3rd Asian Mediation Association Conference
Court's Role in Mediation
by The Hon Mr Justice Fung
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I am very honoured to be able to share with the many distinguished guests locally and from overseas the experience of the Hong Kong Judiciary in promoting mediation in Hong Kong.

The first pilot scheme on mediation was introduced in the Family Court in 2000. I was Chief Judge of the District Court at the time where the Family Court is a division. Overseas experience had showed that mediation was very useful in alleviating the emotions and contentious atmosphere of family and children proceedings. The Judiciary funded the pilot scheme fully so that the parties were provided with mediation service for free. It was a voluntary scheme but the take up rate was very high because of the nil costs. The Judiciary set up the Mediation Coordinator's Office (MCO) which maintained a panel of mediators registered with the scheme. The MCO also conducted information sessions explaining to the parties the nature and effectiveness of mediation, and it also undertook to contact and involve the opposite party when approached by one party only. The Pilot Scheme on Family Mediation ran for 3 years. The settlement rate was almost 80%. It was assessed with the help of the Hong Kong Polytechnic University, and the effectiveness and satisfaction were affirmed. The success of the scheme has grounded mediation firmly in the Hong Kong scene. Family mediation now continues as a user pays service.

In 2006, another pilot scheme was introduced in construction cases, an area traditionally embracive of mediation in Hong Kong ever since the 1990's, where virtually all the cases arising from the construction of new airport were settled by mediation.

In 2008, pilot schemes for mediation were introduced for company cases and also building management cases. The problems with management of multi-storey buildings such as water seepage or maintenance matters can never be satisfactorily resolved except with goodwill and cooperation of the neighbours. Mediation which is conducive to preservation of future relationship is best suited to deal with such problems. Another Mediation Coordinator's Office was set up in the Lands Tribunal, which also carried a panel of mediators including those willing to provide their service *pro bono*. Although the settlement rate of 52% is lower than that in family cases, the scheme is nevertheless useful in providing means of better resolution of the disputes, as was reflected in the Users Satisfaction Survey for 3 years.

In early 2000, a working party was set up to introduce reform in the civil procedures following the overseas experience in other jurisdictions such as New South Wales and England and Wales. The Civil Justice Reform (CJR) culminated in the amendment of the High Court Rules and the District Court Rules in April 2009. The Rules stated the underlying objectives to increase the cost-effectiveness of the procedure and to ensure a case is dealt with as expeditiously as reasonably practicable, and also to facilitate the settlement of disputes. The Court has a duty to encourage the parties to use alternative dispute resolution, and to help them to settle the whole or part of the case.

Mediation was identified as the main form of alternative dispute resolution under CJR. Legal aid was also granted for mediation in legal proceedings.

A new Practice Direction PD31 on Mediation took effect in January 2010, giving 8 months to the profession to familiarize with and be prepared for mediation. During this period, the Masters (i.e. Deputy Registrars charged with the procedural matters) held briefings on mediation during the case management hearings. After the commencement of PD31, the Mediation Information Office took over the education and informative role.

PD 31 provides that mediation is a voluntary consensual process. Solicitors for the parties have the duty to explain to their clients the nature and benefit of mediation and to advice them to actively consider the use of mediation, and to file a certificate of compliance. The Court may adjust the procedural timetable or even stay the proceedings in order to facilitate mediation.

Although a party is not obliged to undergo meditation, unreasonable refusal to attempt mediation as requested by the other party may be a factor in the exercise of the discretion to make an adverse costs order, i.e. denying the winning party whole or part of the legal costs of the proceedings to be paid by the losing party at the end of the case.

Under PD 31, the parties may apply to the Court for directions if they cannot agree on the mediator. The Court will consider the experience and expertise of the mediators proposed by the parties. Unreasonable refusal to consent to the appointment may also result in an adverse costs order.

With the commencement of the Mediation Ordinance (Cap. 620) in January 2013, mediation has a proper statutory grounding in Hong Kong, and with clearer guidance as to the incidence and exceptions of confidentiality.

Experience in the last few years has shown that most parties are willing to attempt mediation, but apparently with less success than the statistical norm. The overall mediation success rate is about 45%, but the settlement reached within half a year of the mediation is close to 60%.

Discussions amongst the Judges and Masters and anecdotal feedbacks from some professionals have come up with possible problem areas:

(1) Mediation is attempted at an inappropriate stage;
(2) Mediation is attempted without a proper mindset;
(3) Mediation is attempted without sufficient endeavours.

The timing for mediation may differ with different types of cases. I was the Judge in charge of Personal Injuries Cases at the implementation of CJR. The PI List is the only list with a pre-action protocol, i.e. letter before action disclosing substance of the claim with supporting documents (e.g. accident reports and hospital records, etc.) aiming at early negotiations for settlement. It was originally thought that mediation could perhaps be factored in at an earlier stage in PI cases. However, cases not settled before action would normally require some expert and/or surveillance reports etc., and the timing of mediation might be more opportune after the documents were exchanged or even later, and it was so accommodated. Settlement rate for mediation in PI was over 70% and in line with the norm.

Money or business cases may be different, as parties may settle for practical reasons to avoid the hassles of litigation or to look to the interests in future. But there may also be cases where rushing into mediation before the parties or the case is ready is ill advised. There is no hard and fast rule.

Upon review, the Masters now make enquiries as to timing of mediation, avoiding the parties from either rushing into mediation or resorting to delaying tactics when faced with mediation proposed by the other side.

The Judiciary and the Legal Aid Department have kept statistics of the hourly rates of the mediators and the hours taken in mediated settlements. For the unsuccessful attempts, some hourly rates were very low or duration very short. There are mediators offering services at very low fixed costs, and it can but only arouse the suspicion of the Courts. Parties are well advised to consider the experience of the mediator and to take the median figures for the successful cases into account in deciding on the charge of the mediators and duration for a genuine attempt at mediation.

Getting it over and done with lacking serious attempt is of course one instance of the wrong mindset. But serious attempt only with a view of one's own interest without regard to the reality or the other's interest is also a wrong mindset. After all, mediation is not so much winning or losing, but trying to resolve the dispute in a way acceptable to both parties, each with some give and take, for the sake of avoiding the uncertainties, attritions and agonies of litigation. That is where an experienced and impartial mediator can be more effective than negotiations by the solicitors whose duty is to their clients.

The mediator's skill and art is the software to complement the hardware of the law and practice directions. The mediator is in a unique position of receiving confidential information from opposite parties. Trust between the mediator and the parties is essential. The mediator must be impartial and be so perceived by the parties, especially unrepresented ones. Once a party feels he or she is rushed into something not completely comfortable with, that is detrimental to the rapport. The mediator must also be familiar with the court procedures, and well read about the subject matter of the case.

The development and maturing of the mediation profession is essential to the success of mediation in Hong Kong. The first must be training and accreditation, then experience and continuing professional development.

In August 2012, Hong Kong Mediation Accreditation Association Limited ("HKMAAL") was set up as the premier mediation accreditation body, responsible for setting the standards for training and accreditation of mediators in Hong Kong, and for handling complaints against its members. Its corporate members are the former major mediation accreditation bodies in Hong Kong, with individual members comprising over 1,700 of about 2,200 mediators in Hong Kong. HKMAAL's mission is to progress towards the single mediation accreditation body in Hong Kong with quality assurance comparable with the international standards.

As to the way forward, some may ask whether mediation will become compulsory in legal proceedings in Hong Kong as in some jurisdictions. The debate may be more relevant in family cases where the parties to the marriage are looking to the fixed pool of family assets for division, and apart from their own interests, the interests of the children are paramount. The matter needs further looked into.

In general cases, the situation is that most parties are quite willing to attempt mediation but perhaps the settlement rates may see room for improvement. International experience unequivocally affirms that mediation is an effective means of dispute resolution with high user satisfaction. Public education as to the nature, proper mindset and effectiveness in mediation is important for general acceptance of mediation as means for alternative dispute resolution. The Judiciary's Mediation Information Office is keeping up the information sessions, and the Judiciary's Mediation website has received over 1 million external hits during the past 4 years. And the mediation profession should take it further to the community.

After all, an effective mediator conscientiously putting in a hard day's work is the other keylink. I have witnessed the fervour and dedication of many mediators in the recent conferences during the Mediation Week. They all embrace the Win-Win ethos and are eager to put that into practice. With the further development and acceptance of mediation in Hong Kong, I am confident that it will have a bright and promising future.