

Seminar:
Route to Mediator for Professionals in the Construction and Engineering Industry
 6:30 – 8:30 p.m. 28 April, 2010

By:
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Common Ways to Resolve Disputes

- ❖ Negotiation
- ❖ Mediation and Conciliation
- ❖ Adjudication
- ❖ Arbitration
- ❖ Litigation
- ❖ Avoidance
- ❖ Violence



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Common Ways of Resolving Disputes

- Litigation
- Alternate Dispute Resolution (ADR)
 - Arbitration
 - Adjudication
 - Mediation
 - Reconciliation




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The Nature of Mediation

Definition:
 “Mediation is a **voluntary, non-binding** private dispute resolution process in which a **neutral person** helps the parties to reach a negotiated settlement.” – by HKIAC


- http://www.hkiac.org/HKIAC/HKIAC_English/main.html




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Different Models of Mediation

- **Settlement** – a form of compromise mediation, based on the parties’ positions and self definition of the problems
- **Facilitative** – interest based and problem solving in nature, often described as “pure” mediation and classic mediation process
- **Therapeutic** – in terms of behavioural, emotional and relationship factors, also known as reconciliation and transformative mediation
- **Evaluative** – in terms of the legal rights and duties, industrial standard or community norms, also known as advisory and managerial mediation





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Facilitative Vs Evaluative Approach

Facilitative:

- Strength – efficient use of negotiation opportunity, process and outcome basically controlled by the parties
- Weakness – may not end up in settlement, can be time consuming and requires cooperative skills by the parties

Evaluative:

- Strength – mediator’s expertise used and outcome likely similar to court decision if there is one
- Weakness – heavy responsibility on mediator and does not encourage communication between the parties

NB: This programme will only focus on the facilitative model





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Features of a Facilitative Mediation

- Voluntary
- Non-binding
- Neutral Third Person as Mediator
- Confidential
- Not to focus on the Rights or Wrongs
- Interest-Based Negotiation
- Structured Negotiation Process





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Styles of Negotiations

- **Positional Negotiation**
 - Winner / loser
 - Tug of war
 - Embarks on the rights and wrongs
- **Principled Negotiation / Interest-based Negotiation**
 - Not to embark on the rights and wrongs
 - Focus on the needs and concerns of parties
 - Win-win situation





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How the Interest-based Negotiation Works

- **Separate the People from the Problem**
 - Entangling with each other
 - Perception
 - Emotion
 - Communication
- **Focus on Interests, not Positions**
 - Underlying Needs and Concerns
 - Not to embark on the rights or wrongs
 - Put your problem before your answer
 - Look forward
 - What ought to be done and not to be blamed

* Bibliography : "Getting to Yes" by Roger Fisher and William Ury



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How the Interest-based Negotiation Works

- **Invent Options for Mutual Gain**
 - Avoid premature judgment
 - Invent first, decide later
 - Not to look for a single answer
 - Expand the pie
- **Insist on Using Objective Criteria**
 - Fair Standard
 - Fair Procedure

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The Mediation Process

- **Preparatory Stage**
 - Agreement to Mediate
 - Pre-Mediation Conference
 - Venue
 - The venue for the mediation should preferably be at a neutral place agreed by the parties.
 - At least 2 rooms
 - Preferably a round table
- **Number and Name of Representatives**
 - Who is the key person



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Mediation Process in a Nutshell

- Opening Statement by the Mediator
- Opening Statement by Respective Parties
- Agenda Setting
- Joint Discussion for each and every issues
- Separate Sessions (Caucuses)
- Joint Discussion
- Settlement Agreement



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The Mediation Process

- **Opening Statement by Mediator**
 - No conflict of interest
 - Acting impartially
 - Not as a judge, not in a position to decide on who is right or wrong
 - ensures attending parties have full authority to settle
 - explains procedure
 - explains nature of confidentiality of the procedure
 - Set ground rules and invite parties to comply with it



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The Mediation Process

• Parties' Opening Statement

- Mediator invites a party to make his/her opening statement
- Mediator summaries the party's case
- Mediator repeats the same for the other party
- Mediator gives parties chance to state their concerns in the presence of the other



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The Mediation Process

• Agenda Setting

- Mutual and Neutral
- Let Parties take ownership in this process
- Prioritized the issues





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The Mediation Process

- **Joint Session**
 - Invite parties to discuss the issues one by one
 - Facilitate communication and understanding between parties
 - Unlikely that there will be any options at this stage
 - Purpose : for Mediator to gather further information to explore the underlying agenda of parties (their needs and concerns)




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The Mediation Process

Separate sessions (caucuses) :

- The mediator or the parties may feel the need to have separate meeting between the mediator and a party
- The mediator will meet the parties in private in turn
- The meeting time for each party will be similar and the number of meetings will be equal for each party
- The content of these separate sessions is confidential to the other side unless agreed to be disclosed by the party in the session




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The Mediation Process

Separate Sessions (caucuses):

- Air grievances
- Exploration of underlying interests by asking open question
- Establish rapport
- Doubt creation
- Identification of bottom line / next step if no settlement reached
- Generation of options for settlement
- At certain stage after one or more rounds of separate sessions the mediator may find the need for a joint session so that the parties could meet again




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The Mediation Process

– Joint session after private sessions:

- The parties meet again to discuss on possible options
- If no mutually acceptable option can be identified another round of private sessions may be arranged
- If an option acceptable by the parties is found, the mediator will assist in reducing that option into writing to become a settlement agreement for the signature by the parties.





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The Mediation Process

- **Concluding mediation:**
 - The mediator will remain positive throughout
 - The mediator will usually conclude the mediation by congratulating the parties



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Mediation

Advantages of Mediation

- ❖ It can take place quickly and often with relatively little expense in contrast to taking the dispute to a court or a tribunal.
- ❖ It focuses on the parties' real commercial, emotional and psychological needs and not just on their legal rights.
- ❖ It gives the parties an opportunity to participate directly and informally in resolving their own dispute.
- ❖ It gives the parties control over the process itself and the outcome.



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Mediation

Advantages of Mediation

- ❖ It produces outcomes which are likely to endure because the parties themselves have chosen them.
- ❖ It eliminates the conflict and hostility that nearly always accompany the compulsory decision of the dispute by a court or tribunal.
- ❖ It can improve understandings between parties with an ongoing relationship.



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Mediation

More About Mediation

- ❖ Mediation is **not** toothless
- ❖ Mediation is **not** just compromise
- ❖ Mediation is **not** a bar to litigation or arbitration
- ❖ Mediation is **not** what lawyers or managers do 'all the time'
- ❖ Mediations is **not** a waste of time and money if it fails
- ❖ Mediation is **not** t yet another cost to the unfortunate parties
- ❖ Mediation is **not** t a sign of weakness or for wimps



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Mediation

More About Mediation (Cont'd)

- ❖ Mediation needs **not** prevent parties having their day in Court
- ❖ Mediation needs **not** disclose your hand
- ❖ Mediation needs **not** be risky
- ❖ Mediation is **not** counseling



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Current Status of Mediation in Hong Kong : Development and Main Issues




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Current Status of Mediation in Hong Kong: Development and Main Issues

- Dispute resolution Schemes involving mediation – introduced through 4 major means in Hong Kong historically
 - Government departments
 - Provisions in standard forms of contracts
 - The court system
 - Mediation related institutions



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Current Status of Mediation in Hong Kong: Development and Main Issues


- Introduction of dispute resolution schemes in standard forms of building contracts


Public sector:

- Mediation first appeared in the Government General Conditions of Contract in 1991 – a “Mediation then Arbitration” scheme
- 4 tier dispute resolution mechanism in the contract for Airport Core Programme Projects and other major public works contracts – Engineer decision, Mediation, Adjudication and Arbitration

Private sector:

- Mediation first appeared in the HKIA/HKIS/HKICM Standard Form of Building Contract in 2005 – also a “Mediation then Arbitration” scheme



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Current Status of Mediation in Hong Kong: Development and Main Issues

Public sector:

- Consider e.g. clause 86(6) of the General Conditions of Contract for Design and Build Contract 1999 Edition,
“If the Supervising Officer shall fail to give such decision in accordance with sub-clause (4) of this Clause or if either the Employer or the Contractor is dissatisfied with such decision then either the Employer or the Contractor may within 28 days after receiving notice of such decision, or within 28 days after the expiration of the said decision period of 28 days, as the case may be, request that the dispute be referred to mediation in accordance with and subject to The Government of the Hong Kong Special Administrative Region Construction Mediation Rules or any modification thereof being in force at the date of such request.”



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Current Status of Mediation in Hong Kong: Development and Main Issues

Private sector:

- Consider e.g. clause 41.3(1) and (2) of the Agreement and Schedule of Building Contract for Use in the Hong Kong Special Administrative Region,
“(1) If the dispute is not resolved by the Designated Representatives within 28 days of the dispute being referred to them by the Architect under clause 41.2, either party may give a notice to the other party, by special delivery, to refer the dispute to mediation and the person to act as mediator shall be agreed between the parties.”



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Current Status of Mediation in Hong Kong: Development and Main Issues

Private sector:

- Consider e.g. clause 41.3(1) and (2) of the Agreement and Schedule of Building Contract for Use in the Hong Kong Special Administrative Region (cont'd),
“(2) If the parties fail to agree on the person to act as the mediator within 21 days after either party has given to the other a written request to do so, the mediator shall, on the written request of either party, be appointed by the President or Vice-President for the time being of The Hong Kong Institute of Architects co-jointly with the President or Vice-president for the time being of the Hong Kong Institute of Surveyors.”



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Current Status of Mediation in Hong Kong: Development and Main Issues

- The Chief Executives' Policy Addresses
2007-8: pledged the development of mediation in Hong Kong,

“85. To alleviate conflicts and foster harmony, we will promote the development of mediation services. On many occasions, interpersonal conflicts need not go to court. Mediation can reduce social costs and help the parties concerned to rebuild their relationship. This is a new trend in advanced regions around the world. The cross-sector working group headed by the Secretary for Justice will map out plans to employ mediation more extensively and effectively in handling higher-end commercial disputes and relatively small-scale local disputes.”



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Current Status of Mediation in Hong Kong: Development and Main Issues

- The Chief Executives' Policy Addresses 2008-9, when talked about the theme of the new initiatives for "Investing for a Caring Society",

"Mapping out how mediation can be more effectively and extensively applied in both commercial disputes and at the community level, with the assistance of a Working Group on Mediation chaired by the Secretary for Justice."

Current Status of Mediation in Hong Kong: Development and Main Issues

- The Chief Justice and the Secretary of Justice also have publicly promoted the use of mediation on many different occasions in recent years
- Leading to schemes of mediation introduced for different kinds of court cases

Current Status of Mediation in Hong Kong: Development and Main Issues

- Family mediation pilot schemes launched in May 2000 (extended to 31st July 2003) followed by the scheme pursuant to Practice Direction 15.10 issued by the Chief Justice
- Construction and Arbitration List of the Court of First Instance – Mediation was introduced in 2006 through Practice Direction 6.1

Current Status of Mediation in Hong Kong: Development and Main Issues

- Schemes conducted by institutions, e.g. those by HKIAC or the Judiciary:
 - Commercial Mediation Pilot Scheme
 - New Insurance Mediation Pilot Scheme
 - Lehman Brothers Mediation and Arbitration Scheme
 - Construction Mediation Scheme
 - Surveying Dispute Mediation and Arbitration Scheme (HKIAC-RICS)
 - Family mediation under Practice Direction 15.10 of the Judiciary
 - Mediation for building management cases under Direction issued by the President of the Lands Tribunal [LTPD: BM No. 1/2009]

Current Status of Mediation in Hong Kong: Development and Main Issues

- Success rate of mediation:
 - Not too much available data because of the nature of confidentiality
 - Major source is from the different schemes e.g. family cases:

“Of the 930 cases which completed the mediation process, 637 reached full agreement and 91 had partial agreement. The success rate was about **78%** (with about 68% achieving full settlement and about 10% achieving partial settlement).” (LC Paper No. CB(2)1717/03-04(01), Panel on Administration of Justice and Legal Services Pilot Scheme on Family Mediation prepared by Judiciary Administration dated 15 March 2004)

Current Status of Mediation in Hong Kong: Development and Main Issues

- Success rate of mediation:
 - Other examples: Building Management cases:

“13. Of the 70 cases which were concluded, seven eventually had not used the mediation service because one of the parties had not turned up. Of the 63 completed mediated cases, 19 reached full agreement and seven partial agreement. The success rate was about **41%**.” (LC Paper No. CB(2)1384/08-09(04) Legislative Council - Panel on Administration of Justice and Legal Services - Evaluation of The Pilot Scheme for Building Management Cases in the Lands Tribunal by Judiciary Administration dated April 2009)

Current Status of Mediation in Hong Kong: Development and Main Issues

- Development and Main Issues:
 - Possible directions of development
 - Implications of the new Practice Direction on mediation
 - 48 recommendations in the Report of the Mediation Working Group chaired by the Secretary of Justice


(please see consultation report in
<http://www.doj.gov.hk/eng/public/mediation.htm>)


Current Status of Mediation in Hong Kong: Development and Main Issues

- Higher commitment of the public to mediation
- Through different campaigns and activities:
 - e.g. “Mediate-first” - “遇到商業糾紛，如可以先嘗試用調解來解決爭議，最後關頭才展開訴訟，就是創新求變的一個好例子。簽署「調解為先」承諾書（Mediate First Pledge）是這個革新的起點”
 - 摘錄自律政司司長在「調解為先」簡介會致辭
(See <http://www.mediatefirst.hk/site/>)
- Supported by 8 organizations

Current Status of Mediation in Hong Kong: Development and Main Issues

- Quality assurance:
 - Different bodies have different requirements for accreditation of mediators:
 - Most common – 40 hours of training + passing 2 simulated mediation cases
 - Some may have written tests
 - There is no common assessment standard amongst the different bodies
 - Different requirements for family mediators
 - Is there a common benchmark for the standards of practising mediators?
 - How to control the quality of mediators in practice?





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Current Status of Mediation in Hong Kong: Development and Main Issues

- Quality assurance:
 - Impossible/difficult to impose a common benchmark
 - Through a Code applicable to all practising mediators who have subscribed to the code
 - Through the requirement of essential terms in the agreement to mediate
 - Through the monitoring of the Code through an umbrella body
 - A company limited by guarantee?
 - An existing leading body in mediation?
 - Or should it be left to individual service providers?



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To Become an Accredited Mediator

HKIAC Panel of General Accredited Mediators

- 3 Stages:
 - Minimum of 40 hours of training in a course recognized by HKIAC to satisfy its Stage I requirement
 - Pass in assessments by acting as mediator in 2 simulated mediation cases or actual cases
 - Accreditation assessment by HKIAC Mediator Assessment Committee

(Please see http://www.hkiac.org/show_content.php?article_id=39#appendix for details)



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To Become an Accredited Mediator

HKIS/HKIA Joint Panel of Accredited Mediators

- Similar to HKIAC requirements
- An additional requirement of 7 years of post-HKIS/HKIA requirement



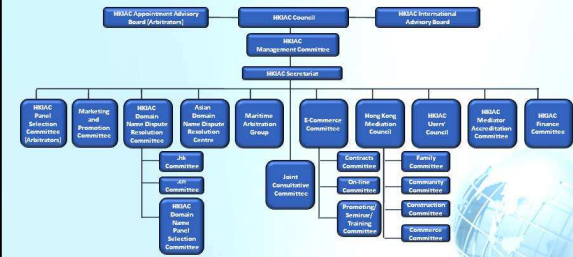
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Hong Kong International Arbitration Centre

- ◆ An independent non-profit making company limited by guarantee established in 1985 to provide advisory and support services for the resolution of local and international disputes by mediation and arbitration.
- ◆ Twenty-five Council Members – Board of Directors.
- ◆ Sixteen staff at the Secretariat.
- ◆ Over 300 international and local arbitrators of experience and distinction.
- ◆ Over 500 international and local mediators of experience and distinction.
- ◆ An active mediation body – Hong Kong Mediation Council, a division of the HKIAC.
- ◆ Facilities to conduct arbitrations and other forms of dispute resolution procedures.
- ◆ Publication of various rules and procedures for arbitrations in Hong Kong including the Securities Arbitration Rules and Small-Claims/Documents-Only Procedures, the latest additions being the Administrated Arbitration Rules.

HKIAC (Cont'd)



Services of HKIAC (Cont'd)

Mediation and Arbitration Services

- ◆ Operates panels of international and local arbitrators of experience and distinction and is happy to make their names available to potential arbitants.
- ◆ Holds lists of accredited mediators in the category of Family and General, and can assist the parties with recommendations of suitable accredited mediators.
- ◆ Accredits mediators for use on the Court Annexed Family Mediation Scheme.
- ◆ Administers the mediation service for Hong Kong Government contracts.

Services of HKIAC

Statutory Appointing Authority & the Hong Kong Courts

- ◆ The HKIAC is the default appointing authority for arbitrators in Hong Kong, a function that was previously exercised by the Hong Kong courts. The Arbitration Ordinance also gives the HKIAC the power to decide whether an arbitral tribunal should consist of one or three arbitrators in international arbitrations if the parties cannot agree on such numbers.
- ◆ The Hong Kong courts are supportive of arbitration and recognise the importance of non-interference in the arbitration process. Parties to arbitration in Hong Kong may be represented by anyone they choose. There is no restriction on lawyers or anyone else from other jurisdiction acting in Hong Kong as representative or arbitrators in arbitrations.

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Thank you !

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http://mediation.judiciary.gov.hk/tc/mediation_videos.html



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