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Slowly but Surely...Mediation Goes Mainstream in Hong Kong

Initially slow to take hold, mediation is now gathering momentum

The Hong Kong International Arbitration Centre (HKIAC) was abuzz. Queen's Counsel from England had arrived in Hong Kong, flanked by a phalanx of juniors, and with his wife and baby daughter installed in a nearby serviced flat. A dozen nervous party representatives, a score of pinstriped solicitors and silks, and a small army of brief-laden assistants thronged the corridors of the Centre.

By Day One of the hearing, the massive multi-million dollar construction arbitration had preoccupied half a dozen companies and their personnel, their lawyers and experts for over two years. Negotiations had broken down; after months of fruitless wrangling, the parties were embarking on six weeks of hearings spread over three months. Already the legal fees had climbed into the millions.

On Day Two the parties made a critical decision. They agreed to take one final stab at settlement, by bringing in a neutral third party facilitator. The mediator flew into Hong Kong on the following morning, spent a full day with the disputants, and then departed. The parties then adjourned over the weekend to consider their positions.

The following Tuesday they signed a settlement agreement. Luckily, the visiting Queen's Counsel had an arbitration award from another case to occupy his remaining months in Hong Kong.

This took place in 2001. Aside from those involved, probably no one in Hong Kong ever heard about it. But over the past few years similar stories are being played out, and gradually, the news is leaking out about mediation.

At the recent opening of the Legal Year, both the Chief Justice and the Secretary for Justice stressed the need for Hong Kong's legal community to embrace alternate means of resolving disputes. Pilot projects in the family, construction and insurance areas, and most recently, Practice Direction 6.3 for Voluntary Mediation in Construction and Arbitration cases are gradually bringing mediation into the consciousness of Hong Kong lawyers and their clients.

What has taken us so long? Elsewhere in the common law world, mediation has mushroomed into one of the most popular forms of settling conflict outside the court system. *The Economist* (3 February 2007, p 60) recently devoted most of a page to

the development of mediation, citing mandatory mediation in several jurisdictions, and mentioning the establishment of a UK-China Business mediation centre, with offices in Beijing and London. In Hong Kong, however, mediation has remained out of the mainstream.

This is rather paradoxical. Traditionally, Hong Kong people have not been a litigious group. The Chinese penchant for resolving conflict through diplomacy and discretion rather than in an adversarial setting meant that the courts were infrequently used. Harmony and balance are core values in Chinese society. And losing a legal battle entailed enormous loss of face. Hence the saying, 'it is better to enter the mouth of a tiger than the door of the court.'

Hong Kong's development as a major international commercial and financial centre, combined with more business and the influence of western culture has inevitably engendered more conflict and more disputes. Hong Kong people now flock to the courts to have their disputes resolved through law.

Arriving at the courthouse however, disputing parties are met with the stark reality that litigation

costs money; great sums of money. Hong Kong's legal services are among the most expensive in the world. Consequently, Hong Kong people often find themselves mortgaging their future to pay for a court battle, or else alone in court as self-represented litigants. Only the wealthy or the socially assisted can afford to litigate in Hong Kong.

Litigation has other drawbacks too. In divorce cases, families already stressed by the broken marriage find their personal lives further disrupted and destroyed by the rigours of the adversarial system we use to settle private personal affairs. Even in the tough commercial world of business, litigants are sometimes surprised by the aggressive tactics of their former partners. Entrenched positions and escalating enmity destroy any hope

of restoring or repairing the business relationship.

Given this background it would seem obvious that Hong Kong is a perfect setting for a private, discreet, efficient and inexpensive way to resolve conflict and get on with life. Mediation, when it works, is exactly that solution. And it does work. Statistics from around the world demonstrate over and over that when disputing parties do sit down with a neutral third party for mediation, they do succeed in working out a solution. Their own settlement may be far more satisfactory and creative than anything a judge could order. Best of all, since a mediated settlement agreement is an agreement that the parties have fashioned for themselves, they are far more likely to respect it and carry out

their end of the deal.

Why then has mediation been slow to take hold in Hong Kong? Part of the answer lies in one of its main benefits. Mediation is a private process and it is confidential. Cases settled in mediation do not appear on the front page of the press because of huge settlements or ground-breaking judgments. In fact, the very existence of the dispute may be top-secret. Mediators do not write papers advertising their brilliant successes, because good mediators know that a successful mediation is one where the parties, not the mediator, have dealt with their conflict. In mediation, it's the parties who deserve the credit for success. The mediator is the just facilitator; the catalyst.

The downside of all this privacy and discretion is that mediation ►

remains in a dark corner of the legal world. Without the spotlight of public success, mediation is often overlooked or even distrusted by both parties and their counsel. Lawyers also have expressed concerns that if mediation takes hold in Hong Kong, there will be less work for the profession. The Economist article issued a dire forecast: 'For those cynical lawyers whose income depends on stoking their clients' outraged intransigence, the growth in mediation may prove to be the end of a lucrative era.'

This fear however, is in most cases ungrounded. First, it ignores the reality that most court cases do indeed settle, if only on the steps of the courthouse. Also, legal counsel can and do play an important role in mediation procedures, not only by providing the parties with advice about their legal rights, but also in establishing the facts and in organizing important information and documents that the parties need to fashion a realistic, workable agreement. Lawyers who do work in the mediation process also know that clients appreciate being spared the blood, sweat and tears of litigation. A happier client is one who will likely return or refer others to the lawyer who got the problem solved efficiently.

Mediation has proved successful in some very complex and difficult situations. One famous Hong Kong example concerned Albert House, where a falling illegal structure killed two people standing in the street below, giving rise to a high profile dispute that was eventually resolved through mediation. This case cast a rare but positive media spotlight on the process itself.

Groups such as the Hong Kong

Mediation Council (part of the Hong Kong International Arbitration Centre), the Law Society, the Chartered Institute of Arbitrators, the ICC, the Hong Kong Mediation Centre, as well as many private practitioners, are actively spreading the word about this 'kinder, gentler' interest-based alternative to battle in court. They also conduct information seminars and train mediators for formal accreditation. Hong Kong's judges last year participated in a three-day seminar to learn about mediation. Government contracts now routinely include a mediation clause. Law students are keen to learn about alternative dispute resolution and all three Hong Kong law schools offer programmes to provide their graduates with the necessary knowledge and skills.

Peer mediation is another area in which Hong Kong people are becoming more aware of non-adversarial means to resolve conflicts. In a two-year pilot project funded by HSBC Foundation, senior secondary school students received training from professional social workers from Hong Kong's Family Welfare Society. These young mediators intervene to resolve conflicts among their fellow students, including bullying and name-calling. In so doing, they are practicing skills which are valuable not only in the mediation process, but also in their social and family situations. Mediation skills are generic, transferable life management skills.

There is also in Hong Kong a movement involving elements of mediation in the criminal law field. University teacher Dennis Wong founded the Centre for Restoration of Human Relationships in 2000. Backed by educators and social

workers, this volunteer organization promotes Restorative Justice (RJ) as an alternative to prosecution of juvenile offenders. The aim of RJ is to achieve a fine balance: holding juvenile offenders responsible for their own actions, while protecting the safety of society.

The Hong Kong Federation of Insurers (HKFI) has for several years taken an active interest in alternatives to litigation. In the summer of 2006 the HKFI announced a grant of HK\$250,000 to fund a pilot project operated by the Hong Kong Mediation Council to use and evaluate mediation in cases of workers who have suffered injuries on the job.

Today in Hong Kong, mediation is gaining acceptance. As clients become more attuned to the advantages of an amicable settlement over an imposed legal decision, as lawyers shed their distrust of alternative dispute resolution, and as the judiciary weighs in to support it, there is a growing consensus that mediation is destined for a long and fruitful future in Hong Kong.



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Post-mediation Interview with Injured Worker

The Hong Kong Mediation Council, with funding from the Hong Kong Federation of Insurers, has begun a pilot project. The following interview was conducted by Louise Barrington and Helena Yuen, who chaired the Hong Kong Mediation Council Employee Insurance Compensation Scheme sub-committee. It records the observations of Mr L, the first worker to use the scheme, a few minutes after the parties completed the mediation

Mr L, you've just come out of a day in the mediation process. How do you feel?

Very happy – it took only a short time to settle. But the room was cold!

Please tell us something about the accident that brought you here.

I was working on a construction site in March last year, and fell – about three meters. I hurt my back – my spine – and my left arm and hand especially – and also had internal damage; my bladder was affected. I'm still off work now, although I'm looking for a new job. I can't do heavy work anymore because I can't lift things. Also, my left hand hasn't much strength.

You're the first worker to go through the EIC scheme for mediation, and we'd like to ask you about the mediation process. First, what prompted you to take part in the scheme?

Well, I was quite concerned about maybe having to go to court. I wanted to avoid a long process and I've never been to court and didn't want to go. I've heard awful stories about the cost of lawyers, and how long it takes. And people told me about claims consultants and people who had got new jobs being told to stop working to get a bigger settlement, and then being forced to settle for a small amount. I was very nervous. I got information from the social worker at the Workers' Health Centre and decided to come to the information session at HKIAC.

So, once you decided to try this scheme, how was the mediator chosen?

Well, at the information session at HKIAC they gave us a list of mediators, and also of lawyers. I could choose. I didn't know anything about any of them. I had had some contact with the insurance company and knew the representative was a lady, so I decided to choose a lady mediator and a lady as my lawyer too. I figured they could get along well.

Last night, before the mediation, how were you feeling?

Well, I was pretty worried and nervous, and maybe a bit confused. I didn't really know what was going to happen and I was still expecting something like on television.

This morning you met the mediator for the first time. How did that go?

Well, we met at 11 and talked for about 50 minutes, just the two of us. She explained that this wasn't going to be like court; she was like a teacher, very kind. She asked questions and actually she helped me remember things I'd forgotten about. I felt really comfortable talking to her about my feelings and what I wanted.

So, at first it was just you and the mediator. Your lawyer wasn't present?

No, not then. In fact, the mediator found a discrepancy in the legal issue of my case, and asked me to call my lawyer to straighten in out at lunchtime. She told me as a mediator she could not give me advice.

What happened next?

I went for lunch, and I believe that was when the mediator met with the representative of the insurance company. I came back to HKIAC at 2:00 and the mediation started then.

You had seen the lawyer beforehand. Did you have a figure in mind?

Oh yes. She worked out what I could expect to receive in my case, according to my injuries. She gave me a high point and a low point and a mid-point. She also told me that there was some risk that I could lose the case completely, if I went to a judge. And then I'd get nothing.

How were you feeling as the mediation began?

I was nervous again, and uncomfortable. It was cold in that room! I was afraid of not saying the right thing, that I'd say something wrong, something that I shouldn't say to them – that would hurt my case.

Was the mediator able to help you?

She explained that nothing we said in the mediation could be used in court, and she could not be a witness if we ever had to go to court, so it was fine to say anything in the mediation. After that I felt much better – less nervous. I began to relax, and then it felt more like just chatting, except that the mediator would take time to confirm what I meant each time.

During the mediation, who had the bigger role, you or your lawyer?

Well, it wouldn't have been the same without the lawyer there, because I don't know about the law and would have been very shaky. Three times during the mediation, I was able to go outside the room and talk to my lawyer alone. Then we would go back in and she would speak on my behalf. We had eye contact so I could let her know that she was saying the right thing.

So, did you feel in control of the situation?

I was using my lawyer's advice. I felt very comfortable all through, and I was comfortable with the settlement we got. The lawyer gave me advice but the final decision was mine.

Did you ever feel pressure to settle?

No, not at all. In fact, it was just the opposite. I was a bit worried that we might not settle, and I wouldn't get what I wanted and would have to go to court.

What was the turning point of the process?

Well, two things. The mediator emphasized the cost savings and gave everyone a very positive focus. Also she helped me to talk about some intimate aspects of my injuries that affect my personal life, permanently. She guided me to say things I wouldn't normally have had the courage to say. When the other side heard that, they realized how bad it was for me, and I think right then was when they raised their offer.

What else did you like about the mediation?

The mediator used the whiteboard. She wrote down everything we had to cover, all listed very clearly – my claims, details of about seven items. Everyone could see what to talk about, and nothing was left out.

And did you sign an agreement?

Yes, we signed a paper with the points listed out. The insurance company lawyer is going to send a draft agreement to my lawyer and I'll have my cheque four weeks after that.

And the result of the mediation; how did it compare with what you expected before you went into the mediation today?

It turned out much better than I expected. For example, they accepted my medical bills right off, no questions or discussion.

Now, coming out of the mediation, do you have any comments or suggestions?

Yes, in fact I do. At the information session, the presentations seemed rather complicated. I think it should be simpler. Just say, we're here to help. And make it clear that going to mediation doesn't mean you'll get a lower amount. The insurance companies will save lots of money if they don't have to go to court, so they can be generous with their settlements.

Also, I would like to have had some information about the lawyers and mediators on the list at the information session. There were just names and contacts. For instance, I am really happy the mediator was a lawyer, because she knew about insurance and she knew how to move the parties. She could tell us about the costs of going to court for this kind of case. And I think, the older the better. In my case, the mediator was able to stop us from arguing – she could even change the atmosphere in the room. She really helped me by asking, 'What do you think about this?' And she encouraged us to talk to our lawyers whenever things seemed to be stuck. She kept us talking, and if we did get stuck, she could change the subject and then come back later and it seemed easier. There was no wasted time. Without her, I'm sure we'd still be stuck on some of the items.

And personally, how are you feeling?

I'm very happy. I feel so much better. My wife and I had discussed it before, but now it is settled, I know she won't consider me a burden in the family. She has had to go out to work. I'm more ready now to look for a new job, because I don't have this hanging over my head. I know I won't have to ask for time off to go to court.

Do you have any doubts or hesitations?

No, not at all! I would recommend that many workers come as well. It's much less hassle than court procedures or trying to get Legal Aid for a court case. The lawyers at Legal Aid are like judges, very impersonal. In mediation, even the lawyers are friendly!