



# **The Current Development and Issues of Mediation in Hong Kong**

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# Overview of Mediation Development in the Judiciary

- Pilot scheme in Family Mediation in 2000
- Civil Justice Reform
- Other schemes: construction cases, building management cases, shareholders' disputes, personal injuries cases
- PD 31, PD 3.3, PD 6.1, PD 15.10, PD 18.1, PD 18.2, PD 20.2, LTPD BM No.1/2009, LTPD CS No.1/2011
- Private Financial Adjudication PD SL9
- Mediation Statistics



# Chief Justice's Working Party on Mediation

- Established in 2007
- The facilitation of consensual mediation of civil disputes in the Court of First Instance, the District Court and the Lands Tribunal
- Focus on measures that could be implemented by the Judiciary
- Cross-sectional membership





# The works of the Working Party

- A platform for the major stakeholders to exchange views about the promotion of mediation within the civil justice framework
- Monitoring the progress of mediation schemes, the works of mediation co-ordinator/ information offices, discussions on mediation statistics



# The law on agreement between parties in matrimonial cases



# The general law on agreement

- Contract : consensus between the parties
- Though there is no formal requirement for writing for most agreements (except agreements on interests in land), we shall focus on agreements in writing
- The consent to an agreement is generally manifested by signing on the agreement
- Draft without prejudice agreement : not binding until signed





# “Without Prejudice”

- “without prejudice” privilege
- “subject to contract”
- “without prejudice save as to costs”
- Documents produced to the court, including mediated agreements, should not be marked “without prejudice”
- “subject to approval by the court”



# Agreements in matrimonial context

- Pre-nuptial agreements
- Post-nuptial agreements
- Separation agreements
- Maintenance agreements
- Settlement agreements
- Mediated agreements





# Effects of agreement of the parties in family proceedings

- It is possible to make a binding agreement between a couple about financial consequences upon separation
- But they could not oust the jurisdiction of the court
- In family proceedings, the court makes order on ancillary relief pursuant to the relevant statutory power
- Before the court makes an order, it has a duty to conduct independent assessment so as to discharge its statutory function
- But the court will give due weight to the agreement between the parties



## Relevant factors in assessing weight attached to an agreement

- L v C [2007] 3 HKLRD 819;  
SPH v SA (2014) 17 HKCFAR 364 para 30
- In the absence of unfair or unconscionable circumstances surrounding the conclusion of the agreement and material and drastic unforeseen circumstances arising thereafter such as to cause manifest prejudice to one of the parties, the courts will hold the parties to their bargain





# Consent order

- Once an agreement was incorporated into a consent order, it derives its authority from the court, not the consent of the parties
- The provisions in the consent order must be those within the court's power to make. Other provisions agreed between the parties can be effected through undertakings given by parties to the court
- Breach of such undertaking is a contempt of court





# Duty of full and frank disclosure

- Special nature of matrimonial proceedings: duty of a party to give full and frank disclosure. Without fulfillment of such duty, the court cannot perform its statutory function
- Breach of such duty can give rise to the possibility of a consent order being set aside when the non-disclosure results in an order which is substantially different from the order which the court would have made if there was proper disclosure



# Sharland v Sharland [2015] UKSC 60 Gohil v Gohil [2015] UKSC 61

- Accidental or negligent non-disclosure: the applicant must also establish that the effect of non-disclosure was such that the order made by the court was substantially different from the order which would have been made if there was proper disclosure
- Intentional non-disclosure: it is deemed to be material unless the defaulting party can show on balance of probabilities that it was not so



# Mediation Ordinance (Cap. 620)

- Came into operation on 1 January 2013
- Promotes, encourages & facilitates the resolution of disputes by mediation





# Mediation Ordinance (Cap. 620)

- Section 8 – confidentiality of mediation communication, exceptions:
  - Consensual disclosure
  - information already in public domain
  - Discovery in civil proceedings
  - Prevention of danger of injury or serious harm
  - Research or educational purposes
  - Seeking legal advice
  - With leave, for enforcing or challenging a mediated settlement agreement; complaint of misconduct; or other justifiable circumstances



# The Court's Approach to Incidence and Exceptions of Confidentiality

- The courts recognized the fundamental importance of confidentiality of mediation communication: *Champion Concord Ltd v Lau Koon Foo*, FACV 16 & 17/2010; *S v T* [2011] 1 HKLRD 534
- Mediation communication is generally covered by “without prejudice” privilege: *Wu Wei v Liu Yi Ping* HCA 1452/2004; *Chu Chung Ming v Lam Wai Dan* HCCW 377/2011





# The Court's Approach to Incidence and Exceptions of Confidentiality

- There are exceptions where the interest of justice requires disclosure to resolve,
  - Whether there is a concluded compromise
  - Whether agreement is to be set aside for misrepresentation, fraud or undue influence
  - Whether there is perjury, blackmail
  - Whether there is explanation for delay in the context of striking out for want of prosecution
  - Without prejudice save as to costs situation





## Section 10(2) Mediation Ordinance: relevant considerations for leave applications

- Section 8(2)
- Public interest or the interests of the administration of justice
- Any other circumstances or matters that the court considers relevant



# Family Mediation Supervision Pilot Scheme



# Background

- The concept of family mediation has increasingly gained acceptance by the community as a non-adversarial family dispute resolution process.
- The demand for family mediation is increasing.
- The Hong Kong Mediation Accreditation Association Limited (HKMAAL) and the Family Mediation Co-ordinator's Office (FMCO) of the Judiciary have jointly launched the Pilot Scheme to enhance the accreditation of family mediators since July 2014.





# Objectives

- To provide more live supervision opportunities for Trainee Family Mediators as well as General Mediators seeking to be accredited as Family Mediators.
- To raise the professional standard of family mediation practice in Hong Kong, that is pertinent to the development of family mediation profession as a whole.



# Criteria for Trainees

- Trainee Family Mediator must complete stage 1 Family Mediation Training
- For General Mediators, they have to attend a 5-day conversion course



# Case Nature

- Each case shall be of a minimum of **five hours** and must be sufficiently complex for the Trainee to demonstrate the ability to manage emotional intensity and mediate complex financial and child related matters.





# Fees

- HKMAAL charges an administration fee of HK\$2,000 per live family mediation from the Trainee. The Trainee would pay Supervisor a fee of HK\$800 per hour (capped at HK\$12,000 for 15 hours per live family mediation, including intake or pre-mediation interviews, briefing and debriefing)
- Parties are required to pay a nominal fee (\$100 per party) to Family Mediation Supervisor.



# Workflow

Parties / Litigants may seek information from Family Mediation Co-ordinator's Office (FMCO) at Family Court (Enquiry, Information Sessions, videos, resource corner)

If the cases are referred by Court / Judges, FMCO may help arrange both parties to attend I.S. and Pre-mediation consultations

If both parties show interest to seek family mediation of this Pilot Scheme, they should submit a letter of authorization to FMCO

FMCO sends the letter to HKMAAL for arranging mediation service

HKMAAL assigns the case to an HKMAAL Accredited Family Mediation Supervisor and a Trainee Family Mediator

*To be Continued .....*





# Workflow

Upon receipt of the consent from the Family Mediation Supervisor and the Trainee, FMCO will make formal referral to the Family Mediation Supervisor

Mediation conducted under the supervision of an HKMAAL Accredited Family Mediation Supervisor (HKMAAL Stage 2 Family Mediator Accreditation Requirement)

Family Mediation Supervisor sends the outcome to FMCO

FMCO compiles statistical returns & reports the results to the Chairman of Working Party on Mediation





# Updated figures about the Scheme:

- Number of Supervisors joining the Scheme: **28**

Private Practitioner	NGOs
14	14

- Number of Trainees enrolled: **30**
- Number of Trainees applied for 2 cases under the scheme: **5**
- Number of applications received: **35**



# Outcome of mediated cases as at 20.11.2015:

Level of agreement reached	Number of cases (%)	Average Time spent on Mediation per case (hour)
Cases with Full agreement	16 (67%)	15
Cases with Partial agreement	5 (21%)	16
<b>Success rate (cases with full/ partial agreement)</b>	<b>21 (88%)</b>	-
Cases with No agreement	3 (12%)	12
Total number of completed cases	24	
Others (e.g. cases on going, result pending, etc)	6	



# Outcome of mediated cases as at 20.11.2015:

Average duration	Days
From the date of referring case from FMCO to the date of assigning case to supervisor and trainee by HKMAAL	8
From the date of appointing mediator to the date of completion of the whole mediation process	86





# Evaluation on the effectiveness of the Scheme:

Period: 3 years  
(From July 2014 – June 2017)

- Feedback (questionnaire) from the trainees once the assigned case is completed
- Feedback (questionnaire) from the Family Supervisors on an annual basis
- An evaluation report on the Scheme will be jointly conducted by the Judiciary and HKMAAL



# Pilot scheme on Private Financial Adjudication (PFA)



# What is PFA?

- For financial disputes in matrimonial and family proceedings
- Parties driven ADR
- A voluntarily agreed neutral determinant process
- Role of Judiciary: facilitative
- The outcome is binding on the parties but not binding on the court
- Pilot scheme





# Consensus from the parties

- PFA Agreement as the basis for a PFA process
- Parties must be responsible for
  - Whether PFA process is suitable
  - Formulation of issues to come within the scope of the PFA process
  - Finding a suitable Adjudicator
  - Working with the Adjudicator to identify the relevant set of rules or procedures for the PFA process



# Quasi-consensual

- Parties must agree to be bound by the outcome
- Parties must be ready to go through the process in good faith and use reasonable endeavour to comply with the procedural directions of the Adjudicator
- Parties must commit to the process after the signing of the PFA agreement



# Role of the Judiciary

- The determination under a PFA is not an arbitration award and it cannot bind the court
- The court will treat a PFA determination as similar to an agreed settlement
- The court will approve a determination and make an order as it deems fit having regard to the approach in *S v S* [2014] EWHC 7 (Fam)





# Role of the Judiciary

- In giving its approval to the commencement of a PFA process, the court plays a facilitative role
- Whilst the court will have regard to the qualification and experience of an proposed adjudicator in the approval of the process, the primary responsibility is vest on the parties and their solicitors to ensure that a suitable candidate is put forward
- Likewise, for the applicable rules and procedures for the PFA process



# Relationship between PFA and other process

- Legal proceedings : may be stayed with liberty to apply for directions (in aid of PFA or otherwise) in the meantime
- Observing the timetable of PFA is important
- Family Mediation
- FDR



# PFA Pilot scheme

- To be reviewed after 3 years
- Collection of data
- Accreditation of adjudicators





# Statistics collected by The Judiciary



# Court of First Instance Mediation Success Rate





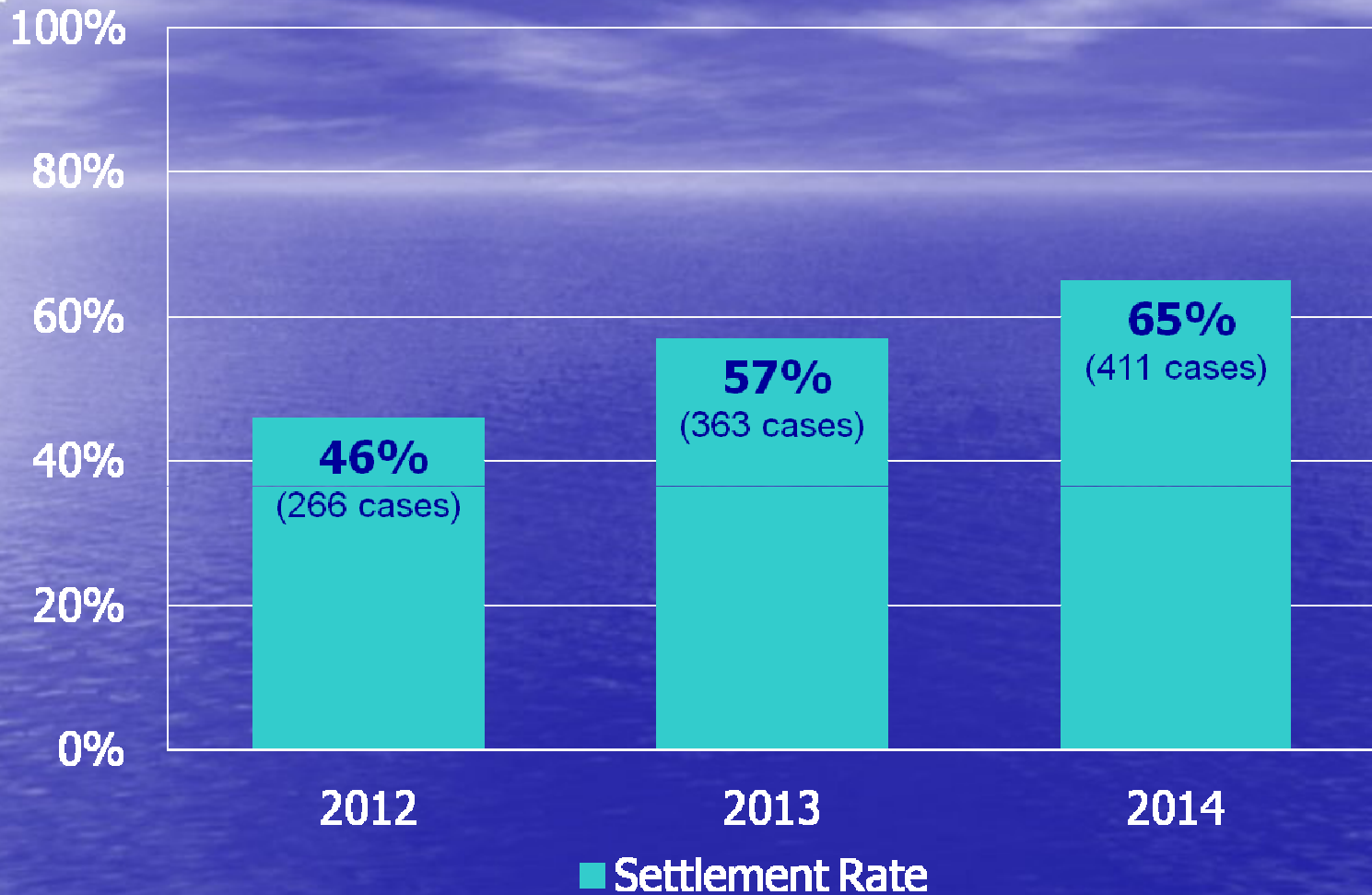
# District Court Mediation Success Rate







## Court of First Instance Settlement Rate<sup>#</sup>



*# It is measured by adding the number of cases with settlement (full or partial) by mediation and those not settling through mediation but disposed of within 6 months afterwards, divided by the total number of cases with mediation over that year.*



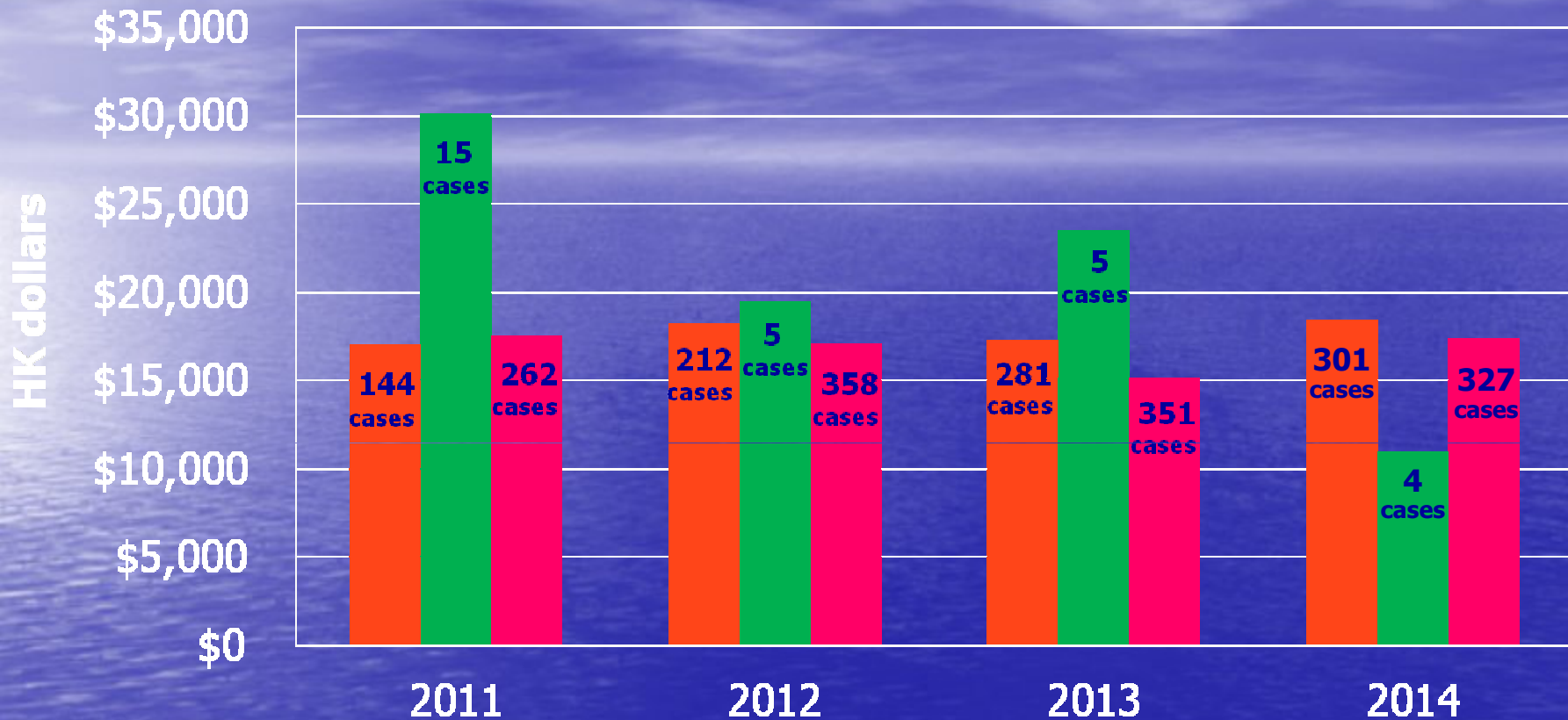
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## Court of First Instance Average Costs of Mediated Cases

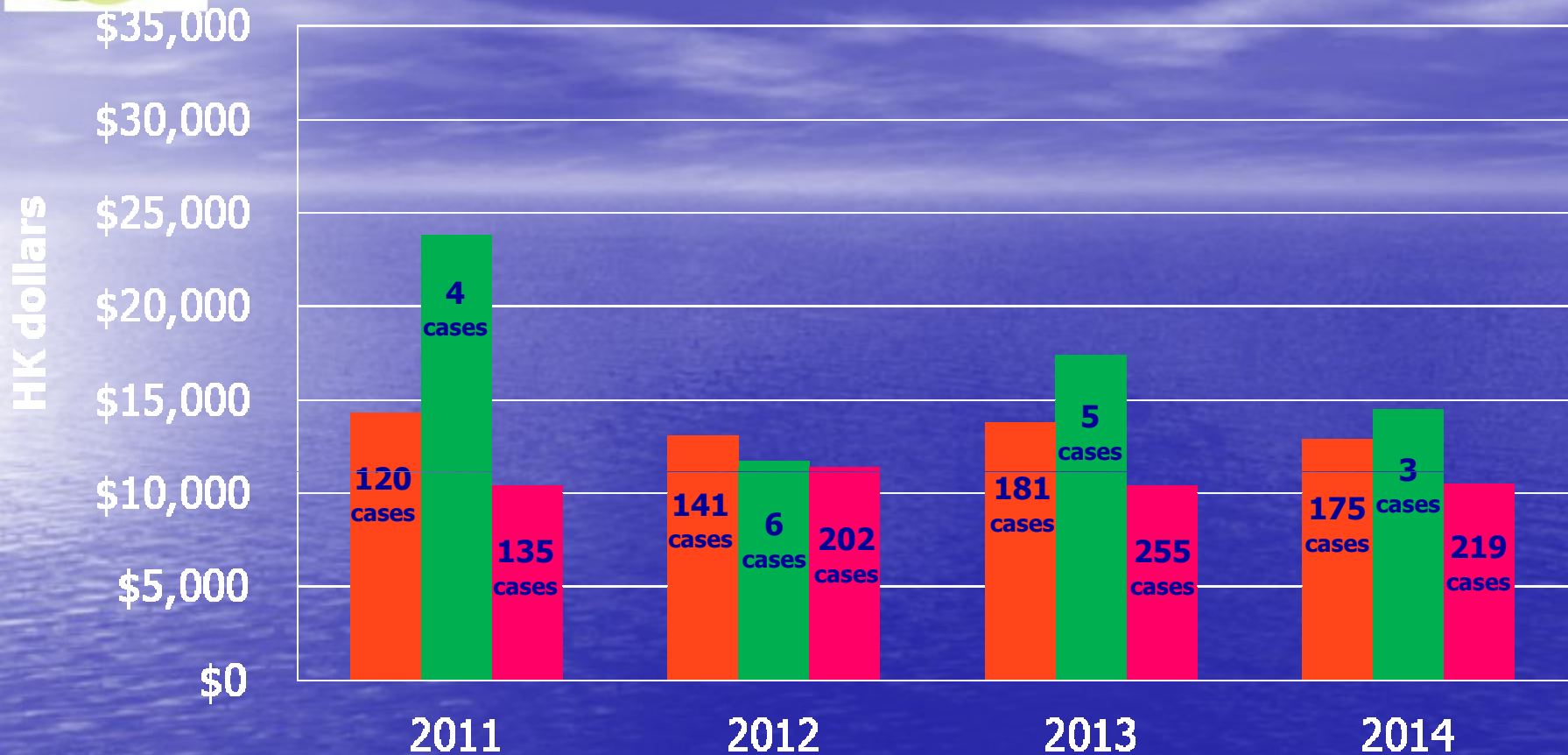


	2011	2012	2013	2014
<b>Full agreement</b>	HK\$17,000 per case	HK\$18,200 per case	HK\$17,300 per case	HK\$18,400 per case
<b>Partial agreement</b>	HK\$30,100 per case	HK\$19,500 per case	HK\$23,500 per case	HK\$11,000 per case
<b>No agreement</b>	HK\$17,500 per case	HK\$17,100 per case	HK\$15,200 per case	HK\$17,400 per case





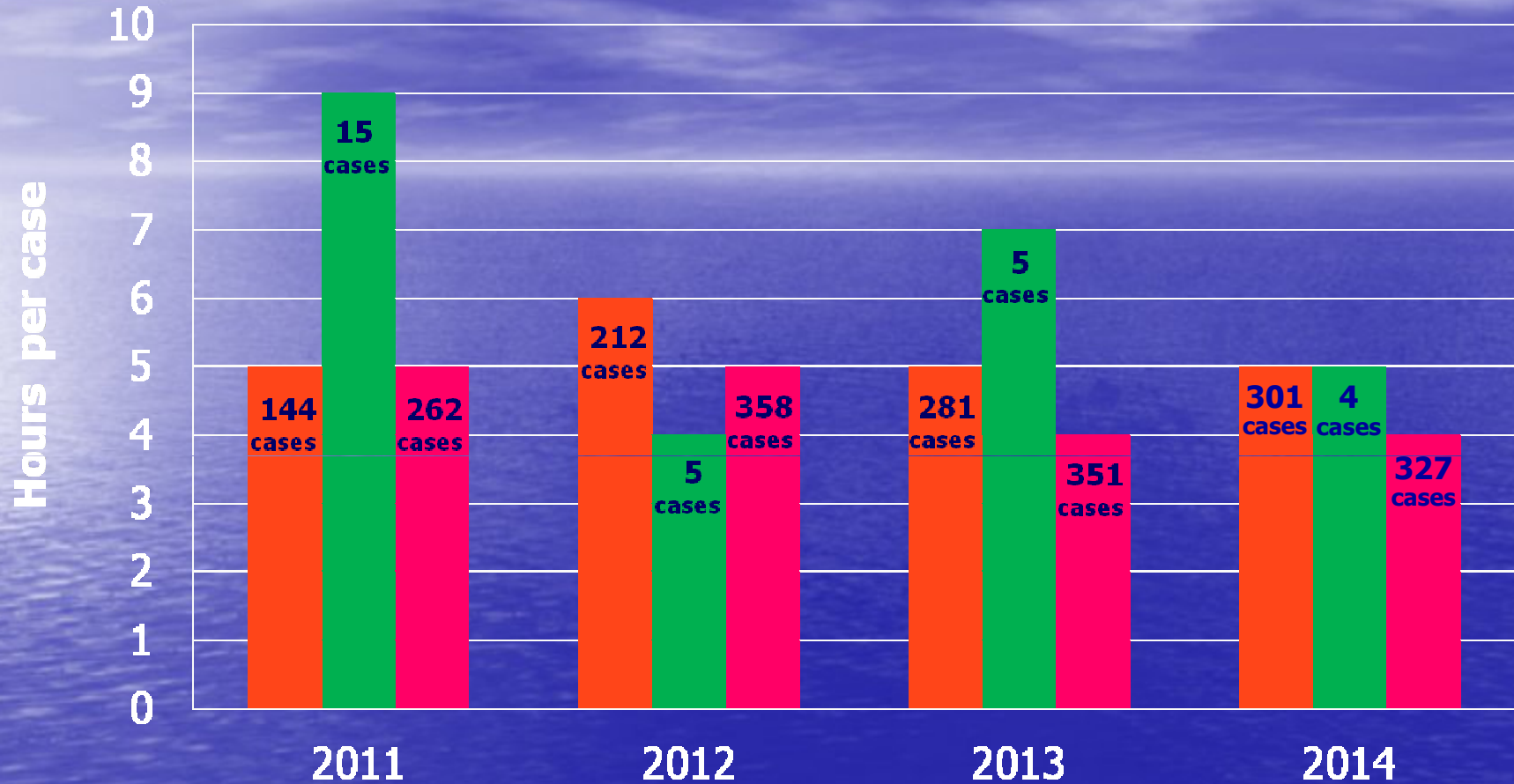
# District Court Average Costs of Mediated Cases



	2011	2012	2013	2014
<b>Full agreement</b>	HK\$14,300 per case	HK\$13,100 per case	HK\$13,800 per case	HK\$12,900 per case
<b>Partial agreement</b>	HK\$23,800 per case	HK\$11,700 per case	HK\$17,400 per case	HK\$14,500 per case
<b>No agreement</b>	HK\$10,400 per case	HK\$11,400 per case	HK\$10,400 per case	HK\$10,500 per case



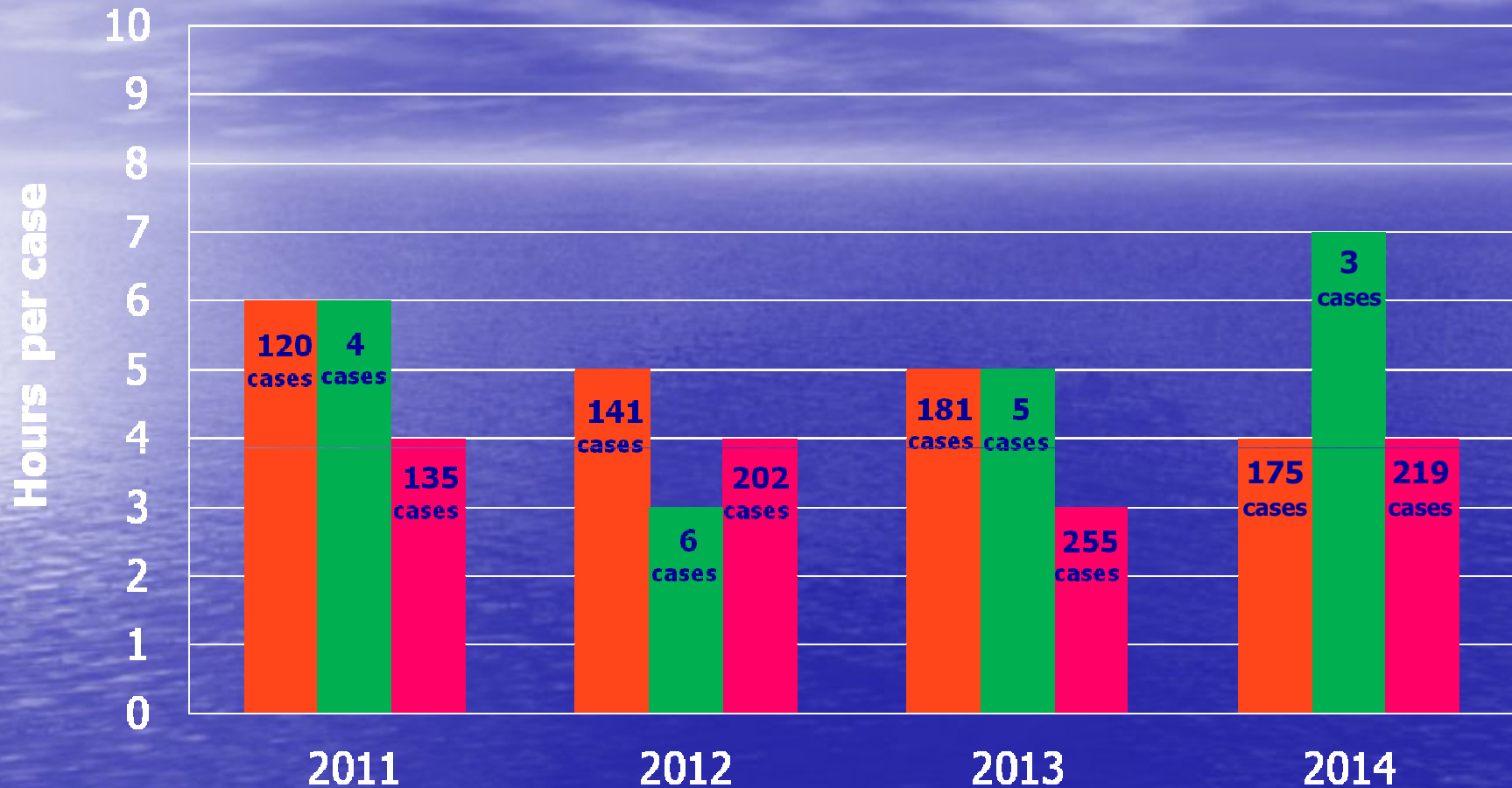
# Court of First Instance Average Time Spent on Mediated Cases



	2011	2012	2013	2014
<b>Full agreement</b>	5 hours per case	6 hours per case	5 hours per case	5 hours per case
<b>Partial agreement</b>	9 hours per case	4 hours per case	7 hours per case	5 hours per case
<b>No agreement</b>	5 hours per case	5 hours per case	4 hours per case	4 hours per case



# District Court Average Time Spent on Mediated Cases



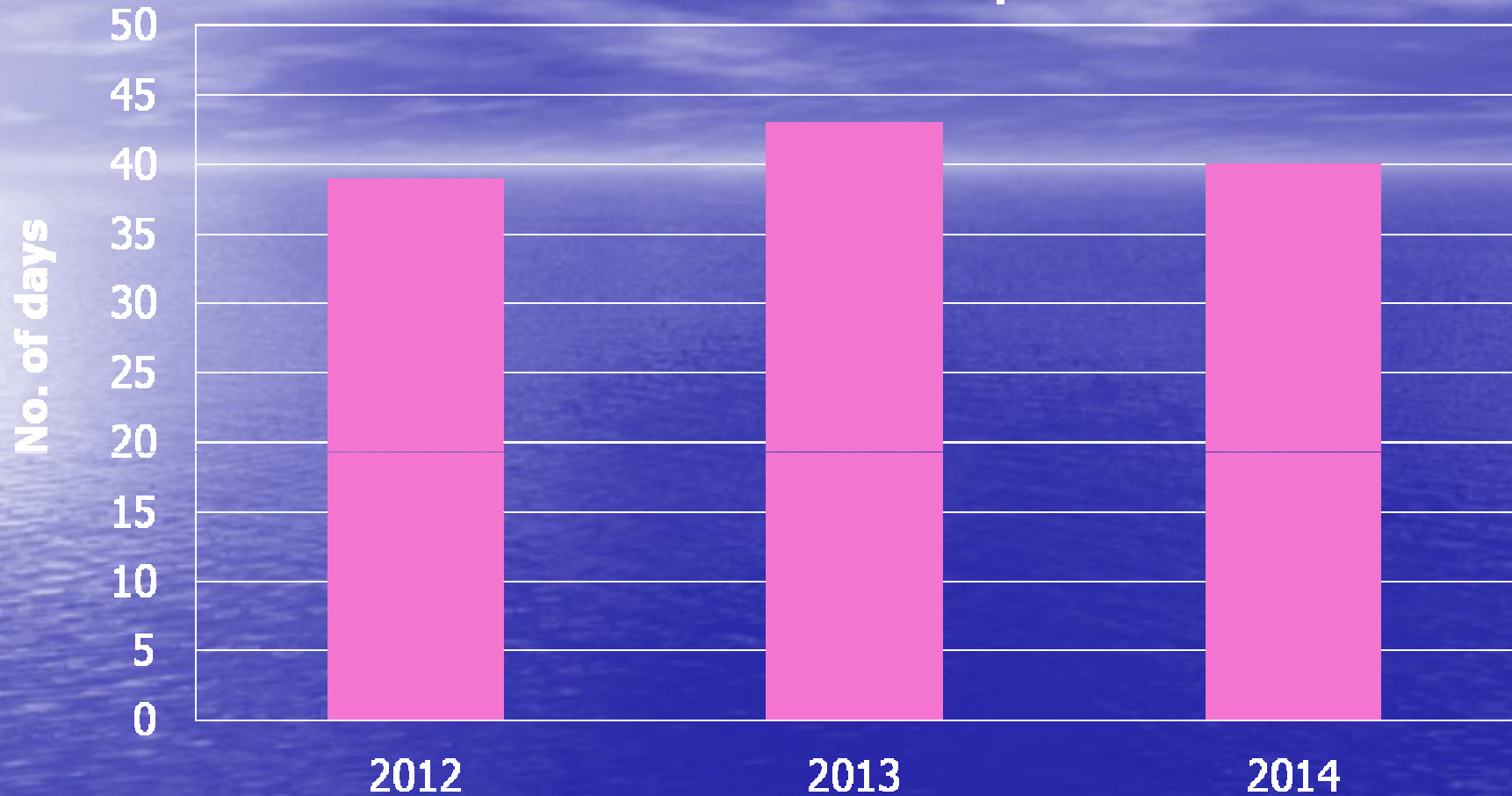
	2011	2012	2013	2014
Full agreement	6 hours per case	5 hours per case	5 hours per case	4 hours per case
Partial agreement	6 hours per case	3 hours per case	5 hours per case	7 hours per case
No agreement	4 hours per case	4 hours per case	3 hours per case	4 hours per case





# Court of First Instance

## Average duration between the date of appointing mediator to the date of completion of mediation

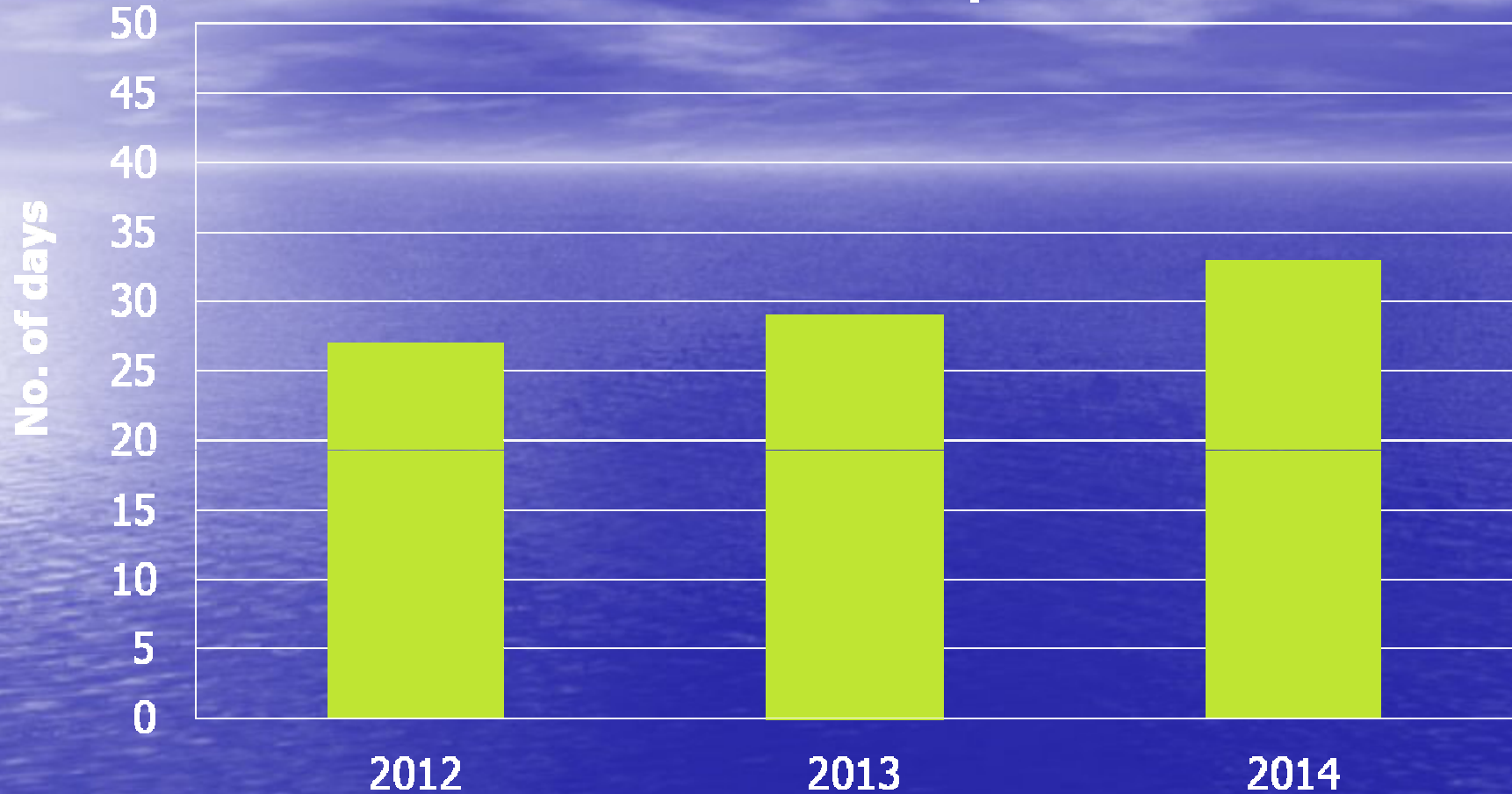


	2012	2013	2014
Court of First Instance	39 days	43 days	40 days



## District Court

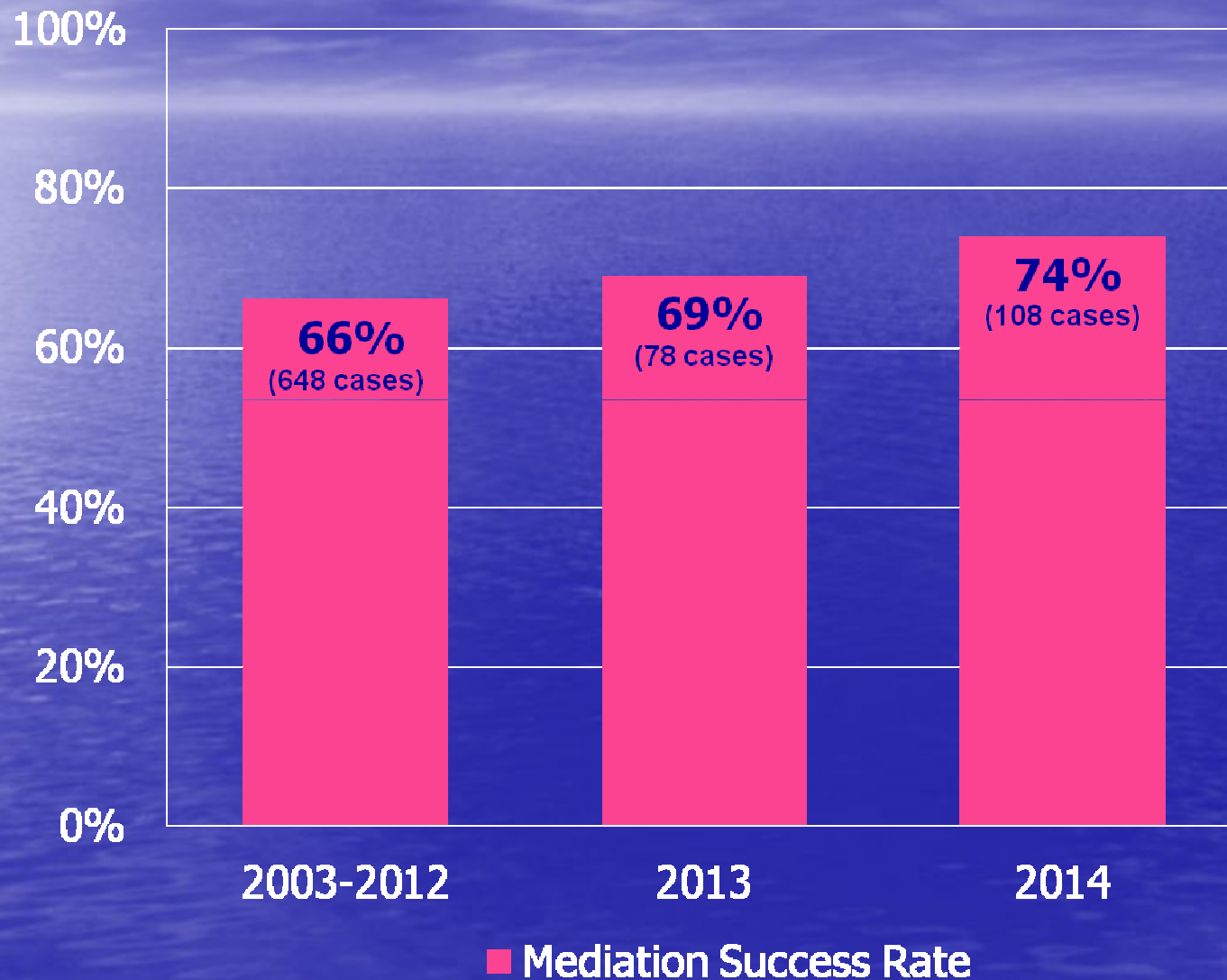
Average duration between the date of appointing mediator to the date of completion of mediation



	2012	2013	2014
District Court	27 days	29 days	33 days



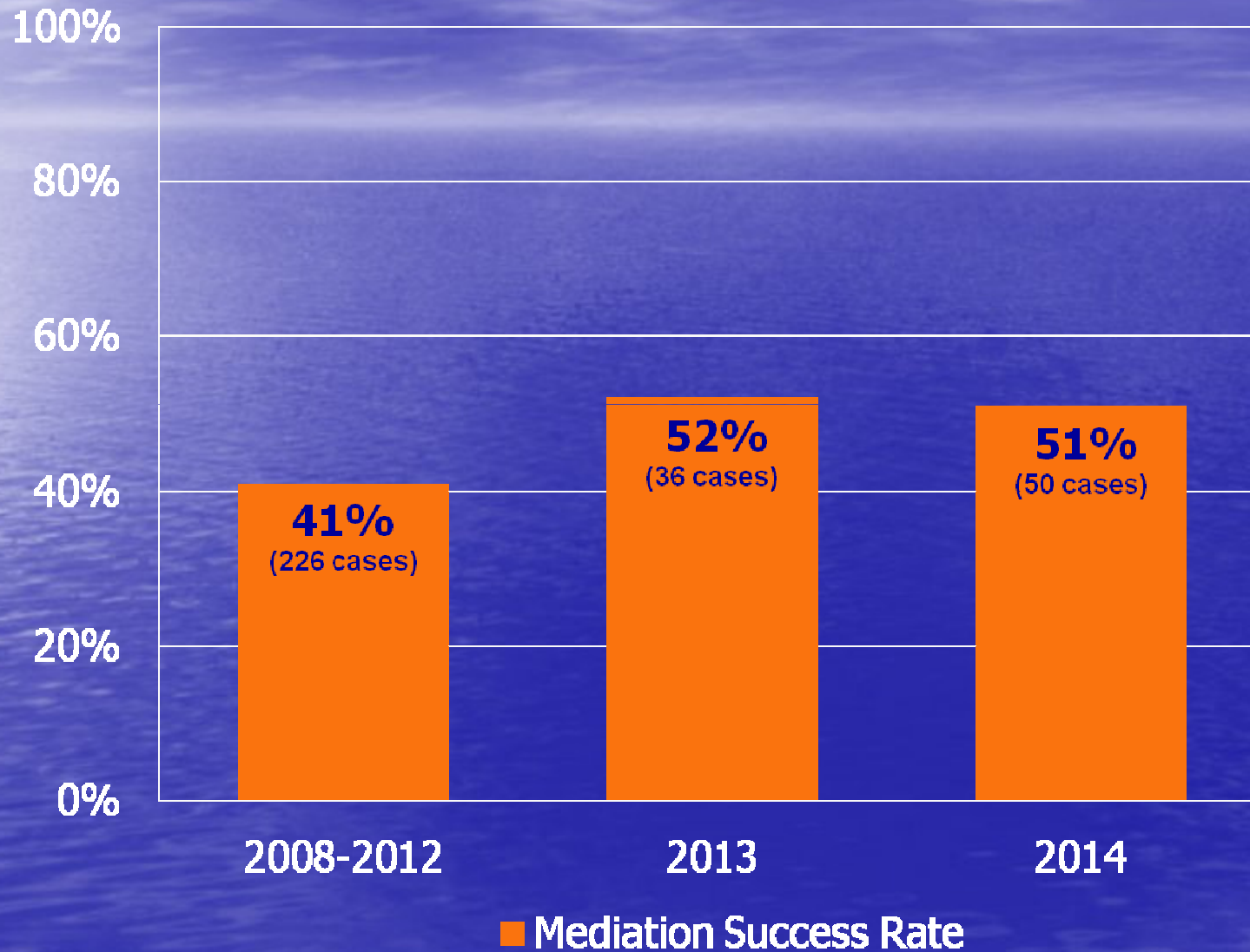
# Family Mediation Co-ordinator's Office Mediation Success Rate 01.08.2003-31.12.2014





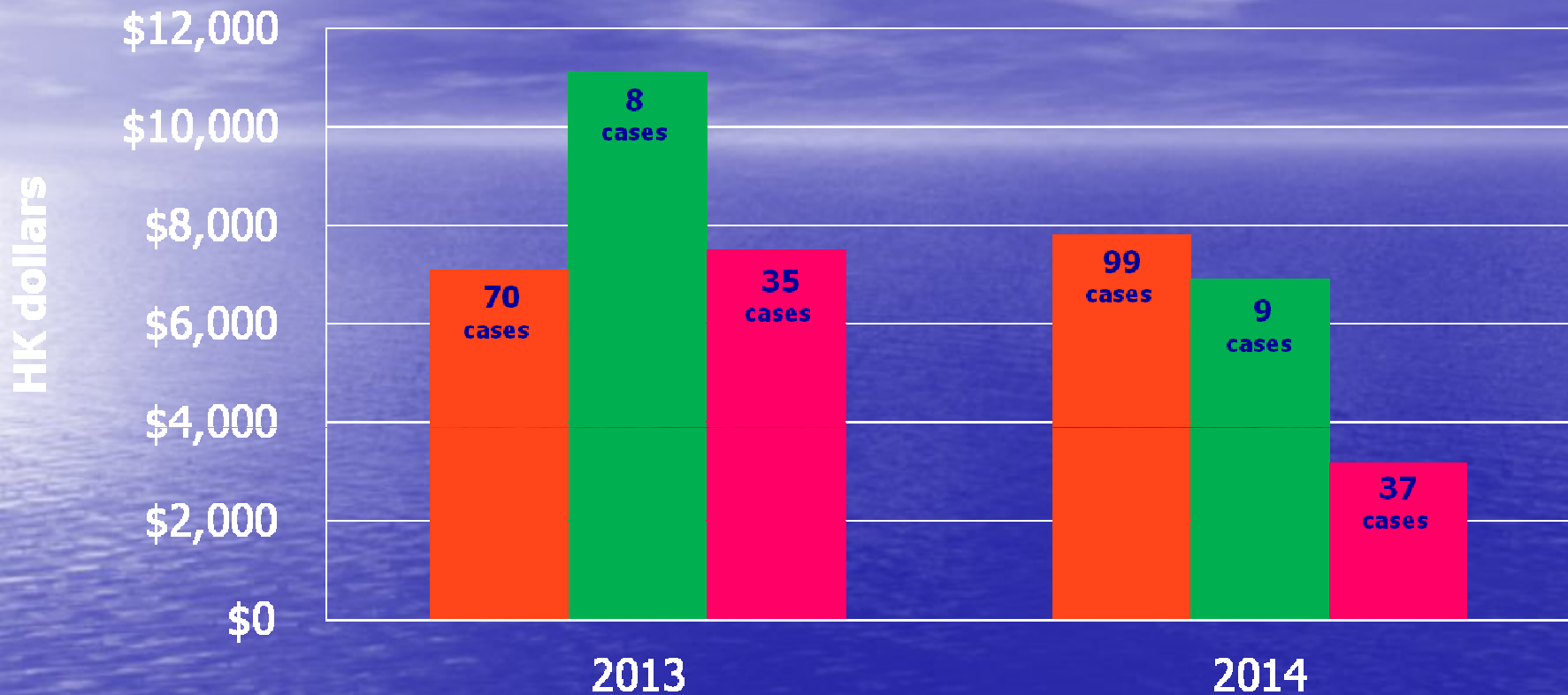


# Building Management Mediation Co-ordinator's Office Mediation Success Rate 01.01.2008– 31.12.2014





# Family Mediation Co-ordinator's Office Average Costs of Mediated Cases



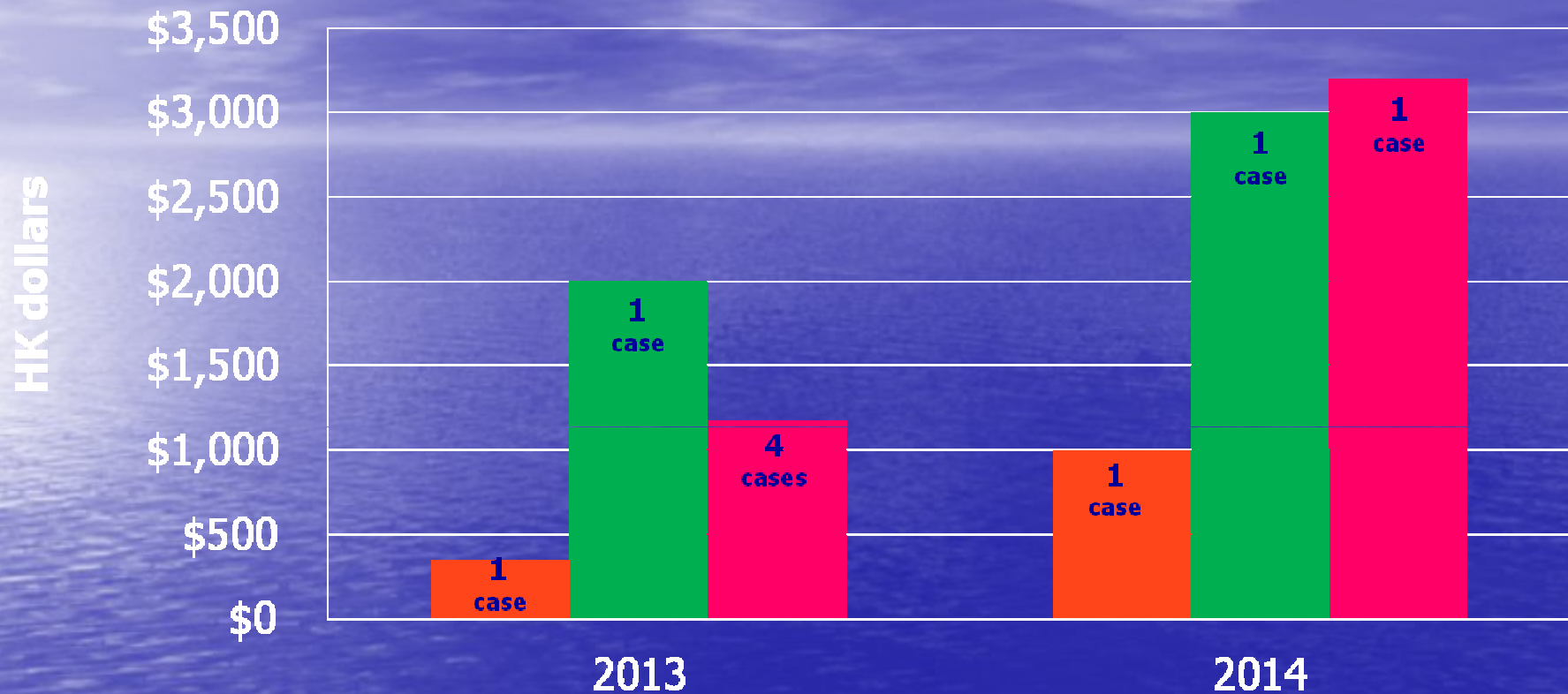
	2013	2014
<b>Full agreement</b>	HK\$7,100 per case	HK\$7,800 per case
<b>Partial agreement</b>	HK\$11,100 per case	HK\$6,900 per case
<b>No agreement</b>	HK\$7,500 per case	HK\$3,200 per case

\* 73% & 67% of cases appointed mediators from NGOs for family mediation respectively in 2013 & 2014. These NGOs would provide mediation service with concession rate to parties with financial difficulty.

\* The average cost of mediated cases before 2013 was not available.



## Building Management Mediation Co-ordinator's Office Average Costs of Fee-charging Mediated Cases



	2013	2014
<b>Full agreement</b>	HK\$350 per case	HK\$1,000 per case
<b>Partial agreement</b>	HK\$2,000 per case	HK\$3,000 per case
<b>No agreement</b>	HK\$1,170 per case	HK\$3,200 per case

\* 8% & 7% of cases chose mediators with fee charging respectively in 2013 & 2014.

\* The average cost of fee-charging mediated cases before 2013 was not available.





# Family Mediation Co-ordinator's Office

## Average Time Spent on Mediated Cases

### 01.08.2003-31-12.2014



	2003-2012	2013	2014
<b>Full agreement</b>	11 hours per case	15 hours per case	15 hours per case
<b>Partial agreement</b>	13 hours per case	22 hours per case	18 hours per case
<b>No agreement</b>	5 hours per case	10 hours per case	9 hours per case



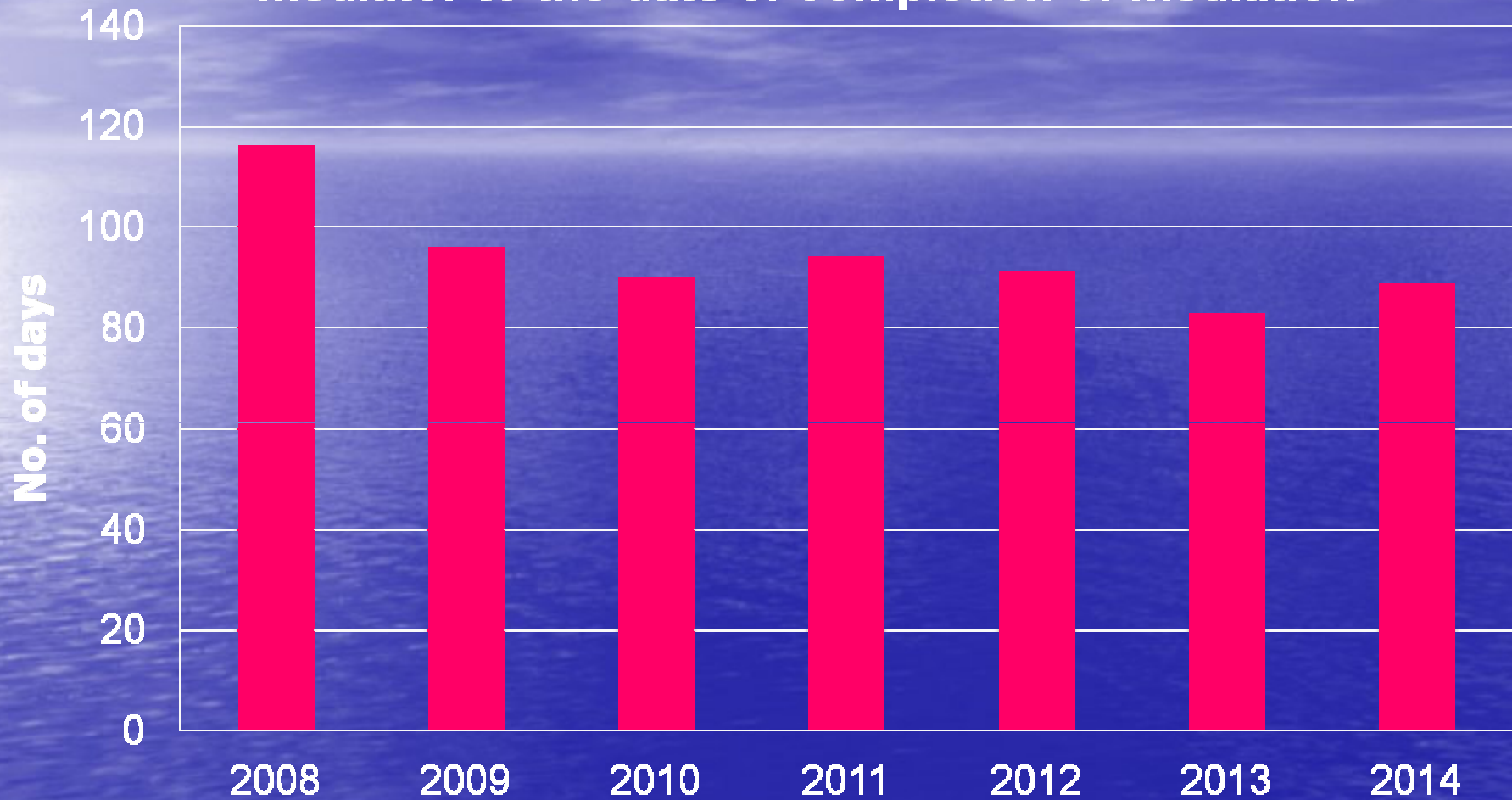
# Building Management Mediation Co-ordinator's Office Average Time Spent on Mediated Cases 01.01.2008-31-12.2014



	2008-2012	2013	2014
<b>Full agreement</b>	6 hours per case	5 hours per case	5 hours per case
<b>Partial agreement</b>	6 hours per case	4 hours per case	3 hours per case
<b>No agreement</b>	4 hours per case	3 hours per case	4 hours per case



## Family Mediation Co-ordinator's Office Average duration between the date of appointing mediator to the date of completion of mediation

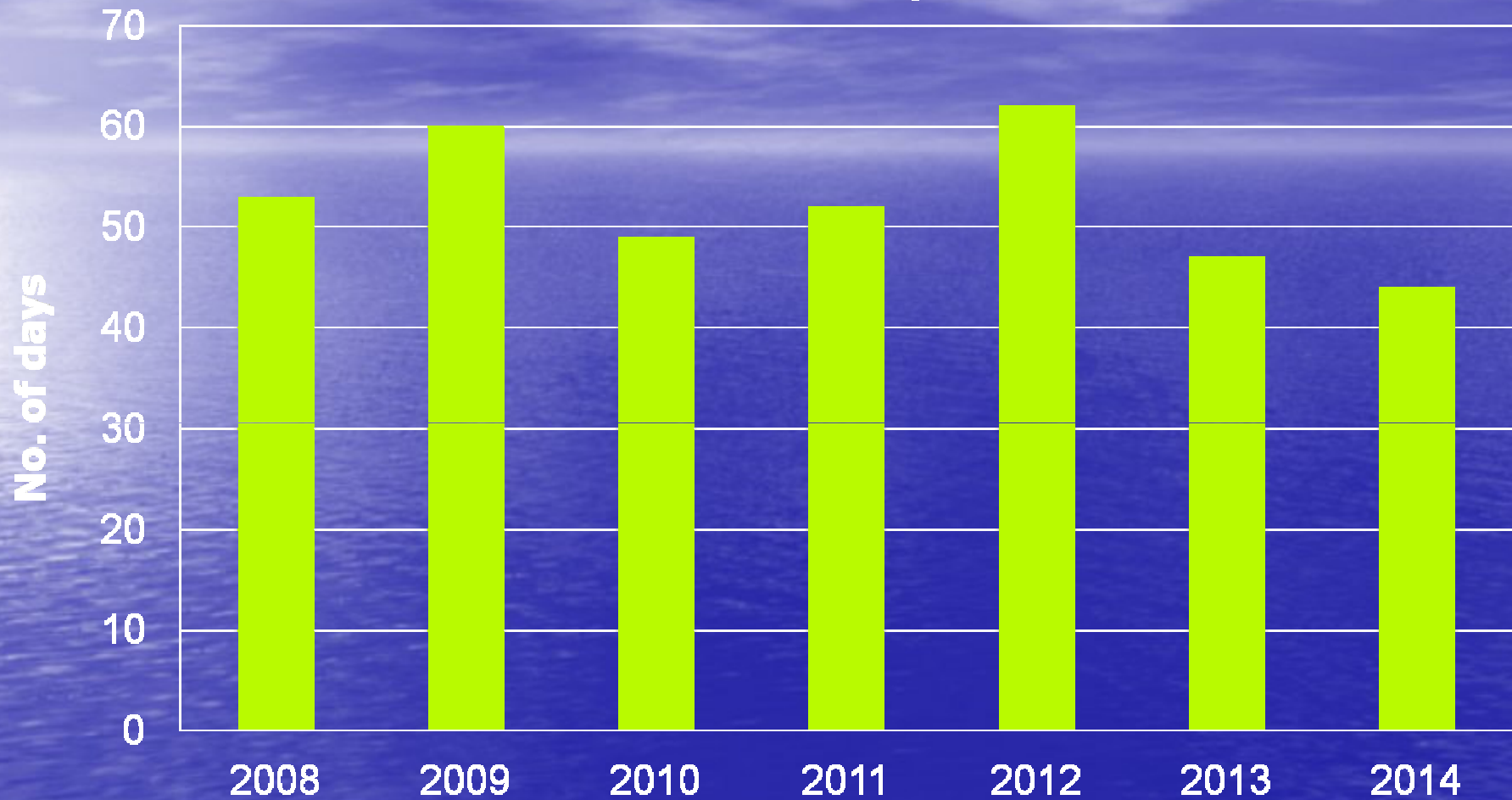


	2008	2009	2010	2011	2012	2013	2014
FMCO	116 days	96 days	90 days	94 days	91 days	83 days	89 days





## Building Management Mediation Co-ordinator's Office Average duration between the date of appointing mediator to the date of completion of mediation

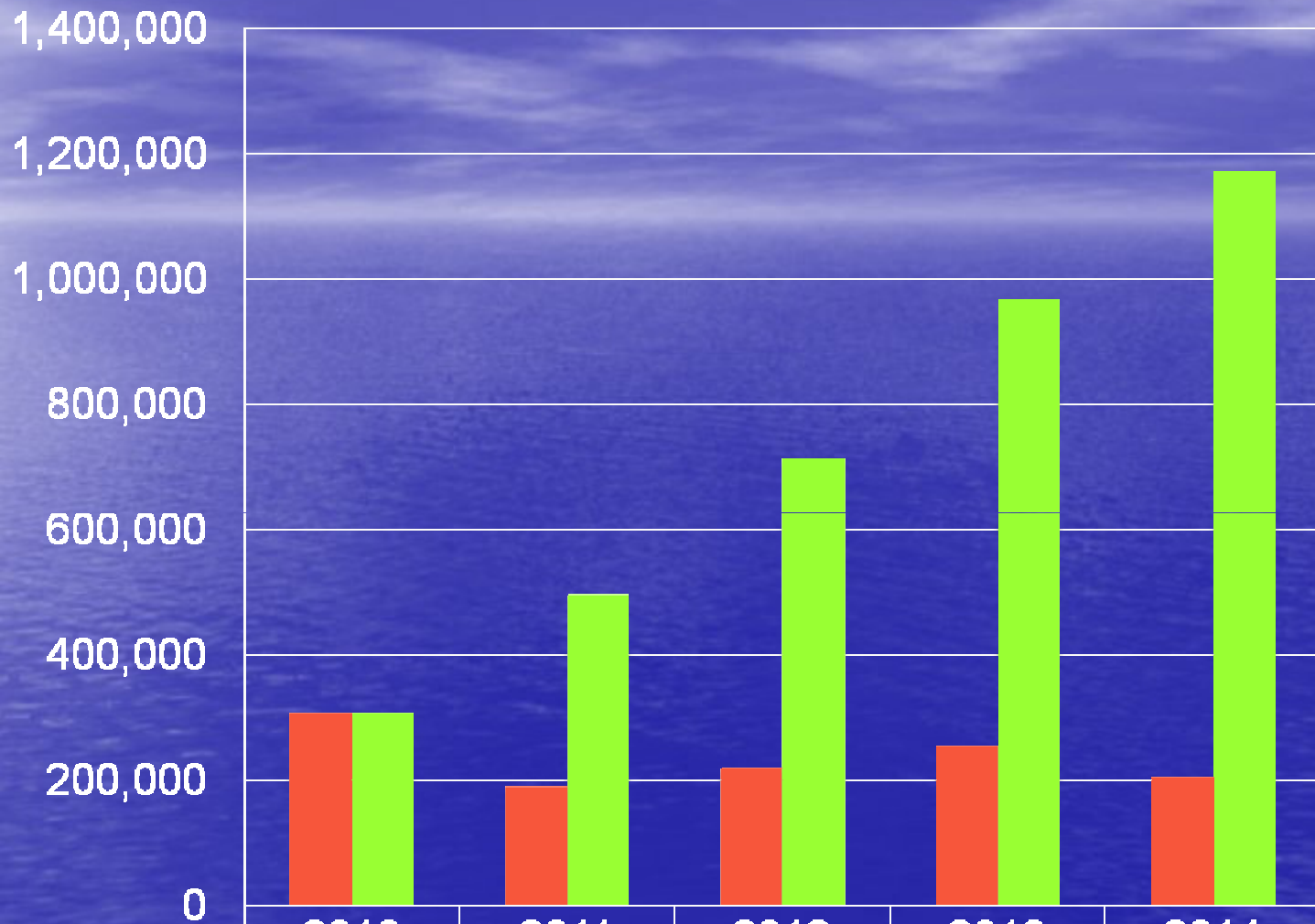


	2008	2009	2010	2011	2012	2013	2014
BMMCO	53 days	60 days	49 days	52 days	62 days	47 days	44 days



# Mediation Website Statistic

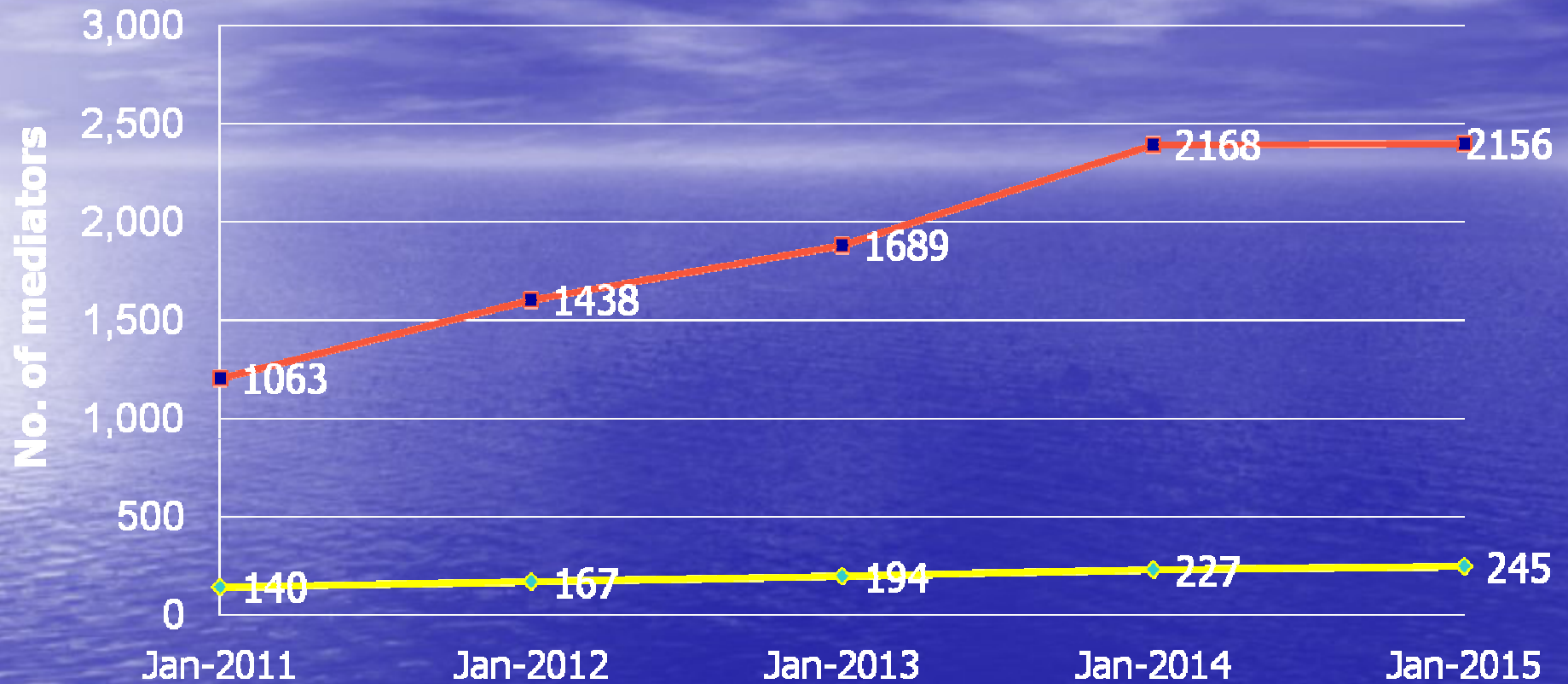
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	2010	2011	2012	2013	2014
■ Yearly	305,551	189,126	218,788	254,636	203,024
■ Accumulated Yearly	305,551	494,677	713,465	968,101	1,171,125



# Total number of mediators in Hong Kong

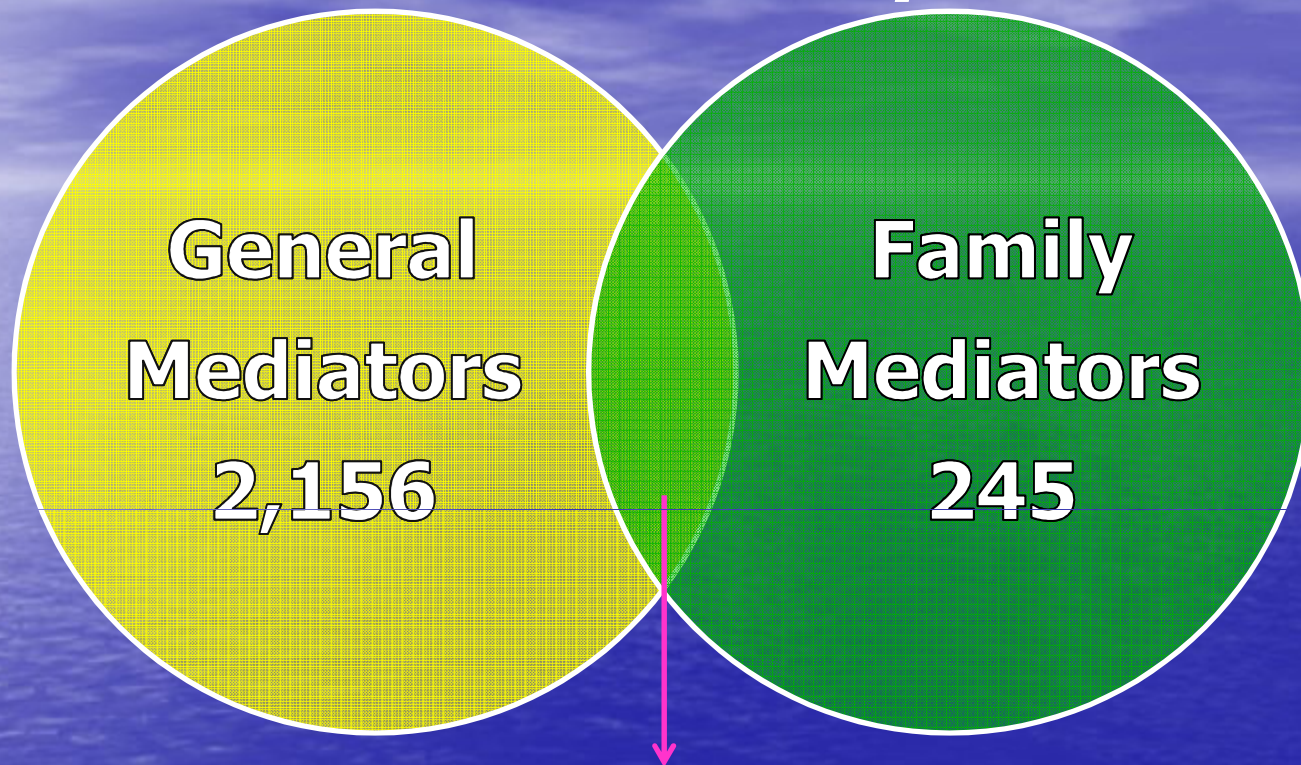


	Jan 2011	Jan 2012	Jan 2013	Jan 2014	Jan 2015
<b>General Mediators</b>	1,063	1,438	1,689	2,168	2,156
<b>Family Mediators</b>	140	167	194	227	245
<b>Total</b>	1,203	1,605	1,883	2,395	2,401





# Total number of mediators in Hong Kong as at January 2015



**84 mediators are  
both GM & FM**

*Remarks:*

*The mediators came from 9 organizations – Hong Kong Mediation Accreditation Association Limited (HKMAAL), the Hong Kong Mediation Council, the Hong Kong Bar Association, the Law Society of Hong Kong, the Chartered Institute of Arbitrators (East Asia Branch), the Hong Kong Institute of Arbitrators, the Hong Kong Institute of Architects, the Hong Kong Institute of Surveyors and the Hong Kong Mediation Centre.*



~ The End ~

Thank You