reyes (Judiciary)

Ms Anna Wu Hung Yuk, SBS, JP (Shantou University Law School)

Mr Chan Bing Woon, SBS, JP (Mediation Council)

Ms Sylvia Siu Wing Yee, JP (Mediation Centre)

Mr Benedict Y S Lai, JP (Department of Justice)

Mr Michael Beckett (City University of Hong Kong)

Mr Leung Hing Fung (The University of Hong Kong)

Mrs Ruth Wong Chan Tsz Ying (Hong Kong Family Welfare Society)

Mr Yeung Man Sing (The Chartered Institute of Arbitrators (East Asia Branch))

6.4 The Sub-group met on 16 occasions on the 12 June 2008, 23 July 2008, 27 August 2008, 18 September 2008, 3 November 2008, 5 December 2008, 14 January 2009, 5 February 2009, 18 March 2009, 23 April 2009, 20 May 2009, 17 June 2009, 24 July 2009, 20 August 2009, 4 September 2009 and 14 September 2009.

## General Approach

6.5 One of the most extensive and specific reviews of appropriate standards in the dispute resolution sector was undertaken by the National Alternative Dispute Resolution Advisory Council (“NADRAC”) in Australia.<sup>83</sup> NADRAC believes that there are strong arguments for having nationally consistent mediator accreditation standards including:

- To enhance the quality of national mediation services
- To facilitate consumer education not only about mediation but also other ADR services
- To build consumer confidence in ADR services
- To improve credibility of ADR
- To help build capacity and coherence of the ADR field

6.6 Australia has proceeded to set up its National Mediator Accreditation Committee in 2009.<sup>84</sup> Its membership comprises mediation organisations, training and education providers, professional bodies and government representatives which are represented on the following four working groups:

- National Mediator Accreditation Committee
- Mediator Standards Body
- Practice and Compliance
- Complaints Handling

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<sup>83</sup> National Alternative Dispute Resolution Advisory Council (“NADRAC”) Australia, “A Framework for ADR Standards”, Report to the Commonwealth Attorney General, 2001.

<sup>84</sup> National Alternative Dispute Resolution Advisory Council (“NADRAC”) Australia, “National Mediator Accreditation System”, 2009 at [www.nadrac.gov.au](http://www.nadrac.gov.au)

6.7 The National Mediator Accreditation Committee in Australia implements NMAS through:

- Developing and reviewing the operation of the standards
- Developing a national register of mediators
- Monitoring, auditing and supporting complaints handling processes
- Promoting mediation

6.8 The setting up of the NMAS in Australia was the result of the cooperation and concerted efforts of industry based mediation organisations, professional membership groups, government and non government agencies, educators, researchers, consumers and mediators in Australia to design a system that can be responsive to a field as diverse as mediation.<sup>85</sup> Their initial work started in 2004 when the Australian Federal Attorney General approved a grant of A\$30,000 to “facilitate a discussion on what were suitable standards for mediation in Australia”.<sup>86</sup>

6.9 In considering the issues raised in the terms of reference, the Sub-group was of the view that mediation has been practiced in Hong Kong for over a decade, and the use of mediation as a dispute resolution mechanism is being introduced in all levels of Hong Kong courts in civil litigation. With active promotion on the part of several mediation service providers and organisations, mediation is starting to gain a wider understanding and acceptance in Hong Kong. Nonetheless, the number of litigation cases that are referred to mediation remains relatively small, though the proportion of such cases that are fully or partially resolved through mediation is high.

6.10 The Sub-group noted that accredited mediators practising in Hong Kong were accredited by different mediation accrediting organisations, each adopting its own set of training and accreditation requirements. Furthermore, the Sub-group noted that of the mediation accrediting organisations in Hong Kong, not all have a disciplinary mechanism to regulate the professional conduct of their mediators. Nor do all such organisations require their members to undergo continuing professional development or training after being accredited as mediators.

6.11 The Sub-group in its discussions on the development of a standardised system for accrediting mediators, prescribing benchmarks for accreditation and ongoing development and training recognised that currently there is no single umbrella body overseeing all mediators in Hong Kong, and that there is no legislation to provide for accrediting standards and training requirements and therefore covered the matters in the terms of reference on this basis.

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<sup>85</sup> Tania Sourdin, “Australian National Mediator Accreditation System: Report on Project”, prepared September 2007, amended November 2008 at [www.leadr.com.au](http://www.leadr.com.au)

<sup>86</sup> National Mediation Conference, “National Accreditation Standards for Mediators”, 2009 at [www.mediationconference.com.au](http://www.mediationconference.com.au)

## **An Umbrella Body?**

6.12 There is currently no single Hong Kong territory-wide regulatory framework for the regulation of mediators. Locally accredited mediators are regulated by the separate bodies accrediting them, and in the case of overseas trained mediators, the regulation, if any, vests in the overseas accrediting bodies.

6.13 The Sub-group considered whether accreditation of mediators should be conducted by a single body in Hong Kong; and if so, what body that should be.

6.14 The Sub-group reviewed the need for a uniform accreditation and regulatory framework and discussed the advantages and disadvantages of having an umbrella accrediting body. The advantages include:

- The ability to ensure quality and working standards of mediators;
- Consistency in the accreditation process including training, standards and continuous education;
- Perceived public confidence in one body regulating all mediators; and
- Avoidance of conflicts between rival accrediting bodies.

6.15 The disadvantages identified are:

- Existing accrediting bodies may be reluctant to surrender the jurisdiction they may enjoy, having developed their own standards and approach. Legislation may be required to 'compel' all mediators to participate in the 'umbrella' system; or else there will be nothing to stop a mediator from holding himself/herself out as having been accredited (from a local or overseas body);
- It will be difficult, if not impossible, to 'police' as there are no restrictions on anyone conferring accreditation status, or on the establishment of a body that can confer accreditation;
- Parties shall have the freedom to appoint anyone (who may or may not be an accredited mediator) to mediate their disputes; and
- There will be difficulties for the 'umbrella' accrediting body to monitor the operation of other accrediting bodies, and in particular how they go about accrediting mediators.

6.16 The Sub-group considered that the establishment of a single body for accrediting mediators is feasible. Indeed the Sub-group saw this as desirable in many ways including assisting to ensure quality of mediators, consistency of standards, education of the public about mediators and mediation, to enhance public confidence in mediation services and maintain credibility of mediation. The Working Group is of the view the establishment of a single body for accrediting mediators is desirable.

### **Recommendation 25**

**The establishment of a single body for accrediting mediators is desirable and can assist to ensure the quality of mediators, consistency of standards, education of the public about mediators and mediation, build public confidence in mediation services and maintain the credibility of mediation.**

## **Standardised System of Accreditation**

6.17 In tandem with considering whether a single body for accrediting mediators should be established, the Sub-group considered whether there was a need to develop a standardised system of accrediting mediators. It also considered that if a standardised system is required, whether it should entail a common benchmark applicable to all mediators irrespective of their practice areas (e.g. commercial cases or community disputes) or it should provide different benchmarks for different categories of mediators by reference to their practice areas.

6.18 A principal objective of an umbrella accreditation system is to ascertain professional competence in referring cases to mediation. Such a system will help potential users of mediation to assess who are good reliable mediators and who are not. The Sub-group identified and discussed the existing mediator accrediting organisations in Hong Kong. A table showing the accreditation requirements of some mediator accrediting organisations in Hong Kong is attached as **Annex 4**.

### **General Mediator Accreditation Bodies in Hong Kong**

6.19 Some mediation service providers which have mediation accreditation include the following:

- ***The Hong Kong International Arbitration Centre***
- ***The Law Society of Hong Kong***
- ***The Hong Kong Mediation Centre***
- ***The Hong Kong Institute of Surveyors***
- ***Royal Institution of Chartered Surveyors Hong Kong***
- ***Hong Kong Institute of Architects***

The following are short descriptions of each of them:

#### ***The Hong Kong International Arbitration Centre***

6.20 HKIAC was established in 1985 to assist disputing parties to solve

their disputes by arbitration and by other means of dispute resolution. It is a non-profit making company limited by guarantee. It was established by a group of leading business and professional people in Hong Kong to be the focus in Asia for dispute resolution. It is funded by the business community and by the Hong Kong Government but it is totally independent of both.

6.21 HKIAC established separate panels of accredited mediators for both general and family mediation. It approves Stage 1 Mediator Accreditation courses conducted by various providers of mediator training in Hong Kong. It does not provide any Stage 1 mediator training as it does not wish to be in a possible conflict position of an organisation which provided both training and accreditation at the same time. It provides Stage 2 Mediator Accreditation Assessments. This assessment is benchmarked and reviewed independently by an international mediation expert to meet best practice in international mediation assessment. Mediators who have successfully completed Stages 1 and 2 accreditation assessments are eligible to be considered for inclusion on the HKIAC panels of accredited mediators.

### ***The Law Society of Hong Kong***

6.22 It was incorporated in 1907 as a company limited by guarantee. It is the professional association for practising solicitors in Hong Kong. All mediators on the Law Society's panel of mediators are solicitors who have undergone training in mediation skills and techniques.

6.23 It conducts mediator training and mediation advocate training for its members. It also conducts Mediator Accreditation Assessment. Solicitors who have successfully completed the mediation training and the accreditation assessments are eligible to be considered for inclusion on the Panel of Accredited General Mediators. The accredited mediators are regulated by an Ethical Code for Mediators and the Code of Practice of the Law Society.

### ***Hong Kong Mediation Centre***

6.24 It was formed in 1999. It is a charitable institution limited by guarantee. It conducts mediator training and mediation advocate training. It also conducts Mediator Accreditation Assessment. Those who have successfully completed the mediation training and the accreditation assessment are eligible to be considered for inclusion on the Centre's panel of accredited mediators.

### ***The Hong Kong Institute of Surveyors***

6.25 It was established in 1984. It has a panel of mediators who are active in mediating disputes in the construction area.

### ***The Royal Institution of Chartered Surveyors Hong Kong***

6.26 This is a branch of the Royal Institution of Chartered Surveyors based in London. It provides a Valuation Dispute Resolution Service to help resolve a wide range of valuation disputes including rent reviews, options to renew, lease renewals, options to purchase, divorce settlements and dissolution of

partnerships.<sup>87</sup>

### ***The Hong Kong Institute of Architects***

6.27 It was established in 1956. Members can apply to become a panel member in the joint panel of Accredited Mediators.

### ***Some Mediator Training Bodies in Hong Kong***

6.28 The Sub-group reviewed some of the mediation accreditation providers that provide mediator training in Hong Kong. A table showing descriptions of some courses in Hong Kong is attached as **Annex 5**. It was found that in most of the mediator training courses conducting mediation for facilitative mediation, a participant is educated and trained in the process of facilitative mediation and the necessary skills required for effective mediation of disputes. While the participant will be introduced to a broad range of dispute resolution processes, the course usually focuses specially on the process of mediation, including the structure and phases of mediation, the essential communication skills, management of the mediation process and effective mediation skills. Likewise, in terms of accreditation, there is a broad similarity in what is required. The participant is generally required to undergo at least two role play assessments which can be conducted in English or Cantonese.

6.29 At present, there is no standardised accreditation or training course in Hong Kong and different mediation training bodies have different standards required. The Sub-group noted the following in the various accreditation courses currently being conducted in Hong Kong:

- Difference in role-play assessment processes
- Difference in course fees
- Difference in training methods
- Difference in the number of training hours

### ***Some Mediator Accreditation Bodies in other Jurisdictions***

6.30 The Sub-group also reviewed some of the mediator accrediting bodies in some other jurisdictions. A table showing the training and accreditation requirement in some other jurisdictions is attached as **Annex 6**.

#### ***Australia***

6.31 Australia's NMAS commenced operation on 1 January 2008. It is an industry based national mediator accrediting scheme which relies on voluntary compliance by mediator organisations which agree to accredit mediators in accordance with the requisite standards. These organisations are known as Recognised Mediator Accreditation Bodies ("RMABs").

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<sup>87</sup> Royal Institution of Chartered Surveyors, "RICS Valuation Dispute Resolution Service: Your Guide to Valuation Dispute Resolution in Greater China", at [www.rics.org](http://www.rics.org)

6.32 Unless 'experience qualified' from 1 January 2008, a mediator in Australia must have completed a mediation education or training course:

- conducted by a training team comprised of at least two instructors where the principal instructor has more than three years' experience as a mediator and has complied with the continuing accreditation requirements as set out in Section 6 of the Approval Standards for that period and has at least three years' experience as an instructor;
- that has assistant instructors or coaches with a ratio of one instructor or coach for every three course participants in the final coached simulation part of the training and where all coaches and instructors are accredited;
- that is a program of a minimum of 38 hours in duration (which may be constituted by more than one mediation workshop provided not more than nine months has passed between workshops), excluding the assessment process referred to in Section 5(2) of the Approval Standards;
- that involves each course participant in at least nine simulated mediation sessions and in at least three simulations each course participant performs the role of mediator; and
- that provides written, debriefing coaching feedback in respect of two simulated mediations to each course participant by different members of the training team.

6.33 The NMAS is intended to provide a base level of accreditation for all mediators irrespective of their field of work. Specific requirements that are relevant to particular fields may be imposed by other accreditation schemes, such as the accreditation scheme for family dispute resolution practitioners. Mediation organisations may opt to accredit mediators under both the NMAS and more specific field based accreditation schemes.

### ***Centre for Effective Dispute Resolution ("CEDR")***

6.34 It is an independent non-profit organisation based in London. Its mission is to encourage and develop mediation and other cost-effective dispute resolution and prevention techniques in the United Kingdom. It is very active in Hong Kong in conducting mediator training programmes including those for members of the Judiciary, the Bar Association and the Law Society.

6.35 CEDR introduced a Registered Mediator status in order to distinguish between practising mediators and those who were accredited but not practising.

### ***LEADR***

6.36 LEADR is an Australasian, not-for-profit membership organisation that promotes alternative dispute resolution including mediation. It has members in Australia, New Zealand and throughout the Asia Pacific region.

## **Views of the Accreditation and Training Sub-group**

6.37 The Sub-group was of the view that difficulties in the operation of a standardised system of accrediting mediators include the following:

- It was not possible, without legislation, to require a mediator to be subject to such a system.
- Although mediation is a professional service, the activity of mediating disputes is so diverse as to be very difficult to establish standards.
- The standardised system will be relying on an initial accrediting body's procedure and its stated standards for accreditation. Firstly, this will mean that the umbrella body will then have to 'evaluate' the initial accrediting body to determine whether or not it approves its accrediting process. Secondly, even if the umbrella body approves the accrediting process, there will be no guarantee that the mediator will be reliable and competent but the umbrella body will then have some responsibility for the mediator's competence.

6.38 The Sub-group considered that unless bound by legislation, a unified Hong Kong mediation accreditation system might not be currently preferred by the existing accreditation bodies in Hong Kong.

6.39 The Sub-group believed that the time was currently not right for it to prescribe a standardised system of accrediting mediators. Emphasis should be put on mediation information dissemination and mediation education. It was of the view that potential users of mediation be provided with appropriate mediation information that will enable them to decide to select mediation to resolve a dispute and to be better able to choose a competent mediator. The Working Group considered that currently the time is not right to prescribe a standardised system of accrediting mediators.

### **Recommendation 26**

**It is considered that currently the time is not right to prescribe a standardised system of accrediting mediators and that the emphasis should be on the provision of appropriate mediation information to potential users of mediation that will enable them to decide whether to choose mediation to resolve disputes and also assist them to be better able to choose competent mediators.**

## **A Common Code of Conduct for Mediators**

6.40 The Sub-group considered whether there is a need to develop a common Code of Conduct applicable to all accredited mediators. It has taken into

account the current regulatory position in that there are several organisations unilaterally accrediting those who were trained as mediators and some exercised disciplinary powers when the conduct of such mediators fell short of stipulated standards.

6.41 The needs of the users of mediation services were taken into account when drawing up the Code. It sets out a minimum standard of professional conduct that should be observed by all mediators.

6.42 The Sub-group reviewed and studied Codes of Conduct for Mediators applied in Hong Kong and several overseas jurisdictions. These include codes of conduct of:

- HKIAC
- Law Society
- Mediation Centre
- CEDR
- The Chartered Institute of Arbitrators (East Asia Branch)
- The Model Standards for Conduct of Mediators (America)
- The Australian National Mediator Standards (Australia)

6.43 The Sub-group believed that the practical approach was to introduce a standardised code of conduct for mediators. It put together a draft code of conduct for mediators in Hong Kong together with a sample Agreement to Mediate. Together they make the Hong Kong Mediation Code (“Code”) and is attached as **Annex 7**. The Code sets out the minimum professional standards expected of mediators in such areas as:

- the engagement by the parties to a mediation of a mediator;
- the mediator's conflict of interests;
- the duty of confidentiality;
- the mediation process;
- the payment of fees; and
- the promotion of mediation services.

The sample Agreement to Mediate is a sample template and is drawn up in the expectation that parties engaging in mediation are always at liberty to vary the terms to meet their particular requirements.

6.44 The Sub-group proposed that the Code be widely promoted in Hong Kong. It was of the view that those mediators who subscribe to the Code will position themselves in the market as offering a standard that will confer some comfort to those who seek their services. In turn, with proper education through continuous promotion, those who require mediation services will turn to those who subscribe to the Code as they know that such mediators offer a standard of service that could confer on them a minimum standard of protection. In time, with good

promotion of the Code, both mediators and those who solicit mediation services will see that the Code is a minimum standard which should apply in all mediations. It is expected that consumers, who ultimately decide on who to turn to for mediation services, will select only those mediators that subscribe to the Code.

6.45 The Code was discussed with mediation service providers in a targeted consultation exercise conducted on 26 June 2009. Over 60 people including representatives from 25 mediation service providers and principal mediation users in Hong Kong attended the consultation meeting and they included representatives from the following:

- HKIAC
- Law Society
- Mediation Council
- Mediation Centre
- Bar Association
- Chartered Institute of Arbitrators (East Asia Branch)
- Hong Kong Institute of Arbitrators
- The Hong Kong Institute of Surveyors
- The Hong Kong Institute of Architects
- Caritas - Hong Kong Caritas Family Service
- Hong Kong Catholic Marriage Advisory Council
- Hong Kong Christian Service
- Hong Kong Family Welfare Society
- Shatin Alliance Community Service Centre
- Hong Kong Sheng Kung Hui Welfare Council
- Yang Memorial Methodist Social Service, Mongkok Integrated Family Service Centre
- Centre for Restoration of Human Relationships
- The Evangelical Lutheran Church of Hong Kong
- The Judiciary
- The University of Hong Kong
- The Chinese University of Hong Kong
- The City University of Hong Kong
- Legal Aid Department
- Hong Kong Federation of Insurers
- Consumer Council

6.46 The consultation centered on the following:

- The contents of the proposed Code
- The contents of the sample Agreement to Mediate (part of the Code)

- The proposal that mediators voluntarily subscribe to Code; and
- The proposed regulatory framework.

6.47 There were lively discussions at the consultation and all were in favour of the Code being a voluntary Code to be adopted by mediators in Hong Kong. In the discussion on professional indemnity insurance for mediators, the Sub-group was mindful that there is no law requiring mediators to take out professional indemnity insurance. It believed that it was important to enhance the understanding of the public as to whether a particular mediator has obtained professional indemnity insurance should there be a need to pursue compensation for professional negligence. The Sub-group was of the view that if the public is properly educated through wide promulgation of the Code, they will prefer to turn to mediators who subscribe to the Code and have such insurance as is relevant to a particular dispute. The Code has been revised in the light of comments received during the consultation to read: *“The Mediator shall consider whether it is appropriate to be covered by professional indemnity insurance and if so shall ensure that he/she is adequately covered.”*

6.48 The Working Group considered that there should be wide promulgation of the Code and mediation service providers should be encouraged to adopt the Code and set up robust complaints and disciplinary processes to enforce the Code.

**Recommendation 27**

**There should be wide promulgation of the Hong Kong Mediation Code which is a code of conduct for mediators in Hong Kong and mediation service providers are encouraged to adopt the Code and set up robust complaints and disciplinary processes to enforce the Code.**

## **Options for Enforcement of Hong Kong Mediation Code**

6.49 The Sub-group was of the view that parties who engage mediators who have subscribed to the Code can legitimately expect that such mediators face disciplinary sanctions for failing to abide to the Code. Without such action, the Code will lack credibility. The Sub-group considered three options for the regulatory enforcement of the Code, as follows:

- Under **Option 1**, there will be no new regulatory framework and the task of regulating mediators will be left to the individual mediation organisations. Such organisations will themselves adopt the Code and consent to enforce it through disciplinary action. Such bodies will therefore discipline such of its members who have subscribed to the Code and failed to observe the requirements. Among the advantages of this option are that it would not be necessary to create a new administrative framework to enforce the Code. This

approach provides for certainty for the members of the respective organisations, in that they will not face duplicate disciplinary action for breaches of the Code outside of their respective organisations.

- Under **Option 2**, the regulation of the Code will be managed by the HKIAC for at least an interim period. It has a long history of accrediting mediators and has within it an existing disciplinary mechanism that can be invoked efficiently and at low cost.
- Under **Option 3**, a company limited by guarantee will be set up to administer the Code. Those who subscribe to the Code must become members of the company and the constitution will provide for such members to be disciplined if they breach the Code. The company will be managed by a board consisting of elected representatives of different organisations that accredit mediators in Hong Kong. An advantage of this option is that the company can attend to matters outside of the disciplinary regime, including procuring group rates for professional indemnity insurance of mediators, and other matters to advance the interests of mediators as a whole.

6.50 The Sub-group considered some of the advantages and disadvantages of **Options 1 to 3** as set out in **Annex 8**.

6.51 In deliberating the various options, the Sub-group considered **Option 1** to best serve the interests of Hong Kong mediators at this time. In time, the Hong Kong mediation community can move from **Option 1** to **Option 3**. The possibility for this should be reviewed in 5 years.

6.52 The Sub-group considered that while the Code as drawn applies to all mediation scenarios, family mediation raises particular sensitivities given that there are interests of not only the mediating parties but also of the children involved. There could be complicated emotional factors that call for specialised family mediation training and experience.

6.53 If there is to be an umbrella accreditation body, the Sub-group has developed an initial draft of a memorandum and articles of association of a company limited by guarantee. The Sub-group emphasised that it is an initial draft and no consultation has taken place on the contents. There are suggestions that the ambit of this company be restricted to merely accreditation and regulation of mediators who subscribe to the Code. This is not reflected in the current draft as it is contemplated that such issues will call for further consultation and deliberations.

6.54 The Working Group considered that a single mediation accrediting body for Hong Kong could be in the form of a company limited by guarantee. The possibility for establishing this body should be reviewed in 5 years.

### **Recommendation 28**

**A single mediation accrediting body in Hong Kong could be in the form of a company limited by guarantee. The possibility for establishing this body should be reviewed in 5 years.**

## **A Mediation Handbook**

6.55 Given the heavy emphasis that the Sub-group placed on raising the awareness of the public on the Code, the Sub-group proposed that a handbook be compiled and published for dissemination as widely as possible. This would enhance greater transparency of what to expect out of the mediation process, and in mediators generally. This publication would be a consumer's guide to mediation, setting out points which should be considered. Thus, by way of illustration, the public could be educated to judge which mediator was best suited for their particular case and the criteria of all different bodies could be set out. The public would therefore be informed what training a particular mediator has received, what disciplinary measures are available should this be called for, and what continuous professional training the mediator is undergoing.

6.56 Given the particular sensitivities of family mediation, a particular chapter addressing such sensitivities could be included in the proposed Handbook.

6.57 In addition, the Sub-group considered that, depending on the availability of resources, the content of the proposed Handbook could be uploaded on to a suitable website in both English and Chinese so as to enable ready public access.

## **Particular Issues under Terms of Reference**

### ***Local and Overseas Accredited Mediators***

6.58 The Sub-group considered how to deal with those who are already accredited by an existing mediation body (local or overseas). It did not believe it was necessary to deal with those who are already accredited, noting that the emphasis is on promulgation of the Code and public education.

### ***Quality of Mediators and Ongoing Professional Development Standards***

6.59 The Sub-group considered how to ensure the quality of mediators and whether mediators should be required to receive on-going training. It identified that there are different accreditation bodies in Hong Kong and each may prescribe a set of continuing training requirements. It looked into their requirements for Continuing Professional Development ("CPD"). A table of the CPD requirements for some mediator accrediting organisations in Hong Kong is attached as **Annex 9**. A table of the CPD requirements for some mediator accrediting organisations in some other jurisdictions is attached as **Annex 10**.

6.60 The Sub-group found it difficult to mandate any particular on-going mediation training requirement but instead considered it important for parties to know more about the particular mediator they intend to engage. Therefore the fact that a mediator is required to undergo CPD should be one of the factors that the parties could consider in engaging a mediator and this could be highlighted in the proposed Handbook. The Sub-group considered that the following are important:

- The promulgation of the Code;
- Information on the CPD requirements of mediator accrediting organisations should be made available to the public; and
- Public education.

6.61 The Working Group considered that information on CPD of mediator accrediting organisations should be made available to the public.

**Recommendation 29**

**Information on the Continuing Professional Development requirements (if any) of mediator accrediting organisations should be made available to the public.**

***Cooperation of Judiciary with Legal and Mediation Professions to ensure Quality of Mediators***

6.62 The Sub-group considered how the Judiciary can work with the legal and mediation professions to ensure the quality of mediators. The Sub-group considered that the Judiciary must be impartial. This means that it cannot endorse (or be seen to favour) one mediator over another. The Judiciary would thus typically not be in a position to recommend that the public choose a mediator with any particular qualifications or accreditation. It must be left for a party (hopefully guided by information provided by the Mediation Information Officer or the advice of the party's lawyers) to decide on an appropriately qualified mediator for a given case.

6.63 The word 'typically' is used because family mediations give rise to different considerations. Family mediations can have a significant impact on the welfare of the children of a marriage. Accordingly, such mediations require experienced professional mediators who will be sensitive to the complex tangle of emotions involved. The court in such situations pro-actively recommends that family mediators possess certain qualifications. The requisitions are those endorsed by the Family Court's Steering Committee on Family Mediation, including professional experiences in working with families for a certain period of time.

6.64 The Sub-group considered that in a normal situation, there are at least 4 ways in which the Judiciary might help to ensure the availability of quality mediators in Hong Kong:

- Whenever the question of an appropriate mediator arises in court, the Judiciary might suggest the parties to select a mediator (of whatever qualifications or accreditation) who has at least subscribed to the Code. This suggestion will not go against the principle of judicial impartiality. If implemented, it can have a significant impact in promoting the Code and persuading as many mediators as possible to subscribe to it.
- With the establishment of the Mediation Information Office within the High Court, the Judiciary could ensure that sufficient materials relevant to the choice of a mediator (including the proposed Mediation Handbook) are freely available to the public. Judges might themselves draw attention to the availability of such materials.
- The Judiciary should consider whether (possibly in conjunction with the Department of Justice) it would be prepared to help maintain a mediation website. The site would contain relevant information and links concerning mediation services and facilities in Hong Kong. The site could include a selection with rulings and practice directions made by the Judiciary that touch on issues relating to mediation. The site would have to be updated on a regular basis. Its upkeep will therefore require an ongoing financial commitment.
- In lectures or statements touching on mediation, judges can repeatedly stress the need for the legal profession to familiarise itself with the latest developments in mediation and for the mediation profession constantly to improve itself. There is value in judicial pronouncements in promoting lawyers and mediators to strive towards the highest professional standards.

6.65 The Judiciary has three offices to provide assistance to court users with mediation, namely the Family Court Mediation Coordinator's Office, the Building Management Mediation Coordinator's Office, and the Mediation Information Office which is located in the High Court adjacent to the Unrepresented Litigants Resource Centre. The Family Court Mediation Coordinator holds information sessions on family mediation and helps the parties to understand the nature and advantages of mediation and generally assist couples seeking mediation to help resolve their problems in a non-adversarial way. Information sessions and pre-mediation consultation are provided free of charge. In January 2010, the Judiciary included a webpage on mediation in its website.

#### **Recommendation 30**

**Whenever the question of an appropriate mediator arises in court, the Judiciary might suggest that the parties consider selecting a mediator (of whatever qualifications or accreditation) who has at least subscribed to the Hong Kong Mediation Code.**

### ***Legislation to deal with Accreditation of Mediators***

6.66 Under its terms of reference, the Sub-group was tasked to consider whether there is a need for legislation to deal with any of the standard/accreditation issues. At the moment, the Sub-group did not consider that there is a need for such specific legislation. In Chapter 7, the Regulatory Framework for mediation is further discussed.

### ***Practical Experience for New Mediators***

6.67 The Sub-group considered whether assistance can be offered to newly accredited mediators who gain mediation accreditation in Hong Kong to obtain practical mediation experience. The Sub-group noted that many new mediators cannot find mediation work after they are accredited. It recommended that a scheme to encourage those with experience in conducting mediation to involve the newly accredited mediators as assistant mediators be implemented. Such assistant mediators will be able to gain insight while working together with those who have experience. Whether such assistants receive any remuneration would be up to the parties, but more experienced mediators could be encouraged to participate in the scheme through being awarded CPD points.

6.68 The Working Group considered that encouragement should be given for experienced mediators to assist newly accredited mediators to obtain practical mediation experience.

#### **Recommendation 31**

**Encouragement should be given for experienced mediators to assist newly accredited mediators to obtain practical mediation experience.**

# Chapter 7

## Regulatory Framework

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7.1 The Regulatory Framework Sub-group (“Sub-group”<sup>88</sup>) considered whether Hong Kong should enact a Mediation Ordinance. It also considered the proposed contents of such an Ordinance should one be enacted. These included definitions of key terminology, objectives and principles of a Mediation Ordinance, confidentiality and privilege, immunity of mediators, limitation, enforcement of mediated settlements, mediation agreement, model rules for mediation and contents of a mediation agreement. The Sub-group looked at the regulatory framework for mediation in various overseas jurisdictions.

7.2 The terms of reference of the Sub-group are as follows:

- (a) the need for legislation on mediation;
- (b) the scope of the proposed legislation, if any;
- (c) the desirability and feasibility of formulating regulatory rules in relation to mediation proceedings and enforcement of mediated settlement agreements; and
- (d) any other issues that may be assigned by the Working Group from time to time.

In particular, the Sub-Group is tasked to consider, among others, the following specific issues:

- (i) whether there is a need to enact a special piece of legislation on mediation; and if so, what matters it should cover;
- (ii) whether it is desirable for the proposed legislation, if there be one, to deal with the confidentiality of mediation proceedings and its exceptions (if any);
- (iii) whether parties should be compelled (by law or by the court) to resolve their disputes by mediation;
- (iv) whether legal aid should be provided for mediation if the legally aided parties wish to attempt it;
- (v) whether it is desirable for members of the judiciary (other than the trial judge) to provide a mediation service as opposed to mediators independent of the judiciary (for example, the experiences in the US, Canada and New South Wales, Australia);
- (vi) whether it is desirable and feasible to devise a set of model rules on mediation;

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<sup>88</sup> All references to “Sub-group” in this Chapter refers to the Regulatory Framework Sub-group.

- (vii) how to enforce a mediated settlement agreement (e.g. as an arbitral award or by way of a judgment (for example, the Swiss law));
- (viii) whether there is a need to facilitate cross-boundary enforcement of mediated settlement agreements between the Mainland and Hong Kong; and if so, how to do it;
- (ix) whether it is desirable to have public consultation on this subject (with or without a white bill annexed to the consultation document).

7.3 The membership of the Sub-group is as follows:

Mr Rimsky Yuen, SC, Chairman (Bar Association);  
 Mr Amirali B Nasir, JP, Vice-Chairman (Law Society);  
 Mr Peter Caldwell, Vice-Chairman (HKIAC);  
 The Hon Mr Justice Lam Man Hon, Johnson (Judiciary);  
 Ms Jody Sin Kar Yu (Mediation Council);  
 Mr Thomas So (Mediation Centre);  
 Mr Larry Kwok, JP (Law Society);  
 Professor David Sandborg (Shantou University Law School);  
 Professor Anne Scully-Hill (Chinese University of Hong Kong);  
 Mr Gary Soo (Hong Kong Institute of Arbitrators);  
 Mr Kenneth Ng (Hongkong and Shanghai Banking Corporation Limited);  
 Ms Jennie Hui (Legal Aid Department); and  
 Mr Ian Wingfield, GBS, JP (Department of Justice)

## Whether or not to have legislation on mediation

7.4 Different jurisdictions have adopted different approaches to promote the use of mediation as a means to resolve dispute. An overall summary can be seen at the table set out in **Annex 11**.<sup>89</sup> As can be seen from **Annex 11**, some of the jurisdictions have enacted legislation on mediation whereas others have not. In some cases, although there is no general or national legislation on mediation, resolution of disputes through mediation is provided for in specific statutory provisions.

7.5 The key question is whether there is a need for Hong Kong to enact

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<sup>89</sup> The table at Annex 11 is primarily based on the Comparative Mediation Table contained in the Appendix to Professor Nadja Alexander (ed.), "Global Trends in Mediations", Kluwer Law International, 2006 at pages 452-465 with modifications based on information and research provided by Mr Larry Kwok (a member of the Regulatory Framework Sub-Group). The Working Group wishes to thank Professor Nadja Alexander for allowing it to incorporate her research and also Mr Larry Kwok for providing assistance in expanding the information contained in the table. Further, see also Karl Mackie, Tim Hardy & Graham Massie (ed.) and Jayne Singer (author), "The EU Mediation Atlas: Practice and Regulation" (LexisNexis) 2004, Annex 10 (which includes various comparative tables concerning, amongst others, legislation on mediation).

legislation on mediation. Whilst the approaches adopted by other jurisdictions (especially common law jurisdictions) and their experiences will provide helpful guidance, it is also necessary to consider the unique circumstances of Hong Kong including the fact that although mediation has been practiced in Hong Kong for over a decade, it is still at a relatively early stage of development.

### ***Arguments against legislation on mediation***

7.6 The traditional argument against enacting legislation on mediation focuses on the very nature of mediation. The argument runs like this. Mediation is a voluntary process. Unless the parties submit to mediation voluntarily, there is no point compelling a person to take part in mediation. It will be just a waste of time since unwilling participants are unlikely to offer genuine co-operation and thus the chances of successfully reaching a mediated settlement are slim. Further, people who argue against legislation on mediation stress that mediation is a very flexible process. How best to mediate a dispute very much depends on the nature of the dispute, the parties' characters and background, as well as the style and skill of the mediator handling the mediation. For these reasons, it is contended that legislation is not necessary. Some even go further to suggest that legislation may be counter-productive in that it would create an impression that mediation is legalistic and may also impose unnecessary limits on how mediation can be done and in the long term stifle the healthy development of mediation.

7.7 Whilst there is some force in these arguments, they cannot be taken too far. In considering whether there should be legislation on mediation, it is important to distinguish between legislation that merely provides an appropriate legal framework for the conduct of mediation on the one hand and legislation that goes further and regulates mediators (such as accreditation or conduct) as well as the mediation process. The international trend is moving towards the former, whereas the latter has generated much controversy. Provided the legislation goes no further than is necessary and does not impose unnecessary control over mediators or undue restraint over the mediation process, the introduction of legislation on mediation can provide a clear and predictable legal framework within which mediation can be conducted as flexibly as may be necessary.

7.8 Others also argue that mediation can be properly developed without any mediation legislation. This school takes the view that mediation can be properly promoted by appropriate policy, coupled with support from the judiciary and the government. One example is the development of mediation in England and Wales.<sup>90</sup> Although mediation has been developed and used as a form of ADR for quite some time (especially after the introduction of the Woolf Reforms in the context of civil justice), there is so far no general legislation on mediation (although there are measures such as pre-action protocols and a mandatory pilot scheme to promote the use of mediation). There is no evidence to suggest that the development of mediation over the past decade or so has been hampered due to the absence of legislation on mediation. In the course of preparing this report, informal discussions had been held with leading mediators practising in England

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<sup>90</sup> As regards the development of mediation in England and Wales, see: Karl Mackie, Tim Hardy & Graham Massie (ed.), *ibid*, Chapter 15; and Nadja Alexander (ed.), *ibid*, Chapter 7.

and Wales. While some of them accept that it would be desirable to have legislation on mediation so as to provide the overall legal framework for mediation to operate, the majority do not see any urgent need to do so. Some even expressed concern that any such legislation should not become a straight-jacket restraining the flexibility of mediation.

7.9 The fact that mediation has developed well in England and Wales without any legislation on mediation does not disprove the advantages of having a mediation statute. Different jurisdictions have different ways to tackle the same issue. Which option is the best depends on the circumstances of the jurisdiction in question. Besides, one can never tell whether mediation would have developed even better had England and Wales enacted an appropriate piece of legislation on mediation. Both Australia and Canada are common law jurisdictions. Unlike England and Wales, Australia and Canada have been far more active in introducing legislative provisions dealing with mediation. Without passing any judgment on whether mediation is better developed in Australia or Canada than in England and Wales and without suggesting that legislation is the sole contributing factor, it cannot be gainsaid that the legislative frameworks in Australia and Canada do provide strong impetus for the healthy development of mediation in Australia and Canada.

### ***The international scene***

7.10 Notwithstanding the presence of arguments against enacting comprehensive national legislation on mediation, the international trend is moving towards having some sort of legislation on mediation. This is particularly so in the case of Europe, except Denmark and the Netherlands<sup>91</sup> (which do not have comprehensive national legislation on mediation but have specific industry based mediation legislation).

7.11 On the international level, there was firstly the UNCITRAL Model Law on International Commercial Conciliation (2002). More recently, there is the Directive 2008/52/EC issued by the European Parliament and of the Council on 21 May 2008 (“EU Mediation Directive”).<sup>92</sup> Not only do these international instruments promote the use of mediation as an alternative dispute resolution, they have the effect of encouraging individual jurisdictions to enact their own legislation on mediation.

7.12 The preamble to the EU Mediation Directive sets out, amongst other things, the key reasons for issuing the EU Mediation Directive. The following are of particular relevance to the issue under consideration:

“(1) The Community has set itself the objective of maintaining and developing an area of freedom, securities and justice, in which the free movement of persons is ensured. To that end, the Community has to adopt, inter alia, measures in the field of judicial cooperation in

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<sup>91</sup> Christopher Newmark & Anthony Monaghan, “Mediators on Mediation: Leading Mediator Perspectives on the Practice of Commercial Mediation”, Tottel, 2005, para. 19.12.

<sup>92</sup> For a brief account of the development leading to the EU Mediation Directive, see: Karl Mackie, Tim Hardy & Graham Massie (ed.), *ibid*, paras. 1.8-1.10.

civil matters that are necessary for the proper functioning of the internal market.

- (2) The principle of access to justice is fundamental and, with a view to facilitating better access to justice, the European Council at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extra-judicial procedures to be created by the Member States.
- (3) In May 2000 the Council adopted Conclusions on alternative methods of settling disputes under civil and commercial law, stating that the establishment of basic principles in this area is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice.
- (4) ...
- (5) The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.
- (6) ...
- (7) ***In order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.*** [emphasis added]

7.13 It is clear from these paragraphs of the preamble that the intention of the EU Mediation Directive is to set out the basic principles so that there would be a “predictable legal framework” for the development of mediation in the various member states of the European Union.

7.14 This approach is consistent with the approach adopted by the UNCITRAL Model Law on International Commercial Conciliation. The 14 Articles contained in the UNCITRAL Model Law on International Commercial Conciliation only set out the broad principles concerning mediation and do not go into specific details. As and when appropriate, the enacting state is encouraged to provide more specific legislative provisions.<sup>93</sup>

7.15 On the national level, one of the best known model laws on mediation is the Uniform Mediation Act, which was approved by the National Conference of Commissioners on Uniform State Laws and recommended for enactment in all the states within the United States in May 2001. Though not entirely free from criticism, the Uniform Mediation Act attracted wide support and paved the way for

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<sup>93</sup> For instance, Article 14 of the UNCITRAL Model Law states that a settlement agreement reached through conciliation is binding and enforceable, and it goes on to say that the enacting states may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement.

the enactment of state legislation based on its terms in a number of US states.<sup>94</sup>

7.16 Further examples of legislation on mediation enacted in other jurisdictions include:

- (1) Mediation Act 2004 (Act No. 8 of 2004) of the Republic of Trinidad and Tobago (assented to on 27 February 2004);
- (2) Mediation Act (Act XVI of 2004) (Malta);
- (3) Mediation Act (No. 110/17.12.2004) (Bulgaria);
- (4) Mediation Act 1997 (No. 61 of 1997) (Australian Capital Territory);
- (5) International Conciliation and Arbitration Act 1993 (Bermuda);
- (6) Dispute Resolution Centres Act 1990 (Queensland) (Part 4); and
- (7) Farm Debt Mediation Act 1994 (New South Wales).

7.17 In Mainland China, mediation has a long history. Put shortly, there is people's mediation (which concerns mainly, if not exclusively, community disputes) and judicial or court-based mediation.<sup>95</sup> At present China does not have a uniform mediation law that is directed at mediation fundamentals and procedures although it has implemented provisions in several laws that refer to mediation.<sup>96</sup> The Mainland Judiciary is very much in favour of using mediation as a means of dispute resolution so as to reduce the ever increasing court cases. The Ministry of Justice is currently working on a draft Mediation Law with a view to further promoting the use of mediation in Mainland China, although the exact time when this new Mediation Law will be introduced remains to be seen.

### ***Reasons for legislation on mediation***

7.18 The Working Group appreciates and supports the need to maintain the flexibility of the mediation process. It also recognizes that excessive legislative control over the conduct of mediation will be counter-productive to the healthy development of mediation in Hong Kong. Having considered and balanced the pros and cons and the recommendation of the Sub-group, the Working Group sees the desirability of having a mediation statute. The following are the key advantages in introducing legislation on mediation in Hong Kong.

7.19 First, legislation on mediation can provide a proper legislative framework within which mediation can be conducted in Hong Kong. A proper legal framework can provide a good platform for the further development of mediation in a proper manner, whereas legislation that seeks to regulate mediators and the mediation process may stifle the healthy development of mediation.

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<sup>94</sup> Nadja Alexander, *ibid*, at page 31.

<sup>95</sup> See: (1) 宋朝武著 《調解立法研究》(中國政法大學出版社)(2008); (2) 張延爛主編 《調解銜接機制理論與實踐》(Mediation Principles and Practice)(Xiamen University Press); (3) Rufus v. Rhoades, Daniel M. Kolkey & Richard Chernick (ed), "Practitioner's Handbook on International Arbitration and Mediation" (2<sup>nd</sup> ed.), Juris, Chapter III.2 (China), §2.07, at page 593.

<sup>96</sup> Sarah E. Hilmer, "Mediation in the People's Republic of China and Hong Kong (SAR)", International Commerce and Arbitration, Vol. 2, Schwenzer Ingeborg (series editor), Eleven International Publishing, The Netherlands, 2009 at page 45.

7.20 In the context of Hong Kong, a legal framework for mediation can address some of the areas in which the law is uncertain, such as confidentiality, admissibility and enforcement of agreement to mediate.

7.21 As pointed out in paragraph 7 of the preamble to the EU Mediation Directive quoted above, legislation on mediation can ensure that parties having recourse to mediation can rely on a predictable legal framework. The situation is analogous to that of arbitration. The Arbitration Ordinance aimed at and has been successful in providing a legal framework for arbitration in Hong Kong.

7.22 Second, there is the issue of legitimisation. As mediation is still at a relatively early stage of development in Hong Kong, there remains some degree of skepticism amongst the general public and even some professionals (including legal professionals) as to whether mediation really works or its status as a legitimate or proper means of alternative dispute resolution. Legislation on mediation could, in effect, serve as the government's and the legislature's 'stamp of approval' to the process and thereby advance the acceptance of mediation by the legal profession and the general public.

7.23 Third, from the education point of view, a well-drafted and lucid statute on mediation could inform the general public (and professionals who are involved in dispute resolution) about mediation, especially what it is (and what it is not), how it works (and how it should not work) and what can be achieved by making proper use of mediation as a means of alternative dispute resolution.

7.24 Fourth, as corollary of the second and third reasons discussed above, a mediation statute could serve to promote mediation to the general public and the legal profession.

7.25 Fifth, a mediation statute can assist in the promotion of Hong Kong as an international dispute resolution centre. As one of first few jurisdictions adopting the UNCITRAL Model Law on International Commercial Arbitration, Hong Kong has successfully established herself as an international dispute resolution centre, especially in the Asian region. The introduction of a mediation statute could contribute to that effect. As noted above, the international trend is moving towards legislation on mediation. In the EU, for example, not only is there the UNCITRAL Model Law on International Commercial Conciliation, but there is also the EU Mediation Directive (which will serve as a further impetus to the introduction of legislation on mediation by the member states). In light of these international developments, a mediation statute could help Hong Kong demonstrate to the world, especially the international business community that Hong Kong is not lagging behind in the development of ADR. Armed with a mediation statute, Hong Kong would have additional ammunition to promote herself and fortify her status as an international dispute resolution centre.

### ***Recommendation***

7.26 For these reasons, the Working Group recommends that there should be legislation on mediation. It is stressed that the legislation should only aim at

providing an appropriate legal framework for the conduct of mediation and not a straight-jacket which would unduly hamper the flexibility of the mediation process and the future development of mediation in Hong Kong.

**Recommendation 32**

**Hong Kong should have legislation on mediation, which should be aimed at providing a proper legal framework for the conduct of mediation in Hong Kong. However, the legislation should not hamper the flexibility of the mediation process.**

***Separate legislation or amending existing legislation***

7.27 Having recommended that there is a need for legislation on mediation, the next question is how to proceed with the recommended enactment. The following three options were considered:

- (1) First, the enactment of a Mediation Ordinance, as a new stand-alone statute.
- (2) Second, the introduction of new legislative provisions into the Arbitration Ordinance and then change the title of the Ordinance appropriately (for instance, Arbitration and Mediation Ordinance, or Alternative Dispute Resolution Ordinance).
- (3) Third, the necessary legislative provisions can be introduced into such existing legislation as may be appropriate. For instance, some of the provisions can be introduced into the Arbitration Ordinance and some into the Evidence Ordinance (such as provisions concerning confidentiality and privilege).

7.28 The advantage of adopting the first option (i.e. separate legislation on mediation) is convenience or easy access. Whilst provisions in other Ordinances may remain applicable when a particular issue arises, separate legislation on mediation will serve the purpose of setting out all the primary legislative provisions governing mediation in Hong Kong in one place. Convenience to the legal profession aside, this advantage is of particular importance to members of the general public who do not have legal training since it would not be necessary for them to go through different statutes before locating the relevant legislative provisions. Equally, for people outside Hong Kong, separate legislation on mediation can also provide easy reference on our law on mediation.

7.29 The second option (i.e. adding the necessary provisions to the existing Arbitration Ordinance) may appear to have certain attractions. Both arbitration and mediation are alternative disputes resolution mechanisms. Hence, to include legislative provisions on mediation in the Arbitration Ordinance may create an umbrella statute dealing with alternative dispute resolution. One may even argue that such an umbrella statute can provide a platform for including

further legislative provisions on ADR as and when the need arises.

7.30 In this regard, reference can be made to the experience of the UNCITRAL<sup>97</sup> Model Law on International Commercial Arbitration.<sup>98</sup> At UNCITRAL, there had been a suggestion that there should be a reference in a preamble of the Model Law to conciliation as an additional method of settling disputes or even that the Model Law should include some provisions on mediation or conciliation.<sup>99</sup> Eventually, the idea of such a preamble was abandoned and the suggestion to include some provisions on conciliation was not adopted. However, several states refer to mediation or conciliation in their Model Law-based arbitration legislation. The manner in which this was done differs. Some make this reference only in one or two provisions,<sup>100</sup> others have inserted a complete set of provisions regulating mediation or conciliation and have also included conciliation in the title of their statute.<sup>101</sup>

7.31 In the context of Hong Kong, it was considered undesirable to merge mediation with arbitration and deal with both of them in the same statute.

7.32 Although both of them are means of alternative dispute resolution, arbitration differs significantly from mediation in a number of ways. Most importantly, arbitration involves adjudication by an independent third party whereas mediation (especially facilitative mediation, which is the one most commonly conducted in Hong Kong and the focus of the proposed legislation on mediation) does not involve any adjudication. Instead, facilitative mediation is a process whereby the mediator facilitates the parties to reach a voluntary settlement. Given the differences in the respective nature of arbitration and mediation, the attraction of dealing with both of them in the same piece of legislation is more apparent than real.

7.33 As the use of mediation (other than in relation to construction disputes) is still at a relatively early stage of development in Hong Kong, it is not surprising that there is some confusion between arbitration and mediation (especially amongst members of the public who do not have legal training and who have no experience with dispute resolution). Practitioners from time to time have come across clients asking about the difference between arbitration and mediation or who believe that there is no real difference between the two. Hence, separate legislation dealing solely with mediation can assist in avoiding confusion and in the promotion of mediation as an additional means of dispute resolution distinct from arbitration. The Hon. Philip Ruddock MP, the former Attorney General of Australia, once said that the Australian government promoted the use of ADR so as to ensure, among other things, that litigants are in a position to make an informed choice whether to

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<sup>97</sup> United Nations Commission on International Trade Law.

<sup>98</sup> For a detailed discussion in this aspect, see: Pieter Sanders, "Unity and Diversity in the Adoption of the Model Law", *Arbitration International*, Vol. 11, No. 1, 1, at pages 26-29.

<sup>99</sup> In this specific context, the terms "mediation" and "conciliation" are interchangeable.

<sup>100</sup> Hong Kong is one of such examples, see sections 2A and 2B of the Arbitration Ordinance.

<sup>101</sup> Examples include Bermuda (i.e. International Conciliation and Arbitration Act 1993, sections 3 to 21 of Part II and sections 22 to 38 of Part III) (see: Nigel Rawding, "ADR: Bermuda's International Conciliation and Arbitration Act 1993", *Arbitration International*, Vol. 10, No. 1, 99) and Nigeria (Arbitration and Conciliation Decree 1988), Part III). Further, in the USA, conciliation or mediation has been generally referred to when adopting the Model Law in various states.

pursue litigation or other means of alternative dispute resolution.<sup>102</sup> Such a policy is consistent with the aim of developing mediation in Hong Kong. To ensure that parties to a dispute can make an informed choice between litigation, arbitration and mediation, there is a need to separate mediation from arbitration and stress their differences.

7.34 Arbitration has been successfully promoted in Hong Kong and is very popular as a means of alternative dispute resolution. Traditionally, arbitration was perceived to be more efficient and less costly than litigation. Whilst these advantages remain largely true in most cases, there is a growing concern that arbitration is getting more and more expensive and sometimes even more expensive than litigation. This is understandable and very often this is not the fault of any party. In litigation, the litigants do not have to pay for the service of the Judge nor the use of court room whereas the parties to arbitration have to pay the arbitrator or a panel of 3 arbitrators on top of the costs for the venue. Any confusion between arbitration and mediation may unnecessarily affect the healthy development of mediation, especially at its early stage when mediation is promoted as a more cost-effective means to resolve disputes.

7.35 Further, reform of the Arbitration Ordinance is already underway and the new Arbitration Ordinance is expected to be enacted in the near future. In the circumstances, it would not be desirable to complicate the reform of the Arbitration Ordinance.

7.36 The third option (i.e. adding the necessary provisions to various relevant statutes such as the Evidence Ordinance) would result in the provisions concerning mediation being scattered around different pieces of legislation. It would be inconvenient and time consuming to locate the relevant provisions, especially in the case of members of the public who do not have legal training. Unless the ultimate decision is just to provide legislative provisions on very limited areas concerning mediation, this approach is less than satisfactory.

7.37 Having considered these three options, the Working Group is of the view that the first option should be adopted. Accordingly, the enactment of a separate statute on mediation is recommended.

**Recommendation 33**

**There should be the enactment of a Mediation Ordinance, instead of introducing legislative provisions relating to mediation into the existing Arbitration Ordinance or other Ordinances.**

<sup>102</sup> The Hon Philip Ruddock MP (Attorney General), 'Towards a less litigious Australia: The Australian Government's Alternative Dispute Resolution initiatives', 2004, 23 (1) "The Arbitrator & Mediator" at page 1. See also: "Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters", November 2006, National Alternative Dispute Resolution Advisory Council, para. 1.8

## Scope of the proposed legislation on mediation

7.38 This section discusses the various key areas that the proposed legislation on mediation (“Proposed Mediation Ordinance”) could cover.

### *Definitions of key terminology*

7.39 An interpretation section is plainly necessary both as a matter of drafting technique and for the purpose of clarifying the applicability and scope of the Proposed Mediation Ordinance. This is also consistent with the approach adopted in Hong Kong since most of the Ordinances enacted in Hong Kong do contain an interpretation section setting out the definitions of the relevant terms and expressions.

7.40 A survey of the key mediation legislation in other jurisdictions shows that it is quite common for mediation statutes to include an interpretation section. Examples include the EU Mediation Directive, the Uniform Mediation Act, the Mediation Act 2004 enacted by the Republic of Trinidad and Tobago as well as the Mediation Act 2004 of Malta.

7.41 Apart from definitions that may be necessary or desirable as a matter of drafting, it is suggested that the following terms and expressions be defined in the Proposed Mediation Ordinance.

(i) *‘Mediation’*

7.42 As noted above, although the term ‘mediation’ has been widely used in both common law and civil law jurisdictions as well as in the international context, there is no universally accepted definition of ‘mediation’. Instead, different bodies and legislations have different definitions (although the different definitions do to a certain extent share certain common features).<sup>103</sup> This is perfectly understandable given the flexible nature of mediation.

7.43 For the purpose of delineating the scope of the Proposed Mediation Ordinance and its applicability, it is necessary to set out a definition of ‘mediation’ so that there will not be any misunderstanding as to exactly what type of mediation process the Proposed Mediation Ordinance is intended to deal with.

7.44 In reaching this conclusion, the Working Group is conscious of the flexible nature of mediation. Hence, too narrow a definition will not be workable and may even run contrary to the aim of providing a general legal framework for the conduct of mediation in Hong Kong. On the other hand, too loose a definition may defeat the very purpose of having a definition in the first place. Accordingly, a balance has to be struck between the two competing considerations, namely: (1) the need to provide a clear and workable definition so that the general public and the stakeholders would know precisely what sort of mediation process is covered by the Proposed Mediation Ordinance; and (2) the desirability of allowing sufficient

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<sup>103</sup> For a detailed discussion on the definition of ‘mediation’ and the historical development, see: David Spencer & Michael Brogan, *ibid*, at pages 3-9.

flexibility so that the future development of mediation will not be unnecessarily inhibited.

7.45 A survey of the key legislation on mediation reveals that the same approach has been adopted, viz., the provision of a definition on mediation in a flexible manner. Examples include the following:

(a) EC Directive - Article 3(a):

*“Mediation” means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. ...”*

(b) UNCITRAL Model Law on International Commercial Conciliation (2002) - Article 1(3):<sup>104</sup>

*“For the purpose of this Law, “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.”*

(c) Uniform Mediation Act (2001) - section 2(1):

*“Mediation” means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute”.*

(d) The Mediation Act 2004 of the Republic of Trinidad & Tobago - section 2:

*“mediation” means a process in which a Mediator facilitates and encourages communication and negotiation between the mediation parties, and seeks to assist the mediation parties in arriving at a voluntary agreement”.*

(e) The Mediation Act (Cap. 474) (Malta) - section 2:

*“mediation” means a process in which a mediator facilitates negotiations between parties to assist them in reaching a voluntary agreement regarding their disputes”.*

(f) The Dispute Resolution Centres Act 1990 (Queensland) - section 2(1)

*“mediation includes -*

(a) *the undertaking of any activity for the purpose of promoting the discussion and settlement of disputes;*

(b) *the bringing together of the parties to any dispute for that*

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<sup>104</sup> The UNCITRAL Model Law on International Commercial Conciliation only has a definition of “conciliation” and not “mediation”. However, its definition of “conciliation” includes mediation. In section 2(1) of the Arbitration Ordinance, the term “conciliation” is also defined to include mediation, see: Robert Morgan, “The Arbitration Ordinance of Hong Kong: A Commentary”, Butterworths, 1997, [2A.03] and its 1997 Supplement, [3.04] (where it was observed that although the terms “conciliation” and “mediation” are often used interchangeably, conciliation is generally understood to be a more active process than mediation).

- purpose, either at the request of one of the parties to the dispute or on the initiative of a director; and*
- (c) *the follow-up of any matter the subject of any such discussion or settlement.”*

7.46 Further, although not part of any legislation, it may be pertinent to note the following two definitions. First, the “Australian Standard - Guide to the prevention, handling and resolution of disputes - AS 4608 - 2004” defines mediation by reference to the NADRAC definition as follows:

*“A process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. ...”*

Second, CEDR defines mediation as follows:<sup>105</sup>

*“Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of the resolution.”*

7.47 Various approaches may be adopted to achieve the aim of providing an appropriate definition of the term ‘mediation’, namely:

- (1) a descriptive approach (i.e. to describe the mediation process by identifying the key elements of a facilitative mediation);
- (2) an inclusive approach (i.e. to state what the term includes);
- (3) an exclusive approach (i.e. to state what the term does not include, for example the definition may state that it does not include evaluative mediation or any form of mediation which involves the mediator advising the parties on the merits of their claims); or
- (4) a combination of some or all of the above approaches.

7.48 To achieve clarity, the Working Group recommends the last option, *viz.*, a combination of the approaches set out above, in that the definition should:

- (1) describe the process by identifying the key elements of a facilitative mediation, which would include: (a) the process is voluntary and the parties participate in the process pursuant to an agreement made by them; (b) the process is conducted by an independent third party (the mediator) who will maintain a neutral and impartial role throughout the process; (c) the process is confidential and privileged; (d) the role of the mediator is to assist the parties to identify issues, to explore options and alternatives and to reach a settlement agreement

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<sup>105</sup> See: “The CEDR Mediator Handbook”, 4<sup>th</sup> ed., at page 26.

- acceptable to the parties;
- (2) expressly state that the mediator will not in any way determine the dispute or give any opinion or evaluation to any party to the dispute;
  - (3) expressly state what processes do not fall within the definition (e.g. without prejudice negotiation between the parties or their legal representatives without the involvement of a third party, arbitration (save where the arbitrator acts as a mediator with the consent of the parties), expert determination or third party neutral evaluation).

7.49 Although a definition along this line may be slightly longer than what one may usually find in mediation statutes enacted in other jurisdictions, this can achieve clarity and ensure that the general public properly understands the process dealt with by the Proposed Mediation Ordinance. Besides, such a definition will not be contrary to the aim of allowing sufficient flexibility so as not to inhibit the future development of mediation in Hong Kong.

(ii) *'Mediator'*

7.50 Since the Proposed Mediation Ordinance will surely have provisions that touch on or refer to mediators, a definition of the term 'mediator' is necessary. Once the definition of 'mediation' is fixed, there should not be any difficulty in drafting an appropriate definition of 'mediator'. The simplest option is to define 'mediator' as the independent third party who conducts the mediation as defined in the Proposed Mediation Ordinance.

7.51 In jurisdictions where there are systems of accreditation or registration of mediators, their mediation statutes often define the term 'mediator' by reference to accreditation or registration.<sup>106</sup> Until and unless Hong Kong sees fit and is in a position to establish such a system of accreditation or registration, it will be neither desirable nor practical to adopt such an approach. In this regard, it is also pertinent to note that the Arbitration Ordinance does not define the term 'arbitrator' by reference to any accreditation or qualification.

(iii) *'Mediation Agreement'*

7.52 The question of whether it is necessary to have a definition of the term 'mediation agreement' depends on whether the Proposed Mediation Ordinance will make provision for the enforcement of a mediation agreement. Unless it is eventually resolved that the Proposed Mediation Ordinance should provide for the enforcement of mediation agreements (such as by way of stay of court proceedings commenced in breach of a mediation agreement), there does not appear to be any real need to insert a definition of the expression 'mediation agreement'. Many of the mediation statutes enacted in other jurisdictions do not have such a definition.

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<sup>106</sup> See, for instance, the definition of 'certified mediator' in section 2 of the Mediation Act 2004 (Republic of Trinidad and Tobago) and the definition of 'registered mediator' in section 3(1) of the Mediation Act 1997 (Australian Capital Territory).

(iv) *‘Mediated Settlement Agreement’*

7.53 Whilst there should not be any difficulty in defining the expression ‘mediated settlement agreement’, many of the mediation statutes enacted in other jurisdictions do not contain such a definition. However, the question of whether it is necessary to include a definition of ‘mediated settlement agreement’ depends on whether there should be any statutory mechanism for enforcing settlement agreements.

7.54 Unless the Proposed Mediation Ordinance contains provisions dealing with enforcement of mediated settlements, there does not appear to be any need in defining the expression ‘mediated settlement agreement’.

**Recommendation 34**

**There should be an interpretation section in the Proposed Mediation Ordinance setting out the key terminology such as ‘mediation’ and ‘mediator’. As regards the expressions ‘mediation agreement’ and ‘mediated settlement agreement’, they should be defined if the Proposed Mediation Ordinance is to contain provisions dealing with their enforcement.**

***Objectives and principles***

7.55 Section 2AA of the Arbitration Ordinance (Cap. 341) sets out its objective and principles. It reads as follows:

- “(1) The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.
- (2) This Ordinance is based on the principles that:
  - (a) subject to the observance of such safeguards as are necessary in the public interest, the parties to a dispute should be free to agree how the dispute should be resolved; and
  - (b) the court should interfere in the arbitration of a dispute only as expressly provided by this Ordinance.”

7.56 Paragraphs (1) to (7) of the preamble to and Article 1 of the EU Mediation Directive also set out the objectives regarding mediation. Similarly, though not in the context of mediation, the current version of the Rules of the High Court (Cap. 4A) (which was amended as a result of the Civil Justice Reform) has a specific Order (Order 1A) setting out the underlying objectives of the Rules.

7.57 The Working Group is of the view that it is desirable to have such a section in the Proposed Mediation Ordinance:

1. A specific section setting out the objective and principles will serve to

inform the general public the aims of the Proposed Mediation Ordinance. It can also be viewed as having an educational value (which is one of the benefits of having a mediation statute).

2. Similar to section 2AA of the Arbitration Ordinance, such a proposed section may also be used as a guiding principle when the court deals with matters covered by the Proposed Mediation Ordinance or mediation generally.

7.58 The objectives may be stated along the following line:

1. to promote, encourage and facilitate the fair, speedy and cost-effective resolution of disputes by mediation;
2. save in excepted circumstances provided for in the Proposed Mediation Ordinance, to protect the confidential nature of mediation and also the privilege attached to communications made in the course of mediation.<sup>107</sup>

**Recommendation 35**

**There should be a section in the Proposed Mediation Ordinance setting out its objectives and underlying principles.**

***Mediation agreement and enforcement***

7.59 Putting aside court-compelled mediation,<sup>108</sup> mediation is a consensual process and the ultimate basis of mediation is contractual. Viewed thus, it is necessary to consider whether the Proposed Mediation Ordinance should contain provisions dealing with mediation agreements and their enforcement.

7.60 The key questions that call for consideration include:

1. whether it is necessary to set out a definition of ‘mediation agreement’, if yes:
  - (a) how should the definition be worded; and
  - (b) should the definition set out the minimum requirements (on contents and formality) to be fulfilled before a mediation agreement will be recognised for the purpose of the Proposed Mediation Ordinance;
2. whether there should be any provisions dealing with the enforcement of mediation agreement in the event one of the parties thereto

<sup>107</sup> In the event it is thought desirable to put in place a statutory mechanism to facilitate easy enforcement of mediated settlement, it will be desirable to add a third objective as follows: “to facilitate the enforcement of mediated settlement agreements”.

<sup>108</sup> Compulsory mediation and provision of mediation service by the Judiciary is not recommended at this stage.

commences legal proceedings in breach of a mediation agreement.

7.61 As observed above, the question of whether it is necessary to have a definition of the term 'mediation agreement' depends on whether the Proposed Mediation Ordinance will make provisions for the enforcement of mediation agreement. In the circumstances, the following discussion will first deal with the question of whether the Proposed Mediation Ordinance shall contain provisions dealing with enforcement of mediation agreement.

#### *Common law position uncertain*

7.62 Although mediation has been used as a means of ADR in common law jurisdictions for quite some time, it remains uncertain whether and when a mediation agreement will be enforceable.<sup>109</sup> One commentator went so far as to suggest that the courts have not kept pace with the commercial world's acceptance of mediation.<sup>110</sup>

7.63 The courts in England and Wales have generally maintained the view that an agreement to mediate is not enforceable for one or all of the following reasons: (1) such agreements are merely agreements to agree and thus unenforceable under general contractual principle;<sup>111</sup> (2) the requirement to negotiate in good faith does not work because it is impossible to ascertain whether a party mediated in good faith; or (3) such agreements are uncertain if they fail to specify the mediation process with sufficient clarity.

7.64 Well-known authorities concerning agreement to negotiate include *Courtney & Fairbain Ltd. v Tolaini Brothers (Hotels) Ltd.*,<sup>112</sup> which was approved by the House of Lords in *Walford v Miles*.<sup>113</sup> These cases led the court in *Paul Smith v H&S International Holdings Inc.*<sup>114</sup> to accept, as correct, a concession that an agreement to submit a dispute to mediation did not create enforceable legal obligations. In *Halifax Financial Services Ltd. v Intuitive Systems Ltd.*,<sup>115</sup> McKinnon J. treated *Walford's* case as authority against the enforcement of agreements to engage in good faith negotiations.

7.65 On the other hand, there is the decision of *Cable & Wireless plc v IBM United Kingdom Ltd.*<sup>116</sup> where Coleman J. upheld a clause to negotiate in good faith to resolve disputes through ADR as recommended by CEDR. In reaching this conclusion, Coleman J. observed as follows:<sup>117</sup>

“... the English Courts should nowadays not be astute to accentuate

<sup>109</sup> For discussions on this topic, see: Karl Mackie, David Miles, William Marsh & Tony Allen, *ibid* at section 6.5 (pages 106-120; Lye Kah Cheong, “A Persisting Aberration: The Movement to Enforce Agreements to Mediate”, (2008) 20 *SACLJ* 195, para. 2.

<sup>110</sup> Lye Kah Cheong, *ibid*, para. 2.

<sup>111</sup> For a brief discussion of this principle, see: “Chitty on Contract”, 13<sup>th</sup> ed., Vol. 1, paras. 2-136 to 2-138.

<sup>112</sup> [1975] 1 WLR 297.

<sup>113</sup> [1992] 2 WLR 174 (see especially per Lord Ackner at pages 181C-182A).

<sup>114</sup> [1991] 2 Lloyd's Rep. 127.

<sup>115</sup> [1999] 1 All ER (Comm) 303.

<sup>116</sup> [2003] BLR 89.

<sup>117</sup> *Ibid*, at page 95.

*uncertainty (and therefore unenforceability) in the field of dispute resolution references. There is now available a clearly recognised and well-developed process of dispute resolution involving sophisticated mediation techniques provided by trained mediators in accordance with procedures designed to achieve settlement by the means most suitable for the dispute in question. ...*

...

*For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in *Dunnet v Railtrack* ...”*

7.66 In Australia, the courts are more prepared to enforce mediation agreements. In *AWA Ltd. v Daniels*,<sup>118</sup> Rogers C.J. gave a direction after the trial had commenced that the parties enter into mediation and, despite the defendants’ objection, adjourned the trial (in an unreported judgment handed down on 24 February 1992).<sup>119</sup> Rogers C.J. held that there was a clear power in any court to control an abuse of its process and such abuse would include commencing proceedings in breach of a conciliation agreement. He rejected the argument that conciliation where one party is reluctant to proceed is necessarily futile. Another often cited authority in this regard is *Hooper Bailie Associated Ltd. v Natcon Group Pty Ltd.*<sup>120</sup> where Giles J. considered the English authorities but concluded that a mediation agreement is in principle enforceable if the conduct required of the parties for participation in the process is sufficiently certain. Giles J. also held that the court may indirectly enforce a mediation agreement as a pre-condition to arbitration or legal proceedings by exercising its inherent jurisdiction to stay or adjourn the relevant proceedings.<sup>121</sup>

7.67 The US courts have not established a fully consistent approach and a comparison of state legislation reveals a further divergence of views. For instance, the Arizona ADR statute appears to contemplate that mediation clauses are enforceable (although this is not expressly stated), whereas the Florida rules expressly prohibit mediators from acting where either party opposes. However, a number of US cases have decided in favour of enforcing mediation agreement.<sup>122</sup>

7.68 In Hong Kong, the position is no clearer. First, in *Kennon Engineering Ltd. v Nippon Kokan Koji Kabushiki Kaisha*,<sup>123</sup> the clause provided for any dispute to be “settled by the Mediation Procedure under the laws of Hong Kong – SAR of PRC” with “[t]he award rendered by the mediation procedure shall be final and binding”. The dispute resolution clause in question was less than well drafted and the court held that it was not an arbitration clause and refused to stay proceedings

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<sup>118</sup> [1992] 2 ACLC 933.

<sup>119</sup> See the discussion in Nigel Rawding, “ADR: Bermuda’s International Conciliation and Arbitration Act 1993”, Vol. 10(1) “Arbitration International” 99, at pages 101-102.

<sup>120</sup> [1992] 28 NSWLR 194.

<sup>121</sup> See also *Elizabeth Bay Developments Pty Ltd. v Boral Building Services Pty Ltd.* [1995] 36 NSWLR 709, where Giles J. followed his own decision in *Hooper* but held that an agreement to mediate whereby parties merely agreed to sign a mediation agreement the terms of which have not been settled beyond the necessity that they be consistent with specified guidelines is uncertain and unenforceable.

<sup>122</sup> Nigel Rawding, *ibid*, at page 102.

<sup>123</sup> Unrep., HCA 3492 & 3973/2002 and HCCT 21/2003, Deputy High Court Judge Muttrie.

in favour of mediation. Putting aside the drafting defects, this case was decided on the unique facts before the court since the parties had attempted to appoint mediators but failed to agree on the mediation procedure. In such circumstances, it is not surprising that the court declined to grant a stay. However, on the question of whether mediation agreement is in law enforceable, this decision offered little, if any, guidance.

7.69 Next in point of time is Reyes J.'s decision in *Hyundai Engineering & Construction Co. Ltd. v Vigour Ltd.*<sup>124</sup> The disputes arose out of construction contracts containing dispute resolution clauses. The plaintiff, whilst keen on resolving the disputes by negotiation, wanted to preserve its rights under the dispute resolution clauses to refer the matter to arbitration. The parties eventually entered into an agreement to negotiate and mediate which provided that: "*The parties will not continue ... arbitration or court action forever ... and any right to sue each other will not be exercised any more mutually and the parties will start to discuss together to resolve any differences ... [and] anything that cannot be finalised will be resolved and decided by the managing directors ... provided failing an ultimate agreement then both parties shall ... submit to ... mediation*". Negotiation failed and the plaintiff suggested mediation but the defendant refused. One of the issues before the court was whether the agreement to negotiate and mediate was legally enforceable.

7.70 Having reviewed the English authorities and following *Cable & Wireless Plc's* case discussed above, Reyes J. held that there is no hard and fast rule that agreements to negotiate or mediate in good faith are *per se* unenforceable. Further, a failure to stipulate a mediation procedure or time frame would not be fatal to the enforceability of the obligation to mediate so long as it is possible objectively to assess whether or not a party has acted in accordance with the agreement by taking or failing to take certain obvious minimum steps within a reasonable time. A party could not opt out of mediation when it has entered into an agreement to mediate in good faith.

7.71 On appeal,<sup>125</sup> Reyes J.'s decision was reversed. The Court of Appeal held that the agreement to negotiate and mediate was imprecise and unenforceable. Besides, the words "submit to third party mediation procedure" did not add anything and thus the clause was unenforceable for lack of certainty. Although this decision to some extent demonstrates the Court of Appeal's approach to a mediation agreement, it remains a decision on its own facts in that it is a decision on the specific clause. The clause in question was drafted in ways different to the usual mediation clause. It thus remains uncertain whether, as a matter of law, a mediation agreement is legally enforceable in Hong Kong.

### *Competing considerations*

7.72 The competing considerations are cogently summarised by Giles J. in *Hooper Bailie Associated Ltd. v Natcon Group Pty Ltd.*<sup>126</sup> as follows:<sup>127</sup>

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<sup>124</sup> [2004] 3 HKLRD 1.

<sup>125</sup> [2005] 3 HKLRD 723 (Rogers VP, Le Pichon and Yuen JJA).

<sup>126</sup> [2002] 28 NSWLR 194.

<sup>127</sup> *Ibid.*, at page 206A-C.

*“Conciliation or mediation is essentially consensual and the opponents of enforceability contend that it is futile to seek to enforce something which requires the co-operation and consent of a party when co-operation and consent can not [sic.] be enforced; equally, they say that there can be no loss to the other party if for want of co-operation and consent the consensual process would have led to no result. The proponents of enforceability contend that this misconceives the objectives of alternative dispute resolution, saying that the most fundamental resistance to compromise can wane and turn to co-operation and consent if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, in particular where a skilled conciliator or mediator is interposed between the parties. What is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come. ...”*

7.73 The arguments for and against enforcing mediation agreement are fairly evenly balanced. From a practical point of view, there is much to be said in support of the contention against enforcement. An unwilling party is unlikely to be fully co-operative or interested even if compelled to mediate. In such circumstances, it might be a waste of time and costs to force the unwilling party to mediate. On the other hand, those who have experience in mediation must have come across cases that initially look unlikely to settle but which were ultimately settled. This lends support to the opposite school that there is benefit in compelling parties to participate in the process (even if they appear un-cooperative or unlikely to consent to a settlement). Besides, even a failed mediation may bring some benefit in that it might narrow the dispute although no overall settlement could be achieved.

#### *Legislation in other jurisdictions*

7.74 Research did not reveal any specific legislative provisions dealing with the enforceability or enforcement of mediation agreements in any other common law jurisdictions.

#### *Recommendation*

7.75 The Working Group does not recommend the introduction of any statutory provisions to deal with the enforceability of mediation agreements.

7.76 Whilst the arguments for and against enforcement are fairly evenly balanced, the Working Group is more inclined to accept the view that there is not much point in providing for the enforcement of a mediation agreement when one of the parties no longer wishes to mediate.

7.77 Even if a statutory mechanism is introduced to enforce mediation agreements (such as one similar to the enforcement of an arbitration agreement under the Arbitration Ordinance), the mechanism would inevitably involve court proceedings. However summary the procedure may be, considerable time and

costs would be involved before adjudication can be obtained from the court on the enforceability of the relevant mediation agreement. This is contrary to the intended benefit of having mediation, which is supposed to be a speedy and cost-effective means to resolve dispute.

7.78 In theory, a mediation agreement can be enforced by specific performance, injunction and an award of damages.<sup>128</sup> However, like cases involving breach of an arbitration agreement, the only realistic means of enforcement would be a stay of the court proceedings. The practical effect of a stay is similar to an order of specific performance of the mediation agreement or an injunction restraining the continuing of the legal proceedings brought in breach of a mediation agreement. An award of damages is unlikely and will involve the difficult question of how the quantum of damages (arising from the loss of opportunity to mediate) should be assessed.

7.79 If the only practical remedy is a stay of proceedings, this (as can be seen from the Australian authorities discussed above) can be granted by the court under its inherent jurisdiction or alternatively by way of case management (with which the court is supposed to be actively involved under the CJR). There is therefore no need for any legislative provision to enforce a mediation agreement.

7.80 Notwithstanding the analysis outlined above, the Sub-group could see the advantage of putting in place a summary procedure for enforcing mediation agreement. As stated above, the arguments for and against enforcement are fairly evenly balanced. Besides, since the cases concerning enforcement are far from consistent, it will be desirable to resolve the uncertainty by including legislative provisions in the Proposed Mediation Ordinance so that the position can be made clear. Once this is made clear, parties would be less likely to renege on a mediation agreement.

7.81 In the event it is thought desirable to include a statutory scheme for enforcing mediation agreements, the scheme can be designed along the lines of the scheme for enforcing arbitration awards. Apart from inserting an appropriate provision in the Proposed Mediation Ordinance, the Rules of the High Court would have to be amended to deal with the procedure. One option is to introduce a separate Order to the Rules of the High Court specifically dealing with application for enforcement of a mediation agreement. The question of speed will be one of the key factors to be considered. Apart from making it a summary process, it may be desirable to have all such applications dealt with by a designated judge (such as the Judge of the Construction and Arbitration List, in which event the name of this specialist list will have to be changed accordingly). It will also be desirable to restrict the right of appeal so as to avoid delay.

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<sup>128</sup> See the discussion in Laurence Boulle, "Mediation: Principles, Process, Practice", Butterworths, 1996, at pages 272-275.

### **Recommendation 36**

**The Working Group does not recommend the introduction of legislative provisions dealing with enforcement of a mediation agreement. However, if it is considered appropriate to introduce such legislative provisions, the enforcement scheme can be designed along the lines of the scheme for enforcing arbitration agreements (i.e. a stay of proceedings pending mediation).**

### ***Mediation process***

7.82 The Arbitration Ordinance contains provisions relating to the conduct of arbitration.<sup>129</sup> The questions that call for consideration are: Do we need to include similar provisions in the Proposed Mediation Ordinance? If yes, what provisions should be included to deal with the mediation process (e.g. appointment of mediators, the role and duty of a mediator, the mediation procedure and representation in the mediation process).

7.83 Subject to a few exceptions dealt with below, the Working Group took the view that no such statutory provisions are necessary.

7.84 Although both arbitration and mediation are means of alternative dispute resolution, there are vast differences between the two. The fact that it is necessary to deal with the process of arbitration in the Arbitration Ordinance does not mean that similar provisions should be included in the Proposed Mediation Ordinance. In particular, a mediation process is far more flexible than an arbitral process. Statutory provisions dealing with the mediation process may be counter-productive as they may reduce the flexibility of the process. Instead, matters concerning the mediation process should be left to the parties and the mediator in question.

7.85 Notwithstanding the need to preserve flexibility of the mediation process, a few areas should be dealt with by the Proposed Mediation Ordinance.

7.86 The first area concerns the appointment of mediators.

7.87 Clause 32 of the Arbitration Bill currently before the Legislative Council makes provisions as to the appointment of mediators.<sup>130</sup> Clause 32 reads, *inter alia*, as follows:

- “(1) If –  
(a) any written agreement provides for the appointment of a

<sup>129</sup> Sections 2GA to 2GG of the Arbitration Ordinance.

<sup>130</sup> Section 2A of the current Arbitration Ordinance only deals with situation where the provision for the appointment of a conciliator is contained in an arbitration. The scope of clause 32 is wider in that it refers to “any written agreement” and not just arbitration agreement.

- mediator by a person who is not one of the parties; and
- (b) that person –
    - (i) refuses to make the appointment; or
    - (ii) does not make the appointment within the time specified in the arbitration agreement or, if not time is so specified, within a reasonable time after being requested by any party to make the appointment,

the HKIAC may, upon application of any party, appoint a mediator.

- (2) An appointment made by the HKIAC under subsection (1) is not subject to appeal.”

7.88 It is considered that such a statutory provision is both necessary and desirable. Since the Arbitration Bill has already been introduced into the Legislative Council and it is uncertain when it would be enacted, it is suggested that:

1. clause 32 of the Arbitration Bill should remain for the consideration of the Legislative Council as part of the new Arbitration Ordinance; and
2. if it is eventually decided to enact the Proposed Mediation Ordinance, a similar provision along the line of clause 32 of the Arbitration Bill (but without reference to arbitration so that the provision can be applied even if the agreement only deals with mediation but not arbitration and mediation) should be included in the Proposed Mediation Ordinance.

7.89 The second area concerns representation. Section 2F of the Arbitration Ordinance provides that sections 44, 45 and 47 of the Legal Practitioners Ordinance do not apply to arbitration proceedings, the giving of advice and the preparation of documents for the purpose of arbitration proceedings as well as any other things done in relation to arbitration proceedings except where it is done in connection with court proceedings arising out of an arbitration agreement or arising in the course of or resulting from arbitration proceedings. The aim of section 2F of the Arbitration Ordinance is to enable non-lawyers or foreign lawyers to participate in arbitration proceedings conducted in Hong Kong.

7.90 The Working Group is of the view that it is desirable to insert a similar provision in the Proposed Mediation Ordinance:

1. The process of mediation is even less formal than arbitration proceedings. Since it is thought appropriate to allow non-lawyers to represent parties in arbitration proceedings, there is all the more reason to allow non-lawyers to represent parties in mediation.
2. Mediation does not involve any determination of the parties' rights and liabilities. No legal submissions would be required. The aim of mediation is to assist the parties to find a solution to their disputes or differences. There is no need to restrict representation to lawyers.
3. There are many types of mediation and the parties to mediation may come from all walks of life. While parties to certain types of dispute

(such as substantial commercial disputes) may be willing to engage lawyers to represent them in mediation, it would unrealistic to expect parties to other types of mediation (such as community mediation or peer mediation) to retain lawyers.

4. Such a provision will give an option to parties in dispute to decide whether or not to engage lawyers; it does not prevent parties from engaging lawyers if they so wish. Hence, it will not affect a party's right to legal advice or legal representation.

7.91 Similar provisions can be found in some of the mediation statutes enacted in other jurisdictions. Examples include section 25 of Malta's Mediation Act 2004 and Article 12(2) and (3) of Bulgaria's Mediation Act 2004.

#### **Recommendation 37**

**There is no need for the Proposed Mediation Ordinance to include any provisions to deal with the mediation process, save that there should be: (a) a provision dealing with the appointment of the mediator along the line of clause 32 of the Draft Arbitration Bill; and (b) a provision (similar to section 2F of the Arbitration Ordinance) that sections 44, 45 and 47 of the Legal Practitioners Ordinance do not apply so that non-lawyers or foreign lawyers can participate in a mediation conducted in Hong Kong.**

### ***Confidentiality and privilege***

7.92 Although confidentiality and privilege are two different concepts and either of them can exist in relation to materials or communications without the other being present. However, it is convenient to deal with both of them together since they do overlap and similar policy considerations apply. The question of whether evidence of certain communications made in the course of mediation should be admitted in a subsequent court or arbitration hearing raises questions of both confidentiality and privilege.

7.93 It is generally accepted that communications made during mediation should be confidential and protected by privilege. However, there is always the tension between the importance of confidentiality to the success of the mediation process on the one hand and the public interest in ensuring that the court has before it the best possible evidence to enable it to ascertain the truth on the other.<sup>131</sup> The key issues to be considered are:

1. whether issues concerning confidentiality and privilege can be left to be dealt with by common law or the parties' agreement or

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<sup>131</sup> Fiona Crosbie, "Aspects of Confidentiality in Mediation: A Matter of Balancing Competing Public Interests", 1995, 2 Commercial Dispute Resolution Journal 51, at page 52.

- mediators' code of conduct; or whether it would be more appropriate to deal with them by way of legislation;
2. if it is necessary to deal with confidentiality and privilege by way of legislation:
    - (a) what should be the scope of protection and obligations;
    - (b) what should be the exceptions (if any); and
    - (c) whether there should be any sanction for breaching such statutory obligations.

*Confidentiality – the common law position*

7.94 The core legal principles of confidentiality can be stated as follows:<sup>132</sup>

1. A duty to treat information as confidential may arise by the express or implied terms of a contract or as an equitable obligation.
2. Key factors in establishing an equitable obligation are the nature of the information, the circumstances in which it was obtained and notice of its confidentiality. The circumstances must have been such as to import an obligation of confidentiality. Such circumstances include cases where information:
  - (a) is received in the course of a relationship or venture which a reasonable person would regard as involving a duty of confidentiality;
  - (b) is received for a limited purpose in the exercise of a legal power or furtherance of a legal duty;
  - (c) is obtained by improper or surreptitious means or, possibly, by accident or mistake; and
  - (d) is received directly or indirectly from another person under a duty of confidentiality.
3. The recipient must have noticed that the information is confidential.
4. The nature of the information must be such as to warrant the recipient being under an obligation to treat it as confidential.
5. A duty of confidentiality may be negated or qualified by agreement between the parties, public interest or operation of law.
6. As a general rule, an action for breach of confidentiality may be brought only by a person to whom the duty in question is owed, but exceptionally an action for protective relief may be brought by someone having responsibility to protect the welfare of that person.

7.95 Parties to mediation normally owe a duty of confidentiality to each other. This is usually expressly provided for by the mediation agreement. Even if the mediation does not expressly provide for confidentiality, the duty would be

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<sup>132</sup> A detailed discussion of the legal principles is beyond the scope of this Report. The following summary is based on R.G. Toulson & C.M. Phipps, "Confidentiality", Sweet & Maxwell (2<sup>nd</sup> ed.), para. 3-001.

implied or would arise as an equitable obligation.<sup>133</sup> Thus, each party to mediation owes to the other a duty of confidentiality and cannot, without the other parties' consent, disclose communications made during mediation. If a party threatens to act in breach of his duty of confidentiality by disclosing communications made in mediation, the court may grant an injunction to restrain such disclosure.<sup>134</sup>

7.96 Confidentiality is regarded as "one of the important philosophical tenets of mediation"<sup>135</sup> and has been justified on at least three grounds.<sup>136</sup> First, it makes mediation attractive to those who wish to avoid publicity and increases parties' willingness to mediate since they know any disclosures made during mediation cannot be used against them subsequently. Second, confidentiality makes mediation more effective by encouraging the parties to frankly disclose their real needs and interests, which promotes the prospects of settlement.<sup>137</sup> Third, confidentiality reinforces the integrity of the mediation process by excluding mediators from pressure to make disclosures during or after the mediation process.

7.97 However, like other areas,<sup>138</sup> the duty of confidentiality (whether arising under contract or in law) does not completely prevent a party from seeking to compel production of evidence of communications made during mediation.

7.98 The recent decision of *Farm Assist Ltd. (in liq.) v The Secretary of State for the Environment, Food and Rural Affairs (No. 2)*<sup>139</sup> illustrates how the question of confidentiality may arise in a mediation and how the court would deal with it. In that case, the claimant commenced legal proceedings to set aside a mediated settlement on the ground that the settlement agreement was entered into under economic duress. The mediation agreement contained provisions of confidentiality. Apart from providing that the parties to the mediation shall keep the communications confidential, it provided that none of the parties to the mediation would call the mediator as a witness to any subsequent court or arbitration proceedings and the mediator would not voluntarily testify without the written agreement of all the parties.

7.99 The claimant wished to call the mediator to testify at the court proceedings. The defendant did not object. However, the mediator declined to do so. Upon the service of a witness summons by the claimant, the mediator applied to set aside the witness summons.

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<sup>133</sup> R.G. Toulson & C.M. Phipps, *ibid*, paras. 14-015 and 15-016.

<sup>134</sup> See, e.g. *Venture Investment Placement Ltd. v Hall* [2005] EWHC 1227 (Ch.), where His Honour Judge Reid QC (sitting as a Judge of the High Court) granted an interim injunction restraining disclosure which might amount to a breach of a confidentiality clause in a mediation agreement.

<sup>135</sup> David Spencer & Michael Brogan, *ibid*, at page 312.

<sup>136</sup> See: Laurence Boulle, *ibid*, at page 281; Fiona Crosbie, *ibid*, at pages 52-53.

<sup>137</sup> It has been argued that openness of communication is essential to rationality in negotiations and such rationality increases the probability that parties will understand the basis for the proposals that are made, which in turn promotes settlement. See: W. Brazil, "Protecting the Confidentiality of Settlement Negotiations" (1988) 39 *The Hastings Law Journal* 307. The New South Wales Law Reform Commission echoed this view in its Report No. 67, 1991, "Alternative Dispute Resolution - Training and Accreditation of Mediators", at page 63.

<sup>138</sup> One obvious example is the confidentiality between patients and doctors. Whilst doctors owe a duty of confidentiality towards his patients, the court may still compel production of medical reports. See, e.g. *Duncan v Medical Practitioner's Disciplinary Committee* [1986] 1 NZLR 513, per Jeffries J.

<sup>139</sup> [2009] EWHC 1102 (TCC) (6 May 2009). This case also illustrates how confidentiality and privilege may overlap.

7.100 Ramsey J. dismissed the mediator’s application to set aside the witness summons and held that the mediator had to testify in court as to what happened during the mediation. The key legal principles expounded by Ramsey J. can be summarised as follows:

- (1) In law, confidentiality is not a bar to disclosure of documents or information in the process of litigation, but the court will only compel such disclosure if it considers it necessary for the fair disposal of the case. Hence, the mere fact that the parties made provisions in their mediation agreement does not by itself prevent a party from giving evidence of such matters in court, nor does it prevent the court from ordering evidence to be disclosed.<sup>140</sup>
- (2) In mediation, a duty of confidentiality is not only owed by one party to the dispute to the opposite party. A duty of confidentiality may also be owed by the parties to the mediator.<sup>141</sup> Thus, even if all parties to the dispute waive confidentiality, the mediator can on his own assert confidentiality; hence, waiver of confidentiality by the parties does not deprive the mediator of his right to preserve the confidentiality of the mediation.<sup>142</sup> However, such a duty of confidentiality is not absolute. Evidence covered by such a duty of confidentiality may be given if the court considers that it is in the interest of justice to do so.<sup>143</sup>

#### *Privilege – the common law position*

7.101 Privilege covers legal professional privilege (which includes advice privilege and litigation privilege) and without prejudice privilege. In addition, there is possibly or arguably a new form of privilege in respect of mediation (which has been referred to as “mediation privilege”).

##### *(i) Legal Professional Privilege*

7.102 Legal professional privilege is a substantive common law and human right<sup>144</sup> that protects the confidentiality of certain types of communication made between a professional legal adviser and his client or, where made in respect of legal proceedings, between the legal adviser or client and a third party.<sup>145</sup> Legal professional privilege can be divided into two heads: advice privilege and litigation privilege.

7.103 Advice privilege protects a confidential communication between a client and his professional legal advisers that is made for the purpose of seeking or

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<sup>140</sup> *Ibid*, para. 21.

<sup>141</sup> *Ibid*, para. 23-24.

<sup>142</sup> *Ibid*, para. 29.

<sup>143</sup> *Ibid*, para. 25-29 and 44(1).

<sup>144</sup> Article 35 of the Basic Law of Hong Kong provides, amongst others, that “Hong Kong residents shall have the right to confidential legal advice”.

<sup>145</sup> A detailed discussion of the legal principles concerning legal professional privilege is beyond the scope of this report. If necessary, reference can be made to: Colin Passmore, “Privilege” (2<sup>nd</sup> ed.) (xpl), Chapters 1 to 4; Bankim Thanki QC, “The Law of Privilege”, OUP, 2006, Chapters 1 to 4; and the leading authority of *Three Rivers District Council v Governor & Company of the Bank of England (No. 6)* [2005] 1 AC 610.

giving legal advice or related legal assistance. It is irrelevant to a claim of advice privilege whether the qualifying communication is made in respect of legal proceedings or a non-contentious matter, since advice privilege protects all qualifying communications between client and legal advisers.<sup>146</sup>

7.104 Litigation privilege, on the other hand, protects confidential communication between either the client or his legal advisers and a third party (such as a factual or expert witness), where such communication comes into existence for the dominant purpose of being used in connection with actual, pending or contemplated litigation.<sup>147</sup>

7.105 The effect of legal professional privilege is that the court cannot compel a party to produce documents that evidence confidential legal communications nor to force a witness to testify on such communications.

7.106 Since the 19<sup>th</sup> century, the justification of legal professional privilege has been the public policy interest in the need to facilitate the administration of justice by encouraging and enabling a client to consult his lawyer fully and frankly, and in complete confidence, safe in the knowledge that what he tells his legal advisers will not be revealed to a third party (including the court) without his consent. The privilege belongs to the client and not the legal adviser, although the legal adviser is under a duty to assert and protect it.<sup>148</sup>

(ii) *Without Prejudice Privilege*

7.107 Unless expressly stated by the parties to the contrary (e.g. open offer of settlement), communications made between the parties to a dispute that are genuinely made with a view to resolving their dispute are generally covered by without prejudice privilege and usually cannot be admitted in evidence in any subsequent court proceedings.<sup>149</sup>

7.108 The position is explained by Lord Griffiths in *Rush & Tompkins Ltd. v Greater London Council*<sup>150</sup> as follows:

*“The “without prejudice” rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in Cutts v Head [1984] Ch. 290, 306:*

*That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be*

<sup>146</sup> See: Colin Passmore, *ibid*, para. 1.002.

<sup>147</sup> *Ibid*, para. 1.002.

<sup>148</sup> *Ibid*, para. 1.006.

<sup>149</sup> For a detailed discussion on without prejudice privilege, see: (a) David Foskett Q.C., “The Law and Practice of Compromise” (6<sup>th</sup> ed.), Chapter 27; (b) Bankim Thanki QC, *ibid*, Chapter 7; and (c) Colin Passmore, *ibid*, Chapter 10.

<sup>150</sup> [1989] 1 AC 1280, at pages 1299D-1300A.

*discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in Scott Paper Co. v Drayton Paper Works Ltd. (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table. ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.*

*The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. ... The application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. ..."*

7.109 It is clear that the without prejudice rule is applicable to mediation communications. In *David Instance v Denny Bros. Printing Ltd.*,<sup>151</sup> the defendant wished to use materials and communications produced for and which arose in relation to an earlier mediation that took place in the States. Lloyd J. granted an injunction to restrain such a threatened use of without prejudice materials. In *Reed Executive plc v Reed Business Information Ltd.*,<sup>152</sup> the claimant lost an appeal but sought to argue costs by relying on without prejudice communications showing that the defendant unreasonably refused to take part in mediation. The English Court of Appeal declined to allow the disclosure of the without prejudice communications. A differently constituted English Court of Appeal took the same view in *Halsey v Milton Keynes General NHS Trust*.<sup>153</sup>

7.110 There are, however, a number of qualifications or exceptions to this general rule where the court will admit evidence of without prejudice communications. The exceptions, discussed by Robert Walker L.J. (as he then was) in *Unilever plc v The Procter & Gamble Co.*,<sup>154</sup> are as follows:

1. when the issue in dispute is whether the without prejudice communications have resulted in a settlement;
2. evidence of without prejudice communications is admissible to show that an agreement apparently concluded should be set aside on the ground of misrepresentation, fraud or undue influence;
3. even if there is no concluded compromise, a clear statement which is made by one party to a without prejudice negotiation and on which the other party is intended to act and does in fact act may be admissible as giving rise to estoppel;
4. where exclusion of the without prejudice communications would act as

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<sup>151</sup> [2000] FSR 869.

<sup>152</sup> [2004] 4 All ER 942.

<sup>153</sup> [2004] 4 All ER 920.

<sup>154</sup> [2000] 1 WLR 2436, at pages 2444C-2445E.

a cloak for perjury, blackmail or other “unambiguous impropriety” (although this exception would only apply in the clearest cases of abuse of a privileged occasion);

5. evidence of without prejudice negotiations may be given to explain delay in an application for striking out for want of prosecution; and
6. what is said during a without prejudice communication may also be admitted where the purpose of adducing that piece of evidence is not to show the truth or falsity of what has been said; this is because such a purpose of adducing evidence of without prejudice communication would fall outside the principle of public policy protecting without prejudice communication.

7.111 Another leading passage dealing with the exceptions to the without prejudice rule can be found in *Rush & Tomplins Ltd. v Greater London Council*.<sup>155</sup>

*“Nearly all the cases in which the scope of the “without prejudice rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what passed between them in the negotiations. These cases show that the rule is not absolute and resort may be had to the “without prejudice” material for a variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of these authorities to resolve the present appeal but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Thus the “without prejudice” materials will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement ... The court will not permit the phrase to be used to exclude an act of bankruptcy ... nor to suppress a threat if an offer is not accepted ... In certain circumstances the “without prejudice” correspondence may be looked at to determine a question of costs after judgment has been given ... There is also authority for the proposition that the admission of an “independent fact” in no way connected with the merits of the cause is admissible even if made in the course of negotiations for a settlement. ...”*

7.112 As can be seen from the discussion in the last two paragraphs, the exceptions to the without prejudice rule are numerous. In practice, it is not always easy to tell whether the without prejudice rule applies or whether a certain exception applies to a particular set of facts.

7.113 Amongst others, it is not always easy (as will be further discussed below) whether a statement made is an admission (and thus inadmissible) or is not an admission (and thus not admissible).

7.114 Equally, it is not always easy to distinguish between admission (which

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<sup>155</sup> [1989] 1 AC 1281, per Lord Griffiths at page 1300B-G.

is inadmissible) and objective fact independent of an admission (which is admissible). For instance, in *AWA Ltd. v Daniels (t/a Deloitte Haskins & Sells)*,<sup>156</sup> the parties attempted mediation after court proceedings commenced. During the mediation, the plaintiff referred to certain deeds of release and indemnity. After the mediation failed, the defendant demanded the plaintiff to produce those deeds and the plaintiff objected on the ground that they were covered by the without prejudice privilege. Rogers C.J. held that those deeds were objective evidence independent of any admission and thus admissible.

7.115 Added to these difficulties is the fact that certain cases, as discussed below, apparently put forward a more general test, *viz.*, whether it is fair and just in the circumstances of the case to allow reliance on matters said during without prejudice communications.

7.116 In *Wu Wei v Liu Yi Ping*,<sup>157</sup> the plaintiff and the defendant were married in Mainland China. During the course of their divorce proceedings, the husband obtained an injunction against the wife in respect of money kept in a bank account. Subsequently, a question arose as to whether there was a breach of the injunction and whether the wife was entitled to rely on communications made during mediation conducted in Mainland China to explain her conduct. The court accepted that the without prejudice rule applies to admissions made in mediation proceedings but held that justice required that the wife be allowed to explain her action by relying on the communications made during mediation.

7.117 In *Smiths Group plc v George Weiss*,<sup>158</sup> the defendant applied to expunge certain materials from the claimant's expert report on the ground that the objected materials were protected by the without prejudice privilege which arose in an earlier mediation. Following *Somatra Ltd. v Sinclair Roche & Temperley*,<sup>159</sup> Deputy Judge Roger Kaye Q.C. held that the appropriate test is whether it would be "fair and just" in the circumstances to allow the claimant to rely on mediation material. On the facts before the court, the defendant's application was granted.

(iii) *A New Form of Privilege - Mediation Privilege?*

7.118 As alluded to above, there is possibly another form of privilege in respect of mediation, *viz.*, mediation privilege, in addition to the privilege discussed above.

7.119 The original of this possible new form of privilege can be traced to the privilege attached to communications between spouses made with a view to establishing a reconciliation, including those made through a third party acting in a mediatory capacity.<sup>160</sup> In *McTaggart v McTaggart*,<sup>161</sup> Denning L.J. took the view, in relation to spouses' discussion with a probation officer, that even if nothing specific was said in this regard, the parties must be taken to have held their

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<sup>156</sup> [1992] 7 ACSR 463.

<sup>157</sup> Unrep., HCA 1452/2004 (Deputy High Court Judge Lisa Wong, S.C.) (30 January 2009).

<sup>158</sup> [2002] ADR.L.R. 03/22.

<sup>159</sup> [2000] 1 WLR 2453.

<sup>160</sup> This has been referred to as "conciliation privilege", see: Bankim Thanki QC, *ibid*, para. 7.38.

<sup>161</sup> [1948] 2 All ER 754.

discussions on the basis that what they said would not be disclosed. This was extended by Denning L.J. in *Mole v Mole*<sup>162</sup> to cover not only probation officers, but also other persons such as clergy, doctors or marriage guidance counsellors to whom either or both parties may go with a view to effecting reconciliation. Subsequently, this principle has been extended to cover communications made through a vicar,<sup>163</sup> a priest acting as marriage counsellor<sup>164</sup> as well as a private individual who assisted spouses to attempt reconciliation.<sup>165</sup> In *Re D (Minors) (Conciliation: Disclosure of Information)*,<sup>166</sup> Sir Thomas Bingham M.R. (who delivered the judgment of the Court of Appeal) reviewed the development and practice of family conciliation in England and held that the law recognised the general inviolability of the privilege protecting statements made during conciliation and that evidence may not be given in proceedings under the Children Act 1989 of statements made by one or other of the parties in the course of meetings held or communications made for the purpose of conciliation save in the very unusual case where a statement is made clearly indicating that the maker has in the past caused or is likely in the future to cause serious harm to the wellbeing of a child.<sup>167</sup>

7.120 In the first edition of Henry Brown & Arthur Marriott, *ADR Principles and Practice* (1993), the authors argued that it is a logical step from the above line of cases for the courts to find that the privilege should apply not only to situations concerning reconciliation, but also to those concerning settlement and to all mediation generally.<sup>168</sup> In the second edition of this work, the authors continued to advocate the possible existence of and desirability for a distinct privilege attaching to the mediation process,<sup>169</sup> although they pointed out that the position remains uncertain.<sup>170</sup>

7.121 Support for the existence of or desirability for such a new species of privilege can also be found in some of the cases concerning privilege. Amongst others, in *Brown v Rice*,<sup>171</sup> Stuart Isaacs QC observed that<sup>172</sup> “It may be in the future that the existence of a distinct mediation privilege will require to be considered by either the legislature or the courts ...” Recently, Ramsey J. discussed this issue in *Farm Assist Ltd. (in liq.) v The Secretary of State for the Environment, Food and Rural Affairs (No. 2)*<sup>173</sup> but did not make any positive ruling one way or another.

7.122 As of now, the question of whether there is a new and distinct form of privilege attaches to communications made during mediation remains uncertain. Equally uncertain is the exact scope (and exceptions, if any) of this new form of privilege, if it does exist.

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<sup>162</sup> [1950] 2 All ER 328.

<sup>163</sup> *Henley v Henley* [1955] 2 WLR 851.

<sup>164</sup> *Pais v Pais* [1970] 3 WLR 830.

<sup>165</sup> *Theodoropoulos v Theodoropoulos* [1963] 3 WLR 354.

<sup>166</sup> [1993] 2 WLR 721.

<sup>167</sup> *Ibid.*, at page 728E-H.

<sup>168</sup> Henry Brown & Arthur Marriott, “ADR Principles and Practice”, Sweet & Maxwell, 1993, page 368.

<sup>169</sup> See: Brown & Marriott, “ADR Principles and Practice” (2<sup>nd</sup> ed.), 1999, paras. 22-079 to 22-097.

<sup>170</sup> *Ibid.*, para. 22-088. For another discussion on the possible existence of this new form of privilege, see: Laurence Boule, *ibid.*, pages 287-289.

<sup>171</sup> [2007] EWHC 625 (Ch.), para. 20.

<sup>172</sup> *Ibid.*, para. 20.

<sup>173</sup> [2009] EWHC 1102 (TCC) (6 May 2009), paras. 32-42.

7.123 The question of whether this issue should be dealt with by the Proposed Mediation Ordinance or whether it should be left to be considered by the courts on a case by case basis.

*Legislation in other jurisdictions on confidentiality and privilege*

7.124 In England, there is no general legislation dealing with the question of confidentiality and privilege, let alone legislation dealing with confidentiality and privilege in the context of mediation. However, whilst these matters are still largely governed by common law, there are specific legislative provisions dealing with confidentiality and privilege. An earlier example can be found in sections 133 and 134 of the Employment Protection (Consolidation) Act 1978, which provide that any evidence given to a conciliation officer in the performance of his duties shall not be admissible in evidence. A more recent example is section 10 of the Police and Criminal Evidence Act 1984, which applies to a number of other statutes such as the Crime (International Co-operation) Act 2003.<sup>174</sup>

7.125 On the other hand, the position in Australia is very different, there are various legislative provisions dealing with confidentiality and privilege in the context of mediation. Examples include:<sup>175</sup>

- (1) section 53B of the Federal Court Act 1976 (Cth) (amended by the Courts (Mediation and Arbitration) Act 1991 (Cth));
- (2) section 30 of the Civil Procedure Act 2005 (which was formerly section 110P of the Supreme Court Act 1970 (NSW), and which was amended by the Courts Legislation (Mediation and Evaluation) Amendment Act 1994 (NSW));
- (3) section 15 of the Farm Debt Mediation Act 1994 (NSW);
- (4) section 13(1) of the Evidence Act 1995 (Cth & NSW);
- (5) section 31 of the Civil Procedure Act 2005 (NSW) (formerly section 110Q of the Supreme Court Act 1970(NSW); and
- (6) section 10 of the Mediation Act 1997 (ACT).

7.126 Legislative provisions enacted in other jurisdictions concerning confidentiality and privilege in the context of mediation include:

- (1) sections 10, 11 and 13 of the Mediation Act 2004 (Republic of Trinidad and Tobago);
- (2) section 27 of the Mediation Act 2004 (Malta); and
- (3) sections 4, 5, 6 and 8 of the Uniform Mediation Act.

7.127 On the international level, Articles 9 and 10 of the UNCITRAL Model Law on International Commercial Conciliation specifically deal with confidentiality and admissibility of evidence. Further, Article 7 of the EU Mediation Directive

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<sup>174</sup> For other examples of statutory definition of privilege, see: Colin Passmore, *ibid.*, footnote 120 in Chapter 8.

<sup>175</sup> See the discussion in David Spencer & Michael Brogan, *ibid.*, at pages 328-330.

states as follows:

*“Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:*

- (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or*
- (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.”*

### *Recommendation*

7.128 The Working Group is of the view that the Proposed Mediation Ordinance should contain express provisions dealing with matters concerning confidentiality and privilege. It should set out the general rules in relation to confidentiality and privilege, the exceptions to the general rules as well as the sanctions for breaches. Whilst the exact scope of such provisions will have to be decided after the public consultation exercise and their wording will have to be carefully considered in the drafting process, the legislations set out in paragraphs 7.124 to 7.127 above can provide helpful examples or even models.

7.129 The key reasons for arriving at this conclusion can be summarised as follows.

7.130 First, as discussed at the outset, one of the reasons for having the Proposed Mediation Ordinance is to provide a legal framework within which mediation can be properly conducted in Hong Kong. Given that confidentiality and privilege are two of the key features of mediation; it is both necessary and desirable for the Proposed Mediation Ordinance to include within the legal framework statutory provisions dealing with confidentiality and privilege.

7.131 Second, since confidentiality and privilege provide great incentives to potential users to have recourse to mediation as a means of dispute resolution, express statutory provisions can provide further assurance to the public and thus assist in the promotion of mediation.

7.132 Third, whilst there is considerable body of case law dealing with confidentiality and privilege, it is not desirable (especially from a policy point of view) to depend entirely on case law.

7.133 Although the authorities are fairly clear in respect of the general

principles concerning confidentiality and privilege, there remain areas which are uncertain. For the sake of clarity and certainty, it would be desirable to deal with those areas in the Proposed Mediation Ordinance.

7.134 As discussed above, the question of whether there is a new form of privilege, *viz.*, mediation privilege, is unclear although both recent decisions and academic texts lend support to the creation or existence of this new form of privilege.

7.135 As noted above, the without prejudice rule focuses on protecting admissions made during without prejudice negotiations against a party's interest. It is debatable whether the without prejudice rule, as it now stands, is sufficient to promote the further development of mediation or whether its scope should be appropriately extended. In this regard, the following observation made by Walker L.J. (as he then was) in *Unilever plc v The Procter & Gamble Co.*<sup>176</sup> is illuminating:

*“Whatever difficulties there are in a complete reconciliation of those cases,<sup>177</sup> they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. **But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the Rush & Tompkins case [1989] A.C. 1280, 1300: “to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts.” Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers .... Sitting at their shoulders as minders.**”* [emphasis added]

7.136 Consistent with the rationale of encouraging parties to speak freely and frankly in a mediation, there is much to be said in favour of creating a general mediation privilege so that (subject to proper statutory exceptions to be mapped out) whatever said during mediation would not be admissible in subsequent proceedings. Not only can this approach avoid the practical difficulties of having to distinguish what is and what is not an admission (which is not always easy), it can enhance the confidence of parties to mediation to speak freely and frankly and thus the value of mediation as an ADR mechanism.

7.137 The exceptions to the rules of confidentiality and privilege are another area where the Proposed Mediation Ordinance can clarify for the purpose of mediation. Several of the legislative provisions referred to in paras. 7.124 to 7.127 do this by setting out the exception. Notable examples include section 11 of the Mediation Act 2004 (Republic of Trinidad and Tobago), section 10(2) of the

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<sup>176</sup> [2000] 1 WLR 2436, at pages 2448H-2449B.

<sup>177</sup> This referred to the older cases considered by Walker L.J. (as he then was) at pages 2446D-2448G.

Mediation Act 1997 (ACT) and section 6 of the Uniform Mediation Act of the United States.

7.138 There is also the question of sanctions for breaching the rules of confidentiality and privilege. One option that may be considered is the introduction of an express statutory provision stipulating that the parties to the mediation and the mediator (and possibly any other parties who have an interest in the matter) may apply to the court for an injunction to restrain the use of confidential or privileged materials.

7.139 Fourth, parties may deal with issues concerning confidentiality and privilege in their mediation agreements and that mediation agreements more often than not do contain such provisions, it remains necessary to deal with situations where a party to a mediation agreement acts in breach of such confidentiality and privilege provisions. At the moment, the courts have to resolve disputes over confidentiality and privilege concerning mediation communications by reference to case law. As discussed above, this is not desirable.

7.140 Fifth, while some took the view that questions of confidentiality may also be dealt with by a code of conduct,<sup>178</sup> this option is neither satisfactory nor practical in the Hong Kong context. Only mediators are subject to a code of conduct, not the parties to the mediation. Besides, at the moment, there is no universal code of conduct or any umbrella body capable of enforcing breaches of a code of conduct. Breaches of a code of conduct can only lead to disciplinary proceedings or sanctions against the mediators, but do not afford sufficient protection to the parties to mediation proceedings.

#### **Recommendation 38**

**The Proposed Mediation Ordinance should include provisions dealing with the rules of confidentiality and privilege, as well as setting out the statutory exceptions to the rules and the sanctions for breaching the rules of confidentiality and privilege.**

#### ***Mediator immunity***

7.141 The term ‘immunity’ is used here to refer to the protection from civil suit. Immunity may be absolute (i.e. full protection from all types of civil liabilities) or partial (e.g. protection from civil liabilities for acts done in good faith). The source of immunity can be contract, statutory provisions or common law. For instance, immunity afforded to judges and other judicial officers are absolute immunity conferred by common law (or in some cases by statute). On the other hand, arbitrators in Hong Kong enjoy partial immunity by virtue of section 2GM of

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<sup>178</sup> See: NADRAC “Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters”, *ibid*, paras. 9.30 to 9.32.

the Arbitration Ordinance.<sup>179</sup>

7.142 Although the position is not entirely certain, mediators do not appear to enjoy general immunity under the common law. Subject to statutory control,<sup>180</sup> parties to mediation are free to deal with the question of mediator immunity by contract. In practice, it is not uncommon for mediators to insist on inserting a provision of immunity in the contract of appointment.

7.143 The question that requires consideration is whether statutory immunity should be given to mediators, and if so, the scope of such immunity. This question has generated considerable debate.<sup>181</sup>

### *Grounds of Liability*

7.144 In general, civil actions that might be brought against a mediator<sup>182</sup> include actions for breach of contract (including breach of implied terms of skill and care), negligence, statutory torts (e.g. discrimination), defamation, breach of confidence (such as unauthorised disclosure or use of confidential information obtained during the mediation process) and possibly breach of fiduciary duties.<sup>183</sup> In addition, there may be liability for breaching the relevant professional standards, liability towards third party, criminal liability and liability for unenforceable agreement (as a result of, for instance, undue influence).<sup>184</sup>

7.145 However, there are hardly any reported instances of mediators being held liable. The case that is most often cited and discussed is Habersberger J.'s decision in *Tapoohi v Lewenberg (No.2)*.<sup>185</sup> Following the death of their mother, the siblings had a dispute over their entitlement to the estate of their mother. Legal proceedings were commenced, but were settled by mediation. One of the parties subsequently applied to set aside the settlement and joined her solicitors as one of the defendants (alleging that her solicitors were negligent in not obtaining proper tax advice before concluding the settlement). The solicitors joined the mediator as a third party, alleging that the mediator coerced the parties to settle despite them

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<sup>179</sup> Section 2GM of the Arbitration Ordinance provides as follows: "An arbitral tribunal is liable in law for an act done or omitted to be done by the arbitral, or by its employees or agents, in relation to the exercise or performance or the purported exercise or performance of the tribunal's arbitral functions only if it is proved that the act was done or omitted to be done honestly."

<sup>180</sup> For instance, section 5 of the Supply of Services (Implied Terms) Ordinance (Cap. 457) deals with implied term as to care and skill whilst section 8 deals with exclusion or restriction of such an implied term. For a discussion on these statutory provisions, see: "Butterworths Hong Kong Contract Law Handbook" (2<sup>nd</sup> ed.) (LexisNexis), at pages 317-320 and pages 322-324.

<sup>181</sup> For further discussions, see, e.g.: (1) Arthur A. Chaykin, "The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation", (1986) 2 *Journal of Dispute Resolution* 47; (2) Robyn Carroll, "Mediator Immunity in Australia" (2001) 23(2) *Sydney Law Review* 185; (3) Joseph Stulberg, "Mediator Immunity" (1986) 2 *Journal of Dispute Resolution* 85; (4) NADRAC, "Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters", *ibid.*, paras. 8.1 to 8.34; (5) Emma Matthews, "An update on mediator immunity", 2009, "LEADR Update" (available at [www.leadr.com.au](http://www.leadr.com.au)); (6) Cyril Chern, "International Commercial Mediation", Informa, London, 2008, at pages 229-233.

<sup>182</sup> See: Laurence Boulle, *ibid.*, at pages 247-252; Andrew Lynch, "Can I Sue My Mediator? – Finding the Key to Mediator Liability" (1995) 6 *ADRJ* 113.

<sup>183</sup> There has been suggestion that a mediator may owe a fiduciary duty, though the position is uncertain due to the lack of case law in this area. See: Chaykin, 'Mediator Liability: A New Role for Fiduciary Duties?' (1984) 53 *U. Cin. L. Rev.* 731; Cyril Chern, *ibid.*, at pages 228-229; Laurence Boulle, *ibid.*, at pages 250-251.

<sup>184</sup> See: Laurence Boulle, *ibid.*, at pages 253-254.

<sup>185</sup> [2003] VSC 410 (Supreme Court of Victoria, Commercial and Equity Division) (21 October 2003).

having informed the mediator that their client needed to seek professional advice on the tax implications of the settlement. The mediator applied, *inter alia*, to strike out the third party proceedings.

7.146 Habersberger J. dismissed the mediator's application and allowed the matter to go to trial. Amongst others, it was held that:

1. the mediator did owe a duty of care both under the contract or in tort; on the facts, it is arguable that the mediator had acted in breach of his duty by coercing the parties to settle; and
2. immunity against actions for negligence could only exist where there were strong public policy grounds and the question of whether the mediator enjoyed immunity should be investigated at trial.

7.147 The dispute did not go to trial but were subsequently settled. Hence, the Court in Australia did not have an opportunity to consider the question of mediator immunity. Since Habersberger J.'s decision was made in the context of a strike-out application, it did not provide definite guidance on the legal issues raised.

7.148 In Hong Kong and England, there does not appear to be any decision dealing with mediator's immunity.

#### *Position in other jurisdictions*

7.149 Legislation in certain jurisdictions protects mediators from civil liability. Many states in the United States have statutes and court rules (both state and federal)<sup>186</sup> or case law<sup>187</sup> creating immunity for mediators to protect them from most civil liability for wrongdoing during the mediation. For example, Florida grants absolute immunity to court-appointed mediators, whilst in Oklahoma, a mediator is only liable if they exhibit "gross negligence with malicious purpose or in a manner exhibiting willful disregard". In Canada, only Saskatchewan has granted immunity to its court-connected mediators in that no action can be commenced against mediators in the provincial mandatory mediation programme if the mediators acted in good faith. These statutes, and others like them, proceed on the basis that mediators, like judges, should be free from civil liability when acting in their official capacities. The presumption is that facilitating settlement is part of a mediator's "official capacity" that can be analogised to the judicial function.<sup>188</sup> In case of court-annexed mediation, one can see the force of this argument. However, in purely voluntary mediation, such a presumption is difficult to justify.

7.150 In Australia, there is no general statute that confers immunity on all mediators working within the jurisdictions. However, there are specific statutes

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<sup>186</sup> States with mediator immunity legislation include: California, Colorado, Connecticut, Florida, Hawaii, Iowa, Louisiana, Maine, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Utah, Virginia, Washington, Wisconsin, Texas and Wyoming.

<sup>187</sup> *Howard v Drapkin* 271 Cal. Rptr, 893 and *Wagshal v Foster* 28 F.3d 1249, 1250-51 (D.C. Cir. 1994). See also: Cyril Chern, *ibid*, at pages 230-232; and Robyn Carroll, *ibid*, at pages 198-200 and pages 219-220 (which suggested that the reasoning in these U.S. cases did not sit well with the nature of facilitative mediation).

<sup>188</sup> See: Cyril Chern, *ibid*, at pages 229-230.

that provide immunity in specified circumstances (which were mostly, if not invariably, concerned with court-appointed or tribunal-connected mediation).<sup>189</sup>

### *Arguments for and against mediator immunity*

7.151 There are competing policy considerations in deciding whether to confer immunity and deciding the scope of protection. The arguments for and against mediators immunity include a combination of policy and practical factors.<sup>190</sup> The following is a summary of the key arguments.

#### *(i) Administration of Justice*

7.152 One view is that like judges, mediators are required to act impartially and therefore immunity is necessary for them to act independently and without fear or favour. Protection from defamation suits aims to promote candour in judicial proceedings and the same objective can be seen to have application to the mediation process.<sup>191</sup> Supporters of this view argue that mediators should be free to conduct mediations in such way as they think fit and should not have to fear being sued for an error of judgment. Fears of this nature may lead a mediator to be overly legalistic in their approach.

7.153 On the other hand, it is argued that immunity is an exceptional privilege and the nature of mediator activities (unless in cases of court-appointed mediator) does not justify this exceptional treatment. In particular, mediators in a facilitative mediation do not adjudicate the disputes and thus perform a role very different to that of judicial officers. In short, this school argues that the policy objectives underlying judicial immunity (or immunity given to arbitrators) do not apply to mediators. There is considerable force in this argument. In Australia, it has been held that each application to extend judicial immunity needs to be shown to come within an established category of case to which the immunity applies, or that the protection is indispensable for the performance of a judicial function.<sup>192</sup> Plainly, there are significant differences between the role of judges and arbitrators on the one hand and that of mediators in a facilitative mediation on the other (although the difference may be less significant in cases of evaluative mediation).

#### *(ii) Integrity of Mediation Process*

7.154 Those in favour of mediators' immunity argue that immunity is necessary to maintain the integrity of the mediation process. There is a concern that an action against a mediator will require a court to inquire into what happened and what was said or not said during the mediation process, which in turn will undermine the parties' confidence in the confidential nature of the process. This, it is argued, will prevent the full and open discussion that is an essential feature of

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<sup>189</sup> See: NADRAC, "Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters", *ibid*, paras. 8.12 to 8.22. One example is section 12 of the Mediation Act 1997 (ACT), which provides partial immunity for registered mediators exercising their functions in good faith.

<sup>190</sup> For detailed discussions on the arguments for and against mediators immunity, see: (a) NADRAC, "Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters", *ibid*, paras. 8.24 and 8.25; (b) Robyn Carroll, *ibid*, at pages 205-219.

<sup>191</sup> Section 11 of the Mediation Act (Australian CT) provides for such an immunity against defamation action.

<sup>192</sup> See: *Mann v O'Neill* (1997) 145 ALR 682 (Brennan CJ, Dawson, Toohey & Gaudron JJ), at page 686.

mediation.

7.155 The counter argument is that the rules of procedures and evidence can be framed to avoid use of a mediator suit to attack concluded agreements, while allowing for mediator accountability. For instance, NADRAC, in its report *The Use of Alternative Dispute Resolution in a Federal Magistracy* (Canberra, The Council, 1999) recognised the need to place some limit on confidentiality or admissibility provisions.

(iii) *Preservation of Mediated Settlement*

7.156 It is argued that mediator's immunity helps to ensure finality of agreements reached by mediation. If no immunity is granted to mediators, a party who wants to renege from a settlement may seek to sue the mediator and thereby avoid the settlement through the backdoor.

7.157 However, the following points can be made in answer to the above contention. First of all, immunity may prevent enquiry as to whether a mediated settlement was made as a result of the mediator's undue pressure or misconduct. The *Tapoohi's* case discussed above illustrates such a problem and support the need to provide redress in appropriate cases. Second, the policy underlying privilege of mediation communications should not preclude making an exception where it operates to the detriment, rather than for the intended benefit, of parties. The pertinent question is whether the objectives of mediation can be advanced by precluding evidence that a mediator exercised improper pressure over a party? The courts are well equipped to decide whether an application to set aside a mediated settlement is based on a genuine complaint against the mediator and whether there is substance in the complaint. Even if the court admits evidence of the mediator's misconduct, the relief may not necessarily be the setting aside of the mediated settlement but can be an award of damages against the mediator.

(iv) *Mediator Neutrality: Process and Substance*

7.158 Whilst the fact that mediators do not adjudicate the dispute is a factor relied on in support of arguments against immunity, it has also been relied on in support of immunity. This school of thought draws a distinction between conduct that is process related and the substantive outcome of the mediation. Whilst it is accepted that mediators should be accountable for misconduct relating to the mediation process (e.g. failure to attend mediation, behaving in an unprofessional manner), it is argued that immunity should be granted in respect of the outcome of the mediation. The key problem with this argument is that immunity, once granted, would affect both the process and the outcome. Again, the case of *Tapoohi's* case discussed above illustrates such a problem.

(v) *Safeguards through Mediators Accountability*

7.159 Another key argument against immunity is that it will inevitably (even if infrequently) have the effect of denying access by parties to a remedy to rectify harm caused by a mediator's misconduct. As a matter of principle, it is argued, that such a state of affairs is unacceptable. As observed by Kirby J. in *Najjar v*

*Haines*,<sup>193</sup> “the trend of modern authority is to expand the circumstances giving rise to redress, not to contract it or enlarge exemptions”.<sup>194</sup>

7.160 The counter-argument is that civil liability is an inappropriate form of redress for the types of complaints likely to be made by parties against mediators. Supporters of this school of thought argue that appropriate measures could be adopted to achieve a balance between the desire to protect mediators from unmeritorious action and the need for accountability for misconduct. Measures that have been suggested include disciplinary proceedings or an administrative system of review and sanction. Another is to qualify immunity to acts done in good faith. A third approach is to set out in legislation the responsibilities of mediators.

7.161 Whilst the contention summarised in the preceding paragraph may be correct in some circumstances, it cannot be gainsaid that in some circumstances (especially when there is a clear causative link between the mediator’s wrongdoing and the harm occasioned by the conclusion of the settlement) civil liability is the only appropriate remedy. Besides, disciplinary proceedings or a system of review and sanction could be costly and the victim of the mediator’s misconduct might not necessarily be able to get full redress for the harm done to him. Furthermore, the suggestion that the mediation statute may set out the responsibilities of mediators would only increase the length and complexity of the relevant legislation and might not be effective unless the statute also provide for some forms of redress.

(vi) *Availability of Mediators*

7.162 It is argued that the lack of immunity will discourage people from acting as mediators, especially on a *pro bono* basis or in cases of community mediation where the fees charged are minimal. The answer to this worry is that mediators may seek protection elsewhere (such as contractual immunity or liability insurance, although the availability and costs of such insurance raise further questions).

*Recommendation*

7.163 The Working Group is of the view that there should not be statutory immunity for mediators. The key reasons are as follows:

1. As noted from the outset, the type of mediation most commonly conducted in Hong Kong is facilitative mediation. Mediators do not adjudicate the disputes before them, but only assist the parties to explore options with a view to reaching a settlement. In other words, mediators do not perform any judicial function. Besides, there is no mandatory mediation or court-annexed mediation. In the circumstances, the rationale underlying immunity for judges and arbitrators does not apply.
2. Judging from experience in other common law jurisdictions (including England and Wales, Australia and New Zealand), the chance of

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<sup>193</sup> [1991] 25 NSWLR 224.

<sup>194</sup> *Ibid.*, at pages 232-233.

mediators being sued is slim.

3. Mediators can include provisions for immunity in their contracts of appointment. This, as we understand, is a common practice in Hong Kong and clients are generally agreeable to give such contractual immunity.
4. Practitioners of mediation are either already covered by liability insurance or are at liberty to take out such insurance to cover the risk of being sued.

7.164 Although the Working Group is inclined against the provision of immunity for mediators, it fully appreciates that the question is a controversial one and that there may be some force in the argument in support of a limited form of immunity (especially in cases of *pro bono* or community mediation). For instance, there could be statutory protection from defamation<sup>195</sup> or a partial immunity from suit unless there is dishonesty.

7.165 In the circumstances, the Working Group recommends that both options be put forward for public consultation.

#### **Recommendation 39**

**The issue of whether to grant mediator immunity from civil suits is a controversial one. Although it is not recommended that such immunity be granted, it may be desirable to allow partial immunity, especially in respect of *pro bono* or community mediation.**

#### *Postscript on Mediators Immunity - the Arbitration Bill*

7.166 At the moment, section 2GM of the Arbitration Ordinance provides partial immunity in that an arbitral tribunal is liable in law for an act done or omitted to be done only if it is proved that the act was done or omitted to be done dishonestly.

7.167 As stated above, a Draft Arbitration Bill was annexed to the Arbitration Law Consultation Paper 2007. A Bill in substantially the same terms, the Arbitration Bill, has now been introduced into the Legislative Council. Clause 103 of the Arbitration Bill provides as follows:

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<sup>195</sup> Along the line of section 11 of the Mediation Act 1997 (Australian Capital Territory), which confers the same privilege in relation to defamation as exists in relation to judicial proceedings in relation to: (a) a mediation session; (b) a document or other material produced at a mediation session or given to a registered mediator for the purpose of arranging or conducting a mediation session.

- “(1) An arbitral tribunal or mediator is liable in law for an act done or omitted to be done by –
- (a) the tribunal or mediator; or
  - (b) an employee or agent of the tribunal or mediator,
- in relation to the exercise or performance, or the purported exercise or performance, of the tribunal’s arbitral functions or the mediator’s functions only if it is proved that the act was done or omitted to be done dishonestly.
- (2) An employee or agent of an arbitral tribunal or mediator is liable in law for an act done or omitted to be done by the employee or agent in relation to the exercise or performance, or the purported exercise or performance, of the tribunal’s arbitral functions or the mediator’s functions only if it is proved that the act was done or omitted to be done dishonestly.”

7.168 Whilst the immunity proposed remains a partial immunity, the scope is extended to cover not only arbitrators but mediators. Paragraph 12.1 of the Arbitration Law Consultation Paper 2007 explained that this is a re-enactment of section 2GM of the current Arbitration Ordinance. There is, however, no detailed explanation as to why it is believed to be necessary or appropriate to extend the scope of immunity to cover mediators.

7.169 Clause 33 of the Arbitration Bill allows an arbitrator to act also as a mediator provided the parties consent in writing. It appears that clause 103 is intended to cover the situation where an arbitrator also acts as a mediator pursuant to clause 33 and thus should enjoy the same immunity.

7.170 Professor Nadja Alexander discussed a similar, though not identical, scenario at the Asian Pacific Mediation Forum 2008 on Regulating Mediation.<sup>196</sup> Section 27(3) of the Commercial Arbitration Act 1984 (New South Wales) makes provisions for arbitrators to mediate (in ways similar to clause 33 of the Arbitration Bill) whilst section 51 of the same Act provides that an arbitrator is not liable for negligence but is liable for fraud. Though the scope of immunity conferred by section 51 of the Commercial Arbitration Act 1984 is apparently narrower than the proposed clause 103 of the Arbitration Bill, it remains a provision for partial immunity. The key difference between section 51 and clause 103 is that the former does not expressly refer to a mediator whereas the latter does.

7.171 At the 2008 Forum, Professor Alexander raised the following questions: If the Australian federal legislature were to pass a general mediation law, would arbitrators still be acting as arbitrators when mediating, or would they fall under the provisions of the proposed general mediation law? Would a section 51 immunity apply to a mediating arbitrator or would they be subject to general mediation provisions relating to mediator accountability? Having raised these questions, Professor Alexander stressed the importance of reviewing existing legislation on ADR so as to see how they would interact with any proposed

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<sup>196</sup> See: Nadja Alexander, “What’s Law Got to Do with it? How the World is Regulating Mediation”, Asian Pacific Mediation Forum 2008, summarised and discussed in Emma Matthews, *ibid*, page 4.

mediation statute.

7.172 Although the wording of section 51 is different from that of clause 103, similar questions would arise if the Proposed Mediation Ordinance deals with the issue of mediator immunity in a way different from clause 103. Amongst others, the following questions would have to be considered:

1. Is the immunity conferred by clause 103 only applicable when an arbitrator acts as a mediator pursuant to clause 33, or is the immunity enjoyed by all mediators (irrespective of whether the mediator also acts as an arbitrator)?
2. If the immunity conferred under clause 103 only applies to arbitrator acting as mediator, should the wording of clause 103 be appropriately revised?
3. If the immunity conferred under clause 103 is intended to be enjoyed by all mediators, is this appropriate in light of the discussion set out above, or should the question of immunity be left to be dealt with in the Proposed Mediation Ordinance so that all statutory provisions concerning mediators can be conveniently found in the same legislation?
4. Apart from the question of immunity, will an arbitrator acting as a mediator be subject to the other provisions contained in the Proposed Mediation Ordinance? If not, what is the justification, if any?

7.173 It is appreciated that consideration of the Arbitration Bill is at an advanced stage. However, for the sake of consistency and in light of the discussion above, it may be desirable to give further thought to clause 103.

### ***Limitation Periods***

7.174 Article 8(1) of the EU Mediation Directive provides as follows:

“Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.”

7.175 Since the EU Mediation Directive was only issued in May 2008, it remains to be seen how the member states of the European Union respond to this Article 8(1).

7.176 In some jurisdictions, the relevant limitation period would be suspended upon the commencement or during the process of mediation.<sup>197</sup> Examples include:

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<sup>197</sup> See the table entitled “Comparative Table: Limitation and Enforceability” included in Karl Mackie, Tim Hardy & Graham Massie (ed.), *ibid*, at page 202.

1. Section 22 of the legislation on mediation enacted in Austria (ZivMediatG, 2004) provides that mediation conducted by a registered mediator suspends the limitation period.<sup>198</sup>
2. In France, a Court of Appeal decision in 2003 held that mediations implemented pursuant to a mediation clause can suspend a limitation period.<sup>199</sup>
3. In Germany, limitation periods are governed by sections 194 to 218 of the Civil Code. Section 203 of the Civil Code provides that the limitation periods are automatically suspended in the event of negotiation and will remain suspended until three months after the collapse of the negotiations. It has been suggested that such negotiations include mediation.<sup>200</sup>
4. In Italy, limitation periods are governed by the Code of Civil Procedure. By virtue of Article 40 of LD 5/2003, the limitation period will be suspended throughout the mediation process provided the mediation is conducted by a registered mediator.<sup>201</sup>

7.177 On the whole, the majority of jurisdictions do not have legislative provisions suspending the relevant limitation periods upon the commencement of mediation. It is also worth noting that the examples set out in the preceding paragraphs are all civil law jurisdictions and not common law jurisdictions.

7.178 In the context of Hong Kong, the Working Group does not find it necessary to introduce legislative provisions suspending limitation periods during the mediation process.

7.179 Suspension of limitation period is only relevant in cases where the mediation is conducted before commencement of court proceedings. In cases where mediation is commenced after commencement of court proceedings, there is no need at all to consider suspension of limitation period.

7.180 The recourse to mediation before commencement of court proceedings should, of course, be encouraged. However, even in cases where mediation is conducted before commencement of court proceedings, there is no real need to suspend the limitation period. Mediation is supposed to be a speedy process. In practice, once the parties agree to mediate, the mediation process will normally be conducted and finished within a short period of time irrespective of whether a settlement is achieved. Thus, unless the mediation is only commenced close to the expiry of the relevant limitation period, there is no need to suspend the limitation period. In cases where the mediation is only conducted shortly before the expiry of limitation period, the intended plaintiff can simply issue a protective writ and withhold service thereof until the mediation fails to achieve a settlement. The cost of issuing a protective writ is minimal. In any event, if parties to a dispute

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<sup>198</sup> See: Karl Mackie, Tim Hardy & Graham Massie (ed.), *ibid*, para. 1.6

<sup>199</sup> See: Cour de Cassation, Chambre Mixte (14 February 2003), referred to in Karl Mackie, Tim Hardy & Graham Massie (ed.), *ibid*, para. 5.8.

<sup>200</sup> See: Karl Mackie, Tim Hardy & Graham Massie (ed.), *ibid*, para. 6.11.

<sup>201</sup> See: Karl Mackie, Tim Hardy & Graham Massie (ed.), *ibid*, para. 9.6.

wish to suspend the applicable limitation period, they can do so by agreement.<sup>202</sup> This can easily be done by inserting an appropriate provision in their mediation agreement or open correspondence between the parties.

**Recommendation 40**

**It is not necessary to introduce legislative provisions to suspend the running of limitation periods during the mediation process.**

***Enforcement of mediated settlement agreements***

7.181 At the moment, a mediated settlement agreement has the effect of a binding contract. Its status is no different from settlement agreement reached by parties through means other than mediation. If a party to a mediated settlement fails to perform his obligations, the other party has to commence legal proceedings to enforce it as a contract.

7.182 Whilst application for summary judgment is clearly an option, the need to commence court proceedings to enforce a mediated settlement is contrary to the idea of using mediation as a speedy dispute resolution mechanism. This raises the question of whether a statutory enforcement mechanism (such as a mechanism similar to the enforcement of arbitral award provided under the Arbitration Ordinance) is necessary.

***Position in other jurisdictions***

7.183 In some jurisdictions, a mediated settlement agreement enjoys the same effect as a judgment or arbitral awards either automatically or if it satisfies certain formal requirements (such as recorded in a public instrument). Examples include:

1. Section 1053 of the German Zivilprozessordnung (ZPO - Code of Civil Procedure) provides that a mediated settlement agreement may be directly enforced if it is recorded in an enforceable public instrument before a notary public.
2. Several American states (e.g. California) also have statutory provisions regarding direct enforcement of mediated settlement agreement.<sup>203</sup>
3. Section 20 of Bermuda's International Conciliation and Arbitration Act 1993 provides that, where a written settlement agreement is reached, it is to be treated as an award on an arbitration agreement for the

<sup>202</sup> See: Karl Mackie, Tim Hardy & Graham Massie (ed.), *ibid*, para. 15.15 (which discusses the comparable position in England and Wales).

<sup>203</sup> Christian Bühring-Uhle, "Arbitration and Mediation in International Business", (2<sup>nd</sup> ed.), Kluwer Law International, pages 235-236 and footnote 612 at page 235.

purpose of enforcement in Bermuda.<sup>204</sup>

4. In Portugal, Article 56 of Law 78/2001 provides that settlement agreements arising out of mediations must be immediately ratified by a judge and have the same effect as a court decision.<sup>205</sup>
5. In Switzerland, there is no legislation on the federal level dealing with enforcement of mediated settlement. On the cantonal level, the situation is similar. Cantonal procedural law to date has not regulated mediation, with the exception of the new Code of Procedural Law of the canton of Glarus. This new Code contains provisions dealing with mediation. Amongst others, parties may ask the court (without filing an action) to approve an out-of-court settlement. With such approval, the settlement agreement is enforceable as a regular judgment.<sup>206</sup>

7.184 Apart from stating that a mediated settlement agreement is binding and enforceable, Article 14 of the UNCITRAL Model Law on International Commercial Conciliation (2002) states that the enacting state may insert a description of the method of enforcing settlement agreements.

7.185 Whilst legislation in some jurisdictions provide for a statutory regime for enforcing mediated settlement, many other jurisdictions do not see fit to do so<sup>207</sup> (especially in respect of mediations that are neither court-annexed mediation nor mediations held by arbitrator-cum-mediator).

### *Competing Policy Considerations*<sup>208</sup>

7.186 The introduction of a separate enforcement mechanism tailored for mediated settlement as an alternative to contract litigation certainly has its advantages. Apart from being speedy and less costly, a separate enforcement mechanism may also offer greater confidentiality protection since reduced contract litigation would lessen the reliance on evidence procured from mediation sessions. For these reasons, some American commentators are exploring the possibility of enforcement through mechanisms other than the strict application of contract law.<sup>209</sup>

7.187 Despite these benefits, the consideration of traditional contract laws such as duress, unconscionability and mistake would be bypassed in summary enforcement procedures. This could permit sophisticated parties to take advantage of weak or uninformed opponents. One suggestion is to introduce special enforcement rules for mediated agreements, including an expansion of the

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<sup>204</sup> See: Nigel Rawding, *ibid*, at pages 100-101.

<sup>205</sup> Karl Mackie, Tim Hardy & Graham Massie (ed.), *ibid*, para. 12.8.

<sup>206</sup> Nadja Alexander, *ibid*, para. 14.7.1.3.

<sup>207</sup> For a summary in respect of enforcement of mediated settlement in major jurisdictions, see the table entitled "Comparative Table: Limitation and Enforceability" at Karl Mackie, Tim Hardy & Graham Massie (ed.), *ibid*, at pages 202-207.

<sup>208</sup> See: NADRAC "Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters", *ibid*, paras. 11.29 to 11.39.

<sup>209</sup> See: Ellen E. Deason, "Procedural rules for complementary systems of litigation and mediation - worldwide", (January 2005) *Notre Dame Law Review* 553.

defence of coercion and a ‘cooling-off’ period which would permit rescission of the agreement immediately following the mediation. These measures may prevent plaintiffs from commencing court proceedings. However, such provisions may enable parties to continually rescind and defer resolution of disputes. Furthermore, if the parties so wish, there is nothing to stop them from embodying their settlement in a court order.

### *Recommendation*

7.188 Although a separate regime for enforcing mediated settlement may appear attractive, the Working Group does not find it necessary to recommend the inclusion of such a mechanism in the Proposed Mediation Ordinance.

7.189 Unlike arbitral awards which are imposed upon a party after a process of adjudication, mediated settlements are reached by the parties voluntarily. Effective “reality testing” conducted by mediators during the mediation process assists in ensuring that the settlement reached is reasonable and will be complied with. For these reasons, the chance of parties to a mediated settlement agreement refusing to perform their obligations is much less. Research in Australia conducted by NADRAC supports this proposition.<sup>210</sup>

7.190 Even if a statutory mechanism for enforcement is to be introduced, there would still be a need to provide for grounds which could be relied on by parties to mediated settlement agreements to resist enforcement. The problem will then arise as to what grounds are to be included. The grounds currently provided for in the Arbitration Ordinance for resisting the enforcement of domestic or Convention awards would not be appropriate given the difference in nature between arbitration and mediation. If the grounds for rescinding or terminating a contract under the law of contract (e.g. duress, undue influence, misrepresentation) are included, the statutory mechanism would not offer much real advantage over an application for summary judgment on the mediated settlement since court proceedings (similar to those commenced for the enforcement of contract) would remain necessary even if such a statutory mechanism is to be put in place.

#### **Recommendation 41**

**It is not necessary to include in the Proposed Mediation Ordinance a statutory mechanism for enforcing mediated settlement agreements. Where necessary, enforcement of mediated settlement agreements can be left to the court as in ordinary cases of enforcement of contracts.**

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<sup>210</sup> See: NADRAC, “Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters”, *ibid*, para. 11.35.

## **Model mediation rules**

7.191 Some jurisdictions' mediation statutes contain model mediation rules. One example is the Mediation Act 2004 (Republic of Trinidad and Tobago).

7.192 Whilst not really necessary (since different mediation bodies have different rules), there is in principle no objection to include a set of model mediation rules in the Proposed Mediation Ordinance (say, as a schedule). However, any model mediation rules so included should not be made mandatory, nor should they be given the status of a set of default rules (in that they would be applicable unless the parties agree otherwise). In order to maintain the flexibility of the mediation process, parties to the mediation should be at liberty to adopt any other mediation rules or to vary the model rules in such ways as they think fit.

7.193 If it is believed that having a model rule is desirable, the Mediation Rules of the HKIAC may be used as a starting point. However, in order to save time and to ensure that the rules can be revised expeditiously as and when necessary, there should be an appropriate provision in the Proposed Mediation Ordinance to ensure that the model rules so included can be revised without having the need to go through the legislative procedure necessary for effecting an amendment to an Ordinance. Instead, power should be given to an appropriate authority (such as the HKIAC, should its Mediation Rules are included) to revise the model rules from time to time without having to seek the prior approval of the Legislative Council.

### **Recommendation 42**

**Whilst not really necessary, there is in principle no objection to include a set of model mediation rules in the Proposed Mediation Ordinance. However, any model mediation rules so included should only serve as a guide and should not be made mandatory. To maintain flexibility of the mediation process, parties should be at liberty to adopt such mediation rules as they deem fit.**

## **Apology**

7.194 When parties are seeking to resolve their disputes, the offer of an apology by one party may have an important effect and may even be instrumental in achieving a settlement. However, as the making of an apology may, though not necessarily will, in law amount to an admission,<sup>211</sup> parties (especially parties with legal advice) are often reluctant to offer an apology.

7.195 In other jurisdictions, matters relating to apology including the

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<sup>211</sup> See the discussion under the heading "Apologies as admissions of liability" in Pure Vines, "Apologies and Civil Liabilities in the UK: A View From Elsewhere", 2008, 12(2) *Edin. L.R.* 200, at pages 212-218.

concern with the legal implications of making an apology have been dealt with by way of legislation in one form or another. In 1986, Massachusetts enacted the first legislative protection of apologies designed to prevent the admissibility in court of an expression of regret for the purpose of determining liability in tort. Since then, many similar legislative provisions dealing with apology in different contexts were introduced in other common law jurisdictions.<sup>212</sup> Key examples are the apology statutes passed in 4 provinces of Canada, namely, British Columbia,<sup>213</sup> Manitoba, Ontario and Nova Scotia.<sup>214</sup> In particular, the Apology Act 2006 of British Columbia is so far the broadest legislation in this regard. Section 2(1) thereof expressly provides that an apology:<sup>215</sup> (a) does not constitute an express or implied admission of fault or liability; (b) does not constitute an affirmation in the context of limitation; (c) does not avoid or affect any insurance coverage; and (d) must not be taken into account in any subsequent determination of fault or liability in connection with that matter. Other examples include section 2 of the Compensation Act 2006 of the United Kingdom and sections 68 and 69 of the Civil Liability Act 2002 of New South Wales.

7.196 The issues that call for consideration are:

- (1) whether the Proposed Mediation Ordinance should contain similar provisions dealing with apology; and
- (2) if yes: (a) whether the provisions should deal with full apology (which includes an admission of fault) or just partial apology (which is only a statement of regret or benevolent gesture and which stops short of an apology); and (b) whether it should be confined to certain specific causes of action or whether it should cover all forms of civil liability.

7.197 Experience in other common law jurisdictions has demonstrated the benefits that could be brought about by legislation on apology. Although experience in other jurisdictions would have to be considered with care, it is generally accepted (especially amongst mediators) that apologies are particularly relevant in disputes that have a personal element (such as employment disputes, personal injuries and especially medical malpractice)<sup>216</sup> as they can change the dynamic between the parties.<sup>217</sup> Even in commercial or other civil disputes, it is not uncommon for people involved to have an emotional reaction to the other parties' conduct. As one mediator observed: "An apology may be just a brief

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<sup>212</sup> For a detailed list, see tables 1 and 2 annexed to *Pure Vines*, *ibid*.

<sup>213</sup> For a discussion on the British Columbia Apology Act 2006, see: Trevor Sones, "The Implications, Challenges and Impacts of Apology: A Canadian Cultural Interpretation", at <http://www.apmec.unisa.edu.au/apmf/2006/papers/sones.pdf>.

<sup>214</sup> The Act was passed but apparently has not yet come into force.

<sup>215</sup> The term "apology" is defined in section 1 to mean "an expression of sympathy or regret, a statement that one is sorry or any 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."

<sup>216</sup> See Dr. David Fang, "Medical Professional Liability. A Daunting Challenge" (2009) *Focus* (published by the Hong Kong Academy of Medicine) 8 (at page 10). An Australian study of medical complaints showed that where 97% of complaints had resulted in an explanation and/or apology, none had proceeded to litigation. See: K. Anderson, D. Allan & P. Finucane, "A 30-month study of patient complaints at a major Australian Hospital" (2001) *Journal of Quality in Clinical Practice* 109.

<sup>217</sup> Barry Leon, "Canada: Safe To Apologise: New Law in British Columbia", *Mediation Committee Newsletter*, September 2006.

moment in mediation. Yet it is often the margin of difference, however slight, that allows parties to settle. At heart, mediations are used in dealing with damaged relationships. When offered with integrity and timing, an apology can indeed be a critically important moment in mediation”.<sup>218</sup>

7.198 In principle, the Working Group sees the advantage of introducing legislative provisions to deal with apologies in the context of mediation. As stated above, experience in other jurisdictions shows that such provisions will make parties to a dispute more willing to offer an apology during the mediation process, which in turn will enhance the chance of settlement. However, it is appreciated that the question of whether legislative provisions on apology (especially a general one) is far from a straightforward one. The effect of apology in the context of dispute resolution has a strong cultural element. Apart from the differences in legislative regimes, the success or failure of a certain apology legislative provision enacted in a certain jurisdiction depends on the cultural perception of apologies. Further, such legislative provisions may have a significant and wide-ranging impact on civil liability. In this regard, it is pertinent to point out that such legislative provisions in other jurisdictions are not confined to the context of mediation. The scope of the legislative provision may also have a significant impact. Whilst legislation dealing with a full apology (which includes admission of fault) is generally perceived to be more effective, legislation dealing with a partial apology may be counter-productive in that they may even exacerbate the problems and increase litigation.<sup>219</sup> Taking all these into account, it was considered that this question deserved a fuller consideration by bodies such as the Law Reform Commission.

**Recommendation 43**

**The question of whether there should be an Apology Ordinance or legislative provisions dealing with the making of apologies for the purpose of enhancing settlement deserves fuller consideration by an appropriate body.**

***Application to the Government***

7.199 Most mediations concern private individuals, be they natural persons or legal entities. However, there is no reason why the Government should not be bound by the Proposed Mediation Ordinance. On the contrary, there is every reason why the Government should be bound.

7.200 First, the Government in various capacities from time to time enters into contracts in the course of performing its functions. Examples include contracts concerning land or construction projects, employment as well as purchase of materials. These contracts are generally no different from contracts

<sup>218</sup> Carl Schneider, “What it Means to be Sorry: The Power of Apology in Mediation”, 17 *Mediation Quarterly*, 2000, at [www.mediate.com](http://www.mediate.com).

<sup>219</sup> Pure Vines, *ibid*, at page 222.

entered into by private individuals. When disputes arise from these contracts, there is no reason why the Government should not have recourse to mediation and thus be bound by the provisions in the Proposed Mediation Ordinance. As a matter of fact, mediation is already used in resolving construction disputes involving the Government.

7.201 Second, the courts in England and Wales have generally endorsed the use of mediation to settle disputes arising in the public law arena<sup>220</sup> although the number of public law disputes that were actually resolved through mediation remains limited. Cases show that where the powers underpinning the decision-making process are discretionary, ADR such as mediation offers a realistic approach in the public law context. A similar approach has been adopted by the courts in New Zealand.<sup>221</sup> Further, since the remedies that the court can grant in a judicial review application are limited, mediation can focus on providing outcomes that are tailored to the parties and their particular needs, such as agreement on action to be taken, apologies or even a commitment to change in policy and procedure.<sup>222</sup>

7.202 Whilst only some and not all public law disputes in Hong Kong will be suitable for mediation, there is no reason why appropriate disputes which are currently resolved through judicial review proceedings cannot be resolved by mediation.

7.203 Third, given the Government's policy to promote mediation, it would be perceived as a vote of non-confidence if the Government seeks to suggest that it should not be bound by the Proposed Mediation Ordinance.

7.204 Fourth, the Government is bound by the current Arbitration Ordinance (save and except Part IV, which concerns enforcement of Convention awards).<sup>223</sup> Although arbitration is different from mediation, both of them are means of ADR and, in the present context, the same approach should be adopted for the sake of consistency.

7.205 For these reasons, it is recommended that the Government should be bound by the Proposed Mediation Ordinance. If there is any good reason for exempting the Government from any specific provisions in the Proposed Mediation Ordinance, specific exemptions can be built in.

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<sup>220</sup> See: (a) Michael Supperstone Q.C., Daniel Stilitz & Clive Sheldon, "ADR and Public Law", [2006] *Public Law* 299; (b) V Bondy & M Sunkin, "Settlement in judicial review proceedings" [2009] *Public Law* 237; (c) V Bondy & M. Sunkin, "The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing" (Public Law Project); (d) *Cowl v Plymouth CC* [2002] 1 WLR 803, per Lord Woolf CJ at [8]; (e) *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002; and Michael Fordham QC, "Judicial Review Handbook" (5<sup>th</sup> ed.), para. 10.2, at pages 108-109.

<sup>221</sup> See: *Guidelines on Process and Content of Legislation* (2001, with supplements added in 2003 and 2007) published by the Legislation Advisory Committee under the authority of the Cabinet of the New Zealand Government, at [http://www.justice.govt.nz/lac/pubs/2001/legislative\\_guide\\_2000/chapter\\_18.html](http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_18.html).

<sup>222</sup> V. Bondy & L. Mulcahy with M. Doyle and V. Reid, "Mediation and Judicial Review: An empirical research study" (Public Law Project), at pages 42-45.

<sup>223</sup> Section 47 of the Arbitration Ordinance.

#### Recommendation 44

**Unless there are specific exceptions that can be properly justified, the Government should be bound by the Proposed Mediation Ordinance.**

### Whether there should be compulsory mediation

7.206 In *Shirayama Shokusen Co. Ltd. v Danovo Ltd.*,<sup>224</sup> Blackburne J. took the view that the court does have jurisdiction to direct ADR even though one party may not be willing to participate in such a process. On the other hand, in *Halsey v Milton Keynes General NHS Trust*,<sup>225</sup> the Court of Appeal said that “if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer to their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it”. It was said that it “is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court”.<sup>226</sup>

7.207 Notwithstanding Blackburne J.’s remark, it is generally accepted that the court, in the absence of specific statutory provision, does not have jurisdiction to order a reluctant party to submit his dispute to mediation.<sup>227</sup> In other words, there is no power to order mediation under common law or as part of the court’s inherent jurisdiction.

7.208 In some jurisdictions, the courts do have statutory power to order parties to a dispute to have recourse to mediation (either before or after commencing court proceedings). For instance, section 53A of the Federal Court of Australia Act 1976 confers upon the Federal Court a power to order mediation without the consent of the parties. Further, cases decided in other jurisdictions advocated the benefits of compulsory mediation.<sup>228</sup>

7.209 However, the debate concerning compulsory or mandatory mediation remains far from settled.<sup>229</sup> On the one hand, it is believed that mediation should remain voluntary. Parties forced to mediate will not be truly co-operative. On the other hand, it is argued that compulsory mediation only enforces participation in a

<sup>224</sup> [2004] 1 WLR 2985.

<sup>225</sup> [2004] 1 WLR 3002.

<sup>226</sup> *Ibid*, para. 9.

<sup>227</sup> See: David Foskett Q.C., “The Law and Practice of Compromise”, (6<sup>th</sup> ed.), Sweet & Maxwell, London, 2005, para. 43-05, at page 585.

<sup>228</sup> See, e.g. *Browning v Crowley* [2004] NSWSC 128, per Bryson J, paras. 5 to 6; *Idoport Pty Ltd. v National Australia Bank Ltd.* [2001] NSWSC 427, per Einstein J., para. 40.

<sup>229</sup> See, e.g.: Paul Venus, “Court directed compulsory mediation - attendance or participation?” (2004) 15(1), *Australian Dispute Resolution Journal* 29; Paul Venus, “Advantages in mandatory mediation” (2003) 41(10) *Law Society Journal* 46; NADRAC, “Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters”, paras. 6.1 to 6.43 (with the key arguments for and against compulsory mediation set out in paras. 6.22 to 6.26).

process during which co-operation and consent might be forthcoming provided the mediation is properly conducted.

7.210 Different jurisdictions have adopted very different approaches. For instance, whilst Canada is generally in favour of mandatory mediation, there is no legislation in England and Wales providing for mandatory mediation although there are measures such as pre-action protocol to strongly encourage the use of mediation.

7.211 As noted above, the development of mediation in Hong Kong is still at a relatively early stage. Although Hong Kong has the advantage of learning from the experience of other jurisdictions, what has happened elsewhere might not necessarily be appropriate in Hong Kong. The experiences in other jurisdictions differ and it is difficult to predict which jurisdiction's experience will be most suitable for adoption in Hong Kong. There would need to be sufficient support or resources (such as a sufficiently large pool of experienced mediators, a proper system or systems of accreditation, etc.) before compulsory mediation could be introduced.

7.212 The CJR, which encourages the use of mediation, was implemented with effect from 2 April 2009. It will be desirable to wait for a while so that studies can be made to see how the CJR impacts upon the use of mediation in Hong Kong. Gary Meggitt in his paper, "The Case for (and against) Compulsory Court-Annexed Mediation in Hong Kong" said:

*"We return then to the choice identified by the Secretary for Justice – compulsion or encouragement. It could be argued that any informed choice should be left until the various pilot schemes have run their course."*<sup>230</sup>

7.213 The Working Group does not recommend the introduction of compulsory mediation at this stage. Instead, it is recommended that the question of compulsory mediation should be revisited at an appropriate time in the future, when the development of mediation in Hong Kong has become more mature and when the general public and the stakeholders have more experience in the use of mediation.

#### **Recommendation 45**

**Compulsory referral to mediation by the court should not be introduced at this stage, but the issue should be revisited when mediation in Hong Kong is become more developed.**

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<sup>230</sup> Gary Meggitt, "The Case for (and against) Compulsory Court-Annexed Mediation in Hong Kong", paper presented at 5<sup>th</sup> Asian Law Institute Conference, Thursday 22 May 2008, Singapore.

## Provision of mediation services by the Judiciary

7.214 The judiciary in some jurisdictions provides mediation services. Notable examples include Australia, Canada and South Africa.<sup>231</sup>

7.215 However, for the reasons summarised above, the Sub-group took the view that the question of whether the Judiciary should provide mediation service should be considered at a later stage. Besides, the Judiciary may be in a better position to lead the consideration of this question (whether as part of the review of the implementation of CJR or as a separate review) since it involves questions which the Judiciary would be in the best position to answer (such as judicial resources and readiness of judges to act as mediators).

### **Recommendation 46**

**At this stage, the Judiciary should not provide mediation services. However, the question should be revisited in future after consultation with the Judiciary (whether as part of the review of the implementation of the Civil Justice Reform or as a separate review).**

## Cross-boundary enforcement of agreements

7.216 The considerations discussed above in relation to a statutory mechanism for enforcing mediated settlement agreements apply with equal, if not greater, force in respect of cross-boundary enforcement of mediated settlement agreements. Besides, unless reciprocal arrangements can be put in place (which would require bilateral arrangements between jurisdictions), there is not much point in considering specific arrangements for cross-boundary enforcement of mediated settlements.

7.217 In the circumstances, the Working Group did not find it necessary for the Proposed Mediation Ordinance to include any statutory mechanism for cross-boundary enforcement of mediated settlement agreement.

### **Recommendation 47**

**It would not be necessary to include in the Proposed Mediation Ordinance provisions for cross-boundary enforcement of mediated settlement agreements.**

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<sup>231</sup> Nadja Alexander, *ibid*, Chapters 2, 5 and 13.

## Legal aid for mediation<sup>232</sup>

7.218 Following the Judiciary's three-year pilot scheme on mediation in matrimonial cases which ended in 2003, the Legal Aid Department ("LAD") after consultation with the Legislative Council Panel on Administration of Justice and Legal Services ("AJLS Panel") launched a one-year pilot scheme on mediation in matrimonial cases on 15 March 2005 ("the Pilot Scheme"). The objective of the Pilot Scheme was to establish whether extending funding to cover mediation of legally aided matrimonial cases was justified.

7.219 Following completion, the evaluation and findings of the Pilot Scheme were presented to the AJLS Panel which supported the Administration's proposal to put in place a permanent arrangement for providing legal aid for mediation in matrimonial cases. LAD finances a legally aided person's share of the mediator's fee and may recover such share from the contribution paid or from money or properties recovered or preserved on behalf of the legally aided person in the proceedings. This is in line with the current legal aid policy which requires that only persons who pass the means and merits tests will be eligible for legal aid.

7.220 The Legal Aid Ordinance (Cap. 91) provides funding for legal representation in courts and tribunals as specified in Part 1 of Schedule 2 thereof. Having considered the matter, the LAD takes the view that legislative amendments will not be necessary for the purpose of providing legal aid to cover mediation in legally aided matrimonial cases. As far as non-matrimonial civil cases are concerned, the LAD takes the view that the current Orders 1A, 1B and 62 of the Rules of the High Court and the Rules of the District Court (which were introduced and amended as a result of the implementation of the CJR), the costs of mediation may be regarded as costs incidental to the proceedings for which legal aid has been granted.<sup>233</sup> Since the expenses incurred are in connection with the legally aided proceedings for the purpose of sections 6 and 16B(a) of the Legal Aid Ordinance, the LAD takes the view that no legislative amendments are required.

7.221 Mediation will not be a mandatory pre-condition for the granting of legal aid for legal representation as it is intended to be an adjunct to litigation and an alternative channel to dispute resolution between the parties.

7.222 Mediators' fees incurred in civil cases will be treated the same way as legal costs and disbursements incurred in legally aided proceedings. The LAD will

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<sup>232</sup> The matters set out below are based on: (1) the paper entitled "Proposal on the Permanent Arrangement for Mediation in Legally-aided Matrimonial Cases" dated June 2008 prepared by the Home Affairs Bureau; (2) the paper entitled "Mediation in legally aided matrimonial cases" dated June 2008 submitted by the Legal Aid Department to the Working Group on Mediation (Paper No. 8/08); and (3) the paper entitled "Mediation in Civil Legal Aid Cases" dated 12 December 2008 submitted by the Legal Aid Department to the Working Group on Mediation (Paper No. 13/08).

<sup>233</sup> This view is supported by Lam J.'s decision in *Chun Wo Construction & Engineering Co. Ltd. v Fujita Corporation and Henryvicy Construction Co. Ltd. t/a Chun Wo-Fujita-Henryvicy Joint Venture v China Win Engineering Ltd.*, unrep., HCCT 37/2006 (12 June 2008) (paras. 89-96). The only rider is that (as pointed out by Lam J. in para. 94, following *Lobster Group Ltd. v Heidelberg Graphic Equipment Ltd.* [2008] EWHC 413 (TCC) (6 March 2008)), if a mediation took place a long time ago before parties commence legal proceedings, the court may be slow to conclude that the costs of such mediation should be treated as costs incidental to the legal proceedings. See also: *Vellacott v Convergence Group plc* [2007] EWHC 1774 and *Eagleson v Liddell* [2001] EWCA Civ 155.

give approval for the engagement of a mediator in the same manner as approval is given for the engagement of medical or other experts.

7.223 In considering approval for the mediators to be engaged, the fees to be charged as well as the number of hours allowed for mediation, the LAD will take into account factors including: (1) the nature and complexity of the disputes in question; (2) the value of the matters under mediation; (3) the benefits to be obtained in proportion to the cost involved; and (4) the implication of the first charge of the Director of Legal Aid where applicable.

*Recommendation*

7.224 The Working Group supports the provision of legal aid to legally aided persons when they are willing to participate in mediation.

**Recommendation 48**

**Legal aid should be provided to legally aided persons when they are willing to participate in mediation.**

## Chapter 8

### Summary of Recommendations

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#### **Recommendation 1**

A clear and workable definition of mediation be agreed upon. Some degree of flexibility in the definition of mediation should be maintained so that future application and development of mediation in Hong Kong will not be unnecessarily restricted.

#### **Recommendation 2**

The use of the words “mediation” and “conciliation” within the Hong Kong legislation should be reviewed, in particular in the Chinese text, to remove any inconsistency.

#### **Recommendation 3**

An “Umbrella” mediation awareness programme which targets the general public with information on the modes and process of mediation be implemented through the use of sector specific mediation publicity campaigns such as those targeting the business and commercial sector, communities, youth and elderly. Such sector specific campaigns should focus on the modes of mediation that are effective and relevant to the specific sector.

#### **Recommendation 4**

Given the many parties involved in the promotion of and public education on mediation and the good work that they have been engaged in, it is recommended that these parties be encouraged to continue their important promotional and public education work. These diverse parties should actively seek to collaborate with each other and pool their efforts and expertise together where the opportunity arises, as concerted efforts would carry greater and more lasting impact.

#### **Recommendation 5**

Mediation information and training for frontline dispute resolvers (such as police officers, social workers, family psychologists, correctional officers and lawyers) should be supported as such training will assist them in their day-to-day work and having a good understanding of mediation will assist them to be effective dispute resolvers or mediation referrers. It will also assist them in promoting mediation as a means to resolve conflicts harmoniously at the community level.

#### **Recommendation 6**

Further promotion of the ‘Mediate First’ Pledge should be encouraged within the business and commercial sectors given its initial success.

### **Recommendation 7**

The 'Mediate First' Pledge to be promoted to different sectors of the community and its website ([www.mediatefirst.hk](http://www.mediatefirst.hk)) be maintained, updated and made interactive in order to provide support to those who subscribe to the Pledge and interested members of the public.

### **Recommendation 8**

The pace of promoting mediation should take into account the readiness of mediators, the maturity of the infrastructural support, and the needs of mediation users. The course of the promotion may be divided into 3 stages: Stage 1 (Awareness Building), Stage 2 (Intensified and Targeted Publicity), and Stage 3 (Mass Outreach). As development migrates from Stage 1 to Stage 2, the pace of promoting mediation should be stepped up. Given the competing demands for Government publicity resources, the support and concerted efforts of all parties involved in mediation should be enlisted.

### **Recommendation 9**

Mediation pilot schemes be considered for disputes in areas such as in the workplace and employment, intellectual property, banking and financial services, medical malpractice and healthcare, child protection, environmental, urban planning, land use and re-development.

### **Recommendation 10**

The experience and statistics from the operation of the Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme be analysed to identify the factors that are conducive to the success of this scheme, its limitations and the lessons to be learnt for the future.

### **Recommendation 11**

The initiative of the insurance industry in the establishment of the New Insurance Mediation Pilot Scheme ("NIMPS") is worthy of support. The Federation of Insurers should be encouraged to analyse and share its experience in operating NIMPS, in particular the factors that are conducive to its success and the lessons to be learnt. The sharing of success stories would be a very effective means of promoting mediation.

### **Recommendation 12**

Further promotion and expansion of family mediation services in Hong Kong should be supported. Consideration should be given to support NGOs providing family mediation services to the community. Development of Collaborative Practice as a less adversarial means of resolving family disputes could be explored further.

### **Recommendation 13**

The challenges posed by unrepresented litigants in court should be further studied and more statistical data made available so that promotion of mediation to unrepresented litigants may be better supported.

### **Recommendation 14**

Special efforts should be made to promote mediation to unrepresented litigants in court including the provision of mediation information and the promotion of the 'Mediate First' website ([www.mediatefirst.hk](http://www.mediatefirst.hk)) to them through the Mediation Information Office and the Resource Centre for Unrepresented Litigants in the High Court.

### **Recommendation 15**

Further support and expansion of the current Restorative Justice and Mediation Programmes throughout the community in Hong Kong should be encouraged.

### **Recommendation 16**

Pending the outcome of the Pilot Project on Community Venues for Mediation, there should be at least one community centre in Hong Kong Island, one in Kowloon and one in the New Territories to be made available as community venues for mediation.

### **Recommendation 17**

Recognising the competing demands on the school curriculum, the potential introduction of mediation education within the primary and secondary schools warrants serious examination and it is recommended that consideration be given to support the expansion of the Peer Mediation Project.

### **Recommendation 18**

The Bar Association and the Law Society should be invited to consider the content and coverage of mediation training for their members as part of their ongoing professional development and whether such training should be made compulsory.

### **Recommendation 19**

In order to foster the further development of mediation knowledge in the legal profession, consideration should be given to revisit the question of mediation being incorporated into compulsory courses at PCLL, LL.B and J.D. programmes at a later stage when the mediation landscape becomes more mature.

### **Recommendation 20**

Subject to resource and curriculum constraints, the Universities should consider enhancing the current elective mediation courses and the mediation element in other courses within the Law Faculties at both the undergraduate and postgraduate

levels.

### **Recommendation 21**

The Universities should be invited to consider offering common core courses on mediation and dispute resolution within the first year undergraduate University programme through an integrated interdisciplinary approach to educating students about the process and skills of mediation.

### **Recommendation 22**

The Law Faculties of the three Universities (University of Hong Kong, Chinese University of Hong Kong, and City University of Hong Kong) should be encouraged to proceed with the development of the proposed “Hong Kong Mediation Competition”.

### **Recommendation 23**

Early Dispute Resolution (“EDR”) systems could be beneficial for organisations, universities and other tertiary institutions in Hong Kong to give due consideration in order to help resolve conflicts and minimise dispute resolution costs within organisations and institutions.

### **Recommendation 24**

An Announcement in the Public Interest be produced and aired on television for the promotion of mediation. More publicity via radio, printed media and new media platform should also be pursued. Educational programmes on mediation targeted at youth should be strengthened and special efforts be made to approach television stations and script-writers to consider including mediation in their television drama productions.

### **Recommendation 25**

The establishment of a single body for accrediting mediators is desirable and can assist to ensure the quality of mediators, consistency of standards, education of the public about mediators and mediation, build public confidence in mediation services and maintain the credibility of mediation.

### **Recommendation 26**

It is considered that currently the time is not right to prescribe a standardised system of accrediting mediators and that the emphasis should be on the provision of appropriate mediation information to potential users of mediation that will enable them to decide whether to choose mediation to resolve disputes and also assist them to be better able to choose competent mediators.

### **Recommendation 27**

There should be wide promulgation of the Hong Kong Mediation Code which is a code of conduct for mediators in Hong Kong and mediation service providers are encouraged to adopt the Code and set up robust complaints and disciplinary processes to enforce the Code.

### **Recommendation 28**

A single mediation accrediting body in Hong Kong could be in the form of a company limited by guarantee. The possibility for establishing this body should be reviewed in 5 years.

### **Recommendation 29**

Information on the Continuing Professional Development requirements (if any) of mediator accrediting organisations should be made available to the public.

### **Recommendation 30**

Whenever the question of an appropriate mediator arises in court, the Judiciary might suggest that the parties consider selecting a mediator (of whatever qualifications or accreditation) who has at least subscribed to the Hong Kong Mediation Code.

### **Recommendation 31**

Encouragement should be given for experienced mediators to assist newly accredited mediators to obtain practical mediation experience.

### **Recommendation 32**

Hong Kong should have legislation on mediation, which should be aimed at providing a proper legal framework for the conduct of mediation in Hong Kong. However, the legislation should not hamper the flexibility of the mediation process.

### **Recommendation 33**

There should be the enactment of a Mediation Ordinance, instead of introducing legislative provisions relating to mediation into the existing Arbitration Ordinance or other Ordinances.

### **Recommendation 34**

There should be an interpretation section in the Proposed Mediation Ordinance setting out the key terminology such as 'mediation' and 'mediator'. As regards the expressions 'mediation agreement' and 'mediated settlement agreement', they should be defined if the Proposed Mediation Ordinance is to contain provisions dealing with their enforcement.

### **Recommendation 35**

There should be a section in the Proposed Mediation Ordinance setting out its objectives and underlying principles.

### **Recommendation 36**

The Working Group does not recommend the introduction of legislative provisions dealing with enforcement of a mediation agreement. However, if it is considered appropriate to introduce such legislative provisions, the enforcement scheme can be designed along the lines of the scheme for enforcing arbitration agreements (i.e. a stay of proceedings pending mediation).

### **Recommendation 37**

There is no need for the Proposed Mediation Ordinance to include any provisions to deal with the mediation process, save that there should be: (a) a provision dealing with the appointment of the mediator along the line of clause 32 of the Draft Arbitration Bill; and (b) a provision (similar to section 2F of the Arbitration Ordinance) that sections 44, 45 and 47 of the Legal Practitioners Ordinance do not apply so that non-lawyers or foreign lawyers can participate in mediation conducted in Hong Kong.

### **Recommendation 38**

The Proposed Mediation Ordinance should include provisions dealing with the rules of confidentiality and privilege, as well as setting out the statutory exceptions to the rules and the sanctions for breaching the rules of confidentiality and privilege.

### **Recommendation 39**

The issue of whether to grant mediator immunity from civil suits is a controversial one. Although it is not recommended that such immunity be granted, it may be desirable to allow partial immunity, especially in respect of *pro bono* or community mediation.

### **Recommendation 40**

It is not necessary to introduce legislative provisions to suspend the running of limitation periods during the mediation process.

### **Recommendation 41**

It is not necessary to include in the Proposed Mediation Ordinance a statutory mechanism for enforcing mediated settlement agreements. Where necessary, enforcement of mediated settlement agreements can be left to the court as in ordinary cases of enforcement of contracts.

#### **Recommendation 42**

Whilst not really necessary, there is in principle no objection to include a set of model mediation rules in the Proposed Mediation Ordinance. However, any model mediation rules so included should only serve as a guide and should not be made mandatory. To maintain flexibility of the mediation process, parties should be at liberty to adopt such mediation rules as they deem fit.

#### **Recommendation 43**

The question of whether there should be an Apology Ordinance or legislative provisions dealing with the making of apologies for the purpose of enhancing settlement deserves fuller consideration by an appropriate body.

#### **Recommendation 44**

Unless there are specific exceptions that can be properly justified, the Government should be bound by the Proposed Mediation Ordinance.

#### **Recommendation 45**

Compulsory referral to mediation by the court should not be introduced at this stage, but the issue should be revisited when mediation in Hong Kong is more developed.

#### **Recommendation 46**

At this stage, the Judiciary should not provide mediation services. However, the question should be revisited in future after consultation with the Judiciary (whether as part of the review of the implementation of the Civil Justice Reform or as a separate review).

#### **Recommendation 47**

It would not be necessary to include in the Proposed Mediation Ordinance provisions for cross-boundary enforcement of mediated settlement agreements.

#### **Recommendation 48**

Legal aid should be provided to legally aided persons when they are willing to participate in mediation.

## ANNEX 1

### List of Legislative Provisions on Mediation and Conciliation in Hong Kong

#### Part I Statutory Definitions

Ca.	Ordinance	Sec	Mediation	Conciliation
25	Labour Tribunal Ordinance	2		“conciliation” (調解) means a discussion or action initiated or undertaken by an authorised officer for the purpose of reaching a settlement of a claim;
55	Labour Relations Ordinance	2	“mediator” (調停員) means a single mediator or a board of mediation appointed under section 11A; (Added 76 of 1997 s. 2)	“conciliation” (調解) means a discussion or action initiated or undertaken by a conciliation officer to assist the parties to a trade dispute to reach a settlement of the trade dispute;
341	Arbitration Ordinance	2		“conciliation” (調解) includes mediation (調停);
453	Minor Employment Claims Adjudication Board Ordinance	2		“conciliation” (調解) means a discussion or action initiated or undertaken by an authorised officer for the purpose of reaching a settlement of a dispute in respect of which a claim may be brought;
482	Merchant Shipping (Liner Conferences) Ordinance	2		“conciliation” (調解) means international mandatory conciliation under Chapter VI of the Code, and references to the institution or completion of conciliation proceedings shall be construed in accordance with subsection (2);

## Part II Statutory Translations

Ca.	Ordinance	Sec	Mediation	Conciliation
47	Apprenticeship Ordinance	39		Conciliation 調解
25	Labour Tribunal Ordinance	6, 15, 25		Conciliation 調解
25C	Labour Tribunal (Forms) Rules	Sch – Form 7		Conciliation 調解
55	Labour Relations Ordinance	2, 3, 4, 5, 6, 7, 8, 9, 11A, 11B, 11C, 11D, 11E, 35	Mediator 調停員 Mediation 調停	Conciliation 調解 Conciliation Officer 調解員
		3, 8		Settlement 和解
91	Legal Aid Ordinance	2, Sch 2, Part I (5)	Mediation 調解	
178D	Designation of Public Officers Notice	Sch	Mediation 調解	
341	Arbitration Ordinance	2, 2A, 2B	Mediation 調停	Conciliator 調解員 Conciliation 調解
397	Ombudsman Ordinance	11B	Mediation 調解 Mediator 調解員	
453	Minor Employment Claims Adjudication Board Ordinance	4(6), 14		Conciliation 調解 Settlement 和解

<b>Ca.</b>	<b>Ordinance</b>	<b>Sec</b>	<b>Mediation</b>	<b>Conciliation</b>
480	Sex Discrimination Ordinance	64, 84		Conciliation 調解 Settlement 和解
480B	Sex Discrimination (Investigation and Conciliation Rules)	6, 7, 8		Conciliation 調解 Conciliator 調解人
482	Merchant Shipping (Liner Conferences) Ordinance	2, 8, 9, 10, Sch 1, Sch 2		Conciliation 調解 Conciliator 調解人
487	Disability Discrimination Ordinance	62(1) (d), 80		Conciliation 調解
487B	Disability Discrimination (Investigation and Conciliation) Rules	6, 8		Conciliation 調解 Conciliator 調解人
487C	Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation	1(c)		Conciliation 調解
503I	Fugitive Offenders (Torture) Order	Sch, Art 21, 23		Conciliation 調解
503J	Fugitive Offenders (Drugs) Order	Sch, Art 32	Mediation 調停	Conciliation 和解
511D	Estate Agents (Determination of Commission Disputes) Regulation		Mediation 調停	
527	Family Status Discrimination Ordinance	44, 62		Conciliation 調解 Settlement 和解

<b>Ca.</b>	<b>Ordinance</b>	<b>Sec</b>	<b>Mediation</b>	<b>Conciliation</b>
527A	Family Status Discrimination (Investigation and Conciliation) Rules	6, 8		Conciliation 調解 Conciliator 調解人
556	Mass Transit Railway Ordinance	52L	Mediation 調解	
577	Tung Chung Cable Car Ordinance	19(13), 29(7), 33(1)	Mediation 調停	
602	Race Discrimination Ordinance	59(1) (d), 78		Conciliation 調解
602B	Race Discrimination (Investigation and Conciliation) Rules	6, 8		Conciliation 調解 Conciliator 調解人

**Mediation Service Providers in Hong Kong  
(as at 14 December 2009)**

No.	Name and Contact Details of Providers
1.	<p>Hong Kong International Arbitration Centre            Address: 38/F, Two Exchange Square, 8 Connaught Place, Central,            Hong Kong            Tel: 2525 2381            Fax: 2524 2171            Email: <a href="mailto:adr@hkiac.org">adr@hkiac.org</a>            Website: <a href="http://www.hkiac.org">www.hkiac.org</a></p>
2.	<p>Hong Kong Mediation Council            c/o Hong Kong International Arbitration Centre            Address: 38/F, Two Exchange Square, 8 Connaught Place, Central,            Hong Kong            Tel: 2525 2381            Fax: 2524 2171            Email: <a href="mailto:adr@hkiac.org">adr@hkiac.org</a>            Website: <a href="http://www.hkiac.org">www.hkiac.org</a></p>
3.	<p>Hong Kong Mediation Centre            Address: Penthouse, Gold and Silver Commercial Building,            12-18 Mercer Street, Central, Hong Kong            Tel: 2866 1800            Fax: 2866 1299            Email: <a href="mailto:admin@mediationcentre.com.hk">admin@mediationcentre.com.hk</a>            Website: <a href="http://www.mediationcentre.org.hk">www.mediationcentre.org.hk</a></p>
4.	<p>The Hong Kong Bar Association            Address: LG2, High Court, 38 Queensway, Hong Kong            Tel: 2869 0210            Fax: 2869 0189            Email: <a href="mailto:info@hkba.org">info@hkba.org</a>            Website: <a href="http://www.hkba.org">www.hkba.org</a></p>
5.	<p>The Law Society of Hong Kong            Address: 3/F, Wing On House, 71 Des Voeux Road Central, Central,            Hong Kong            Tel: 2846 0584            Fax: 2845 0387            Email: <a href="mailto:mediation@hklawsoc.org.hk">mediation@hklawsoc.org.hk</a>            Website: <a href="http://www.hklawsoc.org.hk">www.hklawsoc.org.hk</a></p>

No.	Name and Contact Details of Providers
6.	Chartered Institute of Arbitrators (East Asia Branch) c/o Hong Kong International Arbitration Centre Address: 38/F, Two Exchange Square, 8 Connaught Place, Central, Hong Kong Tel: 2525 2381 Fax: 2524 2171 Email: <a href="mailto:ciarb@hkiac.org">ciarb@hkiac.org</a> Website: <a href="http://www.ciarbasia.org">www.ciarbasia.org</a>
7.	The Hong Kong Institute of Surveyors Address: Suite 801, 8/F, Jardine House, 1 Connaught Place, Central, Hong Kong Tel: 2526 3679 Fax: 2868 4612 Email: <a href="mailto:info@hkis.org.hk">info@hkis.org.hk</a> Website: <a href="http://www.hkis.org.hk">www.hkis.org.hk</a>
8.	The Royal Institution of Chartered Surveyors Hong Kong Address: Room 1804, Hopewell Centre, 183 Queens Road East, Wan Chai, Hong Kong Tel: 2537 7117 Fax: 2537 2756 Email: <a href="mailto:ricsasia@rics.org">ricsasia@rics.org</a> Website: <a href="http://www.ricsasia.org">www.ricsasia.org</a>
9.	The Hong Kong Institute of Architects Address: 19/F, One Hysan Avenue, Causeway Bay, Hong Kong Tel: 2511 6323 Fax: 2519 6011, 2519 3364 Email: <a href="mailto:hkiasec@hkia.org.hk">hkiasec@hkia.org.hk</a> Website: <a href="http://www.hkia.net">www.hkia.net</a>
10.	Hong Kong Institute of Arbitrators c/o Hong Kong International Arbitration Centre Address: 38/F, Two Exchange Square, 8 Connaught place, Central, Hong Kong Tel: 2525 2381 Fax: 2524 2171 Email: <a href="mailto:adr@hkiarb.org.hk">adr@hkiarb.org.hk</a> Website: <a href="http://www.hkiarb.org.hk">www.hkiarb.org.hk</a>
11.	Caritas – Hong Kong Caritas Family Service Address: Shop 203, Wah Ming Shopping Centre, Wah Ming Estate, Fanling, NT Tel: 2669 2316 Fax: 2676 2273

No.	Name and Contact Details of Providers
12.	<p>Hong Kong Catholic Marriage Advisory Council            Marriage Mediation &amp; Counselling Service            Address: Room 101 – 105, M2 Level, Tsui Cheung House,            Tsui Ping (North) Estate, Kwun Tong, Kowloon            Tel: 2782 7560            Fax: 2385 3858            Email: <a href="mailto:mmcs@cmac.org.hk">mmcs@cmac.org.hk</a></p>
13.	<p>Hong Kong Christian Service            Address: 2/F, 33 Granville Road, Tsimshatsui, Kowloon            Tel: 2731 6227            Fax: 2724 3520</p>
14.	<p>Hong Kong Family Welfare Society Mediation Centre            Address: Western Garden, 80A, First Street, Sai Ying Pun, Hong Kong            Tel: 2561 9229            Fax: 2811 0806            Website: <a href="http://www.mediationcentrehk.org">http://www.mediationcentrehk.org</a></p>
15.	<p>Hong Kong Sheng Kung Hui Welfare Council            Address: 5/F, Holy Trinity Bradbury Centre, 139 Ma Tau Chung Road,            Kowloon            Tel: 2713 9174            Fax: 2711 3082</p>
16.	<p>Shatin Alliance Community Services Centre            Address: G/F, Yue Yuet House, Yue Tin Court, Shatin, N.T.            Tel: 2648 9281            Fax: 2635 4795</p>
17.	<p>Yang Memorial Methodist Social Service            Mongkok Integrated Family Service Centre            Address: G/F, Central Commercial Tower, 736 Nathan Road, Mongkok,            Kowloon            Tel: 2171 4001            Fax: 2388 3062</p>
18.	<p>Centre for Restoration of Human Relationships            Address: Unit 301, Lai Ho House, Lai Kok Estate, Sham Shui Po,            Kowloon            Tel: 2399 7776            Fax: 2711 5960</p>
19.	<p>The Evangelical Lutheran Church of Hong Kong            Address: Unit No. R13-16 Commercial Centre, Wo Che Estate, Shatin,            New Territories            Tel: 2650 0022            Fax: 2650 0024</p>

No.	Name and Contact Details of Providers
20.	Methodist Centre Address: 1/F, Aldrich Bay Integrated Services Building, 15 Aldrich Bay Road, Shau Kei Wan, Hong Kong Tel: 2528 2779 Fax: 2520 5401

Note: This list is compiled with information available to the Department of Justice as at 14 December 2009. It contains information from the Judiciary's Mediation Coordinator's Office and is non exhaustive.

## Report on Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme

### 1. Background

The collapse of the Lehman Brothers minibond scheme had resulted in a political fallout affecting more than 48,000 investors in Hong Kong who had invested approximately HK\$20 billion in structured products issued or guaranteed by Lehman Brothers, which is colloquially known as 'minibonds'.<sup>234</sup> As a result of the bankruptcy, these investments have lost the majority of their value and are, in some cases, worthless. Furthermore the residue value of the investment, if any, is under protection of the bankruptcy order. Various channels were made available to assist investors to claim compensation from the banks. The Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme ("Scheme") is one of the platforms dedicated to resolve disputes between investors and banks by means of ADR, in particular, by mediation. This report by the former Scheme Officer, Oscar Tan Khain Sein, compares the Scheme with various dispute resolution avenues and summarises the strengths and weaknesses with respect to the publicity of the Scheme and public education of mediation.

On 31 October 2008, the Hong Kong International Arbitration Centre ("HKIAC") was appointed by the Hong Kong Monetary Authority ("HKMA") to be the service provider for the Scheme. The Scheme is available to qualified candidates under which the HKMA will pay half the fee and the bank concerned the other half. To qualify, an investor has to have made a complaint to the HKMA and the HKMA reviewed it and referred it to the Securities and Futures Commission ("SFC") for consideration; or either the HKMA or the SFC has made a finding against the bank or bank officer concerned.

A total of 200 requests for mediation have been made under the Scheme as of 31 August 2009. The amounts involved range from some HK\$40,000 to over HK\$5 million in each individual case. There were also 37 mediations initiated by the banks. Another 37 cases have been settled by direct negotiations between the investors and the banks after mediation was requested. 81 cases proceeded to mediation and the settlement rate is 88%.

### 2. Various Dispute Resolution Platforms

#### 2.1 Hong Kong Monetary Authority / The Securities and Futures Commission

Of the 20,578 complaints filed with the HKMA by the end of August 2009, 521 have been referred to the SFC, the regulator of investment brokers, for further investigation.<sup>235</sup> Notwithstanding their power to investigate the complaints and take disciplinary actions against the intermediaries concerned pursuant to s.196 of the Securities and Futures Ordinance (Cap 571),<sup>236</sup> investigations may take considerable time and even if intermediaries are found to be guilty of misconduct

<sup>234</sup> Chen Bonnie, "Minibond investors urged to try mediation", *The Standard*, March 26, 2009; See also Policy Committee, "Proposal for Resolution of Mini-bond Issue", Hong Kong Democratic Foundation, November 2008.

<sup>235</sup> Press Release, "Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme Status Update", Hong Kong International Arbitration Centre, 31 August 2009.

<sup>236</sup> At <http://www.hkii.org/hk/legis/ord/571/s196.html>.

and reprimanded, this will not, in and of itself, provide compensation to investors<sup>237</sup>. Although settlement may be offered by the banks, the number of cases that would be settled is patchy and represents only a tiny fraction of the total number of complaints.<sup>238</sup>

## 2.2 *Litigation and Direct Settlement*

Given the circumstances, the only options available to investors are to negotiate a direct settlement with their banks or to sue them for misrepresentation and/or negligence. Insofar as litigation is concerned, investors would have to engage lawyers in preparing their cases. The cost is likely to be disproportionate and the case may take years to conclude, with a possibility of an appeal. On the other hand, the banks are also proactively identifying and settling the egregious cases to reduce the likelihood of a successful suit.<sup>239</sup> For investors who lack the resources to litigate and whose cases do not fall within the ambit of private settlement, banks have been tempted to simply deny liability and refuse further negotiation, in the hope that claimants will lack the resources, both financially and emotionally, to pursue litigation.

### 2.2.1 *Consumer Council*

Investors have also turned to the Consumer Council (“Council”), seeking financial assistance for legal action under its Consumer Legal Action Fund (“CLAF”).<sup>240</sup> The Council up to 24 April 2009 received 11,919 complaints related to Lehman Brothers, 1,169 cases reached settlement involving HK\$350 million.<sup>241</sup>

The Council is incorporated pursuant to the Consumer Council Ordinance (Cap 216)<sup>242</sup> to act as the advocate for consumer interests; and provides conciliation services whenever disputes arise between consumers and vendors.<sup>243</sup> However, investors may not fall within the meaning of ‘consumer’ in the Consumer Council Ordinance. Moreover, the Ordinance does not confer power to the Council to prosecute banks or financial intermediaries for misconduct in the course of brokering investment products.<sup>244</sup>

Despite the uncertainty as to whether the Council has power to marshal representative cases for lawsuit against the banks in relation to the brokerage of Lehman Brothers related derivatives, an action has been brought against a bank under the CLAF in the District Court.<sup>245</sup> It may take two years before the case can be heard by the court.<sup>246</sup> There are 120 other cases under processing by the Council but it is not uncommon that applications were withdrawn after the

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<sup>237</sup> “Sun Hung Kai Investment Services Ltd agrees with SFC to repurchase Minibonds from its clients at original value”, Enforcement News, Securities and Futures Commission, 22 January 2009.

<sup>238</sup> *Ibid.*

<sup>239</sup> “雷曼迷債和解個案至今逾百宗，料涉資6 0 0 0萬元”，經濟通，13 January 2009.

<sup>240</sup> Press Release, “Consumer Council has put in place a special workforce to handle the Lehman Brothers cases”, The Consumer Council, 30 October, 2008, at: [http://www.consumer.org.hk/website/ws\\_en/news/press\\_releases/2008103001.html](http://www.consumer.org.hk/website/ws_en/news/press_releases/2008103001.html).

<sup>241</sup> Lee Diana, “Council enters minibond fray”, *The Standard*, 28 April 2009.

<sup>242</sup> At <http://www.hkllii.org/hk/legis/ord/216/s4.html>.

<sup>243</sup> At <http://www.hkllii.org/hk/legis/ord/216/s4.html>.

<sup>244</sup> Wong On Yin, “What does the Consumer Council Do?”, 27 October 2008, at: <http://wongonyin.mysinablog.com/index.php?op=ViewArticle&articleId=1408192>.

<sup>245</sup> Moy Patsy, “Lehman investor to get her Day in Court”, *The Standard*, 25 September 2009.

<sup>246</sup> Lee Diana, “Council enters minibond fray”, *The Standard*, 28 April 2009.

banks offered settlements.<sup>247</sup>

### **2.2.2 The Small Claims Tribunal**

A group of 135 investors, whose claims did not exceed HK\$50,000, have sought to recover their money by filing suits against banks in the Small Claims Tribunal (“SCT”). It took 3 months for the Adjudicator of the SCT to hear all the cases. It was determined that the claims be referred to the District Court. The Adjudicator was of the view that the cases concerned banks’ responsibilities and the risks to customers, of which new and complicated legal points would be involved, and which would undoubtedly impact on the public and banking sector. In addition, there was no precedent case in this regard and the SCT may not have the legal power to handle such cases.<sup>248</sup> Notwithstanding the above reasons, it can be reasonably anticipated that even if the cases are tried in the SCT, the probability of an appeal is high and the cases would eventually end up in the Court of Appeal. It followed that if an investor lost the case in court, he would have to pay not only his own costs but those of the bank – a daunting prospect for most individuals.

### **2.2.3 Class Action in USA**

Although there are thousands of aggrieved investors, Hong Kong does not have a system of class action rights under which the investors can sue collectively. It is therefore an onerous burden for an individual investor to bring an action in Hong Kong. With the view that contingency fees arrangement may be helpful, some investors turned to a U.S. law firm who would represent them in a class action in New York to recoup HK\$1.53 billion. Seven plaintiffs in Hong Kong and the US filed the action, contending that HSBC (USA) had failed to protect the interests of the investors by redeeming the collateral — securities now being held by both HSBC and Bank of New York Mellon Corp., and was therefore in breach of their duties as trustee.<sup>249</sup> While this litigation has been able to get off the ground, it is estimated that no trial will begin for at least another 3 years and that 18% of any compensation obtained would be deducted as legal fees.<sup>250</sup>

## **2.3 The Buy-Back Proposal**

In response to the public outcry, the Hong Kong Government proposed a plan to buy back the investments at their current estimated value, which will allow investors to partially recover some of their loss. As an alternative to litigation, the Hong Kong Association of Banks had accepted the Government’s proposal of buying back mini-bonds from investors priced at their current estimated value. Unfortunately this plan collapsed due to legal technicalities. In November 2008, the banks received from the trustee (HSBC) a letter from the legal advisers to Lehman Brothers in the US addressed to the trustee. Claims in that letter include that the proceeds from any sale of the underlying collateral for the mini-bonds should be paid to Lehman Brothers before the issuer of the mini-bonds and in turn the investors. This claim is said to be contrary to the express terms of the mini-bond documents, but if upheld, will significantly reduce the value of the mini-bonds. Due to the complexities of the legal issues involved and the uncertainties surrounding their outcome, the banks have therefore decided to continue the buy-back only after these legal issues have been clarified

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<sup>247</sup> Moy Patsy, “Lehman investor to get her Day in Court”, *The Standard*, 25 September 2009.

<sup>248</sup> Siu Beatrice, “Minibond investors fear move spells end for claims”, *The Standard*, 24 March 2009.

<sup>249</sup> Agencies, “Hong Kong investors sue US banks over Lehman losses”, *The Economic Times*, 15 March 2009.

<sup>250</sup> “Lehman Brothers Suit in US will be filed in Weeks” *Ming Pao News*, 4 February 2009.

and the market value of the products be determined.<sup>251</sup>

## **2.4 Political Channels**

Apart from direct negotiation and/or litigation, some investors seek to exert political pressure on banks to speed up the processing of claims. Amongst various initiatives, the Legislative Council, in response to the immense public pressure, established a special committee to lead an enquiry into the mini-bond affair at the end of October 2008.<sup>252</sup> A group called the *Alliance of Lehman Brothers Victims* was formed to organise information sessions, processions and assemblies.

The Democratic Party took an active role in assisting investors. Up to July 2009, the Party received about 8000 complaints, involving HK\$ 4 billion. The Party referred to the police 5,383 cases, of which 2,887 complainants have been interviewed and 103 cases reached settlement with banks after the police took over the investigation.

## **3. The Mediation Scheme**

### **3.1 Commissioning**

On 31 October 2008, the HKIAC was appointed by the HKMA to be the service provider for the Scheme.<sup>253</sup> The Scheme is available to qualified candidates under which the HKMA will pay half the fee and the bank concerned the other half.<sup>254</sup> To qualify, an investor has to have made a complaint to the HKMA and the HKMA reviewed it and referred it to the SFC for consideration; or either the HKMA or the SFC has made a finding against the bank or bank officer concerned.<sup>255</sup>

### **3.2 Scheme Office**

To cope with the operation of the Scheme, a Scheme Office was set up to perform several functions. First of all, the Scheme Office is the first port of call for enquiries in relation to the Scheme. Scheme Office staff have answered phone calls referred from the HKMA or banks and made appointments with the parties. In addition, the Scheme Officer has conducted pre-mediation briefings with parties and helped parties in submitting application forms. On top of this, the Scheme Office has collected statistics on the effectiveness of the Scheme. Furthermore, the Scheme Office is responsible for the carrying out of case administration, including following-up with claimants and banks, and checking and filing mediation arrangements and their corresponding documents.

### **3.3 The Interim Result of the Scheme**

A total of 200 requests for mediation have been made under the Scheme as of 31 August 2009. The amounts involved range from some HK\$40,000 to over HK\$5 million in each individual case. There were also 37 mediations initiated by the banks.

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<sup>251</sup> Press release, "Latest Developments regarding buy-back of minibonds", Hong Kong Association of Banks, 17 December 2008, at: [http://www.hkab.org.hk/asp/public/news.asp?Submit=Detail&lan=en&id=NS\\_0000058](http://www.hkab.org.hk/asp/public/news.asp?Submit=Detail&lan=en&id=NS_0000058)

<sup>252</sup> LegCo to Debate Assisting the Victims of the Lehman Brothers Incident" 20 October 2008, at: <http://www.info.gov.hk/gia/general/200810/20/P200810200198.htm>; On 12 November 2008, it voted to invoke its powers under the Legislative Council (Powers and Privileges) Ordinance to conduct a public probe of Hong Kong banks that have been accused of misselling.

<sup>253</sup> Press Release, "Lehman Brothers-related Investment Products Dispute", Hong Kong International Arbitration Centre, 31 October 2008.

<sup>254</sup> The fee for mediation is HK\$5600 per party and the fee for arbitration is HK\$8100 per party; the duration of mediation is 5 hours.

<sup>255</sup> Press Release, "HKMA announces mediation and arbitration services for Lehman Brothers-related cases", Hong Kong Monetary Authority, 31 October 2008.

Another 37 cases have been settled by direct negotiations between the investors and the banks after mediation was requested. 81 cases proceeded to mediation and the settlement rate is 88%.<sup>256</sup>

#### 4. Investors' Choice of Platforms and its Implications on Publicity

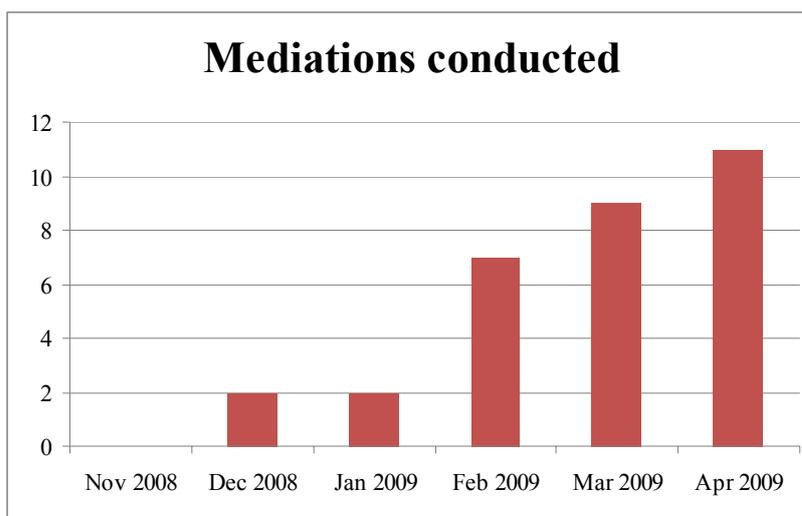
##### 4.1 Investors prefer conventional platforms over mediation

It is noted that of the 48,000 investors affected by the bankruptcy of Lehman Brothers, 20,578 filed their complaints with HKMA; whilst 11,919 filed their complaints with the Consumer Council and 8000 sought assistance from a political party. 5,383 investors chose to report their case to the police, some of which are referred by political parties.

Although an investor may file multiple complaints with different organisations, there is a significant contrast between the numbers of cases filed with the aforementioned organisations and that under the Lehman Mediation Scheme. Only 1138 enquiries were received by the Scheme Office, 264 pre-mediation briefings were conducted with 200 mediation requests and 81 ended up in mediation.

These findings have significant implications on the promotion and the publicity of future mediation schemes:

##### 4.1.1 Timing of the Announcement



**Avoid clashing the announcement of mediation schemes with the announcement of other government's interventions.** The Scheme began in November 2008. As the graph shows, no mediation was conducted in the first month. This may have been due to the lack of confidence felt by banks in the Scheme and mediation in general. Another reason being attention and priority were given to the Buy-Back Proposal and the political intervention by the Legislative Council at that time. This is evidenced by the media coverage of Lehman Brothers-related events occurred in the period of November and December 2008.<sup>257</sup> Of the 208 news reports, 49 were related to the Buy-Back Proposal and 34 were related to Legislative Council. Some 40 reports were related

<sup>256</sup> Press Release, "Mediation 100% Success for Lehman Brothers-Related Investment Product Cases" Hong Kong International Arbitration Centre, 19 February, 2009.

<sup>257</sup> The Scheme has kept newspaper clippings from three sources, namely *Ming Pao Daily*, *Sing Tao Daily* and *ET Net*.

to individual litigated case whilst the other focused on the interactions among individual banks, investors and political parties. Only 11 reports mentioned mediation and the Scheme. The slow progress of the Scheme also attracted adverse reporting by the end of December 2008.<sup>258</sup> From January 2009 onwards, there were only two reports covering the Scheme.

#### **4.1.2 Target Audience of Publicity Campaign**

**Promotion should be focused on parties critical to the occurrence of mediation.** Individual claimants were more receptive to mediation due to their limited resources to pursue other dispute resolution alternatives. However, it was only after reaching deadlock in resolving disputes unassisted that banks became more willing to try mediation through the Scheme.

Starting from the first mediation case initiated by a bank in December 2008, which was successfully settled, more requests from parties requesting mediation followed. By May 2009 32 cases, involving six different banks, have been referred to mediation. Of these mediations 34% have been non-referral cases – that is cases initiated by the parties without having been cases referred by the HKMA to the SFC. It should be noted that mediation is driven by the banks and they preferred to start with non-referral cases. Having said that, only 1 seminar was held for bankers during the period of November and December 2008 compared to the numerous visits paid to bank’s management by political parties.

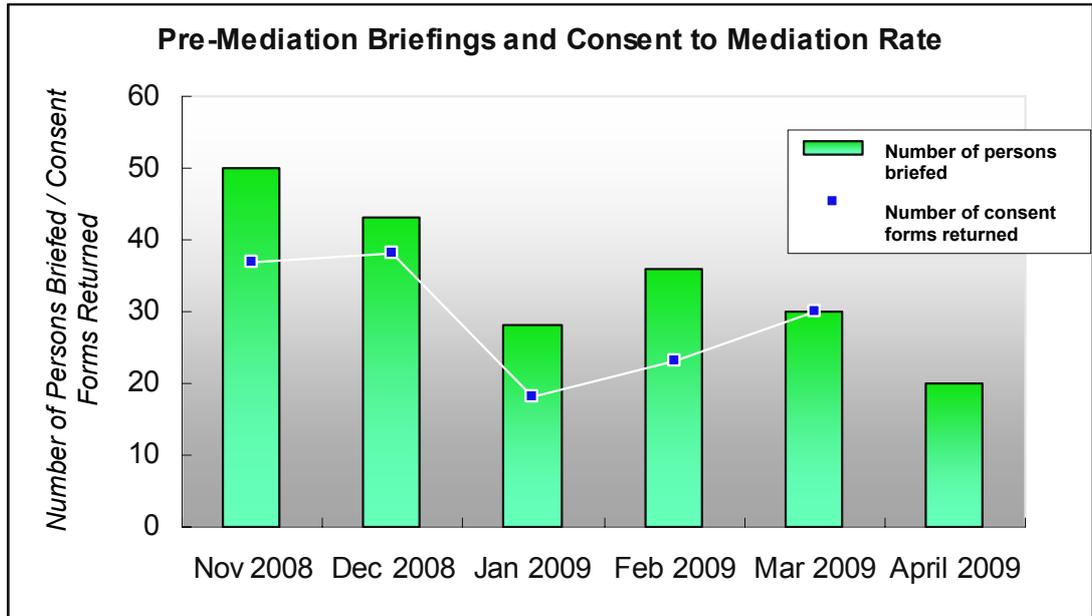
#### **4.1.3 Promotional Channels**

**Increase exposure by expanding the scale of pre-mediation briefings.** Since the Scheme Office does not proactively solicit cases for the convening of mediation, a special hotline ((852) 8100 6448) has been set up to handle all enquiries in relation to the Scheme. The hotline is a vital channel by which banks and investors can initiate mediation. Through the hotline, investors were invited to the Scheme Office to attend a pre-mediation briefing introducing parties to the concept, nature and aims of mediation. The briefings have been proven very successful. Of those parties who attended such briefings 82% opted to pursue mediation as their dispute resolution mechanism. Indeed some 15% of parties seemed so attracted to mediation after the briefings that they gave their immediate consent to resolve their dispute in this manner.

One drawback of having such pre-mediation briefing without adequate publicity and logistics support is that it can only be held at the HKMA premises for a very limited number of investors. In contrast, political parties have been able to rent school premises for numerous seminars on various topics, including but not limited to mediation and legal issues relevant to investors’ claims. These multi-topic seminars had attracted hundreds of investors. It would be particularly useful if the Scheme Office could hold such seminars to prepare investors for mediation.

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<sup>258</sup> See “金管局調解迷債一籌莫展”, *Sina Hong Kong*, 12 December 2008; “雷曼首宗仲裁個案完成 議員：效率低到笑死人”, *The Apply Daily*, 23 December 2008.



Unsurprisingly, political parties were very proactive in promoting their diversified services to investors. Numerous seminars, sharing and Q & A sessions were held; progress reports were published regularly on their websites together with useful information pack and hotlines. A group provided counselling services to vulnerable claimants. Other groups have assisted claimants refer their complaints to the HKMA and the Consumer Council, or to file their claims with courts, including class action in USA. Processions organised by investors' groups have received wide media coverage. Letters were sent to the banks on investors' behalf inviting direct settlement offers. None of these could be pursued by the Scheme Office due to its neutrality.

## 5. Public Education

The experience of the Lehman Mediation Scheme has indicated that public education on mediation schemes should be focused on three levels to bring about the optimal results of the scheme. They are summarized below:

### 5.1 Information that helps change false perceptions

Experience shows that parties frequently have the perception that mediators are conciliators who are government officials and are there to advise parties as to the amount of settlement (usually 100% of the investment principal in the eyes of investor). It should be made clear to the disputants the rudiments of mediation, its functions and limitations in order that they are able to distinguish mediation from other rights-based dispute resolution processes.

Under the Scheme, pre-mediation briefings were conducted with individual banks and investors during which a practising mediator discusses the suitability of mediation with regard to specific cases. The pre-mediation session helps disputants make informed decisions as to whether or not to mediate. The session is crucial to the Scheme as it is very important for the parties to bring to mediation an appropriate mindset for settlement.

## **5.2 Information pertaining to the preparation of mediation**

Since most of the investors are of low education level, and do not have experience in mediation or formal negotiation, it is necessary to provide them with some initial assistance and familiarise them with the mediation process. Moreover, each mediation session under the Scheme lasts for only a limited number of hours. Parties which engage in hostile arguments are unlikely to have sufficient time to explore settlement options. Even corporations and their legal advisors may be unfamiliar with the mediation process.

Under the Scheme, these were achieved by holding preparation meetings with banks and investors before mediation took place. A mediator other than the one who would serve as the neutral in the actual mediation would act as a mediation advocate to prepare the investor for negotiation. Although it is not a normal practice in mediation, this has proven to be effective in settlement mediation where only a single issue is at stake.

## **5.3 Information pertaining to negotiation**

It is necessary to differentiate mediation with distributive negotiations between investors and the banks without the facilitation of a mediator. Very often parties are pre-occupied by the concept of “who is at fault shall compensate” which reinforces the already tense relationship between the parties. Bank officials are also reluctant to settle if they deem that they are not at fault. Negotiation mindset of this kind led to the overlooking of the need to manage risks, minimise political impacts, maintain reputation and strengthen client relationship on the part of banks, as well as the needs of investors such as cash-flow problems, chronic medical expenses to be paid, etc. These underlying concerns are likely to lead parties to accept an early mediated settlement.

By setting aside the ‘rights’ and ‘wrongs’, mediators can help parties explore settlement options including but not limited to the “buy-back” of minibonds and/or other *ex gratia* offers such as medical allowances to the elderly or counseling service to help investors cope with pressure due to the sudden and huge financial loss, reduction in mortgage loan interests, or even making donation to designated charitable organisations.<sup>259</sup> Mediation schemes are likely to have a high settlement rate if parties are educated with appropriate negotiation knowledge in addition to the assistance of a mediator.

Acknowledgement:

This report is provided by Oscar Tan Khain Sein, formerly Scheme Officer.

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<sup>259</sup> Tan, Oscar, “There’s more to mediation than talking”, *The Standard*, 22 October, 2008.

### Accreditation Requirements of some Hong Kong Mediator Accrediting Organisations

	<b>The Law Society of Hong Kong (Law Society)</b>	<b>Hong Kong International Arbitration Centre (HKIAC)</b>	<b>Hong Kong Mediation Centre (HKMC)</b>	<b>HK Institute of Surveyors (HKIS) &amp; HK Institute of Architects (HKIA)</b>
<b>Preliminary requirement</b>	<p>Hold a current practising certificate.</p> <p>Member of the Law Society.</p>	Nil	Nil	<p>A professional member of HKIS/ HKIA.</p> <p>Minimum 7 yrs related post qualification (HKIS or HKIA) experience.</p>
<b>Training requirement</b>	Satisfactory completion of a mediation training course or courses of 40 hrs minimum duration approved by the Mediator Accreditation Committee.	Satisfactory completion of a mediation training course of 40 hrs minimum duration approved by the HKIAC Mediator Accreditation Committee.	<p>Satisfactory completion of at least a 40 hrs HKMC mediation training course or other HKMC recognised course.</p> <p>And written assessment with:</p> <ul style="list-style-type: none"> <li>• 30 multiple choice questions (60 marks)</li> <li>• 5 short questions (20 marks); and</li> <li>• 1 Settlement Agreement Drafting (20 marks)</li> </ul>	<p>Satisfactory completion of a mediator training course and assessment recognised by HKIS/HKIA Accreditation Panel.</p> <p>Training course and assessment based on same format as HKIAC General Accredited Mediator (i.e. 40 hrs).</p>
<b>Practical assessment</b>	<p>Mediate or co-mediate at least 2 actual or simulated mediation cases.</p> <p>For each simulation mediation assessment exercise, there is a lead assessor.</p> <p>The exact allocation of time for a simulated mediation assessment may vary slightly</p>	<p>Mediate or co-mediate at least 2 actual or simulated cases.</p> <p>Reading time: 15 min.</p> <p>Role-play: 1.5 hrs.</p> <p>Writing of mediated agreement 15 min.</p> <p>Peer/self-reflection: 15 min.</p> <p>Feedback: 15 min.</p> <p>3 sessions of assessments each</p>	<p>Mediate in 2 simulated cases (1 hr each) in 1 day.</p> <p>Reading time: 30 min.</p> <p>Role-play: 1 hr (including mediated agreement/ statement of outcomes).</p> <p>Complete 2 simulated cases in one day.</p> <p>Actors arranged by HKMC will act as</p>	<p>Assessment is based on the same format as that for HKIAC General Accredited Mediator, 2 actual or simulated mediation cases.</p>

	<b>The Law Society of Hong Kong (Law Society)</b>	<b>Hong Kong International Arbitration Centre (HKIAC)</b>	<b>Hong Kong Mediation Centre (HKMC)</b>	<b>HK Institute of Surveyors (HKIS) &amp; HK Institute of Architects (HKIA)</b>
	<p>between different lead assessors. The format quoted below should only be treated as a general framework.</p> <p>Reading time: 15 min.</p> <p>Role-play: 1.5 hrs.</p> <p>Writing of mediated agreement: 15 min.</p> <p>Peer/self-reflection: 15 min.</p> <p>Feedback: 15 min.</p> <p>Complete 2 simulated mediation cases within 4 years after training course.</p> <p>3 assessment sessions (2.5 hrs each).</p> <p>Each candidate will act as the mediator and be assessed by an assessor.</p> <p>Role play video recorded.</p> <p>Assessments in English or Cantonese.</p>	<p>day (2.5 hrs each). An assessor will be present to assess the performance of the candidate.</p> <p>Assessed as mediator in 1 of 3 sessions.</p> <p>Role play video recorded.</p> <p>Assessments in English or Cantonese.</p>	<p>the 2 parties in dispute.</p> <p>Performance video recorded and assessed by panel assessors.</p> <p>Assessments in either English or Cantonese.</p>	
<b>Post assessment</b>	<ul style="list-style-type: none"> <li>• Apply to the Law Society Mediator Accreditation Committee for accreditation as a General Mediator (HK\$500 fee).</li> <li>• May be required to take part in an accreditation assessment including a personal interview and a possible further simulation.</li> <li>• Accredited candidates have names included in</li> </ul>	<ul style="list-style-type: none"> <li>• Apply to the HKIAC Mediator Accreditation Committee for accreditation (HK\$600 fee).</li> <li>• May be required by the Committee to take part in an accreditation assessment including a personal interview and a possible further simulation.</li> <li>• Accredited candidates have names included in</li> </ul>	<ul style="list-style-type: none"> <li>• Apply for membership of HKMC (HK\$500).</li> </ul>	<ul style="list-style-type: none"> <li>• Apply for Membership of the HKIS/ HKIA Joint Dispute Resolution Panel of Mediators (HK\$1,500 fee valid for 3 years).</li> </ul>

	<b>The Law Society of Hong Kong (Law Society)</b>	<b>Hong Kong International Arbitration Centre (HKIAC)</b>	<b>Hong Kong Mediation Centre (HKMC)</b>	<b>HK Institute of Surveyors (HKIS) &amp; HK Institute of Architects (HKIA)</b>
	the relevant Law Society Panel of Accredited Mediators.	the relevant HKIAC Panel of Accredited Mediators.		

**Acknowledgements:**

This table is based on information provided by Cecilia Wong, a member of the Working Group and research by Maria Choi, Secretary of the Sub-groups.

### Course Description for some Hong Kong Mediator Training Courses

	<b>The Law Society of Hong Kong (“Law Society”)</b>	<b>The Hong Kong Mediation Centre &amp; St. James’ Settlements</b>	<b>Baptist University &amp; Conflict Resolution Centre</b>	<b>Law Society, Bar Association &amp; International Chamber of Commerce (“ICC”)</b>
Course Name	Mediation Training Course	Certificate on Professional Mediator Training	Mediation Skills Training Programme	ICC Mediation Five-Day Training Course
Total Hours	40 hours (5 full days)	42 hours (14 sessions)	40 hours (5 full days)	40 hours (5 full days)
Fee	HK\$8,000 for the full 40 hour course	HK\$3,800 (member) / HK\$6,000 (non-member)	HK\$6,900	HK\$15,000
Assessment	<ul style="list-style-type: none"> <li>The Law Society’s assessment is conducted independently and separately from the training course.</li> </ul>	<ul style="list-style-type: none"> <li>Written examination plus role plays</li> </ul>	<ul style="list-style-type: none"> <li>Satisfactory completion of this five-day training course will satisfy the minimum 40-hour mediation training requirement of Stage 1 of the Law Society’s requirements to be an Accredited General Mediator.</li> <li>The second stage of the accreditation process requires 2 satisfactory assessments or actual mediations after the course.</li> </ul>	<ul style="list-style-type: none"> <li>Satisfactory completion of this five-day training course will satisfy the minimum 40-hour mediation training requirement of Stage 1 of the Law Society’s requirements to be an Accredited General Mediator.</li> <li>The second stage of the accreditation process requires 2 satisfactory assessments or actual mediations after the course.</li> </ul>

#### Acknowledgements:

This table is based on information provided by the Hong Kong Mediation Centre, Cecilia Wong, a member of the Working Group and research by Maria Choi, Secretary of the Sub-groups.

## Training and Accreditation Requirements in some other jurisdictions

Jurisdictions	Training and Accreditation
Australia	<ul style="list-style-type: none"> <li>• National Mediator Accreditation System (“NMAS”) commenced on 1 January 2008.</li> <li>• Under the NMAS, ADR organisations called ‘Recognised Mediator Accreditation Bodies’ (“RMAB”) are responsible for accrediting individual mediators.</li> <li>• The NMAS requires 5 days of initial training and education (average of 40 hours), in addition to a formal assessment and a requirement for continuing professional development.</li> <li>• It is a voluntary scheme and there is no requirement for people providing services called ‘mediation’ to be accredited under it. However, some organisations, courts and governments have indicated that they will only use mediators accredited under the system, for example the Federal Court.</li> <li>• Currently RMABs include courts, government bodies, bar association and law societies.</li> <li>• A permanent National Mediator Standards Body established in 2010, replacing the National Mediator Accreditation Committee Inc.</li> <li>• The Mediator Standards Body is responsible for reviewing and developing the Standards, monitoring compliance and promoting mediation.</li> <li>• The legal profession may have an even more important role than the courts in informing/referring members of the public to ADR.</li> <li>• There has been an increasing amount of ADR training provided by legal professional bodies, including law societies and bar associations.</li> <li>• Some law schools in Australia offer significant education about ADR as part of their core curricula for law students.</li> <li>• Other professionals regularly involved with ADR include architects, engineers, planners, psychologists, social workers and accountants.</li> <li>• Disputes may also be referred to ADR processes by business associations and consumer organisations.</li> </ul>
Austria	<ul style="list-style-type: none"> <li>• The regulation of the training and accreditation of mediators is governed by the Civil Law on Mediation Training which sets out the content and scope of training in this field.</li> <li>• Training courses tend to comprise a minimum of 200 hours.</li> <li>• The principal mediation providers are organised under an umbrella organisation, <i>Platform fur mediation</i> and tend to be sector based, for example one covering the legal profession, another representing notaries and another tax accountants.</li> <li>• An Advisory Board <i>ZivMediatG</i> was set up with specific rights and obligations to the Ministry of Justice provided for by law.</li> <li>• Victim-offender mediation must meet requirements of the appointed ADR organisation (Neustart).</li> </ul>

Jurisdictions	Training and Accreditation
New Zealand	<ul style="list-style-type: none"> <li>• In New Zealand, many mediators are trained by and become accredited members of the Arbitrators' and Mediators' Institute of New Zealand ("AMINZ") and/or Leading Edge Alternative Dispute Resolvers ("LEADR").</li> <li>• There is no formal national accreditation or regulatory standards for mediation.</li> <li>• AMINZ and LEADR provide mediators with high training standards and continuing professional development requirements.</li> <li>• LEADR's course is a 40 hour training course that also meets the requirements of the Australian National Accreditation Standards.</li> <li>• The AMINZ Associate syllabus sets out the topics which form the basis for the academic standard to be attained for Associate membership. These topics are taught at the Massey University Dispute Resolution Centre, the University of Waikato School of Law and the University of Auckland Faculty of Law.</li> </ul>
United Kingdom	<ul style="list-style-type: none"> <li>• Mediation in the United Kingdom developed without any form of regulation in relation to training provision. There is no 'certification' or registration system post-training that established a mediator's competence. Continuing Professional Development is not mandatory.</li> <li>• The Civil Mediation Council ("CMC") was set up 2003 with the support of 35 ADR providers, professional bodies, independent mediators and practitioners to focus on legal reform and education in mediation. It is now going through an internal debate as to whether or not to standardise accreditation and to act as regulator of the field.</li> <li>• Assessment of participants to determine their competence to mediate disputes is now an accepted part of all mediator training from the major providers in England.</li> <li>• No pre-requisite skills or professional background are generally required prior to attend the course, many of the skills for effective mediation being centered on practical skills.</li> <li>• Mostly 40-hour mediation courses with assessment.</li> </ul>
Germany	<ul style="list-style-type: none"> <li>• Mediators are not subject to national regulation - standards and mediation styles vary greatly.</li> <li>• Accreditation and practice standards development vary according to organisational/practice areas.</li> <li>• Private-sector training consisting of between 100 and 600 hours over one to two years are on offer. Generally, it comprises 200 contact hours spanning 2 years including clinical practice.</li> <li>• Amendments to the civil procedure laws provide statutory frameworks for both mandatory and voluntary court-related mediation schemes.</li> <li>• Accreditation programmes are being designed and offered on an inter-disciplinary basis at postgraduate level and allow students to specialise in different practice areas.</li> <li>• Limited offerings as part of university law studies.</li> <li>• Trend towards one to two years long programme consisting of intensive training modules.</li> </ul>

Jurisdictions	Training and Accreditation
Canada	<ul style="list-style-type: none"> <li>• The ADR Institute of Canada has drafted and implemented a national Model Code of Conduct for Mediators in June 2005 that attempts to protect the integrity of the mediation process by establishing a model ethics code for mediators who are members of the Institute.</li> <li>• A number of professional associations of mediators emerged nationally and provincially.</li> <li>• These institutes (e.g. ADR Institute of Canada) provide training and national accreditation. They may also have strict rules and procedures for accreditation and protocols for mediation.</li> <li>• To satisfy the requirements for accreditation, practitioners must meet education, practical experience and skills assessment requirements, pass reviews and obtain approval.</li> <li>• There is separate accreditation for family mediation from the Family Mediation Canada Institute.</li> </ul>
Singapore	<ul style="list-style-type: none"> <li>• No national system or law to regulate accreditation of mediators, quality, standards or practice of mediation.</li> <li>• Singapore Mediation Centre (“SMC”) has its own internal system of mediation training and accreditation.</li> <li>• Numbers of mediators accredited each year are limited.</li> <li>• Accreditation lasts for one year, subject to renewal.</li> <li>• Re-accreditation only if participation in 8 hours of annual continuing education and mediator is available to conduct at least 5 mediations per year if requested to do so.</li> <li>• SMC has its own Code of Conduct which its mediators must follow.</li> </ul>
Netherlands	<ul style="list-style-type: none"> <li>• Court-connected mediation was introduced in the Netherlands in 1999.</li> <li>• All courts provide a customised service which helps parties to find the most suitable dispute resolution process for their dispute and if suitable a case is referred to a mediator.</li> <li>• This ‘referral to mediation’ system has proved a very useful and frequently applied method of resolving legal disputes.</li> <li>• Netherlands has one umbrella organisation <i>Nederlands mediation Instituut</i> (‘NMI’) which enjoys strong links with the Ministry of Justice.</li> <li>• It does not train mediators itself but accredits certain institutions to do so.</li> </ul>
Scotland	<ul style="list-style-type: none"> <li>• Accreditation on an organisational/practice area basis.</li> <li>• Sector-specific schemes emerging.</li> <li>• Training is sector-specific and mainly provided by private training organisations.</li> <li>• Some university courses on offer.</li> </ul>

Jurisdictions	Training and Accreditation
South Africa	<ul style="list-style-type: none"> <li>• Training for mediators by private and public organisations especially in labour and family law disputes.</li> <li>• Professional background and experience relevant for mediator recognition.</li> </ul>
Switzerland	<ul style="list-style-type: none"> <li>• Accreditation on an organisational/practice area basis.</li> <li>• Training provided by private training organisations, universities and law firms.</li> <li>• University Law Schools offer some mediation training courses between 75-200 contact hours.</li> </ul>
Denmark	<ul style="list-style-type: none"> <li>• No national accreditation scheme, but mediators in court-related mediation must be judges or attorneys with 7 days mediation training.</li> <li>• Private sector training bodies with courses ranging from 1 day to several weeks.</li> <li>• ADR courses offered in some University Law Schools.</li> <li>• Two-year postgraduate degrees offered at tertiary level.</li> </ul>
United States of America	<ul style="list-style-type: none"> <li>• Mediation appears more ‘professionalised’ in the United States of America where State laws regarding the use of lawyers as opposed to mediators may differ widely.</li> <li>• No national accreditation scheme.</li> <li>• Some states have fairly sophisticated laws concerning mediation. They have laws with clear expectations for certification, ethical standards and protections preserving the confidential nature of mediation by ensuring that a mediator need not testify in a case that they have worked on.</li> <li>• Some states have laws that only relate to mediators working within the court system. Community and commercial mediators practising outside the court system may not be subject to the law and its legal protections.</li> <li>• Although many states recommend qualifications for mediators, no state has requirements for practice of mediation.</li> <li>• Rather than regulate the practice of mediation, some states have chosen to create lists of mediators meeting criteria for certain areas of practice.</li> <li>• When states have guidelines or requirements for mediators who receive court referrals or appointments, judges commonly have discretion in applying these guidelines.</li> <li>• Standard training courses comprise up to 50 hours.</li> </ul>

**Acknowledgements:**

This table is primarily based on the Comparative Mediation Table contained in the Appendix to Professor Nadja Alexander (ed.), “Global Trends in Mediations”, Kluwer Law International, 2006 at pages 452-465 with modifications based on information and research by Maria Choi, Secretary of the Sub-groups.

## **THE HONG KONG MEDIATION CODE**

### **General Responsibilities**

1. The Mediator shall act fairly in dealing with the Parties to the mediation, have no personal interest in the terms of any Settlement Agreement, show no bias towards the Parties, be reasonably available as requested by the Parties, and be certain that the Parties have been informed about the mediation process.

### **Responsibilities to the Parties**

#### **2. Impartiality/Conflict of Interest**

The Mediator shall maintain impartiality towards all Parties. The Mediator shall disclose to the Parties any affiliations/interests which the Mediator may have or had with any Party and in such situation obtain the prior written consent of all the Parties before proceeding with the mediation.

#### **3. Informed Consent**

- (a) The Mediator shall explain to all Parties the nature of the mediation process, the procedures to be utilised and the role of the Mediator.
- (b) The Mediator shall ensure the Parties sign an Agreement to Mediate prior to the substantive negotiations between the Parties.\*
- (c) The Agreement(s) to Mediate shall include the responsibilities and obligations of the Mediator and the Parties.

#### **4. Confidentiality**

- (a) The Mediator shall keep confidential all information, arising out of or in connection with the mediation, unless compelled by law or public policy grounds.
- (b) Any information disclosed in confidence to the Mediator by one of the Parties shall not be disclosed to the other Party without prior permission.
- (c) Paragraphs 4(a) and 4(b) shall not apply in the event such information discloses an actual or potential threat to human life or safety.

#### **5. Suspension or Termination of Mediation**

The Mediator shall inform the Parties of their right to withdraw from the mediation. If the Mediator believes that a party is unable or unwilling to participate effectively in the mediation process, the Mediator can suspend or terminate the mediation.

\* A sample Agreement to Mediate is attached.

## **6. Insurance**

The Mediator shall consider whether it is appropriate to be covered by professional indemnity insurance and if so, shall ensure that he/she is adequately covered.

## **Defining the Process**

### **7. Independent Advice and Information**

In a mediation in which a Party is without legal representation or relevant expert opinion, the Mediator shall consider whether to encourage the Party to obtain legal advice or relevant expert opinion.

### **8. Fees**

The Mediator has a duty to define and describe in writing the fees for the mediation. The Mediator shall not charge contingent fees or base the fees upon the outcome of the mediation.

## **Responsibilities to the Mediation Process and the Public**

### **9. Competence**

The Mediator shall be competent and knowledgeable in the process of mediation. Relevant factors shall include training, specialist training and continuous education, having regard to the relevant standards and/or accreditation scheme to which the Mediator is accredited. For example, in the event the mediation relates to separation/divorce, the Mediator shall have attained the relevant specialist training and the appropriate accreditation.

### **10. Appointment**

Before accepting an appointment, the Mediator must be satisfied that he/she has time available to ensure that the mediation can proceed in an expeditious manner.

### **11. Advertising/promotion of the Mediator's services**

The Mediator may promote his/her practice, but shall do so in a professional, truthful and dignified manner.

**\*AGREEMENT TO MEDIATE**

THIS AGREEMENT IS MADE ON \_\_\_\_\_

BETWEEN THE FOLLOWING PERSONS *(in this Agreement called the 'Parties')*

\_\_\_\_\_  
*(Name of Party: Please Print)*

\_\_\_\_\_  
*(Name of Party: Please Print)*

\_\_\_\_\_  
*(Contact Telephone Number)*

\_\_\_\_\_  
*(Contact Telephone Number)*

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
*(Address)*

\_\_\_\_\_  
*(Address)*

AND THE MEDIATOR *(called 'the Mediator')*

\_\_\_\_\_  
*(Name of Mediator: Please Print)*

\_\_\_\_\_  
*(Contact Telephone Number)*

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
*(Address)*

**APPOINTMENT OF MEDIATOR**

1. The Parties appoint the Mediator to mediate the Dispute between them in accordance with the terms of this Agreement.

## **ROLE OF THE MEDIATOR**

2. The Mediator will be neutral and impartial. The Mediator will assist the Parties to attempt to resolve the Dispute by helping them to:
  - (a) systematically isolate the issues in dispute;
  - (b) develop options for the resolution of these issues; and
  - (c) explore the usefulness of these options to meet their interests and needs.
3. The Mediator may meet with the Parties together or separately.
4. The Mediator will not:
  - (a) give legal or other professional advice to any Party; or
  - (b) impose a result on any Party; or
  - (c) make decisions for any Party.

## **CONFLICT OF INTEREST**

5. The Mediator must, prior to the commencement of the mediation, disclose to the Parties to the best of the Mediator's knowledge any prior dealings with any of the Parties as well as any interest in the Dispute.
6. If in the course of the mediation the Mediator becomes aware of any circumstances that might reasonably be considered to affect the Mediator's capacity to act impartially, the Mediator must immediately inform the Parties of these circumstances. The Parties will then decide whether the mediation will continue with that Mediator or with a new mediator appointed by the Parties.

## **COOPERATION BY THE PARTIES**

7. The Parties agree to cooperate in good faith with the Mediator and each other during the mediation.

## **AUTHORITY TO SETTLE AND REPRESENTATION AT THE MEDIATION SESSION**

8. The Parties agree to attend the mediation with authority to settle within any range that can reasonably be anticipated.
9. At the mediation each Party may be accompanied by one or more persons, including legally qualified persons, to assist and advise them.

## **COMMUNICATION BETWEEN THE MEDIATOR AND THE PARTIES**

10. Any information disclosed to a Mediator in private is to be treated as confidential by the Mediator unless the Party making the disclosure states otherwise.

## **CONFIDENTIALITY OF THE MEDIATION**

11. Every person involved in the mediation:
  - (a) will keep confidential all information arising out of or in connection with the mediation, including the fact and terms of any settlement, but not including the fact that the mediation is to take place or has taken place or where disclosure is required by law to implement or to enforce terms of settlement; and
  - (b) acknowledges that all such information passing between the Parties and the Mediator, however communicated, is agreed to be without prejudice to any Party's legal position and may not be produced as evidence or disclosed to any judge, arbitrator or other decision-maker in any legal or other formal process, except where otherwise disclosable in law.
12. Where a Party privately discloses to the Mediator any information in confidence before, during or after the mediation, the Mediator will not disclose that information to any other Party or person without the consent of the Party disclosing it, unless required by law to make disclosure.
13. The Parties will not call the Mediator as a witness, nor require him to produce in evidence any records or notes relating to the mediation, in any litigation, arbitration or other formal process arising from or in connection with the Dispute and the mediation; nor will the Mediator act or agree to act as a witness, expert, arbitrator or consultant in any such process.
14. No verbatim recording or transcript of the mediation will be made in any form.

## **TERMINATION OF THE MEDIATION**

15. A Party may terminate the mediation at any time after consultation with the Mediator.
16. The Mediator may terminate the mediation if, after consultation with the Parties, the Mediator feels unable to assist the Parties to achieve resolution of the Dispute.

## **SETTLEMENT OF THE DISPUTE**

17. No terms of settlement reached at the mediation will be legally binding until set out in writing and signed by or on behalf of each of the Parties.

## **EXCLUSION OF LIABILITY AND INDEMNITY**

18. The Mediator will not be liable to any Party for any act or omission by the Mediator in the performance or purported performance of the Mediator's obligations under this Agreement unless the act or omission is fraudulent.

19. Each Party indemnifies the Mediator against all claims by that Party or anyone claiming under or through that Party, arising out of or in any way referable to any act or omission by the Mediator in the performance or purported performance of the Mediator's obligations under this agreement, unless the act or omission is fraudulent.
20. No statements or comments, whether written or oral, made or used by the Parties or their representatives or the Mediator within the mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this document may be pleaded as a bar to any such action.

### **MEDIATION CODE**

21. The mediation shall proceed according to the terms of this Agreement and the Hong Kong Mediation Code.

### **COST OF THE MEDIATION**

22. The Parties will be responsible for the fees and expenses of the Mediator in accordance with the SCHEDULE.
23. Unless otherwise agreed by the Parties in writing, each Party agrees to share the mediation fees equally and also to bear its own legal and other costs and expenses or preparing for and attending the mediation ("each Party's Legal Costs") prior to the mediation. However, each Party further agrees that any court or tribunal may treat both the mediation fees and each Party's legal costs as costs in the case in relation to any litigation or arbitration where that court or tribunal has power to assess or make orders as to costs, whether or not the mediation results in settlement of the Dispute.

### **LEGAL STATUS AND EFFECT OF THE MEDIATION**

24. Any contemplated or existing litigation or arbitration in relation to the Dispute may be started or continued despite the mediation, unless the Parties agree or a court orders otherwise.
25. This Agreement is governed by the law of the Hong Kong Special Administrative Region and the courts of the Hong Kong Special Administrative Region shall have exclusive jurisdiction to decide any matters arising out of or in connection with this Agreement and the mediation.

**FULL DISCLOSURE** (applicable to family mediation)

- 26. (a) The Parties agree to fully and honestly disclose all relevant information as requested by the Mediator and by each other.
- (b) Any failure by either of the Parties to make full and frank disclosure may result in the setting aside of any agreement reached in mediation.

**SIGNING OF THE AGREEMENT TO MEDIATE**

Date: \_\_\_\_\_

\_\_\_\_\_  
*Name of Party or Representative (Please print and sign here)*

\_\_\_\_\_  
*Name of Party or Representative (Please print and sign here)*

\_\_\_\_\_  
*Name of Party or Representative (Please print and sign here)*

\_\_\_\_\_  
*Name of Party or Representative (Please print and sign here)*

\_\_\_\_\_  
*Name of Mediator (Please print and sign here)*

## SCHEDULE

### Fees and Expenses of Mediator

1. For all preparation \$ (per hour)

2. For the mediation \$ (per hour)

3. Room hire fees \$

4. Allocation of costs

Party 1 %

Party 2 %

Party 3 %

Party 4 %

**Or**

All parties equally %

## Some Options for Regulatory Enforcement of the Hong Kong Mediation Code

### Option 1

*There will be no new regulatory framework and it will be left to the individual bodies, such as the Hong Kong International Arbitration Centre (“HKIAC”), the Mediation Centre, the Law Society, the Bar Association, etc. to subscribe to the Hong Kong Mediation Code (“Code”) on a voluntary basis. In turn, these bodies will discipline their members.*

The advantages of this approach include:

- It does not create another administration and no extra costs will be incurred;
- It provides certainty for people who are members of their respective organisations who will not need to face duplicity in disciplinary hearings;
- It will be more acceptable as no changes are made to the existing status quo of the individual organisation; and
- It provides the fastest means of implementation.

The disadvantages of this approach include:

- No statutory powers can be given to any organisation;
- No central organisation to unify/standardise the individual organisation; and
- No central organisation to take disciplinary action and enforce the Code in different organisations.

### Option 2

*It will be managed by the HKIAC for an interim period.*

The advantages of this approach include:

- HKIAC has a long history in Hong Kong and it will be easier to take up such a role for an interim period;
- HKIAC has already got everything in place and it has people from all walks of life;
- HKIAC already well-established and in existence, it will be more effective and efficient; and
- As there is an interim period, it can shorten the time for setting up a new organisation.

The disadvantages of this approach include:

- It may not fully take into account of the needs and interests of other organisations;
- There is an element of confusion because mediation is within an organisation that entitles arbitration;
- Other organisations may feel unfairness as they are not competing on the same ground; and
- The other organisations may have concern over HKIAC's impartiality. This factor may deter members of the other organisations from joining.

### **Option 3**

***A company limited by guarantee will be set up to administer the regulation of the Code. Those who subscribe to the Code must become members of the company and the Code will be a by-law of this company. There are provisions within the Articles that enable disciplinary action to be taken by this company.***

The advantages of this approach include:

- In terms of insurance, it will be easier because this will give the insured some collective bargaining powers;
- It can also be an interim organisation to look after the various issues including disciplinary proceedings;
- It will be an entity which is the coordinating organisation where views can be exchanged;
- It will also lead to continuity. Same applies to other jurisdictions where there is going to be a move towards a central organisation;
- As it is a central organisation, there is no conflict of interest and everyone can participate;
- It is more effective and independent and mediation will be a stand-alone process, distinct from other dispute resolution, for example, arbitration;
- It can allow the setting up of a statutory organisation in a longer term; and
- An impartial central organisation gives more confidence to the members and the public which will encourage the use of mediation as a means of dispute resolution.

The disadvantages of using this approach include:

- It is not as immediate as HKIAC which is already in existence;
- There will be an annual maintenance cost for running and establishing such a organisation; and
- Funding may be a problem although it may be resolved by having mediators to subscribe to membership. The question of whether mediators are going to pay for their subscriptions will be an issue.

## **Compromise Options 2 and 3**

***To cut away the established mediation part of HKIAC and to re-brand it into a stand-alone mediation organisation in Hong Kong***

The advantages of this approach include:

- It solves the element of confusion that mediation is within an organisation entitled arbitration;
- It has already got people from all walks of life;
- It has a long history in Hong Kong and will be more acceptable to the public; and
- It will be more effective and efficient.

The disadvantages of this approach include:

- It may not fully take into account of the needs and interests of the other organisations;
- There may be a perceived conflict of interest and other organisations may not agree to join in;
- It creates unfairness to the other organisations as they can also provide competing services; and
- It will need time and resources to set up a new organisation.

**Continuing Professional Development ('CPD')  
requirements for some Mediator  
Accrediting Organisations in Hong Kong**

Law Society of Hong Kong	Hong Kong International Arbitration Centre (HKIAC)	Hong Kong Mediation Centre	Hong Kong Institute of Surveyors and Hong Kong Institute of Architects
<ul style="list-style-type: none"> <li>• Accredited mediator is required to complete a total of at least 20 CPD points from mediation training during the 4 immediately preceding CPD years.</li> <li>• Renewal of membership: Fee HK\$500 for 4 years.</li> </ul>	<ul style="list-style-type: none"> <li>• Accredited mediator required to complete at least 20 CPD points in mediation training during the 4 immediately preceding CPD years.</li> <li>• Renewal of membership: Fee HK\$800 a year.</li> <li>• The CPD requirement may also be achieved through a variety of approved activities and not exclusively through activities sponsored by the Hong Kong Mediation Council (part of HKIAC) or its interest groups.</li> </ul>	<ul style="list-style-type: none"> <li>• Accredited mediator is required to complete a total of at least 10 CPD points over a 2 years' period (5 points from training activities and five points from professional activities).</li> <li>• Renewal of membership: Fee HK\$500 a year.</li> <li>• Training activities include participating in and organising courses, lectures, seminars, conferences, presentations and workshops.</li> </ul> <p>Professional activities include serving as instructors, assistant instructors during mediation courses, actors and assessors for mediation role play examination and mediators for pro bono cases.</p>	<ul style="list-style-type: none"> <li>• Accredited mediator is required to complete a total of at least 20 CPD points in mediation training during the previous 3 years.</li> <li>• Renewal of membership: Fee HK\$1,500 for 3 years.</li> </ul>

Acknowledgements:

This table is based on information and research by Maria Choi, Secretary of the Sub-groups.

**CPD requirements for some Mediator  
Accrediting Organisations in other jurisdictions**

<b>Australian National Mediator Accreditation Standards</b>	<b>LEADR</b>	<b>The Chartered Institute of Arbitrators</b>
<p>Mediators seeking re-accreditation must meet approval requirements of their Recognised Mediation Accreditation Body (RMAB) and within each 2 year cycle, provide evidence that they have either:</p> <p>i. Conducted at least 25 hours of mediation, co-mediation or conciliation (in total duration) within the 2 year cycle; or</p> <p>ii. Where a mediator is unable to provide such evidence for reasons such as, a lack of work opportunities (in respect of newly qualified mediators); a focus on work undertaken as a dispute manager, facilitator, conflict coach or related area; a family, career or study break; illness or injury, an RMAB may require the mediator to have completed no less than 10 hours of mediation, co-mediation or conciliation work per 2 year cycle and may require that the mediator attend 'top up' training or reassessment.</p> <p>Have completed at least 20 hrs of continuing professional development in every 2 year cycle that</p>	<p><b>LEADR Accreditation</b></p> <p>To retain LEADR accreditation practitioners must in the 3 year period immediately preceding 30 June each year after initial accreditation or deemed initial accreditation, have:</p> <ul style="list-style-type: none"> <li>• conducted for periods of no less than 75 hrs in total the relevant ADR process; or</li> <li>• attended workshops, courses or e-lectures relating to that process for periods of not less than 25 hrs; or</li> <li>• attended workshops, courses or e-lectures relating to that process for periods of not less than twelve and a half hours and taught that process for not less than twelve and a half hours.</li> </ul> <p><b>Advanced LEADR Accreditation</b></p> <p>In order to retain advanced accreditation, a practitioner must during the six months following the expiration of each three year period after the initial advanced accreditation or deemed</p>	<p>Members have to achieve 60 points over 3 years, at least 30 of which should be directly relevant to the area(s) in which he receives appointment.</p> <p>CPD points will be given to the following activities:</p> <ul style="list-style-type: none"> <li>• Time spent as an arbitrator, mediator, neutral or advocate in arbitration, mediation/ADR hearings including preliminary or interlocutory meetings or giving evidence as an expert at a hearing or in court (1 CPD point per hour - to a max of 10 points per year).</li> <li>• Documents only Awards, Adjudications and/or Expert Determinations (1 CPD point per hour - to a max of 10 points per year).</li> <li>• Attendance at the Institute's and Branch Courses and Conferences, including lectures, seminars, workshops, surgeries and distance learning courses (1 CPD point per hour excluding breaks - to a max of 20 points per year).</li> <li>• Attendance at other courses ad conferences, including lectures, seminars, workshops, surgeries and distance learning courses related to arbitration, adjudication, mediation and related subjects (1 CPD point per hr to a max of 10 points).</li> <li>• Preparation and publication of</li> </ul>

<b>Australian National Mediator Accreditation Standards</b>	<b>LEADR</b>	<b>The Chartered Institute of Arbitrators</b>
<p>can be made up as follows:</p> <ul style="list-style-type: none"> <li>• attendance at continuing professional development courses, educational programmes, seminars or workshops on mediation or related skill areas as referred to in the competencies (up to 20 hrs)</li> <li>• external supervision or auditing of their clinical practice (up to 15 hrs)</li> <li>• presentations at mediation or ADR seminars or workshops including 2 hours of preparation time for each hour delivered (up to 16 hrs)</li> <li>• representing clients in four mediations (up to a max of 8 hrs)</li> <li>• coaching, instructing or mentoring of trainee and/or less experienced mediators (up to 10 hrs)</li> <li>• role playing for trainee mediators and candidates for mediation assessment or observing mediations (up to 8 hrs)</li> <li>• mentoring of less experienced mediators and enabling observational opportunities (up to 10 hrs)</li> </ul>	<p>advanced accreditation provide the Accreditation Committee with:</p> <ul style="list-style-type: none"> <li>• ten written evaluations applying the process for which the practitioner is accredited indicating that the practitioner's conduct of the relevant process has demonstrated a high level of competence; or</li> <li>• evidence of at least 4 x 1 hr long supervision sessions per year in the three years prior to renewal of accreditation by a supervisor who has received prior approval by the Committee and who provides the Committee with a written assessment of the practitioner's high level of competence; or</li> <li>• a written assessment by a qualified independent assessor that the practitioner, in a session in which he conducts the relevant process, has demonstrated a high level of competence. Prior approval of the assessor must be obtained from the Accreditation Committee.</li> </ul> <p>Unless the Accreditation Committee shall have exempted the practitioner from doing so.</p>	<p>an article relating to arbitration, ADR and other related topics and for a professional journal (5 points for any published article, to a max of 10 points).</p> <ul style="list-style-type: none"> <li>• Preparation and publication of a book relating to arbitration, ADR and other related topics (20 CPD points - pro rata for co-authorship).</li> <li>• Lecturing and tutoring on dispute resolution and related subjects (1 point per hour. No points for repeat lectures within 6 months, to a max of 10 points).</li> <li>• Setting and marking Institute examinations and examinations for other bodies on dispute resolution to be approved by the Professional Committee (1 point per hour subject to a max of 10 points).</li> </ul>

## Mediation Regulation in Various Jurisdictions

Primary Fields of Application	Predominant Mediation Styles	Types of ADR Regulation/Legislation	Court-related Mediation Referrals
<b>AUSTRALIA</b>			
<p>Civil disputes generally including family, commercial, personal injury, succession, work place, and community disputes</p> <p>Also native title, human rights, anti-discrimination, environmental, school, community, victim-offender mediation and legal aid conferencing matters</p>	<p>Facilitative and transformative mediation models are found mainly in non-legal contexts and typically in neighbourhood and family dispute resolution</p> <p>Wise Counsel, Settlement and Expert advisory models are commonly found in legal, commercial and political dispute resolution</p>	<p>No comprehensive national mediation legislation</p> <p>Limited general legislation in States and territories</p> <p>Specific industry-based mediation legislation</p> <p>Court rules and procedural legislation</p> <p>Mediation required for legal aid funding. Codes and standards of ADR service providers.</p> <p>Minimum voluntary national accreditation standard. Mediation as pre-condition for legal aid. Significant body of case law</p>	<p>Two major trends:</p> <ol style="list-style-type: none"> <li>1. Legislatively-based mandatory referral at discretion of court</li> <li>2. Legislatively-based mandatory pre-filing mediation</li> </ol> <p>Most court referrals are based on the market-place model</p>
<b>AUSTRIA</b>			
<p>Victim-offender, family, school, environmental, discrimination, commercial, and workplace disputes</p>	<p>The dominant styles are transformative and facilitative</p> <p>More directive models are used by some legal practitioners</p> <p>Co-mediation is used extensively, especially in family matters</p>	<p>National regulation of civil mediation by the <i>Law on Mediation in Civil Cases 2003</i></p> <p>Specific mediation legislation for neighbourhood, environmental, family and disability discrimination disputes</p> <p>Victim-offender mediation is regulated by the law relating to juveniles and criminal procedure legislation</p> <p>Codes and standards of ADR services providers, many of whom are members of the</p>	<p>Legislatively-based voluntary referral to mediation for all civil matters and specified criminal matters</p> <p>Referrals based on the justice model</p>

Primary Fields of Application	Predominant Mediation Styles	Types of ADR Regulation/Legislation	Court-related Mediation Referrals
		Australian Mediation Network – a national umbrella organisation	
<b>CANADA</b>			
Labour-management, family, civil, commercial, community, victim-offender, environmental and administrative disputes	Facilitative and transformative models found mainly in non-legal contexts Settlement, expert advisory models most common in mandatory referrals of commercial matters  Wise counsel model dominates in Judicial Dispute Resolution (“JDR”)	No comprehensive general legislation Specific legislation e.g. mediation of certain environmental and financial disputes  State-based court rules and procedural legislation in civil (including family) matters  Codes and standards of ADR service-providers  Some case law on mediation	Variety of legislative-based referral systems depending on jurisdiction  Voluntary schemes dominate in civil law Quebec (justice model)  Trend towards mandatory schemes in common law jurisdictions (market-place model)  Court referrals to family mediation are voluntary but mandatory referral to mediation information sessions Growing JDR practice
<b>DENMARK</b>			
Family, victim-offender, labour disputes, civil disputes including commercial disputes	Facilitative and transformative mediation models mainly in family disputes and non-legal contexts  Settlement – and evaluative models found in court-related civil, commercial and labour mediation	No comprehensive national mediation legislation  Specific regulation for labour and tenancy disputes  Recommendations for procedural legislation for civil cases  Codes and standards of ADR service-providers	Mandatory mediation exists only in labour disputes. ‘Mediators’ in labour disputes are experienced judges who may impose solutions with legal effect if parties cannot agree. Judges

Primary Fields of Application	Predominant Mediation Styles	Types of ADR Regulation/Legislation	Court-related Mediation Referrals
			and lawyers are mediators in court-related mediation in civil disputes (justice model). Pilot and continuing programs in court-related family and victim-offender mediation
<b>ENGLAND AND WALES</b>			
Civil, commercial, consumer, community, employment, family, peer and victim-offender mediation	Facilitative settlement, wise counsel and some transformative mediation  Interest in expert advisory/early neutral evaluation increasing	No comprehensive national mediation legislation  Civil Mediation Council was set up to investigate national issues  <i>Civil Procedure Rules</i> (and case law) encourage the use of ADR Civil Mediation  Council has promulgated basic standards for ADR service-providers  Providers tend to have higher standards for the neutrals they accredit  Some case law on mediation	Predominantly voluntary referral – although robust encouragement by some courts and mandatory referral in some contexts (market-place model)  Encouragement of mediation as a pre-condition for legal aid
<b>FRANCE</b>			
Victim-offender, family, commercial, workplace, school, community and intercultural/social dispute	Facilitative and settlement mediation models  ADR practice on the rise	No comprehensive national legislation  Court rules and procedural legislation for mediation of criminal and civil matters including family and workplace disputes  Codes and standards of ADR service-providers  Limited case law on mediation	<i>New Code of Civil Procedure</i> allows for voluntary referral to mediation by the judge  <i>Code of Penal Procedure</i> allows for free mediation between victim and offender in

Primary Fields of Application	Predominant Mediation Styles	Types of ADR Regulation/Legislation	Court-related Mediation Referrals
			certain circumstances Referrals based on justice model
<b>GERMANY</b>			
Family, victim-offender, school, administrative, environmental, civil especially commercial and workplace applications of mediation	Facilitative and transformative mediation models  Increasing use of JDR where expert advisory and wise counsel models are widely applied	No comprehensive general mediation legislation  Court rules and procedural legislation on national and State levels for civil (including family and insolvency) and criminal matters Codes and standards of ADR service-providers and industry schemes  Limited case law on mediation	Voluntary referral under a variety of court-related mediation schemes, many of which use judge-mediators  Mandatory ADR for small claims matters in some States Justice model dominates
<b>ITALY</b>			
Public and consumer ombudsmen, family, victim-offender and commercial and related civil disputes  Online, intercultural and social mediation is on the rise	Facilitative and settlement mediation  Expert advisory and wise counsel models used most widely by justices of the peace and ombudsmen	No comprehensive general mediation legislation, but legislatively-based national register of commercial mediation organisations and remuneration schedule for public mediators  Draft legislation for procedural legislation to regulate mediation in all court civil matters. Specific legislation regulating mediation for juvenile, consumer, construction and various commercial matters  Codes and standards of ADR service – providers and industry schemes	Voluntary mediation before a justice of the peace  Mandatory pre-filing mediation for labour, telecommunications and sub-contracting disputes  Draft legislation includes proposals for mandatory and voluntary referrals to mediation  Market-place and justice models co-exist

Primary Fields of Application	Predominant Mediation Styles	Types of ADR Regulation/Legislation	Court-related Mediation Referrals
<b>NETHERLANDS</b>			
Family, labour, commercial, growing number of administrative matters	Facilitative, settlement and transformative mediation	No comprehensive national mediation legislation Specific industry-based mediation legislation Court rules and procedural legislation. Codes and standards of ADR service providers, the largest of which is <i>Nederlands Mediation Insituut</i> (NMI) which operates nationally	Successful nationwide pilot project on voluntary court-related mediation Continued government encouragement thereof Market-place model dominates with government incentives
<b>NEW ZEALAND</b>			
Family, employment, peer, environmental, commercial, cross-cultural, tenancy, construction, human rights, health and disability, discrimination and victim-offender mediation	Largely facilitative mediation, but other forms of mediation also exist	No comprehensive national mediation legislation, but resolution of disputes through mediation is found within various pieces of legislation such as the Family Proceedings Act, Children, Young Persons and Their Families Act, Human Rights Act and Employment Relations Act  Employment Mediation Service is the first port of call for those in an employment dispute	Parties may be ordered to mediate under Rule 442(5) of the High Court Rules, but only with their agreement
<b>SINGAPORE</b>			
Civil disputes including commercial, matrimonial and employment disputes. Minor criminal offences are also covered by mediation mechanism under	Largely facilitate mediation, but other forms of mediation also exist	No comprehensive legislation on mediation, but mediation as a dispute resolution mechanism is found within individual legislations such as section 50(1) of the Women's Charter (Amendment) Act and section 133 of the	Court-based mediation are carried out by the Subordinate Court.

<b>Primary Fields of Application</b>	<b>Predominant Mediation Styles</b>	<b>Types of ADR Regulation/Legislation</b>	<b>Court-related Mediation Referrals</b>
the Criminal Procedure Code		Criminal Procedure Code (magistrate can mediate minor criminal offences themselves or through a court mediator)	
<b>SCOTLAND</b>			
Family, commercial, community, consumer, workplace, victim-offender, school and health sector applications of mediation	Facilitative mediation Settlement and expert advisory models used extensively by sheriffs JDR in Sheriff Courts	No comprehensive national mediation legislation Court rules and procedural legislation for mediation in civil cases, mainly family, small claims and employment Specific industry-based mediation legislation Regulation of legal aid and mediation Codes and standards of ADR service-providers and industry schemes	Voluntary JDR or referral to external mediator in small claims disputes Market-place and justice models available
<b>SOUTH AFRICA</b>			
Labour, family, human rights and constitutional context, community	Statutory provisions seem to promote expert advisory and settlement models Facilitative mediation also practised	No comprehensive national mediation legislation Statutory provisions on mediation in relation to labour, family, human rights, discrimination and public misconduct Court rules on mediation for some courts Codes and standards of ADR service-providers and industry schemes	Mandatory referral to pre-trial conferences as well as voluntary referrals to mediation Mainly market-place model
<b>SWITZERLAND</b>			
Family, work place, victim-offender, community, public/administrative disputes, ombudsmen schemes in various industries	Transformative facilitative and settlement Co-mediation in family matters	No comprehensive national mediation legislation Court rules and procedural legislation for criminal, divorce, administrative and civil matters	Mandatory pre-trial conferences chaired by Justices of the Peace Conciliation courts for

Primary Fields of Application	Predominant Mediation Styles	Types of ADR Regulation/Legislation	Court-related Mediation Referrals
		<p>Draft uniform <i>Civil Procedure Law</i> to include civil mediation</p> <p>Proposal to include legal aid provisions for family mediation</p> <p>Codes and standards of ADR service-providers and industry schemes</p>	residential tenancy disputes
<b>UNITED STATES OF AMERICA</b>			
<p>Family, employment, peer, environmental and public law, healthcare, online dispute resolution, commercial, cross-cultural, victim-offender mediation</p>	<p>Mediation models include:</p> <p>Facilitative</p> <p>Transformative Settlement</p> <p>Expert Advisory Wise Counsel</p>	<p>No comprehensive national mediation legislation</p> <p>But <i>Uniform Mediation Act</i> (2001)</p> <p>More than 2500 mediation related statutes including specific industry based mediation legislation, and state-based court rules and procedural legislation</p> <p>Extensive case law</p> <p>Codes and standards of ADR service-providers and industry schemes</p>	<p>Mandatory and voluntary referrals under a variety of different schemes</p> <p>Multi-door-court-house models</p> <p>Market-place model dominates</p>
<b>CROSS-BORDER DISPUTES</b>			
<p>Civil, commercial, penal, family consumer, trade, investment and online disputes</p>	<p>Model laws, Codes of conduct, domestic legislation and international treaties envisage a broad range of mediation styles including:</p> <p>Facilitative, Transformative, Settlement, expert advisory, and wise counsel</p>	<p>EU Directive on Mediation in Civil and Commercial Matters (draft, 2006)</p> <p>European Code of Conduct for Mediators (2004)</p> <p>UNICTRAL Model Law on International Commercial Conciliation (2002) and corresponding section of US Uniform Mediation Act (2001)</p> <p>EU Green Paper on ADR Measures for Civil and Commercial Matters</p>	<p>Court-related mediation is encompassed by most of the cross-border regulations and guidelines set out in the previous column</p>

Primary Fields of Application	Predominant Mediation Styles	Types of ADR Regulation/Legislation	Court-related Mediation Referrals
		(2001) Recommendation No. R (98)1 on Family Mediation in Europe (Council of Europe, 1998) European Charter for Training in Family Mediation for Separation and Divorce (1992) Mediation Rules of various international mediation organisations such as ICC	

Acknowledgements:

This table is primarily based on the Comparative Mediation Table contained in the Appendix to Professor Nadja Alexander (ed.), "Global Trends in Mediations", Kluwer Law International, 2006 at pages 452-465 with modifications based on information and research provided by Mr Larry Kwok (a member of the Regulatory Framework Sub-group).