MEDIATION FIRST CONFERENCE
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HONG KONG CONVENTION & EXHIBITION CENTRE

TOPIC

"Current experience and challenges of mediation in Hong Kong with particular emphasis on:

1. Role of advisors (legal or otherwise) in mediation
2. Are people committed to resolving disputes by mediation?"

INTRODUCTION

1. The above topics were discussed in the "Mediation First" conference on 12 May 2012 held at the Hong Kong Convention & Exhibition Centre. As requested, I shall endeavour to give more details to my talk. In this article, I shall also add other relevant topics and authorities, which were, due to shortage of time, not covered in the discussion and mentioned in my brief notes and some of the recent authorities are useful to illustrate the topics for discussion.

2. Mediation is a new subject in Hong Kong in civil litigation. It was not until the Civil Justice Reform that it was introduced to Hong Kong as a serious subject for alternative civil disputes resolution. The Civil Justice Reform commenced on 2 April 2009. But the operative date for mediation under Practice Direction 31 was postponed to 1 January 2010 in order to allow more time on the drafting of Practice Direction 31, which was amended to make it more comprehensive and more practicable. It will be instructive to understand the reasons why the Working Party on Civil Justice Reform had introduced mediation as the alternative disputes resolution.

3. By Recommendation 138, the Working Party recommended that a scheme should be introduced for the court to provide litigants with better information and support with a view to encouraging greater use of purely voluntary mediation. The Working Party has, in particular, taken into consideration the following factors on mediation:

a. In suitable cases, mediation may result in very substantial savings in costs[1].

b. Mediation can produce flexible and constructive outcome as between the parties which traditional legal remedies cannot offer[2].

c. Mediation also provides the chance of a swifter resolution of the dispute in conditions of confidentiality and in an atmosphere where the parties channeled towards seeking settlement rather than towards inflicting maximum adversarial damage on each other[3].

4. The Working Party had also recommended that mediation must be voluntary in the sense that no attempt should be made to force anyone to settle a case. However, the court may be given power to order the parties to appoint a mediator and to proceed with the mediation until it is terminated (usually either by settlement, by the mediator certifying that it has not succeeded or by either party withdrawing); or to direct the parties to appoint a mediator and to engage to some stated degree in the mediation process; or to recommend mediation and to impose costs sanctions if no attempt at mediation occurs[4].

5. The Court has been industriously adopting the above guiding principles in the cases before it as shown in the cases discussed below.

6. It would be helpful for members of the profession to keep the above principles in heart and understand the Court's attitudes in the administration of those principles in the cases, which will illustrate the proper approach in giving advice to clients. This will also avoid misunderstanding of Practice Direction 31 and the practice in Court, which has given rise to the malpractice of sham mediation by merely going through the motions only without real intention of seeking settlement for the disputes. It was rumored that sham mediation was done because the Court would not

[1] Paragraph 798 of the Final Report

[2] Paragraph 799 of the Final Report

[3] Paragraph 800 of the Final Report

[4] Paragraphs 814 & 819 of the Final Report

give leave to set the case down for trial without the parties first going through mediation. Investigations had been made and it was found that the rumour was unfounded. Had members of the profession paid attention to the Working Party's guidance on mediation in §4 above, they would not have had such a misconception. I hope that this article will dispel the profession's misconception of the court practice on mediation.

7. In the authorities below, it can be seen that the Court has attempted to give guidance to members of the legal profession on the proper mindset and attitude in giving legal advice to clients on mediation.

THE COURT'S APPROACH

A. voluntary exercise

8. In *Hak Tung Alfred Tang v. Bloomberg L.P. (a firm) & Ors* HCA198/2010, 16 July 2010 (unreported), the court had stated it clearly that the mediation was a voluntary exercise. At §12:

> "…After all, mediation is a voluntary exercise of the parties. Any party who considers that mediation is not helpful or cannot assist the parties to settle may terminate the mediation at any time. Whether such decision is a reasonable decision or whether such conduct is a sincere and genuine attempt on mediation is for the trial judge to decide at the end of the trial."

B. The Court may advise legal representatives to advise clients on mediation

9. The Court has power to recommend the legal representatives to advise clients to consider using mediation to resolve their disputes. In fact, before the commencement of the Civil Justice Reform, the Court of Appeal had foreseen the function of mediation and had made guiding remarks in *iRiver Hong Kong Limited v. Thakral Corporation (HK) Limited* CACV252/2007 [2008] 4 HKLRD 1000. At paragraph 98 of the judgment, the Court of Appeal demonstrated the use of mediation and pointed out that the legal advisors had failed to advise their clients on mediation:

> "98. Before we leave this case, we wish to observe that this is a typical case where parties should have explored resolution of their disputes by mediation. The total damages are just over $1 million. However, we are told that the total legal costs incurred by the parties, including costs of this appeal, run up to about $4.7 million. Apart from the usual attempts in settlement negotiation conducted by solicitors' correspondence, the parties have not tried other means of alternative dispute resolution. We have not been told whether the solicitors have given advice to their respective clients on the possibility of resolving the matter through mediation. "

10. To highlight the importance of mediation to the legal advisors, who might have thought that private negotiations might have served the purpose, the Court of Appeal went further to say:

> "99. The mere fact that negotiation between solicitors fails to result in a settlement does not mean that the parties would not benefit from mediation conducted by a skilled mediator. As observed by Brooke LJ in *Dunnett v Railtrack* [2002] 2 All ER 850 at para. 14, "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…when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result 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. A mediator may be able to provide solutions which are beyond the powers of the court to provide. "
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> 100. In *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 at para. 11, Dyson LJ said, "The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. "
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> 101. Later in *Burchell v Bullard* [2005] Build LR 330, Ward LJ said at para. 43, "Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. "
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> 102. In the more recent case of *Egan v Motor Services (Bath)* [2007] EWCA Cir 1002, Ward LJ made some useful suggestions as regards how a solicitor could proffer advice on mediation to a client effectively. "

11. The Court of Appeal finally advised members of the legal profession in Hong Kong to bear in mind the above comments and views of the court when they advised their clients:

> "103. In Hong Kong, mediation as a means to settle disputes has increasingly been recognised. Those who have tried mediation usually find the process constructive even though not all mediations resulted in full settlement. Sometimes parties were able to narrow down their differences during the course of mediation and come up with a full settlement at a later stage. An example can be found in *Chun Wo Construction & Engineering Co Ltd v China Win Engineering Ltd*, HCCT 37 of 2006, 12 June 2008.
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> 104. We also have a large number of skilled mediators in Hong Kong who are willing to provide mediation services at reasonable costs.
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> 105. Against such background, it is indeed regrettable that the parties in the present case have not had the good sense of trying to resolve their commercial dispute by a much more cost effective means.
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> 106. The Civil Justice Reform shall come into force in 2009. The new Order 1A sets out the underlying objectives of the rules and Order 1B sets out the power of the court in case management. Parties and their lawyers have a duty to assist the court to further the underlying objectives. They will be well advised to have the above comments on ADR in mind in making attempts to resolve their dispute effectively. "

12. The above were clear indications from the Court to members of the legal profession on the appropriate approach of giving legal advice to clients on mediation. This Court of Appeal decision was delivered in August, 2008, before the operation of the Civil Justice Reform on 2 April 2009.

C. The Court may take mediation into account when considering costs order

13. In the post-CJR period, the Court had given more explicit and coercive advice to members of the profession to advise clients on mediation if they were minded to avoid the sanction of costs against them. In *Supply chain & Logistics Technology Limited v. NEC Hong Kong Ltd.* HCA1939/2006 by Lam J. on 29 January 2009 (unreported), the Court held

that failure to mediate could be taken into account on the question of costs and proper case management required the court and the parties to consider the most effective mode for the resolution of the disputes and therefore the court had to consider whether it was an appropriate case for mediation when it made the costs order. If the party elected to ignore the court's direction on mediation, he had to give explanation to the court for such decision. At paragraphs 11-13, Lam J. said:

> "11. Failure to participate in mediation can be taken into account on the question of costs. The rationale is that the purpose of civil litigation is to resolve dispute between the parties. Proper case management requires the court and the parties to consider what is the most cost effective and satisfactory way to resolve a dispute. In many instances, adversarial litigation is only one of the modes to resolve a dispute and it may not be the best mode. If there is an alternative by which the dispute may be resolved in a more cost effective, timely and satisfactory manner but a party insists on resorting to litigation despite suggestion from the court to explore that alternative, in effect he is adopting a potentially more expensive and time-consuming mode in dealing with the same subject matter that may cause greater attrition to all parties in terms of financial and personal well-being and human relationship, and as such less satisfactory. He may or may not have good reasons for taking such a stance. But before the court suggests the parties to consider mediation, it usually would have examined whether the case is appropriate for mediation. A party who chooses to ignore such suggestion should not be surprised if the court seeks an explanation from him for not making attempts in mediation when it deals with the question of costs.
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> 12. This approach is well in line with English authorities, see *Dunnett v Railtrack* [2002] 1 WLR 2423 and *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002. In Hong Kong, the pilot schemes on mediation in the High Court Construction and Arbitration List, Sections 168A and 177(f) Companies Ordinance cases and the Lands Tribunal Building Management Cases adopted the same approach.
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> 13. In dealing with costs, it is well established that settlement attempts that have a prospect in satisfactory resolution of the dispute and the rejection of such attempts are relevant considerations because such case management conducts have a direct bearing on the reduction or escalation of the costs of the litigation. As Simon Brown LJ put it in *Butcher v Wolfe* [1999] 1 FLR 334,

> "For the plaintiff to be entitled to recover his costs --- in this or any other litigation --- he must show at least that he has obtained at the hearing something of value which he could not otherwise have expected to get. Only that justifies his proceeding with the action to trial." "

D. Proper legal advice on mediation

14. Not only was the Court concerned that clients were not legally advised on mediation, the Court was also concerned with the proper legal advice given by a solicitor to his client. In *Chevalier (Construction) Co. Ltd. v. Take Cheong Engineering Development Ltd*. HCA153/2008 [2011] 2 HKLRD 463, the Court, having considered that it was unreasonable for the defendant not to accept a reasonable offer made by the plaintiff, had even pointed out to the profession that a solicitor was not doing a service to his client if he had not explained comprehensively and professionally all the pros and cons of the litigation to clients before they participate in mediation. At paragraphs 19-20, Lam J. said:

> "19. I do not know to what extent the Defendant was driven by the misconceived notion in handling settlement negotiations and participating in the mediation process. But based on what Mr Lai told me at the application for stay, this piece of litigation had imposed serious financial burden not only on the Defendant but also on him personally. With the benefit of hindsight, it is a great pity that he did not accept the March 2010 offer.
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> 20. I again do not know the extent to which the Defendant's solicitor had explained to Mr Lai the costs and risk associated with the litigation and the merits of the claim and the counterclaim. But I must emphasize again the importance of the lawyers explaining comprehensively and professionally all pros and cons of the litigation to their respective clients before the clients participate in a mediation. A solicitor who paints an unrealistic rosy picture for his client would generate unrealistic expectation on the part of the client. At the end of the day, if mediation fails and litigation fails to deliver the expected result, the client would suffer tremendously. Such a solicitor is not doing a service to his client."

THE ROLE OF ADVISOR (LEGAL OR OTHERWISE) IN MEDIATION

15. I shall place emphasis on the legal advisors. Other advisors will play more or less the same role. From the cases above, it can be clearly seen that the Court had placed significant reliance upon the profession to give proper and appropriate professional advice to clients on mediation and settlement, the consequence of which could be serious for clients, to whom the solicitor owned a duty. To prepare a proper mindset for mediation, it may be advisable for members of the profession to pay attention to the authorities as to: (i) the approach as to how to assess the case for the determination whether it is suitable for mediation; (ii) the grounds, which the Court refused to accept as sufficient reasons for not considering or attempting mediation; (iii) the proper approach to adopt mediation in parallel with litigation proceedings; and (iv) the cases, which the Court would accept that mediation was not suitable and no sanction would be imposed upon a party who had failed to attempt mediation. The authorities that follow will throw some light on these issues.

A. The approach to assessment and grounds that the court refused to accept refusing mediation

16. In *Golden Eagle International (Group) Ltd. v. GR Investment Holdings Ltd.* HCA2032/2007 [2010] 3 HKLRD 273, the defendant had failed to beat the plaintiff's sanctioned offer and the plaintiff asked for costs on indemnity basis. The Court held that the nature of the dispute would determine whether the case was suitable for mediation[5]. In this case the Court had set out the following, which it refused to accept as sufficient reasons to refuse mediation:

a. The defendant's excuse that for commercial reason the defendant had refused to mediate[6].

b. If the strength of the defendant's case was a borderline case, the defendant did not have good reason for refusing mediation[7].

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[5] Paragraph 26

[6] Paragraph 20

[7] Paragraph 31

c. Also, a party could not rely on his own unreasonable obdurate attitude to justify a refusal of mediation on the ground that it had no prospect of success[8].

d. Nor did the court accept wide difference between the parties as the reason for refusing mediation[9].

The learned judge had left open the option of refusing to mediate on the ground of having a strong case. At paragraph 30, the learned judge said:

> '30. In this judgment I wish to leave open the question whether in the light of the above features in Hong Kong a party can rely on having a strong case as the ground for refusing mediation. But it is plain to me that the Defendant's case does not fall within the category of reasonable belief of a strong case identified by Dyson LJ at para. 19 of his judgment,
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> > "Some cases are clear-cut. A good example is where a party would have succeeded in an application for summary judgment … Other cases are more borderline. In truly borderline cases, the fact that a party refused to agree to ADR because he thought that he would win should be given little or no weight by the court when considering whether the refusal to agree to ADR was reasonable. Borderline cases are likely to be suitable for ADR unless there are significant countervailing factors which tip the scales the other way. "'

In *Pacific Long Distance Telephone v. New World Telecommunications Ltd.* HCA1688/2006 by DHCJ Houghton, SC on 23 May 2012 (unreported), the plaintiff was unsuccessful and was to be ordered to pay costs to the defendant. The plaintiff argued that there should be no order as to costs and one of the reasons being that defendant was unreasonable to have refused mediation. The Court accepted the defendant's belief as to the strength of its position in regard to the matters that were in issue was the relevant factor for refusing mediation, relying upon *Halsey v. Milton Keynes General NHS Trust* [2004] 1 WLR 3002.[10]

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[8] Paragraph 35

[9] Paragraph 36

[10] Paragraph 12

17. Considering the above judgments on the issue whether the Court will accept a party's belief as to the strength of his/her case, it seems apparent that the Court will take into account the strength of the party's case, but it did not simply take the party's subjective view for its determination. The Court will rather take an objective view by reference to the evidence available for its determination, which echoes with §16(c) above.

18. In *Pacific Long Distance Telephone v. New World Telecommunications Ltd.*, the learned Deputy Judge had also added the following, which the Court refused to accept as sufficient reasons to refuse mediation:

a. Because the parties had made previous unsuccessful attempts to settle the matter, it was thought unlikely that mediation would be of assistance.[11]

b. The defendant's view that an out-of-court settlement would be taken as some sort of admission of liability.[12]

B. Continuing obligation to mediate

19. As to the proper approach to adopt mediation in parallel with litigation proceedings, the learned Deputy Judge had emphasized on the continuing obligations of parties in *Pacific Long Distance Telephone v. New World Telecommunications Ltd. supra*, said:

> "18. It appears to me that the position in regard to the mediation is this. The parties both had continuing obligations to seek ways in which the disputes between them could be resolved without the necessity and cost of court litigation at trial. The introduction or amendment of matters in issue as the litigation proceeded increases, not reduces, the importance of considering, or if appropriate re-considering, the appropriateness and availability of methods of alternative dispute resolution…. "

[11] Paragraph 12

[12] Paragraph 16

C. Cases where the Court would impose no sanction

20. The Court, however, had agreed not to impose costs sanction on the party who had failed or refused to attempt mediation in some cases.

21. In *The Incorporated Owners of Shatin New Town v. Yeung Kui* CACV 45/2009 by C.A. on 5 February 2010 (unreported), the respondent had failed before the Court of Appeal but he argued that the costs order should be "each party bears its own costs" for the reason that the appellant had refused to mediate. The Court of Appeal had considered the reasons for the appellant's refusal of mediation and held that the appellant had given good reasons for so refusing: that the respondent had delayed the matter; when the respondent proposed mediation, the matter was approaching trial and mediation might further delay it; that it was a matter concerning the interpretation of the Deed of Mutual Covenants and the respondent had turned down the appellant's proposal before.[13] The Court of Appeal ultimately awarded costs to the successful appellant.

22. In *Oriental Press Group Ltd. & Another v. Fevaworks Solutions Ltd.* HCA2140/2008 by Chung J. on 25 March 2011 (unreported), a defamation case where the plaintiff succeeded, the Court was to consider the costs to the plaintiff. The defendant alleged that the plaintiff had refused to mediate and asked the court to award no costs to it. The Court held that because the legal position of libel on the internet was a novel issue and that the defendant was unlikely to accept the awarded amount, which the Court found that it was reasonable for the plaintiff to refuse mediation[14].

23. In *Golden Eagle International (Group) Ltd. v. GR Investment Holdings Ltd. supra*, the defendant had failed to beat the plaintiff's sanctioned offer and the plaintiff asked for costs on an indemnity basis. The court did not accept the defendant's excuse of commercial reason to refuse mediation. But the Court accepted that the defendant's belief of the strength of its case might be a legitimate reason for refusing to mediate and having considered that the defendant's case was only borderline case and other factors, the Court ordered the defendant to pay the costs on common fund basis.

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[13] Paragraphs 8 & 9

[14] Paragraphs 11 & 12

24. In *Pacific Long Distance Telephone v. New World Telecommunications Ltd. supra*, the plaintiff was unsuccessful and was to be ordered to pay costs to the defendant. The plaintiff argued that there should be no order as to costs and one of the reasons being that defendant was unreasonable to have refused mediation. Having considered all the circumstances, the Court held that neither party was at fault for no mediation taking place and it therefore awarded costs to the defendant.

D. The position of an advisor (legal or otherwise) in mediation

25. I put emphasis on the legal advisors because they are frequently consulted by their clients and, being the trustees, they play a very important role in the process of mediation.

26. The primary objective of mediation is settlement at the earliest possible moment. The function of mediation is clearly set out in CEDR[15]:

> "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 resolution."

27. The legal advisors must bear in mind that when giving advice on mediation to clients, they should be clear that they have no conflict of interest in giving the advice. If he/she does not believe mediation is an effective means for dispute resolution or if they consider that they are unable to prioritize client's interest above profit maximization, it is advisable that they should advise clients to seek other advice. There is a Mediation Information Office at the High Court Building, which can render proper advice on mediation for the public free of charge. I suppose the fundamental mindset of a legal advisor is that he/she truly believes that mediation is a useful means, by which the clients may consider making use of for a fast and cheap resolution of their disputes.

28. The next advice for the legal advisors is that they should not take an adversarial stance in mediation because they will affect their clients. Mediation is a process of bargaining between the parties and they have to

[15] Abbreviation of Centre for Effective Dispute Resolution

adopt a compromising attitude in order to breach their gaps. To take an adversarial stance throughout the mediation process is not conducive to the process.

29. The third advice for the legal advisors is that they should let clients decide the terms for settlement. After all, they are the ones to decide, not the legal advisors, whose primary duty is to ensure that the parties are having a fair platform for negotiations, taking all the relevant factors, especially the legal factors into consideration before they reach an agreement. The legal advisors should not hijack clients' decision on terms of settlement.

30. Lastly, I only wish to point out to legal advisors that they must exercise caution when they prepare the settlement agreement for clients. Otherwise, clients may end up with another set of litigation over the disputes in the settlement agreement.

31. In *Champion Concord Ltd. & Another v. Lau Koon Foo & Another* FACV16 & 17/2010 delivered on 23 November 2011, the parties had gone through mediation and settled their dispute over a sale and purchase of land by way of a settlement agreement, which contained convoluted terms and unclear definition with the result that the parties then had to commence another litigation on the settlement agreement all the way to the Court of Final Appeal.

ARE PEOPLE COMMITTAL TO RESOLVING DISPUTES BY MEDIATION?

32. The Judiciary has been keeping statistics on mediation. In its report of the First two years' Implementation of CJR from 2 April 2009 to 31 March 2011 tabled before the Legislative Counsel, it said at page 32 §49 that there was a rising trend for the use of mediation. The Monitoring Committee of CJR headed by the Chief Judge of The High Court had also noted that the Department of Justice had adopted mediation for works-related disputes, with satisfactory results of average 62.5% settlement for the work-related cases for the 2 years. The settlement rate for general claims for the first 6 months was 43.75% settlement. The Legal Aid Department had 66.8% settlement rate for the period of April 2009 to October 2011.

33. Generally speaking, the report concluded that there had been an increasing awareness among litigating parties that mediation would be one of the means of alternative dispute resolution and it would take more time for the litigating parties to be convinced of the benefit of mediation. The success of mediation hinges upon the mindset of the legal profession and how the legal representatives advise and prepare their clients for mediation. See paragraphs 51 and 52 of the report.

K. W. Lung
Registrar, High Court
19 December 2012