

# ESTABLISHING YOUR REPUTATION AS A PROFESSIONAL MEDIATOR

The Hon Mr. Justice Barnabas Fung

- **Since one of the most promising approaches to the peaceful settlement of disputes is skillful third-party mediation, we, the United Nation, have a responsibility to “we the peoples” to professionalize our efforts to resolve conflicts constructively rather than destructively and to “save succeeding generations from the scourge of war” -**
- Ban Ki-moon, Report of the Secretary-General on Enhancing Mediation and Its Supporting Activities, 8 April 2009

# Agenda

Dispute Resolution

Professionalism

Qualities of a Mediator

Mediator's Dilemma

Conclusion

Questions and Answer

## Dispute Resolution

- ❑ Traditional adjudication by courts of law
- ❑ Alternative dispute resolution
  - Development of ADR in Hong Kong (see table)
  - Overseas experience: 30% or more cases settled through mediation
- ❑ Suitability for mediation
  - Secrecy
  - Early resolution (or narrowing down issues)
  - Preservation of relationship (e.g. business, family or neighbourhood)
  - Costs consideration (and possible costs sanction)
  - Principle and precedence (whether to be established in next case)

# Alternative Dispute Resolution in Hong Kong

	Judicial Settlement	Arbitration	Mediation	Neutral Evaluation	Interim Adjudication
1970's	Small Claims Tribunal* Labour Tribunal*				
1980's		HK International Arbitration Centre			
1990's			Construction Industry (e.g. New Airport Project) Hong Kong Mediation Council (1994) Hong Kong Mediation Centre (1999)	Construction Industry (can be used with arbitration/mediation)	Construction Industry (can be used with arbitration/mediation)

# Alternative Dispute Resolution in Hong Kong

	Judicial Settlement	Arbitration	Mediation	Neutral Evaluation	Interim Adjudication
2000's	Family Court Financial Dispute Resolution (2003)*  *Call-over courts and trial courts		Family Court Mediation Pilot Scheme (2000) Construction & Arbitration List Mediation Pilot Scheme (2006) Lands Tribunal Building Management Cases Mediation Pilot Scheme (2008) Bankruptcy & winding up List Mediation Pilot Scheme (2008) Civil Justice Reform (2009) (High Court & District Court)		

# Professionalism

---

- Undertaking work with special skill or knowledge in return for payment
- Competence, integrity and no conflict of interest
- Confidentiality

# Qualities of a Mediator

---

- Mediation Approach
  - Facilitative, not evaluative nor advisory
  - Bringing out disputes and bringing together parties' own resolution
  - Trust as repository of confidential information
  - Rapport with parties and legal representatives

# Mediator's Competence

Communication Skills

Negotiation Skills

Mediation Process Skills

Legal and Contextual Knowledge

Personal Attributes

# Mediator's Competence

- ❑ Communication skills
  - Listening
  - Summarizing
  - Pinpointing and bulleting (flip board)
  
- ❑ Negotiation skills
  - Position based (litigation)
  - Interest or need based (mediation)
  - Willingness to settle by all concerned

# Mediator's Competence

## □ Mediation process skills

- Preparation
  - ❖ Pre-mediation meeting
  - ❖ Reading into the documents
  - ❖ Understanding positions of parties
- Control of process
  - ❖ Control of procedure and flow
  - ❖ Keeping "Equal Time"
  - ❖ Pro-active and directive and not a mere messenger
  - ❖ prioritizing issues for discussion
  - ❖ Restrain personal attacks

# Mediator's Competence

## □ Mediation process skills

- Joint or separate sessions
  - ❖ Opening joint session
  - ❖ Private session: open up possibilities to resolve problems
  - ❖ Joint session: more circumspective on the issues
  - ❖ Compartmentalize confidential vs open information (white board)
  - ❖ Readiness of parties to resume joint session(s)

# Mediator's Competence

- Mediation process skills
- Ice breaking
  - ❖ Encourage parties to express their views
  - ❖ Airing of grievances and concerns
- Reality testing
  - ❖ Helping each party to understand strengths and weaknesses of their case
  - ❖ Considering the matter from the other perspectives
  - ❖ Analysis of costs and risks

# Legal and contextual knowledge

- Basic legal knowledge
- PD31 (Mediation) and PD15.10 (Family Mediation)
- Heads of claim in different actions (e.g. PI, matrimonial employment, contract, corporate or partnership disputes)
- Stages in legal procedures
  
- Knowledge of subject matter
- Common jargons and practices
- Special needs and grievances
- Options in different disputes (e.g. apology, non-monetary items, practical solutions)
- Basic drafting skills
- Recording elements of a binding agreement

# Professional Ethics

- Impartiality and Neutrality
  - Fair and equal treatment
  - Avoid being judgmental
  - Eagerness may be misinterpreted as taking side
  
- Conflict of interests
  - Clients' interest first
  - Previous dealings or affiliations
  - Apparent conflict and disclosure

# Professional Ethics

- Confidentiality
  - Mediation Code
  - Mediation Agreement
  - Common law
    - ❖ Genuine negotiations with a view to settlement, including mediation meetings, are protected from disclosure whether or not “without prejudice stamped” applied (*Wu Wei v Liu Ying Ping* HCA 1452/2004)
    - ❖ Confidentiality in mediation of fundamental importance and evidence which invades confidentiality will be permitted to be adduced only in highly exceptional circumstances (*Champion Concord Ltd v Lau Koon Foo* FACV 16&17/2010)
    - ❖ May be without prejudice even as to costs



# Professional Ethics

## □ Mediation Bill

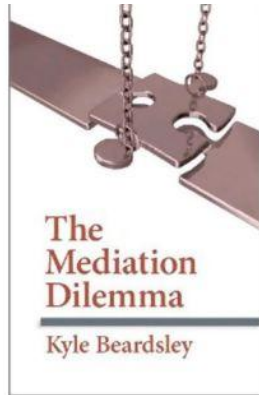
- No disclosure unless expressly provided for or with leave of the court (e.g. enforcing or challenging a mediated settlement agreement)
- Admissibility: relevance and context of use
- Not admissible to prove merits of case, but may be admissible to explain delay or breach of court order (*Wu Wei v Liu Ying Ping*)

## □ “Mediation Privilege”







- Mediator can enforce confidentiality provision but subject to court’s power to compel disclosure if necessary for fair disposal of the case (*Farm Assist Ltd (In Liq) v S of S for the Environment, Food & Rural Affairs (No. 2)* [2009] All ER (D) 228 (Jun))

# Personal attributes

- Patience (for rebuke or rebuff)
- Empathy (for parties problems and behaviour)
- Perseverance (belief in solution)
- Feel good factor in achieving settlement



# Mediation Dilemma

		Mediator A choose to do	
		Good	Evil
Mediator B choose to do	Good	A peaceful world and everyone plays fair and ethically 	A gets a short term benefit, B has no advantage  
	Evil	B gets a short term benefit, A has no advantage   \$MILE	No one trusts mediation: A rotten, dead, disgraceful profession 

# Mediation Dilemma



## Mediation Dilemma – a few stories

### A Mediator and experienced lawyer

- A building management dispute involve multi-millions renovation costs
- The disputes are between individual owners and the Incorporate Owners (IO) Committee
- Their adversarial relationship last for more than a decade
- The Incorporate Owners sent a "resigned" assistant property manager as representative
- Mediator convinced the other side to attend mediation session

### A Lawyer and experienced mediator

- A joint venture dispute involving 2 families and there are three ongoing legal actions on the subject matter of the dispute;
- The history of the matters in the dispute last for half a century;
- there is a lot of bitterness between the two families;
- The lawyer of one party realizes the parties will easily get emotional;
- Lawyer requested the mediator to arrange a three hours mediation

# The Challenges of Mediation-legal practitioners

## Ethical and Professional Issues

- “My client” tactic: “My client wants...my client doesn’t ....have time....fee..
- Delaying tactics: To appoint mediator, to approve the agreement to mediate, to agree the mediation meeting
- Unrealistic proposal: estimated length of a trial is 20 days whilst allowing only 3-4 hours for mediation; spending millions on legal costs whilst only prepares to spare a few thousands mediation fees
- Discouraging disputants to engage in direct dialogue in the mediation
- Inadequate preparation of clients for mediation
- Wrongfully advise clients about the process of mediation
- Using adversarial strategy instead of problem solving approach
- Treating the mediator as a member of the opposite camp
- Focusing on legal issues not on problem solving

# The Challenges of Mediation-mediators

## Ethical and Professional Issues

- Sham mediation
- Cut-throat pricing
- Unrealistic approach
- Inadequate training
- No or minimal follow up
- Inadequate preparation
- Malpractice

# Reflection

- Delay in appointment
- Ring fencing of clients by lawyers
- Identify the clients: parties to the disputes
- Reaching out to the parties
- Sham mediation (e.g. unreasonably short hours or low fees)
- Avoid taking up sham cases
- Not to waste time if no prospect of progress
- Lawyers need to report duration of mediation to court
- Inadequate training/experience with some mediators
- Uncertainties in an evolving profession
- Opportunities in evolving market
- Overseas experience good guide for optimism
- Qualities of mediator

# Conclusion

- High energy and need a lot of passion
- Persevering but don't get too keen to reach a settlement
- Make your best efforts for the day
- Quality and integrity of the mediator is the only guarantee for success
- Quality and integrity of the profession will in turn benefit its members

THANK YOU