

Development of mediation in Hong Kong

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Overview

Pre CJR stage:

- HKIE Mediation Rules 1985
- Airport project: mediation in construction contracts
- HKIAC Mediation Group set up in 1994
- Mediation Council (1999)
- Pilot Scheme for Family Mediation 2000

CJR consultation and Final Report of the CJR Working Party 2004

- Mediation has a role to play in the civil justice system
- Potentially cost-effective means of achieving fair and satisfactory resolution of dispute
- Temporary stay and costs sanction are legitimate and proportionate measures to encourage parties to consider the use of mediation
- These will not impair the right of access to the court

More pilot schemes 2006 to 2009

- Court schemes:
- Construction cases
- Building management cases
- Company cases involving shareholder disputes
- Mediation Co-ordinators' offices in the Family Court and the Lands Tribunal
- Pro-bono schemes providing mediation services:
- Insurance mediation pilot scheme for personal injuries cases
- Commercial mediation pilot scheme
- Mediation pilot scheme for construction industry

Chief Justice's Working Party on Mediation

- Set up in 2006
- To consider how consensual mediation of civil disputes in the CFI, DC and LT may be facilitated
- Members from all stakeholders: judges, lawyers, mediators and DoJ and LAD
- Platform for exchanging views about the promotion of mediation with the civil justice system
- Monitor pilot schemes and mediation co-ordinator's offices
- Promotion of mediation training of judicial officers
- Foster support from major stakeholders in the joint effort to promote mediation

Other significant events

- Mediation Conference Dec 2007
- Amendments of Guide to Professional Conduct by the Law Society and the Bar Code: professional obligation of the lawyers to advise parties on mediation in appropriate cases
- Provision of Legal Aid for mediation
- Mediate First: mediation pledge
- Hong Kong Mediation Code 2010

Secretary for Justice's Working Group on Mediation 2007-2010

- To make recommendations on facilitating and encouraging of use of mediation and to ensure the quality and standard of mediators
- Cross-sectional membership
- Three sub-groups:
 - Public Education and Publicity
 - Accreditation and Training
 - Regulatory framework
- Report published in Feb 2010 with 48 recommendations
- Works continued by the SJ's Task Force on Mediation

The Mediation Practice Direction

[PD 31]

- The civil justice system serves as a means for the fair resolution of dispute between parties.
- As specified in our new Order 1A, the objectives of our procedures include the achievement of procedural economy in the process and the facilitation of settlement.
- Lawyers and parties are required to assist the court in furtherance of these objectives.
- Case management involves proper consideration of different options to achieve a resolution.

Main features

- Mediation Certificate
- Mediation Notice and Response
- Court directions on Mediation mechanics
- Interim stay
- Costs sanction
- Litigants in person: assistance provided by the new Mediation Information Office

Mediation Certificate

- To be filed within 28 days after close of pleadings
- To focus the minds of the parties on exploration of mediation
- To facilitate lawyers in advising clients on mediation
- To provide information to court for assessing whether mediation is appropriate and whether refusal is reasonable

Mediation Notice & Response

- A mechanism to facilitate parties to enter into dialogue on mediation
- Identify areas of agreement and disagreement on mediation
- To assist the court to facilitate mediation in deciding whether and what directions should be made on mediation mechanics and interim stay

Costs sanction

- The underlying objectives in Order 1A will be taken into account when the court decides on costs
- The conduct of the parties will be relevant, including the reasonableness in the manner in which an issue is pursued
- Court will not look into privileged materials, mediation is a without prejudice process
- Unreasonable refusal to mediate will be penalized by adverse costs order; a party who refuses to attempt mediation bears the burden of providing a reasonable explanation for so doing: *Golden Eagle v GR Investment Holdings* [2010] 3 HKLRD 273

- Practice Direction 31 came into effect on 1 Jan 2010
- According to Mediation Certificates filed with the court, most parties are willing to attempt mediation
- Litigants in person can obtain information and assistance from the Mediation Information Office at the High Court
- Joint Mediation Helpline Office set up in 2010
- Many mediation skill and mediation advocacy training courses were run by different trainers and the number of accredited mediators have increased substantially

How far have we gone?

- Collaborative effort of all the stakeholders is needed and it has partly been achieved through various platforms:
 - Chief Justice's Working Party;
 - Mediation Conference;
 - Secretary for Justice's Working Group and Task Force;
 - Joint Helpline Office

Change of mindset?

- To achieve fair and efficient resolution of dispute, the traditional hostile adversarial litigious approach of lawyers has to be changed.
- Changing of mindset cannot be achieved by rules or theories. It has to be reinforced by a real experience in achieving satisfactory resolution of dispute through actual mediation.
- To have a meaningful mediation with some prospect of settlement, lawyers must properly prepared their clients, not only on the real merits of their case, but also the available options and the needs of the clients.



Though mediation has established its role as a dispute resolution option in Hong Kong, we still need to work harder in the following respects

- Changing the mindsets of the individual lawyers
- Quality assurance of our mediators
- Promotion of public awareness, in particular the commercial sector
- Development of reliable and transparent data base of mediators to facilitate parties in choosing a suitable mediator



Thank you