

Developments in International Commercial Mediation: USA, UK, Asia, India and the European Union

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This paper will look at some of the major developments in international commercial mediation to date but the author would ask the reader to bear in mind that the picture is constantly changing which reflects the adaptability and dynamism of mediation in the modern era.

The United States

That this discussion begins in the USA is not an accident as the modern facilitative model of mediation began in the USA in the early 70's and in particular following the 1976 Pound Conference in Minneapolis.¹ ADR has become a pillar of dispute resolution in the United States and today it is used for everything from personal injury and professional negligence claims to sexual harassment cases. ADR clauses are found in the contracts of large corporations like General Electric and many US companies² have signed the Conflict Prevention Resolution (CPR) ADR pledge to utilize alternatives to litigation which includes the following:

*"We recognize that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. Alternative dispute resolution (ADR) procedures involve collaborative techniques which can often spare businesses the high costs of litigation."*³

Mediation in the US is not easy to categorize or describe in general terms since each State and local jurisdiction utilizes mediation as it deems appropriate for the local environment. Therefore within the United States, the laws governing mediation vary state by state.

Mediation in the US Courts

Currently the support of the courts in the US for mediation is very strong. US District Courts, for example, may order mandatory mediation. In the Atlantic Pipe Corporation (APC) case⁴ APC petitioned the First Circuit Federal Court because it believed that the U.S. District Court in the District of Puerto Rico did not have the authority to compel APC to participate in and pay the financial costs of mediation. Although the First Circuit Court did not support the mediation order, it nevertheless concluded that the District Court possessed the inherent

¹ CHRIS POOLE, THE FUTURE OF MEDIATION, <http://jamsadrblog.com/author/adavis/> posted on March 19 2015.

² For example the CPR website states that their ADR pledge has been signed by over 4000 corporations <http://cpradr.org/Home> accessed 30 Dec. 12

³ <http://cpradr.org/Home> accessed 30 Dec. 12

⁴ In Re Atlantic Pipe Corp., 304 F.3d 135 (1st Cir. 2002)

power to order compulsory mediation, subject to various considerations discussed in its opinion.

Private commercial mediation

In the US private commercial mediation is very popular. The parties to a dispute decide that mediation would be appropriate and select a mediator from amongst one of the private providers who offer these services. Although US commercial mediation practice is primarily dominated by the facilitative mediation model there are many types of mediation processes available and the end user has the discretion to choose the type of mediation they want. There is no overarching body for mediator training or mediator standards and there are much “ad hoc” mediation held each year, which do not pass through a court scheme or mediation service provider.

New developments

As noted above the USA in spite of initiatives like the UMA is not a unified jurisdiction and each state will enact such legislation regarding mediation as it sees fit. This very diversity means that the USA continues to push out the envelope with regard to new mediation initiatives. Below are two recent examples of new mediation programmes that are being tried out.

Mediating serious criminal cases

In most international jurisdictions serious criminal cases are not considered suitable for mediation, however as demonstrated below, this is not considered out of bounds in the USA.

In one county in Kansas, court judges are resolving serious criminal cases by acting as mediators. The Judges who mediate the criminal cases in the court aren't the judges assigned to the cases, and they don't disclose what they learned in the mediation process reports. During the mediation, prosecutors and defense lawyers seek agreement on the conviction and penalty.

To date homicide cases have been resolved through mediation, as well as cases alleging aggravated assault on a law enforcement officer, interference with an officer, child sexual abuse, drug possession and criminal damage to property. Mediation in the homicide case lasted for four about hours.

Judge Cheryl Kingfisher of the Topeka Court told a newspaper “I think it's going very well,” and that “The goal of mediation is to bring as much justice as you can to as many people as you can.”⁵

New Mandatory Mediation Programme in the Bankruptcy Court for the District of New Jersey

⁵ DEBRA CASSENS WEISS, ABA JOURNAL, Posted Feb 04, 2014, quoting the Topeka Capital-Journal

In November 20, 2013, the Board of Judges of the United States Bankruptcy Court for the District of New Jersey approved a comprehensive, Court-supervised mediation program (“Mediation Program”) to facilitate resolution of contested matters and adversary proceedings for debtors, creditors and parties in interest. In May 1, 2014 the Court advised the Bar and public that it had issued a general order adopting what it called a Presumptive Referral to Mediation. The Order “Referring Matter to Mediation and Designating Mediator” begins by stating:

“It appearing that the Court has determined that mediation may produce a mutually agreeable resolution of all or some of the issues between the parties, and has directed that the following claims be referred to mediation”⁶

The rationale for introducing a mandatory mediation programme was apparently because, for several years, the judges of the Bankruptcy Court had been evaluating the pre-existing mediation program and determined that it was rarely, if ever, used and had become moribund. The clerk of the Bankruptcy Court surveyed the local Bar and found there was overwhelming support for mediation in adversary proceedings. In order to make the new program successful, the court determined to make mediation presumptive for all adversary proceedings in the hope that mediation would be utilized extensively to benefit litigants and the court by engendering swifter, less costly resolution.”⁷

Phillips believes that this “new mandatory mediation initiativemay be unique in scale in structure”⁸ and others have noted “There is great hope on the part of the bankruptcy judges that this new presumptive mediation program will lead to more efficient and cost-effective service to parties in bankruptcy cases, a change that will benefit not only the litigants, but also the legal professionals and the court as a whole”⁹

The United Kingdom

An important landmark in modern mediation’s development in the UK was Lord Woolf’s seminal Access to Justice Report 1998 which was the forerunner for the Civil Procedure Rules (CPR)

⁶ <http://www.njb.uscourts.gov/mediationNew> Accessed 30 May 2015

⁷ <http://www.foxrothschild.com/newspubs/newspubsArticle.aspx?id=19327355091#sthash.IJkAwmlT.dpuf>

⁸ PETER PHILLIPS, “MANDATORY MEDIATION INITIATIVE AT THE BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY” Posted on March 20, 2014

<http://businessconflictmanagement.com/blog/2014/03/mandatory-mediation-initiative-at-the-bankruptcy-court-for-the-district-of-new-jersey/>

⁹ Raymond Lyons www.foxrothschild.com/newspubs/newspubsArticle.aspx?id=19327355091#sthash.IJkAwmlT.dpuf

In his preface to his interim Report¹⁰ he stated:

“A general theme of this report has been the need to bring the uncontrolled features of the adversarial system under proper discipline. Another has been to promote more, better and earlier settlements. At the same time, it has been my aim to refocus the rules of the system, which have tended to become over-technical and detached from their proper purposes”

He went on to say “I remain convinced that there is a grave need to move to a managed system of dispute resolution”

This new approach had a huge effect on civil litigation in the UK and has been influencing the way lawyers run their cases ever since.

New Developments UK

In the United Kingdom, unlike other jurisdictions such as Hong Kong, there is no legislation governing the use of mediation and in fact there is no legal requirement for a mediator to register with anyone. This includes not having to undergo training or be accredited by an accreditation body before a person can practise as a mediator.

As mentioned although no formal training as a mediator is legally required, if a mediator wants to obtain work they will need to get themselves accredited by a recognised mediation training organisation, as without accreditation parties would be unlikely to select them. In the UK nearly all mediation provider organisations who wish to be included in the “Find a Civil Mediator Directory” (the Directory) on the website run the Ministry of Justice, have to be accredited by the Civil Mediation Council (“CMC”).

The Civil Mediation Council

The CMC’s purpose, as expressed in its Constitution, is to represent the common interests of mediation providers and mediators in promoting mediation; to do so through the performance of the Council’s objects, and generally by improving the understanding of the uses and application of mediation. The CMC has broader concerns in the context of lawyers and litigation:

- To be a neutral and independent body to represent and provide civil and commercial mediation and other dispute resolution options as alternatives to litigation and thereby to foster law reform and access to justice for the general public;
- To be a portal for access by potential users of and referrers to mediation and other dispute resolution options including judges, lawyers and the general public;
- To establish and foster the fullest understanding among the judiciary, lawyers and the general public of mediation and other dispute resolution options, including means of access, cost benefits and the simplicity of mediation procedure.

¹⁰ LORD WOOLF, ACCESS TO JUSTICE REPORT, July 1996, at pp

CMC new developments

In 2015 the CMC having previously operated as an unincorporated association for members, established a not for profit company limited by guarantee. This decision was taken to carry forward and develop the role of the CMC as the trusted authority for mediation in England and Wales, both in promoting its use more widely and in setting standards in which users of mediation can have confidence.

In January 2015 the CMC introduced the individual registration scheme, which according to the CMC is to anticipate and reflect the growing call (from Government and the EU) for some form of at least light touch mediator regulation to provide added public confidence in the practice and process of mediation. It also mirrors the steps that are already being taken elsewhere, for example in family mediation. The CMC hopes that Registered Mediator status will quickly be seen by mediation users as a recognised badge of approval and a mark of quality assurance when searching for a suitable mediator.¹¹

Current UK mediation scene

According to the CEDR 2014 Mediation Audit the mediation market in the UK grew by 9%, meaning that 9500 commercial mediations were performed in 2014. The audit also shows that £9 billion worth of commercial claims were mediated and that through mediation UK businesses will save £2.4 billion in management time, relationships, productivity and legal fees

The results of the CEDR Audit, which is conducted every two years, were announced at the Civil Mediation Conference in Leeds. The Audit's key findings, made possible through collaboration with the Civil Mediation Council made a number of encouraging findings for the UK mediation community:

- The trend towards appointing mediators directly seems to have halted, in 2014 it happens in 66% of cases, but in 2012 it was 71%. Mediation Service Provider numbers seem to be getting better possibly because there also appear to be more successful groupings of mediators
- The group of the most experienced mediators has grown by 30%
- There are signs that younger mediators are getting more work and the number of female mediators is increasing although there is still a need for more ethnic diversity in the market
- Amongst working mediators, non-lawyers are a fast growing group - dominance of the profession by lawyers has now shrunk to 52%.
- When appointing a mediator, lawyers ranked the following factors (in order of importance) from a list of 17 items: the mediator's availability, the mediator's personal

¹¹ www.civilmediation.org/news/cmc-launches-individual-mediator-registration/99

style, the mediator's experience, their background or qualifications and finally their fees

- Just over 75% of cases settle on the day of mediation and another 11% shortly after (the combination of these numbers is similar to previous years)
- On average there are 16 hours input from a mediator on a case, but the time is spent differently according to experience
- Mediators say 71% of lawyers and 62% of clients do well at mediation and only 14% and 15% are inadequate. These figures show an improvement on previous years
- Lawyers also say that mediators are doing well at mediation - 82% and only 6% inadequate. These too are improving figures
- Mediators' fee rates have on average come down in price slightly since 2012
- There is a strengthening of mediators (76%) and lawyers (57%) wanting more encouragement to mediate disputes (although mandatory mediation is still unpopular – only 15% of mediators in favour)
- Over three quarters of both mediators and lawyers say that with regard to the Jackson reforms impact upon mediation there has been no difference or it's too early to tell
- The market is still dominated by a select few mediators, although the size of that group is steadily rising. A group of around 130 individuals are involved in around 85% of all non-scheme commercial cases; the size of this group has grown by 30% since 2012 when just 100 individuals held 85% of the market.

European Developments

The EU Mediation Practice Directive

The Mediation Practice Directive (the Directive) took effect from 11 June 2008. It followed on from the European Green Paper on Mediation published by the European Union in 2002 and European Mediation Code of Conduct 2004. In essence, the Directive is aimed at encouraging the use of mediation in civil and commercial matters and in addition to make uniform across the Member States of the European Union the legal status of certain principles of mediation practice.

The Directive only applies to cross-border disputes, which concern civil and commercial matters and it excludes, amongst other things, disputes in family, community law and administrative actions. The Directive requires Member States to make provision for enforcement of written agreements arising from mediation (providing both parties are agreeable) unless it is contrary to the law of the Member State or the Member State does not provide for its enforceability.

The Preamble of the Directive 2008/52/EC (6) provides a description of the advantages of mediation:

Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely

to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

The European Parliament summarised the goal of the Directive as follows:

*Goal: Through the Directive the European Union intends to encourage amicable dispute resolution, particularly through the use of mediation **

While the Directive is said to apply to cross-border disputes in civil and commercial matters, several EU member states have gone further and enacted legislation that also caters for domestic mediations. Nearly every EU country has implemented the Directive albeit in slightly different ways.

Effect of the Directive

According to the authors of a 2014 Study¹² of the Directive carried out by the European Parliament “the 2008 Mediation Directive has helped to advance the mediation discourse across Europe”. However they went on to say that the “Directive has not achieved its objective stated in its Article 1” which reads:

‘To facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.’

The Study formed part of what its author described as effort to ‘reboot’ the Directive, more than two and a half years since the deadline for its implementation in the national legal systems and believe this is both timely and necessary.⁴

Why is mediation still not widely used in the EU countries?

This is what some call the "EU Mediation Paradox” and finding the answer to this paradox has taxed the minds of legislators in the EU since they began promoting mediation between member states. As can be seen from the table below the take up of mediation has been extremely weak in many EU countries and even the countries with higher numbers of mediations the figures are still low compared to countries such as the USA and Australia.

Estimated Number of Mediations per Year	Countries	No of countries	% EU countries
<i>More than 10 000</i>	Germany, Italy, Netherlands, UK	4	14%
<i>Between 5 000 and</i>	Hungary, Poland	2	7%

¹² DIRECTORATE GENERAL FOR INTERNAL POLICIES, POLICY DEPARTMENT C: CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS
 LEGAL AFFAIRS. “REBOOTING THE MEDIATION DIRECTIVE”: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU. European Parliament B-1047 Brussels, E-mail: udo.bux@ep.europa.eu, 2014 p6.

<i>10 000</i>			
<i>Between 2 000 and 5 000</i>	Belgium, France, Slovenia	3	11%
<i>Between 500 and 2 000</i>	Austria, Denmark, Ireland, Romania, Slovakia, Spain	6	21%
<i>Less than 500</i>	Bulgaria, Croatia, Cyprus, Czech Rep., Estonia, Finland, Greece, Latvia, Lithuania, Luxembourg, Malta, Portugal, Sweden	13	46%

¹³ EU Study 2014

European Mediation

As noted above in contrast to the United States and many other common law jurisdictions, the state of development of ADR and mediation in continental Europe is uneven and some years behind the United States and UK.¹⁴ Lawyers from civil law jurisdictions tend not to be as familiar as their common law brethren are with mediation. They often have little understanding of mediation and how to use it.

Factors at play in ADR in Europe

At first glance, ADR activity in the civil law jurisdictions in Western Europe appears to be following the same pattern, with the current situation resembling that, which existed in the UK in the early 1990s. ADR advocates have established centres to promote ADR such as, for example, CMAP in France and the German Civil Code was amended to include provisions, which require the court to set an early date for a settlement conference that the parties must attend in person. At the settlement conference, the Judge can act as a mediator or the court can refer the case to another Judge to conduct settlement discussions. Possibly the most important change is that the court can propose that the parties try to mediate out of court.

¹³ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, p. 6

¹⁴ DAVID CAIRNS, *MEDIATING INTERNATIONAL COMMERCIAL DISPUTES*, Differences in US and European approaches to ADR, *Dispute Resolution Journal* Aug 2005

Notwithstanding these developments, when one takes a closer look it is clear that there are very different factors at play in EU countries:¹⁵

- The civil inquisitorial system results in shorter hearings, little if any disclosure of documents and significantly lower costs. In the eyes of many, litigation in civil jurisdictions does not therefore share the features of common law litigation that first gave rise to the need for ADR.
- The judiciary in civil law jurisdictions has historically had a greater role in encouraging settlement than their counterparts in England or America. In some civil codes the Judges have a positive duty to encourage the parties to settle and are even able to take on a role rather like a mediator in order to achieve this. In the circumstances, is an external mediator adding value?
- Many civil law jurisdictions do not currently recognise the principle of without prejudice settlement discussions. The safe environment in which mediations take place in America and England is therefore not replicated.
- It is the Chambers of Commerce on the continent rather than the courts that appear to be doing the most to promote the development of ADR. Most of the French Chambers of Commerce have opened their own mediation centres but, like their counterparts in Sweden, Italy and Spain, are handling few cases.

Another complication is that the fundamental differences between trial processes in common law and civil law jurisdictions have shaped lawyers' perceptions of their role in dispute resolution. Common law judges have historically refrained from actively encouraging settlement in order to preserve their neutrality. So any settlement initiative has to come from one of the parties. In contrast, the Swiss and the German legal systems have strong traditions of judge-led settlement initiatives.

The new ICC Mediation Rules

On 1 January 2014, the new ICC Mediation Rules¹⁶ entered into force, replacing the previous 2001 ICC ADR Rules. These new Rules were drafted by the ICC Commission on Arbitration and ADR with the aim of making the Rules more user-friendly, facilitating the use of alternative dispute resolution techniques and enhancing the effectiveness of the ICC Rules.

However as one commentator put it “The new rules are an evolution rather than a revolution¹⁷” which was confirmed by the ICC’s Hannah Tu¨mpel:

*“there’s no earth-shaking new change to the rules. The old ADR rules worked but we wanted to ensure that we take into consideration our lessons learned, having administered international commercial mediation cases since 2001.”*¹⁸

¹⁵ DANNY MCFADDEN, *MEDIATION IN GREATER CHINA*, Kluwer Law Book Company, 2013

¹⁶ Int’l Chamber of Commerce, *ICC Mediation Rules (2014)*, available at <http://www.iccwbo>

¹⁷ ALEXANDRA MUNOZ, Article published in *Les Cahiers de l'Arbitrage* 2014/2 (The Paris Journal of International Arbitration) of 1 June 2014,

The new Rules codify the practices developed by the ICC in managing ADR proceedings during the last decade. As part of this new look the ICC created the International Centre for ADR (the “Centre”) as a separate administrative body within the ICC (Art.1.1)¹⁹ to provide more focus for non-arbitration processes. By creating the Centre the ICC also wanted to address any concerns that might have arisen regarding the sharing of information between the mediation and arbitration arms of the ICC if the matter does not settle at mediation and subsequently proceeds to arbitration.

The changes in the Rules

The most obvious change is the change of name, the ADR Rules of 2001 referred to "ADR" in their title and to a "Neutral", the new Mediation Rules, entitled "Mediation" Rules, and referring to a "Mediator" but in essence this does not change much at all.

The ICC states that the “formal” change in title reflects the fact that mediation was the ADR technique that has been most often used by parties (90%), either by choice or by default, during the last ten years under the previous Rules.

- Application – the new Rules apply to all agreements to refer a dispute to mediation under the ICC Mediation Rules entered into after 1 January 2014.
- Administration of the Rules – the Rules will be administered by the International Centre for ADR. The Rules emphasise that this is a separate administrative body located within the ICC (Art 1.1)
- Mediation framework – the new Rules empower the Centre to determine the place and language of the mediation if the parties cannot otherwise agree (Art 4).
- Mediator appointment process – where the parties are unable to agree on the mediator, the new Rules entitle the parties to request that the Centre provide a list of candidates to the parties. The ICC commented that this option already appears to be extremely popular based on the number of requests received since the introduction of the new Rules earlier this year.
- Conduct of the mediation – the new Rules include only brief provisions governing the conduct of the mediation (including, for example, requiring that the parties attend a conference with the mediator (a face-to-face meeting is not prescribed therefore this

18 HANNAH TUMPEL, Senior Counsel and Manager of the ICC International Centre for ADR, As quoted by Calliope Sudborough, Deputy Manager, ICC International Centre for ADR and Co-Chair ABA International Mediation Committee of the Section of International Law.” Mediation Rules Unveiled at Global Launch Event, INT’L CHAMBER OF COM. (Dec. 4, 2013), <http://www.iccwbo.org/News/Articles/2013/New-ICC-Mediation-Rules-unveiled-at-global-launch-event/>.

¹⁹ ICC Mediation Rules 1 January 2014, Art.1.1

can occur over the phone) and that following this discussion, the mediator prepare a written note recording the manner in which the mediation is to be conducted) (Art 7).

- Confidentiality – the content of the mediation (but not the fact that the mediation is taking place or has taken place) is to remain confidential under the Rules (Art 9).
- The Rules are accompanied by a set of standard clauses that the parties may wish to consider including in their contractual dispute resolution regimes

One of the key reasons for the establishment of the Centre and revision of the Rules is to draw a clear line between the ICC arbitration and other ADR processes. Sudborough states that the new initiatives have allowed mediation to “step out of the shadow cast by the institution’s reputation as an arbitral institution.”²⁰ It remains to be seen if this will be demonstrated in the future by an increase in mediation case numbers but already the Rules have been widely publicised especially in Asia receiving a positive response.

Australia

Just behind the United States, Australia has for some time been a global frontrunner in mediation law and practice.²¹ It has been officially recognised for many years in Australia that mediation is a cheaper and quicker alternative process to traditional court litigation. There are many State legislative acts providing for mediation, some mandatory and others requiring the parties' consent. As in countries such as Singapore, the USA and UK a mediation ‘industry’ has been established with many private organisations and institutions offering mediation services for a wide range of disputes. This has led in turn to a call for the industry to be regulated and in Australia a national practice standards and quality assurance organisation, the National Mediator Accreditation System (NMAS) 2009,²² was set up to try to safeguard and increase the quality of mediation services and the qualification of mediators.

The NMAS is a voluntary industry system under which organisations that meet certain criteria (known as Recognised Mediator Accreditation Bodies or RMABs) may accredit

²⁰CALLIOPE M. SUDBOROUGH ICC’S NEW MEDIATION RULES: Mediation Steps out of the Shadow, *The Year in Review*, an Annual Publication of the ABA of International Law, Spring 2014 Vol 48 Published in cooperation with the SMU Dedman School of Law p186

²¹ ULRICH MAGNUS MEDIATION IN AUSTRALIA: DEVELOPMENT AND PROBLEMS Published online January 2013 | e-ISBN: 9780191758270 | DOI: <http://dx.doi.org/10.1093/acprof:oso/9780199653485.003.0017>

²² For background regarding establishment of the NMAS see <http://www.wadra.law.ecu.edu.au/accreditation.html>

mediators. Later a body called the National Mediator Accreditation Committee (NMAC) was established to fully implement the NMAS, including establishing an ongoing national Mediator Standards Body (MSB) from 2010.²³

The MSB lists its objectives as being to:²⁴

- develop, maintain and amend the NMAS, which includes the Australian National Mediator Standards comprising the Approval Standards and the Practice Standards (the Standards).
- oversee the application of the Standards with a view to achieving consistency, quality and public protection regarding mediation services and mediation training.
- support, complement and encourage members in their quest to meet their objectives in relation to the Standards;
- ensure that training and accreditation of mediators continues to develop.
- require records to be maintained of mediators who are accredited under the Standards and facilitate access to mediators who have national accreditation.

New revised NMAS

A revised NMAS was approved in February 2015 and will come into effect on 1 July 2015. The revisions build on the initial Approval and Practice Standards which were published in 2008 and on feedback from members during various stages of the revision process.

Some important additions and changes are as follows:

In Part II the Approval Standards were amended in the following key respects:

- The period within which the 38-hour training requirement can be completed has increased from 9 months to 24 months

The experience qualified pathway for gaining accreditation has been modified and additional pathways for gaining accreditation have been introduced;

- Accreditation and experience requirements for trainers, coaches and assessors have been added;
- The number of CPD hours to be achieved/obtained in each two-year cycle has been slightly increased but the activities that can contribute to CPD have been broadened, and exceptions to completing the requirements have been restricted;
- There is a new provision for mediators to apply for leave of absence and also to apply for reinstatement following leave of absence or lapsed or suspended accreditation;
- The MSB has been provided with the ability, in exceptional circumstances, to waive compliance with any provision of the Approval Standards, on application by Recognised Mediation Accreditation Bodies (RMAB).

In Part III, the Practice Standards have been amended to specify clearly the minimum practice and competency requirements for mediators, and also a requirement to inform

²³ NATIONAL MEDIATOR ACCREDITATION SYSTEM (NMAS)– A History of the Development of the Standards

²⁴ <http://www.msb.org.au/about-us/msb-objectives>

participants about what they can expect of the mediation process and of the mediator. In addition, mediators must give participants information on how they can provide positive feedback or lodge a formal complaint in relation to services provided by them.

The Board looks forward to the revised NMAS making a positive contribution to the continued improvement of professional mediator standards.

India

Developments in India

As the quote below demonstrates the ethos of mediation is deeply felt in India.

“I realized that the true function of a lawyer was to unite parties. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromise of hundreds of cases. I lost nothing thereby not even money; certainly not my soul.” Mahatma Gandhi

Following what has been referred to as an “unprecedented litigation explosion” the need for alternatives to adjudication has become increasingly obvious to the Indian government and judiciary. There are estimated to be approximately 30 million cases pending in different courts and it could be as late as 2330 by the time Indian courts, working at the current pace, clear the backlog of cases that exists today.²⁵

Background

In India, one contemporary process for dispute resolution that is rooted in ancient tradition is called *Lok Adalat* (meaning "People's Court"). It draws from the *panchayat* system of justice, where *panchas*, or village elders, helped villagers resolve their disputes. Lok Adalat, as it is currently practiced, is a type of a swift settlement conference presided over by a judge and/or a panel of attorneys, with the distinctive feature being that the neutral party, the Lok Adalat judge, is often viewed by the parties as an authority figure. Lok Adalat judges frequently propose monetary solutions to a dispute. Such settlement proposals are often accepted by the parties by virtue of the Lok Adalat judge's perceived authority.²⁶

Lok Adalat takes its authority from the Legal Services Act of 1987 and is provided free of charge to litigants by government-funded agencies and the courts. Lok Adalat is used in disputes where monetary compensation is claimed, including insurance disputes and automobile accident proceedings.²⁷ The wide use of Lok Adalat has been instrumental in reducing the backlog of the courts.

²⁵ SHASHAK GARG, the Growth of Mediation in India. PowerPoint: Emerging trends in Mediation (1) The INADR 6th Annual World Congress: <http://www.inadr.org/event/international-adr-societys-6th-annual-world-congress-2/> 2014

²⁶ GREGG RELYEA AND NIRANJAN BHATT, “Comparing Mediation And Lok Adalat: Toward An Integrated Approach To Dispute Resolution In India” June 2009, Mediate.com Accessed 16 May 2015

²⁷ SRIRAM PANCHU, “MEDIATION PRACTICE AND LAW”, Lexis Nexis, Haryana India, Reprinted Edition 2014 Page 34g

Both mediation and Lok Adalat are dispute resolution processes in which the parties attempt to settle their civil disputes through negotiation. In its contemporary form, Lok Adalat shares some of the features of the mediation process, but is also distinct in several important ways

Differences between Lok Adalat and Mediation

Mediation is a structured voluntary confidential negotiation process with identifiable stages where a neutral third party uses specialized communication and negotiation techniques to assist parties in resolving their dispute. In the process, the underlying interests of the parties may be explored. Both traditional and non-traditional terms of agreement may be reached. Mediation focuses on the factual background of a dispute, the parties' current circumstances, and future opportunities for working out a practical solution to a dispute.

Lok Adalat is a public evaluation process presided over by a judge or panel of neutrals who propose a monetary settlement after briefly hearing the factual background and claims involved in a dispute. Negotiation, in the form of offers and counter-offers, may take place on a limited basis during the Lok Adalat process, after which the Lok Adalat judge proposes a specific settlement.

New Law - Mediation and Code of Civil Procedure

In 1999 the Indian Parliament amended the Code of Civil Procedure, (1908 (CPC)) and introduced a new provision, Section 89, which gave the Courts the power to refer matters to one of the ADR tracks listed therein:

This was later followed by amendments in 2011 which read:

In the principal Act, after section 88, the following section shall be inserted, namely:—

"Section 89. Settlement of disputes outside the Court.

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for—

- (a) arbitration;
- (b) conciliation;
- (c) judicial settlement including settlement through Lok Adalat; or
- (d) mediation.

(2) Where a dispute has been referred:

(a) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

These amendments were made in order to make Section 89 simpler and more straightforward
28 Coupled with Section 89 and allied laws, this allows the judiciary the opportunity to offer the parties a wide range of dispute resolution methods to resolve their issues.

Guidelines Alternate Dispute Resolution under Section 89 of the Code of Civil Procedure

Justice RV Raveendran in a Supreme Court of India case *Afconsg Infrastructure Ltd. Vs. Cherian Varkey Construction Co. (P) Ltd.* 29 discussed, in great detail, the provisions of Section 89 and the Court.

Justice Raveendran said:

We may summarize the procedure to be adopted by a court under section 89 of the Code:

(b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes.

(c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

(d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

(e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with section 64 of the Act.

(f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes:

1. Lok Adalat;
2. Mediation by a neutral third party facilitator or mediator; and
3. A judicial settlement, where a Judge assists the parties to arrive at a settlement.

²⁸ Law Commission of India

²⁹ Saturday, September 3, 2011 <http://www.legalblog.in/2011/09/alternate-dispute-resolution-under.html#sthash.gxNmX50o.dpuf>

The adoption of the new law, which came into effect in July 2002, received a mixed response across the Indian subcontinent.³⁰ According to Popat this led to the uneven introduction of ADR services in the different States and but also to “the implementation of the ADR system gaining and losing momentum with the change of guard in each High Court.”³¹

New Delhi Mediation Centre

In order to promote mediation Mr. Justice R.C. Lahoti, the then Chief Justice, Supreme Court of India constituted a Mediation and Conciliation Project Committee. A pilot project on mediation was initiated in Delhi in the month of August, 2005. The first batches of senior Additional District Judges were imparted mediation training of 40 hours duration. Judicial mediators began judicial mediation in their chambers starting in August, 2005. Later a permanent mediation centre with all modern facilities was established at the Tis Hazari court complex in October, 2005. Subsequently judicial mediation was started at the Karkardooma Court Complex in December, 2005. The Centre has its own Mediation Rules³² and on a recent visits to the Centre by the author (February 2015) it could be observed that the Centre is very popular. In fact in spite of being given extra space by the Court it is struggling to keep up with the demand for mediation sessions.

Adoption of mediation in India

According to Xavier, while judges in India have been quick to recognize the use of mediation as a helpful mechanism for reducing case backlogs and delays, Indian lawyers have not rushed to embrace mediation.³³ However, in the past few years, the government and the judiciary have been making conscious efforts to increase the use of alternative dispute resolution methods, and have also set up mediation centres across India. Currently, these centres are settling matters mainly pertaining to the laws of property, matrimony and partnerships. However with these schemes receiving more support from the government and the judiciary, there seems to be a bright future for mediation in India. It is hoped that in the near future mediation becomes the preferred choice for disputant parties for all matters which can be resolved by a mutually agreed out of court settlement.³⁴

Greater China and South East Asian Developments

China

³⁰ PRATHAMESH D POPAT, “ADR in India”, Mediate.com, Accessed 3 July 2015, First published by the Association for Conflict Resolution, October 2010

³¹ *ibid*

³² No.171/Rules/DHC , Dated: 11th August, 2005: <http://delhimediationcentre.gov.in/MediationConciliation.htm>

³³ ANIL XAVIER, “Mediation its origin & growth in India” Vol 27 Hamline Journal of Public Law and Policy p5 2009, <http://www.arbitrationindia.com/htm/articles.html>

³⁴ *Ibid*

During the last two to three years, interest in the international modern commercial model of mediation in China, has progressed from its being seen as a thought provoking ADR “topic”, to currently being viewed as a serious process worthy of adoption by Chinese dispute resolution bodies.³⁵

This has led to the creation of new mediation organizations, alliances and an increased emphasis on mediation training throughout China. ³⁶The Chinese government has given increasing support to mediation for example; in 2012 the Securities Association of China formulated the Administrative Measures for the Mediation of Securities Disputes, Rules for the Mediation of Securities Disputes and Administrative Measures for Mediators on a trial basis to deal with disputes in the securities area.

Mediation Alliances

Northern China

In 2015 two major mediation alliances were established separately in the south and north of China. The “Beijing Mediation Alliance” was established in Beijing on 27th April 2015, co-initiated by sixteen organizations as follows: Beijing Arbitration Commission Mediation Centre; the Mediation Centre of the Internet Society of China; the Dispute Settlement Centre of the Intellectual Property Centre of Ministry of Industry and Information Technology; the Dispute Resolution Centre of Securities Association of China; the Mediation Centre of China Law Counsel Centre, the China Futures Association; the Beijing Insurance Association; the Beijing Banking Association, the Beijing People’s Mediation Committee of Medical Disputes the Mediation Committee of Beijing Television Artists Association; the Commercial Mediation Centre of Z-park Technology Entrepreneurs Association; the Mediation Centre of Z-park Copyright Dispute; the Research Centre on International Disputes Resolution of Beijing Foreign Studies University ; the Dispute Beijing Institute of Technology; and Mediation Online. The Alliance also issued a “Declaration of Beijing Mediation Alliance” at the same time.

The aim of the Beijing Mediation Alliance is to enhance communication and cooperation between the current dispute settlement organizations, and promote the quality of mediation. Wang Hong Song was appointed as the director of the Beijing Mediation Alliance, whilst Guo Yuzhong was appointed as the general secretary. The establishment of the Beijing Mediation Alliance is intended to bring together current dispute settlement organizations in order to promote the overall level of mediation service in China and professionalize mediation services. The Alliance hopes to explore methods of cooperation between the mediation organizations, courts and local governments, so that commercial mediation can provide parties with convenient, fast and more economic ways to resolve disputes.

The members of Beijing Mediation Alliance have made a common commitment to:

- publicize and promote the concept of mediation

³⁵ In the author’s experience it has always been relatively easy to fill conferences with young Chinese lawyers and arbitrators curious to learn more about modern mediation (In 2007 with the CCPIT Mediation Centre the author visited 4 cities Beijing, Shanghai, Guangzhou and Chongqing where seminars attracted over 150 participants in each city)

³⁶ An example of such training is the ongoing mediation training programme provided by CEDR Asia Pacific in cooperation with the China Council for the Promotion of International Trade/China Chamber of International Commerce Mediation Centre Beijing, which is being held in CCCPIT offices throughout China.

- promote the concept of a third party mediation service based on neutrality, fairness, and professionalism
- consolidate learning and innovate the rules and procedures of mediation
- communicate with each regarding skills training, assessment, evaluation and feedback to mediators
- actively support and participate in research surrounding the theories and practice of mediation

According to Liu Jing the Beijing Mediation Alliance will play an important role in contacting dispute resolution organizations and building a platform for exchange and cooperation between the dispute resolution service agencies and research organizations in Beijing.³⁷

Southern China

Not to be left behind, in Southern China the “Commercial Mediation Alliance between Guangdong, Hong Kong and Macao Regions” was established at Qianhai in Shenzhen on 7th December 2014 being part of the Industry Cooperation Zone established in the region.

The “Regulations on the Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone in Shenzhen Special Economic Zone” state that it will: “...encourage cooperation of non-governmental mediation organisations between Hong Kong and Shenzhen, in order to offer commercial mediation services in the Qianhai Cooperation Zone”. The “Plans on building a first-class city ruled by law” made by the Shenzhen municipal party committee also explicitly requires the Shenzhen International Court of Arbitration to “collaborate with the major commercial mediation agencies in Guangdong, Hong Kong and Macao regions, and establish cooperation mechanisms and platforms at Qianhai, in order to offer creative mediation services for the enterprises at Qianhai”.

In order to effect the above, the Commercial Mediation Alliance was co-established on the basis of the Mediation Centre of Shenzhen International Court of Arbitration allying with twelve other major commercial mediation agencies in Guangdong, Hong Kong and Macao regions, namely: the Dispute Mediation Centre of Shenzhen Securities and Futures Industry, the Commercial Mediation Committee of Hong Kong Chinese Enterprises Association, the Hong Kong International Arbitration Centre, and the Hong Kong Mediation Council. The Secretariat of the mediation alliance is located at the Shenzhen International Court of Arbitration at Qianhai. The aim of this mediation alliance is to integrate the commercial mediation resources in the Guangdong, Hong Kong and Macao regions, and to enhance business exchange and cooperation between commercial mediation service agencies, in order to promote the quality of commercial mediation services in these regions and their status in the Asia-Pacific region, so that the parties, especially the parties from the Qianhai region, can be provided with professional mediation services.

Shanghai which is one of China’s great commercial cities, is not far behind in its efforts to become a dominant player in dispute resolution. This is part of an overall effort to build Shanghai into a high level service centre in finance, shipping, trade and it is regarded as extremely important that Shanghai also have an international commercial dispute resolution centre in order to effectively and quickly resolve international trade disputes. The Shanghai Commercial Mediation Centre was created in 2011 and strongly supported by the Shanghai

³⁷ LIU JING AND WANG XUEHUA, ANNUAL REVIEW ON INTERNATIONAL TRADE DISPUTE RESOLUTION ,Beijing Arbitration Commission, Lexis Nexis 2014 p204

government; it has promoted mediation and supported training in the region. In 2013 Shanghai Commercial Mediation Centre held an inauguration ceremony for the Professional Intellectual Property Commission and the International Commercial Joint Mediation Court of the Shanghai Free Trade Zone.

Spurred by the opening of the Shanghai Free Trade Zone (FTZ) and the demand for new initiatives, the Shanghai University of Finance and Economics opened a research centre in June 2015 to delve into “alternative dispute resolution” with particular regard to the FTZ. This initiative was followed by the holding of the Mediation, Arbitration and Shanghai Free Trade Zone Dispute Resolution International Symposium in July 2015. Leading overseas ADR experts from the UK, Hong Kong, Singapore and the EU together with local mediation bodies discussed ways of establishing an Asia Pacific Dispute Resolution Centre in Shanghai. This endeavour is being fully supported by the Shanghai Municipal Commission of Commerce and the Shanghai International Arbitration Centre.³⁸

So overall the changes that have taken place in China during the last 5 years demonstrate that although currently lawyers and parties are not yet using stand-alone commercial mediation in great numbers,³⁹ knowledge and expertise of the modern mediation model is gaining pace. So it is submitted that in the not too distant future as in other jurisdictions like Hong Kong and Singapore, commercial disputes in China will be using mediation on a regular basis.

Singapore

In the last two years Singapore has been reviewing its mediation services especially in the international area. Supported by a new Singapore International Commercial Court (SICC) the Singapore government has sponsored the established of three new mediation bodies as discussed below.

Background

The mediation movement in Singapore, drawing on both Asian and modern Western concepts, has been an integral part of the Singapore legal system since the 1990s. In August 1997, with the support of the Judiciary, the Singapore Academy of Law (SAL),⁴⁰ the Ministry of Law and various professional and trade associations, the Singapore Mediation Centre (SMC) was established.

Since the opening of SMC, as at 31 December 2013, 2291 matters have been referred to SMC, and of these, 2125 matters were mediated and 73% of these matters were settled. In monetary terms, about S\$3.2 billion worth of claims have been mediated at SMC. The highest quantum dispute mediated was S\$209 million.

New bodies established in Singapore

³⁸ Mediation, Arbitration and Shanghai Free Trade Zone Dispute Resolution International Symposium Shanghai, 13 July 2015 organized by the Shanghai Municipal Commission of Commerce, British Consulate General Shanghai, Shanghai International Arbitration Centre: Hosted by the Shanghai University of Finance and Economics. (The author Danny McFadden was the invited key note speaker)

³⁹ It should be noted that mediation is very popular in China in the community sphere and in combined Med Arb processes in arbitration cases. Also Chinese courts often use mediation before or during a trial. The “stand alone” Western model of using an independent professional third party is rarely used and in the author’s experience it is usually adopted only where one of the parties is a foreign party.

⁴⁰ The SAL is a statutory body governed by a Senate which is headed by the Chief Justice of Singapore. SAL’s functions are focused on 3 main areas of work: supporting the growth and development of the legal industry; building up the intellectual capital of the legal profession by enhancing legal knowledge; and improving the efficiency of legal practice through information technology. See <http://www.sal.org.sg/default.aspx>

Singapore International Mediation Centre (SIMC)

The last few years have seen a great deal of innovation and hard work put into the creation of new mediation and ADR initiatives in Singapore.

In March 2015 the Singapore International Mediation Centre (“SIMC”) was “established to provide best-of-class international commercial mediation services.”⁴¹ SIMC is led by an international board of directors, and has a panel of international mediators as well as a panel of technical experts and specialists.⁴²

The SIMC will try to provide differentiated mediation products and services including: case management service and a flexible mediation venue of the parties’ choice; deal making service to assist parties in negotiating sustainable deals; post-merger facilitation to maximise cooperation and mutual benefit from mergers; dispute process design service to assist users to develop appropriate processes to manage disputes effectively; online dispute resolution service to resolve disputes more efficiently; e-dossier of profiles of experienced mediators that will include a feedback digest; and designating authority service where the SIMC will on parties’ request, assist on the selection of the most appropriate mediators.⁴³

This initiative is part of a larger picture, with the SIMC working closely with the SMC and Singapore International Arbitration Centre (SIAC), as well as the soon to be formed Singapore International Commercial Court (SICC), to promote international dispute resolution including mediation in the region.⁴⁴

Singapore International Mediation Institute (SIMI)

An independent non-profit entity called the Singapore International Mediation Institute (SIMI) was established in 2015 to act as a professional body for mediation in Singapore.⁴⁵ SIMI is tasked with:

- certifying the competency of mediators
- applying and enforcing standards of professional ethics
- requiring continuing professional development for SIMI accredited mediators

⁴¹ Executive Summary, Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Mediation, p 3, available online: www.mlaw.gov.sg/content/dam/minlaw/corp/News/

⁴² Executive Summary, Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Mediation, p 3, available online: www.mlaw.gov.sg/content/dam/minlaw/corp/News/

⁴³ Executive Summary, Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Mediation, pp 3–4, available online: <http://www.mlaw.gov.sg/content/dam/minlaw/corp/News/>

⁴⁴ Press release of the Ministry of Law, “Government Welcomes Recommendations to Establish Singapore International Commercial Court”, 3 December 2013, www.mlaw.gov.sg/news/press-releases/government-welcomes-recommendation-to-establish-SICC.html.

⁴⁵ Executive Summary, Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial/ www.mlaw.gov.sg/content/dam/minlaw/corp/News/

- delivering impartial information about mediation and making tools available to assist parties to make basic decisions about mediation.⁴⁶

SIAC- SIMC New Arb/Med/Arb Protocol

Refreshing an earlier offering of a hybrid dispute resolution model the SIMC and the Singapore International Arbitration Centre (SIAC) are now jointly offering a new “arbitration/mediation/arbitration” procedure (the SIAC-SIMC Arb/Med/Arb Protocol). Under the SIAC-SIMC Arb/Med/Arb Protocol, disputes are referred to arbitration at the SIAC, but after the respondent files its Response to the Notice of Arbitration, the arbitration will be stayed for a period of eight weeks and referred to mediation with a separate mediator appointed from the SIMC’s panel.

Should the mediation result in a settlement, the mediated settlement can be recorded by the arbitrator in the form of a consent award, enforceable under the New York Convention. The non-justiciable elements of any mediated settlement will need to be recorded in a separate settlement agreement (which would not be enforceable under the New York Convention). If the mediation does not result in settlement, the SIAC arbitration will proceed to the procedural timetable.

The Singapore International Commercial Court (SICC)

Providing background and support to the new mediation initiatives is the new Singapore International Commercial Court (SICC), which will involve an adjudicative court process managed by the Singapore High Court. The SICC will complement mediation at SIMC and arbitration at SIAC – it will offer adjudication by a court rather than a tribunal, will be able to handle non-arbitrable matters, and will also permit parties access to an appeal process.

SICC will have, like SIMC, an international and diverse panel of judges and jurists and will target cross-border commercial disputes that may be subject to foreign law and may not otherwise be dealt with in Singapore. Proposed legislative amendments have been placed before Parliament to ensure that the Constitution, the Supreme Court of Judicature Act, and the Legal Profession Act will be ready to support the establishment of the SICC, for example, by providing for the appointment of international judges and their powers, and putting in place a framework for foreign-qualified lawyers to practise in the SICC for cases which have no substantial connection to Singapore.⁴⁷

Mediation in Hong Kong

⁴⁶ Executive Summary, Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Mediation, p 3, <<http://www.mlaw.gov.sg/content/dam/minlaw/corp/News/>.

⁴⁷ EUNICE CHUA HUI HAN, "SIMC AND SICC - NEW DEVELOPMENTS IN SINGAPORE FOR THE RESOLUTION OF INTERNATIONAL COMMERCIAL DISPUTES" Singapore Law Blog (21 October 2014) (<http://www.singaporelawblog.sg/blog/article/52>)⁴⁷

Beginning in 2006 the Hong Kong government, judiciary and legal bodies started a process of re-examining the ADR environment in Hong Kong. It had not gone unnoticed by some in Hong Kong that Singapore was making great strides in positioning itself as the premier dispute resolution centre in Asia, including being able to offer modern commercial mediation services. Thus began the creation of what today is an increasingly sophisticated mediation infrastructure in Hong Kong.

Background

In 2009 the promotion of mediation was included as part of a raft of new changes to the Civil Justice Reforms (CJR) of the High Court “with a view to ensuring and improving access to justice at a reasonable cost and speed” These reforms resulted in lawyers and their clients in Hong Kong being forced to re-examine the way they conduct litigation⁴⁸ and in particular how mediation may form part of their legal strategy.

The CJR introduced a number of new rules to the existing High Court Rules, aimed at making litigation fairer, more efficient and cost effective. Unlike the UK where, following the Woolf Reforms an entirely new set of rules were adopted, the existing High Court Rules were kept with selective amendments grafted on to them.⁴⁹

The Courts in Hong Kong are currently advising parties that before considering taking legal action they should first consider other ways to resolve their disputes. “Court action should be your last resort.”⁵⁰

The Mediation Practice Direction 31

Practice Direction 31 (PD 31) came into effect on 1 January 2010. PD 31 states that the underlying objective of the Rules of the High Court and the District Court (as amended under the CJR) is to facilitate the settlement of disputes. The Court has a duty as part of active case management to further that objective by encouraging disputing parties to use ADR if the Court considers that it is appropriate and that the court should facilitate its use. The Court also has a duty to help the parties to settle their case. The parties and their legal representatives have the duty of assisting the Court to discharge the duty in question.

One key element is that pursuant to PD31, the Courts in Hong Kong are able to impose an adverse costs order on any party, which unreasonably fails to engage in the mediation process.

So the possible consequences of refusing to mediate now need careful consideration when anyone involved in legal action in Hong Kong considers their options prior to attempting to resolve a dispute. English legal precedent, which has been closely followed by the Hong

⁴⁸ Winston & Strawn LLP, ‘Greater China Law Update’, April 2009, p.12

⁴⁹ The Final Report of the Working Party on Civil Justice Reform published 3 March 2004

⁵⁰ Frequently Asked Questions Civil Justice Reforms Hong Kong Government Information, 2 April 2009

Kong courts,⁵¹ provides clear evidence that litigants who refuse to mediate can suffer greatly if their refusal is seen as unreasonable when costs are being decided.⁵²

Hong Kong Mediation Bill

After much discussion it was decided by lawmakers in Hong Kong to establish a legislative framework for mediation in Hong Kong. This was actually a very big step for Hong Kong to take as in other jurisdictions like the UK and Australia, it has not been considered necessary to enact mediation legislation of this kind.

The Mediation Bill was introduced to the Legislative Council on 30 November 2011. (On 22 June 2012, the Mediation Ordinance was enacted which gave effect to the Mediation Bill). The introduction of this bill was intended to be an indication of the Government's desire to encourage parties to adopt mediation as a favoured alternative dispute resolution avenue.

The Mediation Bill

Meaning of Mediation (s.4)

The meaning of 'mediation' is defined as a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating the dispute, assists the parties to do any or all of the following:

- identify the issues in dispute
- explore and generate options
- communicate with one another, and
- reach agreement regarding the resolution of the whole or part of the dispute.

The definition is consistent with the facilitative model of mediation provided for in PD31, namely, the mediator is there to assist the parties to reach their own resolution of the dispute rather than imposing their own views or decisions on them.

Scope (s.5)

The Bill applies to any mediation conducted under an agreement to mediate if either:

- the mediation is wholly or partly conducted in Hong Kong, or
- the agreement provides that the Bill or the laws of Hong Kong is to apply to the mediation.

The proposed law will not apply to mediations under the Labour Relations, Ombudsman or Arbitration Ordinances, conciliations under the Labour Tribunal and Labour Relations Ordinances or other anti-discrimination ordinances.

Confidentiality (s.8)

⁵¹ In Hong Kong Court of Appeal case *iRiver Hong Kong Limited v Thakral Corporation (HK) Limited*, CACV 252 of 2007 (Judgment dated 08/08/2008) Yeung JA referred to English cases such as *Dunnet v Railtrack* [2002], *Halsey and Burchell v Bullard* [2005], *v Milton Keynes General NHS Trust* [2004].

Provisions have been made to clarify the boundaries of confidentiality in mediation, although the confidentiality of mediation communications is already recognised by the Hong Kong Courts.⁵³

The Mediation Bill confirms that subject to certain exceptions discussed below, all mediation communications are confidential. Accordingly, in the event the parties are unable to reach agreement and litigation or arbitration commences or continues, the parties cannot disclose the mediation communications in the proceedings.

There are some important exceptions:

Whilst the confidentiality provisions in the Mediation Bill are largely consistent with the common law position, the Bill's drafters hoped that "they generally provide greater certainty to the confidential nature of mediation communications and clarify the circumstances in which disclosure may be made." It is possible that these exceptions to the blanket of confidentiality, clauses 8(2) and 8(3) of the Mediation Bill, will override a confidentiality provision in a mediation agreement to the extent the latter is inconsistent with the provisions of the Mediation Bill. It will be to the courts to provide guidance on the interpretation of these clauses in the future if called upon to do so.

Hong Kong Mediation Accreditation Association Limited (HKMAAL)

The establishment of HMAAL in 2013, an umbrella regulatory body for mediation in Hong Kong, was a first for Asia in that no other jurisdiction has tried to bring all mediators under one roof before in this way. Although currently not a statutory body it has been successful persuading most mediators in Hong Kong to join. Unlike the Civil Mediation Council⁵⁴ in the UK which is open to individual mediators HMAAL will only accept mediation organisations as members. HKMAAL has set up a Mediation Accreditation Committee and a Working Group on Accreditation Standards. HKMAAL is essentially a regulatory body. It states its main function is to establish an accreditation system for mediators in Hong Kong with a view to maintaining and unifying the standards of mediators and ensuring the professionalism of mediators in Hong Kong. Currently HKMAAL is working on HKMAAL's accreditation standards and the requisite assessment arrangements.

The aims of the HKMAAL are:

- To set standards for accredited mediators, supervisors, assessors, trainers, coaches and other professionals involved in mediation in Hong Kong, and to accredit them on

⁵³ MENACHEM M. HASOFER, SUSANNE J. HARRIS, 'LEGAL UPDATE-LITIGATION & DISPUTE RESOLUTION, The Mediation Bill: Hong Kong Takes Another Small Step Forward', Hong Kong, 13 December 2011

⁵⁴ The CMC and HKMAAL are similar in that they are both umbrella bodies with similar aims but in practice take different approaches to trying to regulate mediation in their respective jurisdictions.

satisfying the requisite standards.

- To set standards for relevant mediation training courses in Hong Kong, and to approve them on satisfying the requisite standards.⁵⁵
- To promote a culture of best practice and professionalism in mediation in Hong Kong.
- It is now collating a set of accreditation standards and guidelines in consultation with the mediation profession in Hong Kong. 56

As for the accreditation of mediators, there is no statutory provision regulating accreditation of mediators in Hong Kong and mediators have a choice as to whether or not to join the HKMAAL. However it is estimated at least 85% of Hong Kong mediators have become members, as at 17 July 2015 HMAAL had a total of 2,111 current accredited mediators, including 1,833 General Mediators, 229 Family Mediators and 49 Family Mediation Supervisors.

Current status of mediation in Hong Kong

As for the rest of Greater China where the field is only just opening up, it is hard to obtain hard data on the total number of commercial mediation cases per year in Hong Kong. However a recent global survey of General Counsel has found that nearly half of the respondents believe that mediation will grow significantly ahead of litigation in the Asia Pacific region, with Hong Kong uniquely placed at the forefront of that trend.⁵⁷

A KPMG General Counsel Survey ⁵⁸ found that 48% of General Counsels surveyed believe that mediation will grow significantly ahead of litigation and arbitration in the region. They suggest that cultural factors, such as a tradition of family owned and run organisations, and an associated need for privacy, make mediation an especially attractive way of settling disputes.

According to the Hong Kong government there are three main reasons why the use of mediation has grown so enthusiastically in Hong Kong;

- It is part of a growing regional, and indeed global, trend for settling disputes without resorting to litigation
- It fits neatly with Hong Kong's cultural tradition and legal history, being influenced by both British and mainland Chinese ideas
- It is part of a demand circle – international law firms have imported the practice from other jurisdictions which has creating increased local demand.

⁵⁵ The author is a member of the Hong Kong Department of Justice's Steering Committee on Mediation and also a member of the Department of Justice's Accreditation Committee which is working closely with HKMAAL on issues regarding Accreditation in Hong Kong.

⁵⁶ However I am not quite sure where the line between assessing and training is, because if using a group of assessors, you assess candidates by way of using role plays, after they have been trained by others, this may still be considered part of the training process.

⁵⁷ KPMG Global General Counsel Survey 2012 [www.kpmg.com/global]

⁵⁸ KPMG, op.cit.

Apology Legislation to be introduced in Hong Kong

One new initiative which is intended to benefit mediation, apology legislation, is currently being steered towards legislation in Hong Kong.

Background

The Steering Committee on Mediation, chaired by the Secretary for Justice Mr Rimsky Yuen, was set up in late 2012 to further foster the development of mediation in the Hong Kong Special Administrative Region. It comprises members from different sectors including legal professionals, mediation experts, medical practitioners, academics, administrators, social workers and insurers.⁵⁹

The Working Group on Mediation of the [Hong Kong] Department of Justice recommended, amongst other things, that the question whether there should be apology legislation dealing with the making of apologies for the purpose of enhancing settlement deserves fuller consideration by an appropriate body.

The main objective of the proposed apology legislation is to promote and encourage the making of apologies in order to facilitate the amicable settlement of disputes by clarifying the legal consequences of making an apology.

In June 2015 the Steering Committee on Mediation today launched a six-week public consultation to seek views on whether to enact apology legislation in Hong Kong. The Consultation Paper on Enactment of Apology Legislation⁶⁰ invited the public to offer their views on this topic.

The Consultation Paper (Paper)

The Paper noted that:

“It appears that there is a general reluctance in both the public and the private sectors of our community to apologize, particularly when the issue of liability is yet to be decided. Such an attitude is not conducive to the prevention of escalation of disputes or the amicable settlement thereof. Indeed, anxiety and anger on the part of the persons injured or their families might in time inflate where there is neither sign of regret nor expression of sorrow coming from the persons causing injury by the lapse of time. Total apathy about the mishap from the party causing the same ,remains a stumbling block rendering it unlikely for the parties to be willing to attempt to resolve their disputes amicably, e.g. by mediation.”

⁵⁹ The Author of this article Danny McFadden is a current sitting Member of the Steering Committee.

⁶⁰ This Consultation Paper published online at <http://www.doj.gov.hk/eng/public/apology.html> also available on website www.doj.gov.hk/eng/public/apology.html

The Paper went on to say that

*“This phenomenon of reluctance of the parties causing injury to apologize or express regret or sympathy to the injured persons is not confined to private individuals and commercial entities. Public officials and civil servants acting in their official capacities are similarly concerned with the legal implications of an apology or expression of regret. The observation that government officials may not apologize lightly, for fear that it would incur legal liability was made by the former Ombudsman Mr Alan Lai Nin.”*⁶¹

The Paper looked at the possible legal implications of an apology made by a party to a dispute in Hong Kong. It also raised two areas that may potentially be affected by the making of an apology by a party to a dispute, namely, the reckoning of statutory limitation period and insurance contracts, and the need to make express provisions in the apology legislation to deal with them.

After looking at overseas experience and legislation, holding seminars with experts and mediator professionals the Steering Committee made seven recommendations.

The Paper’s Recommendations

1. That apology legislation be enacted in Hong Kong.
2. The apology legislation is to apply to civil and other forms of non-criminal proceedings including disciplinary proceedings.
3. The apology legislation is to cover full apologies.
4. The apology legislation is to apply to the Government.
5. The apology legislation expressly precludes an admission of a claim by way of an apology from constituting an acknowledgment of a right of action for the purposes of the Hong Kong Limitation Ordinance.
6. The apology legislation expressly provides that an apology shall not affect any insurance coverage that is, or would be, available to the person making the apology.
7. The apology legislation is to take the form of a stand-alone legislation.

At the time of this article going to print the final results of the public consultation are unlikely to be published. However it is reasonably certain that the apology legislation will be enacted and will cover full apologies. It will be of great interest to all mediation professionals and the government to see if having apology legislation in place facilitates the amicable settlement of disputes in Hong Kong.

Conclusion

As commented earlier in this article mediation is not a static field and is continuing to develop worldwide. It is worth noting however that Asia is currently the place where most new activity is happening. In particular China, Hong Kong and Singapore where new

⁶¹ Ibid

mediation bodies and organisations are being created, mediation legislation is being introduced and training in mediation both for lawyers and new mediators is fast gaining pace. Hong Kong and Singapore for example, are showing that they are not simply copying foreign ADR development blueprints. Initiatives such as those mentioned above demonstrate that whilst acknowledging the Western roots of commercial mediation Asian countries have not stopped there. New ideas are being tested and practices designed to suit local conditions as much as possible. China whilst still somewhat behind in the adoption of modern mediation practice is already beginning to embrace new mediation ideas whilst ensuring that mediation has “Chinese Characteristics” (中国特色). This exciting wave of innovation and enthusiasm for mediation coming out of Asia can only in the long run be of enormous benefit to mediation everywhere.