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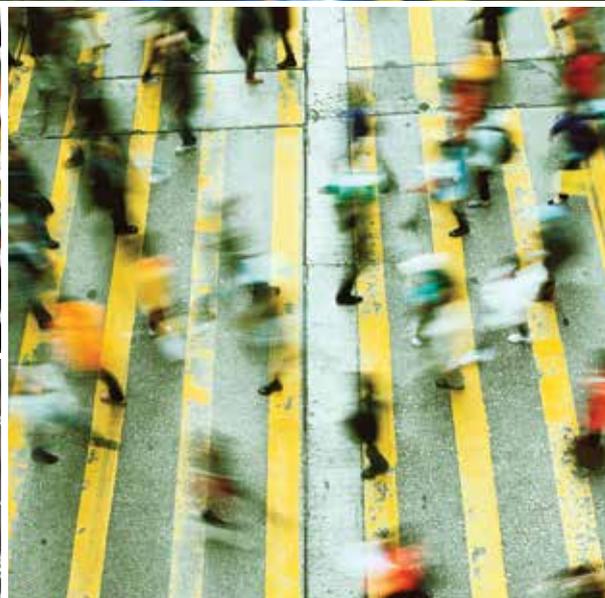
# ADR IN ASIA PACIFIC

SPOTLIGHT ON MEDIATION IN HONG KONG



## IN THIS ISSUE

- 01 Welcome
- 02 Common ADR processes: An overview
- 05 The why, what, when and how of mediating in Hong Kong
- 15 Client perspectives:  
Mediation in Hong Kong five years on
- 22 The next step:  
An iPad app to extend the debate
- 24 Our ADR practice
- 25 Key contacts in our global ADR team
- 28 Authors
- 29 Publications and accolades



ISSUE 1



# WELCOME

Welcome to issue 1 of our *ADR in Asia Pacific* guide.

This publication provides you with essential practical guidance on various Alternative Dispute Resolution (ADR) processes. We report on regional developments and industry trends, drawing on the expertise of our award-winning ADR practice.

Building on other thought leadership initiatives<sup>1</sup>, we have canvassed the views of around 100 of our leading international clients from a range of sectors on their use of ADR, in particular mediation, in Hong Kong. Our research marks the fifth anniversary of *Practice Direction 31*<sup>2</sup>, which introduced a 'mediation step' to Hong Kong litigation. Our findings, through direct interviews and voting via a bespoke Herbert Smith Freehills iPad app, are at pages 15 and 21 of this guide. We wish to thank the organisations and individuals who supported our research for being generous with their time and their insights. Due to its confidential nature, there is a paucity of user data on mediation, and we hope that our outputs better inform mediation users in Hong Kong and across Asia Pacific. We also wish to help bridge the 'knowledge gap' we have identified across certain parts of the user community.

In this issue, we also highlight the most commonly encountered ADR processes and their use in Asia Pacific (page 2). We also include a practical guide to mediation at page 5. This focuses on procedures in Hong Kong, but contains an abundance of practical advice on mediator selection, mediation preparation, when to mediate and what to expect from the mediation day and your role in it. This is of relevance regardless of the country in which you are considering mediation.

Looking ahead to issue 2, we focus on ADR developments in Singapore, particularly the role of ArbMed, a hybrid ADR process combining arbitration with mediation.

We are also very excited to have taken a leading role in the upcoming Global Pound Conference (GPC) series which will canvass thousands of stakeholders worldwide over an extensive 18-month period, on their use of ADR and other dispute resolution processes (see [www.globalpoundconference.org](http://www.globalpoundconference.org) for more details).

Please do not hesitate to contact us if you have any questions about ADR – we welcome the chance to work with you to resolve or, better still, avoid, your commercial disputes.



**FROM TOP**  
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# COMMON ADR PROCESSES: AN OVERVIEW

Many ADR options exist. Below is a brief summary of the most frequently used processes and their applications across Asia and Australia.

## 1 Mediation (non-binding)

Structured settlement discussions facilitated by a neutral third party (the mediator) with no decision-making power. Overwhelmingly the most frequently used ADR process, including across Asia and Australia. The mediator spends at least a part of the mediation engaged in 'shuttle diplomacy' between the parties, who are usually located in separate rooms. The hope is that progress can be made where direct negotiation has become deadlocked. The style of mediators varies from pure 'facilitators' (who assist the parties in their negotiations) to 'evaluators' (who encourage settlement by expressing views on the merits and likely outcomes).

If the parties decide to settle their dispute at the mediation, the terms will be captured in a binding settlement agreement. In the event of a failure to comply with its terms, the successful party will typically need to enforce the agreement as a breach of contract.

Mediation may be undertaken at any time by consent of the parties (either *ad hoc* or by virtue of an underlying contract), and in some jurisdictions it is required during litigation. Mediation is recognised across Asia and in Australia. It is often deployed, and in some Australian jurisdictions almost required, as a court-annexed process. In some jurisdictions, for example Japan, the People's Republic of China (PRC) and Singapore, mediation is referred to as 'conciliation' in some contexts. Conciliation, as a distinct process (eg, in Hong Kong labour disputes) is typically a precursor to mediation, and is less structured in its procedure.

## 2 Early neutral evaluation (ENE)<sup>1</sup> (non-binding)

Neutral third party provides a non-binding evaluation of the dispute, usually at an early stage in the dispute. There are no particular procedural requirements for ENE beyond those agreed between the parties. For example, some ENEs involve only written submissions to the evaluator, while others can resemble a mini-trial, including brief cross-examination of key witnesses. In contrast to mediation, the aim of ENE is to provide a without prejudice evaluation of the merits of the case.

The idea behind ENE is that a considered opinion of a mutually respected neutral such as a retired judge or senior legal practitioner may assist the parties in narrowing a disputed point of contractual construction, for example, and assist the parties in forming a realistic appraisal of their case. However, it is non-binding and can serve to polarise positions in negotiations if one party considers it is 'right' as a result. ENE is more prevalent in the West, particularly the USA. It is becoming more common in Australia in certain types of disputes such as revenue disputes. Whilst very rarely used in practice, some Asian jurisdictions support ENE. For example, the Hong Kong Law Society provides a standard outline for agreements for ENE, CEDR Asia Pacific, the Singapore Mediation Centre and the Singaporean courts all offer ENE services, and the Philippine courts operate a scheme whereby the pre-trial judge acts as an evaluator to facilitate settlement.

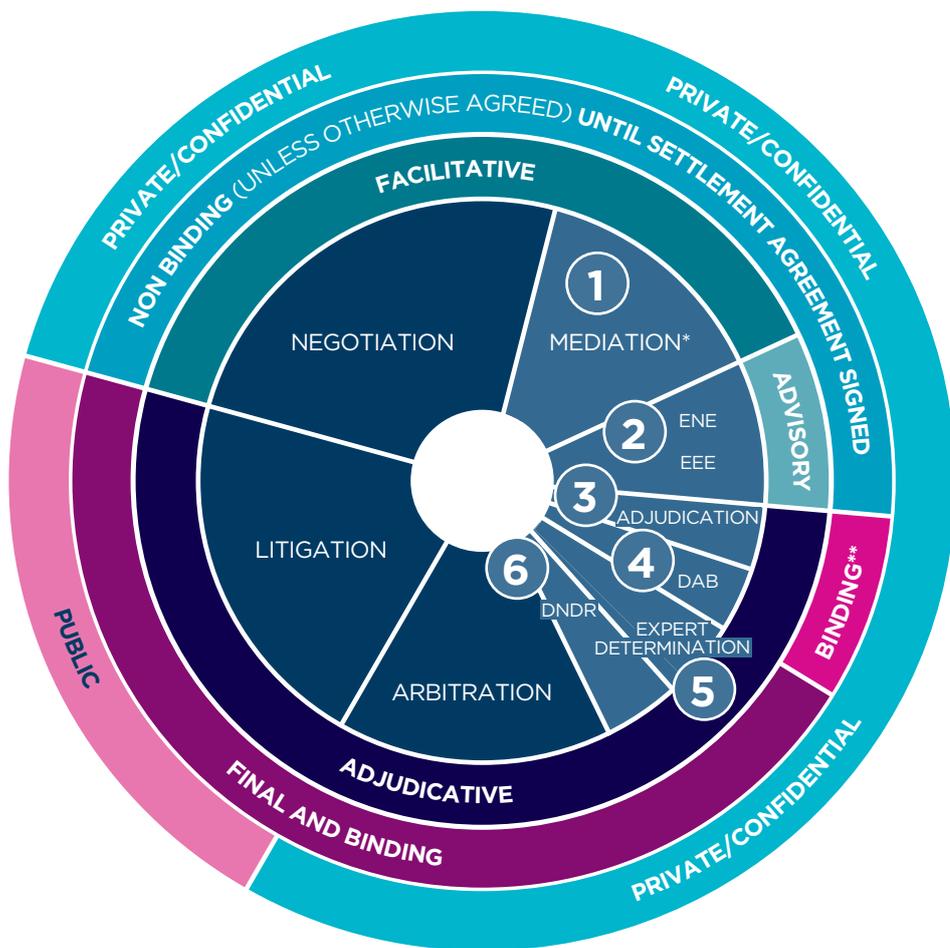
## 3 Adjudication (binding)

Adjudication consists of an abbreviated court-like procedure under the direction of an adjudicator, where rules of evidence may be applied flexibly or dispensed with altogether. The process is quick (often only a few weeks) and the decision of the adjudicator is binding pending any final determination of the dispute by way of litigation or arbitration (which rarely happens in practice). It is generally used in the construction industry and on large infrastructure projects as it provides certainty and minimises disruption (including cashflow problems) to a long term project. Adjudication is provided for in Hong Kong<sup>2</sup>, as well as in Singapore<sup>3</sup>, Malaysia<sup>4</sup> and Australia<sup>5</sup>. The NEC3 model construction contract, which will be used by the Hong Kong government for all its projects put out for tender in 2015/16, includes a standard adjudication clause.

## 4 Dispute Review Boards/Dispute Adjudication Boards (DRB/DAB) (non-binding recommendation (DRB) or binding (DAB))

A project-specific dispute resolution process, often comprising a panel of three persons (one appointed by each party with a neutral chairperson). Most often used in large international construction and engineering contracts, DABs provide a binding decision pending subsequent determination by a court or arbitral tribunal, should the losing party refuse to comply with the decision. In this sense they are similar to adjudicators' decisions. They are intended to keep a long term project on track by providing quick resolution to disputes encountered during the project. In Asia, DABs are sometimes seen in international standard form contracts in the construction and infrastructure industries.

**THE DISPUTE RESOLUTION WHEEL**



**NOTES**

**7** MedArb/ArbMed (see page 4) are hybrid processes combining facilitative non-binding aspects and evaluative binding aspects.

\* Sometimes referred to as conciliation.

\*\* Unless/until overturned by arbitration or litigation.

DABs were deployed successfully in relation to disputes arising out of the HK\$20 billion construction of Chep Lap Kok International Airport in Hong Kong as well as the US\$3.4 billion Ertan Hydroelectric Project in the PRC. The Hong Kong government includes DRB provisions in its default contract for construction contracts, and the Hong Kong Architectural Services Department has a full set of rules for DRBs. DABs are mandated for all projects financed by the Asian Development Bank and the FIDIC suite of contracts (if unamended). Enforcement of DAB decisions is not always straightforward in the context of arbitration as recent case law from the Singaporean courts has demonstrated.<sup>6</sup> DRBs and DABs have been used to resolve disputes arising out of Australian contracts (most often construction contracts). However, given the significant costs involved, they may be uneconomical on all but the largest projects.

**5 Expert determination (binding)**

A neutral third party with expertise in the subject matter of the dispute is appointed pursuant to an agreement between the parties to make a final and binding decision. It can be highly effective where the parties anticipate a specific type of technical dispute arising, in which the expertise of the decision-maker will be critical. Examples include completion accounts disputes, valuation disputes and technical engineering matters. It is quicker/cheaper than litigation or arbitration, and is confidential and flexible as to procedure (this will be determined by the expert in the absence of agreement between the parties). However, there is usually no right of appeal.<sup>7</sup> To enforce the expert's decision in the event of a failure to comply, the successful party would need to sue the uncooperative counterparty in the courts for breach of contract (being the agreement to be

bound by the expert's decision). The absence of a straightforward system for international enforcement of experts' decisions weakens their effectiveness in international disputes (when compared, in particular, to arbitration).

Expert determination is used occasionally in some Asian jurisdictions (for example, in Hong Kong on technical and valuation matters, and in Singapore on intellectual property, construction and energy disputes). It is not recognised in other jurisdictions (for example, in the PRC, Japan, Thailand and Indonesia, usually because it is regarded as an abrogation of the jurisdiction of the courts). It is sometimes deployed across the region pursuant to international standard form contracts partnered with a governing law that recognises expert determination. Expert determination is regularly provided for in Australian commercial contracts where disputes of a technical or accounting nature might arise.

## 6 Domain Name Dispute Resolution (DNDR)

This is a widely used process to adjudicate disputes between trademark owners and registrants of domain names by a specialist panel. A domain name corresponds to a routing address on the internet (eg, '.com', '.hk', etc). The Internet Corporation for Assigned Names and Numbers (ICANN) monitors and administers the use of domain names by including specialised dispute resolution procedures in its domain name registration agreements. The Asian Domain Name Dispute Resolution Centre (ADNDRC) – a cooperative effort operated by the China International Economic and Trade Arbitration Commission (CIETAC), Hong Kong International Arbitration Centre (HKIAC), Kuala Lumpur Regional Centre for Arbitration (KLRC), and Korean Internet Address Dispute Resolution Committee (KIDRC) – provides dispute resolution services, most notably under the ICANN Uniform Domain Name Dispute Resolution Policy (UDRP).

DNDR is fast: the panel appointed is usually required to render a decision within 14 days. The parties technically have the option to challenge the decision in a court of mutual jurisdiction, and execution of the panel's decision is suspended for 10 days to offer the parties the chance to appeal. In practice, very few decisions are appealed.

Under the Domain Name Dispute Resolution Policy used by the Hong Kong Internet Registration Corporation (HKIRC), which is the sole authority on the '.hk' domain name, a decision by the panel is automatically treated as an arbitral award. It is therefore subject to the provisions of the Arbitration Ordinance for the purposes of appeal and enforcement.

In Australia, domain name disputes regarding '.au' domain names are administered by .au Domain Administration Ltd (auDA) in accordance with the .au Dispute Resolution Policy (auDRP). The auDRP is adapted from the UDRP administered by ICANN. The auDRP provides for independent arbitration of domain name disputes which are dealt with by independent auDRP providers approved by auDA.

## 7 MedArb / ArbMed (hybrid)

Hybrid processes using mediation either before (MedArb) or during (ArbMed) arbitration proceedings, usually with the same person or people acting as mediator(s) and arbitrator(s). If the mediation results in a settlement, the parties may have their agreement recorded in the form of an arbitral award and the arbitration proceedings (where on foot) are terminated. If the mediation fails, the arbitration proceedings are commenced (MedArb) or continued (ArbMed), and a final and binding arbitral award is handed down by the arbitral tribunal and is binding on the parties.

In some Asian jurisdictions, particularly those based on civil law traditions such as the PRC<sup>8</sup> and Japan<sup>9</sup>, tribunals have long offered to help the parties settle (or "conciliate") their dispute as a matter of course at some point during the arbitration. In these countries, mediation is sometimes referred to as "conciliation", but it refers to broadly the same process. When an arbitral tribunal raises the possibility of mediation, particularly towards the end of the arbitral proceedings, the risk of losing the arbitration can be helpful in focusing the parties' minds on a reasonable settlement.

Whilst ArbMed is provided for in the laws and procedures of certain other Asian jurisdictions (notably Hong Kong<sup>10</sup> and Singapore<sup>11</sup>), the practice of combining arbitration with mediation is often viewed with skepticism, and is very rarely used. Parties, particularly those with a common law background, appear reluctant to disclose their true assessment of the dispute (especially any potential weaknesses on their side) to a mediator, given the possibility that the same individual will be required to determine their dispute in arbitration proceedings if the mediation fails. This has resulted in certain institutions enacting rules providing that the mediator(s) and arbitrator(s) should be different individual(s) (see endnotes 9 and 11).

The position is largely the same in Australia, with MedArb / ArbMed not commonly used; often due to the perception that an arbitrator may lose independence or impartiality as a result of also mediating the parties' dispute.



## 2. WHAT DOES MEDIATION INVOLVE?

Provided the parties agree (for example through an enforceable dispute resolution clause providing for mediation<sup>3</sup> or, typically, *ad hoc* as a dispute develops), mediation can be attempted in any way the parties decide. However, they usually follow the following pattern:

- Appointment of the mediator and agreement of the terms of the mediation (see pages 10 and 11);
- Initial private discussions with the mediator and getting ready for the mediation, including preparation of position papers and documents (see page 12);
- Mediation day starting with a plenary session with all parties present and typically making opening statements; break out or caucus sessions with the mediator shuttling between the parties in private rooms; joint closing session to tie up any settlement, or if there has been no settlement, to conclude the mediation and typically encourage post-mediation dialogue (see pages 12 and 13).

In the context of litigation, parties are required to follow the procedures set out in PD 31, which was enacted on 1 January 2010.

Whilst falling short of expressly requiring parties to litigation in Hong Kong to mediate, PD 31 has been interpreted in practice as introducing a requirement to attempt mediation. In keeping with prior practice (and the approach in England and Wales), parties who fail to engage in mediation without reasonable justification face potential adverse cost consequences.<sup>4</sup> See below for more information.

### PROCEDURAL REQUIREMENTS FOR MEDIATION UNDER PD 31

Pleadings filed

**Legally represented parties must file a Mediation Certificate<sup>5</sup> with the Timetabling Questionnaire:**

- Stating whether they have attempted mediation and if not, whether they are willing to do so
- If not willing to mediate, must give reasons
- Party's solicitor must state and client must confirm that advice on mediation has been given
- In Timetabling Questionnaire parties must confirm whether they have attempted settlement by ADR, or are willing to do so and request a stay of proceedings to attempt settlement

As soon as practicable

**If wishing to attempt mediation party must serve a Mediation Notice<sup>6</sup> on the other party and file it at court:**

- Recording elements of dispute to be referred to mediation
- Proposals regarding procedural rules (if desired), mediator appointment, venue, time frames (incl. stay), costs
- Signed by party/solicitor
- Mediation Notice may be taken into account on the question of costs

Within 14 days (or such period as the parties agree/court directs)



## COST SANCTIONS UNDER PD 31

If a party unreasonably refuses to mediate, it may face an adverse costs order even if it is ultimately successful in the litigation. This would have the effect of reversing the usual 'costs follow the event' rule, whereby the losing party is ordered to pay the winning party's costs. PD 31 prescribes specific circumstances where the court will not make an adverse cost order, namely:

**The party has engaged in mediation to the minimum level of participation agreed to by the parties or as directed by the court prior to the mediation**

'Minimum participation' was interpreted by the court in *Resource Development Ltd v Swanbridge Ltd*<sup>9</sup> as at least one substantive session of a duration determined by the mediator. Anecdotally, the minimum duration is regarded as being around four hours.

**The party has a reasonable explanation for not engaging in mediation**

The principles which will determine whether a party has unreasonably refused to participate, and what constitutes a satisfactory level of participation, are still in development. English case law is helpful, but there have also been a number of Hong Kong decisions on the issue:

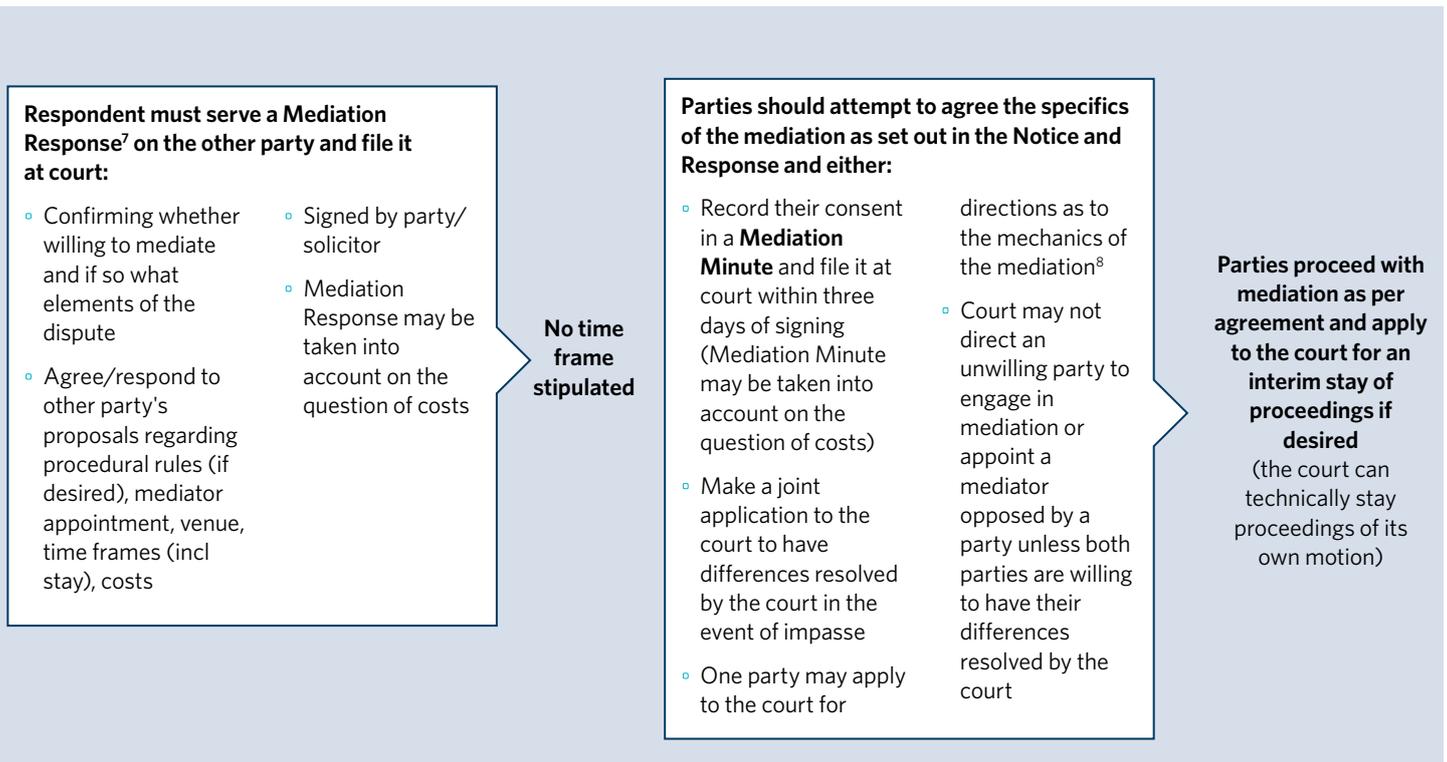
- In *Golden Eagle International (Group) Limited v GR Investment Holdings*<sup>10</sup> (decided before the CJR and PD 31), the court held that a party's reasonable belief

that he had a strong case did not justify a refusal to mediate, nor did a significant difference in claims or settlement offers between the parties. Conversely, in *Incorporated Owners of Shatin New Town v Yeung Kui*<sup>11</sup> the Court of Appeal found that the winning party had reasonably refused to mediate because the case ultimately involved a decision on a point of law. This ground for refusal is, however, interpreted restrictively and is distinguished from disputes that are not 'easily mediated', which the courts do not consider to be a reasonable ground for refusal to mediate.

- In *Ansar Mohammad v Global Legend Transportation Ltd*<sup>12</sup>, the High Court reduced the costs awarded to the defendant by 20% for its refusal to participate in mediation without a reasonable explanation and for conducting the proceedings in a manner inconsistent

Immediately following the enactment of PD 31, there were several instances of the court, usually at interlocutory hearings, putting pressure on the parties which helped to trigger mediation. With the bedding down of the procedures, less judicial intervention has been observed as the parties (usually guided by their legal advisors) serve and file Mediation Certificates as a matter of course.

We set out below the procedural requirements stipulated in PD 31. These arise after pleadings are filed.



with the underlying objectives of the CJR. Interestingly, this action was commenced before the enactment of PD 31; the court commented that, had the mediation regime been in effect at the time the defendant refused to mediate, it would have been at risk of being deprived of all its costs.

- Two recent cases have seen the courts making adverse cost orders against a party for refusals to mediate without reasonable explanation (*Kwan Wing Leung v Fung Chi Leung* (September 2014) and *Wu Yim Kwong Kindwind v Manhood Development Limited* (July 2015)). The latter judgment offers a salutary reminder to legal advisors of their obligation to advise clients about their duty to comply with the CJR's underlying objectives and PD 31. It also highlights that settlement negotiation is different to ADR and cannot be taken as a replacement for mediation. In the case, even

though the plaintiff did not take the initiative in commencing settlement negotiations, this could not be taken as an indication to the defendant that the plaintiff was not willing to settle. Furthermore, this did not mean that any attempt to mediate would be a waste of time. A cost order was made against the defendant based on his persistent unreasonable refusal in the face of multiple offers to mediate by the plaintiff.

- Whilst a refusal to mediate is an important consideration for a court when deciding costs, it was determined in *Good Try Investments v Easily Development Ltd*<sup>13</sup> that it is not the sole element for the court to consider but must be viewed within the context of the rest of the circumstances.

Immediately following the enactment of PD 31, the court demonstrated a willingness to make adverse costs orders against parties which

"unreasonably" refused to mediate. There were instances of the court ordering a recalcitrant or uncooperative party to bear the costs of the action at a higher level than would otherwise be the case (eg, on an 'indemnity' or 'common fund' basis instead of the normal 'party and party' basis). Judicial intervention and adverse costs orders have declined in recent years, probably because parties are avoiding the risk by attempting mediation and engaging sufficiently in the process.

Faced with an opposing party unwilling to mediate, a party proposing mediation should ensure it has given thought to appropriate costs protection mechanisms and has pressed the unwilling party to articulate its reasons for refusal. If no, or inadequate, reasons are provided, these will likely be relevant to costs submissions at the conclusion of the case.



### 3. WHEN SHOULD I MEDIATE?

Mediating at the wrong time in the dispute cycle is often doomed to fail. External factors may exceptionally require mediation at a particular point in time. Aside from this, you must assess when in the dispute cycle it may be most advantageous to mediate, taking on board case-specific factors.

#### EXTERNAL FACTORS

##### Court rules: PD 31

- Requires early and serious consideration of ADR. Failure to respond to a mediation proposal, or a refusal to mediate, can have adverse costs consequences, as set out above. Although in practice litigating parties tend to mediate after pleadings and before discovery, they may agree to mediate at a later stage in the litigation, and often do.

##### Agreed dispute resolution process

- The parties may have contractually agreed to undertake mediation if a dispute arises. This could be an escalation clause (providing for several levels of dispute resolution – for example a meeting of senior management, followed by mediation, followed by litigation or arbitration should the prior stages fail to resolve the dispute). These are not common in Hong Kong and a recent case has questioned the enforceability of a mediation clause as a pre-condition to arbitration.<sup>14</sup> Notwithstanding this, it is advisable to check the underlying contract(s) for such provisions and assess their enforceability (in common law jurisdictions, generally speaking, an escalation clause must be sufficiently certain in respect of time frames and procedure to constitute more than a mere agreement to negotiate).<sup>15</sup>
- More than 100 organisations in Hong Kong have signed a "mediate first" pledge, which expresses their intent to mediate their dispute before considering litigation. The mediate first pledge is open for signature to all organisations and is actively promoted by the Department of Justice.

##### Court order

- Exceptionally, once proceedings are under way, the court may stay proceedings of its own initiative for the parties to engage in ADR. However, in *Resource Development v Swanbridge Ltd*<sup>16</sup>, the court held that the proceedings should only be stayed if such a stay would have any practical effect. In practice, the Hong Kong courts tend to leave the parties to proceed with mediation in their own time and will not (unless requested to do so) order a stay.

##### Limitation period

- Check whether the limitation period for lodging a claim at court/with an arbitral tribunal is soon to expire. Agreeing to mediate in Hong Kong does not automatically postpone the underlying limitation period.<sup>17</sup> If you wish to mediate in such circumstances, you should either (a) seek agreement from the other side to suspend the limitation period (a "tolling agreement") pending mediation; or (b) issue a protective claim and then seek a stay from the court for mediation to be conducted.

## CASE SPECIFIC FACTORS

### Extent of knowledge and understanding about the case

Is there a minimum level of clarity on the:

- Issues in dispute...
- Quantum...
- Relative merits of the case...

...to enable the parties to be clear what dispute(s) they are trying to resolve and to enable a meaningful risk assessment to be carried out on whether to settle or fight the case? Bear in mind:

- In Hong Kong, there is no formal requirement to exchange information/documents pre-action so a very early mediation may be forged on too little information before the issues have adequately crystallised.
- If mediation is not attempted after pleadings, will proceeding with discovery/disclosure make a subsequent mediation more likely to be successful? Will either party really find a 'smoking gun'? Would any increased chance of success really be justified by the likely costs of the discovery/disclosure exercise?
- Are there specific categories of documents that might greatly assist a mediation? If so, can the parties agree on staged discovery (Hong Kong's new Practice Direction PDSL1.2 on E-discovery specifically provides for this)?
- Will factual/expert witnesses have truly important information to add which could alter the assessment and so point towards a later mediation?
- The risks inherent in the trial, including the performance of witnesses, naturally mean that the parties will undertake an on-going re-appraisal of the case as the trial proceeds. In long trials there may be opportunities to resolve the matter through negotiation, including mediation.
- Whilst the vast majority of the costs of the action will have been incurred by the end of trial, even then there may be significant commercial or reputational factors that make a negotiated settlement preferable to a judgment of the court being handed down.
- In arbitration, similar considerations apply but there are likely to be lower discovery/disclosure costs. In terms of reputational concerns approaching a hearing/arbitral award, given that arbitration is a private process, parties may be less incentivised to settle/mediate given they are not at risk of 'washing their dirty linen in public'. That said, in several jurisdictions, notably the PRC, mediation is often attempted at some stage during the arbitral hearing, usually initiated by the arbitrators rather than the parties.

### Costs

- What are the likely overall costs if the matter proceeds to litigation/arbitration?
  - What will be the most expensive stages, how much will they cost and when will they occur both for cash flow purposes and ultimate liability?
  - What is the potential overall costs liability of an unsuccessful defendant subject to an adverse costs order?
  - If successful, what proportion of costs would be irrecoverable in any event?
- Mediator fees vary but in large commercial disputes mediation costs are usually insignificant compared to the parties' other costs and the sums in dispute.

### Will mediation succeed?

- Critical to the question of success at mediation are the attitudes of decision-makers:
  - How entrenched are they in their positions?
  - Are they reconciled to a compromised outcome?
  - Are there linguistic, personal, emotional or cultural issues (for example 'face' concerns) which affect their ability to participate effectively?
  - Are they motivated by a desire for public vindication that may only be achievable through a court judgment?
- It is worth noting that 'success' may not necessarily mean a final and binding settlement. Any of the following may be worthwhile outcomes:
  - Clarifying the factual and legal issues in dispute, their importance and the merits of the parties' positions
  - Narrowing the issues by eliminating/resolving peripheral ones
  - Exploring the underlying interests and motives of the parties
  - Focusing the attention of key decision makers on the issues in dispute and ensuring an early assessment of the associated risks

#### 4. HOW DO I ARRANGE A MEDIATION?

If, after consideration of all relevant factors, a party proposes mediation and that proposal is accepted, the parties must then agree on specific arrangements for the mediation. In Hong Kong, as in most jurisdictions, this can be done either:

##### Through an ADR/mediation service provider, which monitors the performance of the mediator

Numerous organisations offer supporting services such as procedural rules, guidelines, codes of conduct, complaints mechanisms, and support with mediator appointments. Among these organisations, which differ in their services offered, the most relevant include:

- The Law Society of Hong Kong (LSHK)
- Hong Kong Mediation Council (HKMC), a division of the HKIAC
- The Hong Kong Mediation Centre (HKMC)
- Centre for Effective Dispute Resolution Asia Pacific (CEDR)
- The Mediation Information Office (MIO) created by the Hong Kong judiciary
- Joint Mediation Helpline Office (JMHO), founded in a cooperative effort between eight institutions

##### Through the parties agreeing to appoint and instruct an independent mediator

A significant majority of commercial mediations are now arranged on an *ad hoc* basis, typically by external lawyers, without the assistance of an ADR provider. Usually, the documents governing the mediation and procedure will be provided by the appointed mediator.

##### What is the mediator's role?

Choosing the right mediator is usually crucially important. The mediator controls the process and encourages open and honest communication between the parties. The mediator's primary role is to facilitate 'without prejudice' communication between the parties, seek common ground and encourage them to find agreement if possible. Mediators do not determine any matters in dispute between the parties (although they can and do express views when requested to do so).

##### Mediator selection

Given the critical role played by the mediator in the mediation process, the selection of the mediator is a topic that attracts significant attention. The selection process is put into even sharper focus due to the relatively small number of experienced mediators active in Hong Kong.

##### Accreditation

##### When is mediation not appropriate?

As in most jurisdictions, mediators practising in Hong Kong require no formal training or qualifications. However, in practice mediators almost always undertake some formal training (typically called "accreditation"). Mediators are usually from a professional background, typically the law. They often practise part time as mediators whilst pursuing other careers.

Specialised organisations offer mediator training and services, thereby providing an indication of the mediator's skills and competences. The Hong Kong Mediation Accreditation Association Limited (HKMAAL) aims in the long term to become the sole accreditation body in Hong Kong. The Association was founded by the Hong Kong Bar Association, the HKIAC, the HKMC and the LSHK in 2012. At the moment, various institutions continue to offer independent mediator accreditation.

Although there are now over 2,000 accredited mediators in Hong Kong, there remain relatively few mediators with the skill, experience and (perhaps most importantly) authority to manage mediations involving difficult issues and commercially sophisticated parties. Inexperienced mediators can also struggle when dealing with individual litigants who are often uncooperative and/or highly emotional. In some more valuable or complex cases, the parties have brought in mediators from outside Hong Kong - usually London QCs who specialise in mediation. This is not an option in cases involving parties who do not speak English, or where the amount in dispute does not justify the costs involved, but the authority and experience that these overseas mediators bring can be invaluable. In any case, it is imperative that Hong Kong continues to develop its own pool of seasoned, authoritative mediators. Experience suggests that some of the most effective local mediators are Hong Kong barristers, and there are already some bilingual barristers who are much sought-after as mediators.

When selecting a mediator:

- **Make contact** - There is no issue in principle in speaking with mediators privately about a potential mediation appointment to gain an understanding of their approach to the process and their personal style. Consider asking for referees to obtain insights into the strengths and weaknesses of the mediator.
- **Mediation experience** - Ask specifically about the mediator's practical experience. You will want to ensure that the mediator has sufficient experience of acting as a mediator. The mediator's process skills - listening, questioning, negotiating, management - will all be highly important to the parties in finding a resolution.

- **Subject matter knowledge** - Identify whether specialist knowledge is necessary for the mediator to participate credibly in the process. The more stringent the requirements, the smaller the pool of mediators (if any exist) who will have the expertise. In practice, the mediator needs enough relevant industry or sector knowledge to 'speak the same language' as the parties and command their respect, but usually does not need to be an absolute expert in the relevant field.
- **Language skills** - It may be necessary or beneficial to select a bilingual mediator (for example one who can converse in Chinese should the parties concerned not speak the same language to a sufficient standard).
- **Mediator style** - This is best viewed as a continuum, with pure facilitators at one end and pure evaluators at the other. A **facilitative mediator** assists parties to structure their negotiation and will be reluctant either to express a view on the strength of a party's case or propose a possible settlement. An **evaluator** is likely to express his or her views on both facts and law, and will be more inclined to make proposals for settlement. There is a risk that an evaluator may entrench one or both parties' positions by expressing views on certain issues, which could alienate a party whose position is strongly maintained but inconsistent with the mediator's evaluation. Amongst Hong Kong corporate users, there appears to be a slight preference for evaluative mediators, as parties still look to the mediator to express an authoritative view. However, ADR providers, perhaps influenced by international norms, anecdotally prefer facilitative mediators.

##### Court directed mediator selection

Whilst it is rare for the parties to apply to the court to appoint the mediator, *Upplan Co Ltd v Li Ho Ming*<sup>18</sup> provides useful guidance on the issues the court will consider when such an application is made. The parties agreed to mediate but were unable to agree on the choice of mediator and jointly applied to the court for direction pursuant to PD 31. The Court of First Instance cited the issues and sums in dispute, the mediator's knowledge and experience of both the subject matter and mediation, and the mediator's fees and availability as relevant factors to be taken into account by them when appointing a mediator.

##### Mediation agreement

When parties agree to mediate, they will sign with the mediator a mediation agreement to record their consent to do so and the terms on which the mediation will go forward. Since mediations have a limited statutory framework in Hong Kong, the mediation agreement is the contract between the parties and provides the procedural framework and rules for the



mediation. Not only does the mediation agreement provide clarity for the parties but mediators will also require it, as it will set out their obligations and include terms to protect them. Typically in Hong Kong, the parties agree to be bound by the mediator's standard terms. Mediation agreements are usually similar in form, irrespective of the dispute being mediated and whether the mediation is being conducted through a commercial mediation provider or on an *ad hoc* basis. Sample mediation agreements are provided by the Law Society of Hong Kong, the JMHO and other ADR providers. A model mediation agreement is also included in the Hong Kong Mediation Code.

As a guide, mediation agreements should:

- Address the scope of the dispute being referred to mediation (it is common to refer to the claim number if court or arbitration proceedings have commenced)
- Identify the parties clearly. If you specifically want a particular person from the other side to attend the mediation, try to have this included
- Define the role, responsibilities and powers of the mediator
- Set out the date, time and place of the mediation that has been agreed; record any time limits. It is good practice to set out express provisions for the exchange of written case summaries (including their maximum length) and documents so that the parties and the mediator have sufficient time to prepare
- State the intention of the parties to cooperate in good faith with the mediator and each other
- State that representatives from each party have full authority to settle the dispute and bind the party to any settlement agreement at the mediation
- State that the mediator will not have any liability to the parties in connection with the mediation (usually subject to an exception for wilful misconduct or bad faith)
- State that no settlement is agreed or legally binding until it is agreed in writing by way of a settlement agreement. This provision reduces the likelihood of satellite litigation as to whether a settlement was reached and if so on what terms
- Contain a provision that each party and the mediator may terminate the mediation
- Make provision for costs. The parties usually agree to split the mediation costs equally (including the mediator's fees and any venue costs). It is important to distinguish between the immediate payment of costs (how the mediator's fees are to be funded) and ultimate responsibility for such costs in the dispute. It is possible to agree that costs for the mediation should be treated as being 'in the cause' (ie, the ultimate loser in the subsequent litigation or arbitration pays the winner's costs)
- Elect a governing law and jurisdiction clause typically in favour of Hong Kong law and the Hong Kong courts
- Ensure that the agreement contains an express agreement by all parties that the mediation is conducted on a 'without prejudice' basis and that they will keep confidential everything said in the mediation and every written document produced for the purposes of the mediation, but not the fact that the mediation has taken place. It is usual to carve out disclosure required by law. While the confidentiality of the process is guaranteed under Hong Kong law (see right) absent express agreement, clear drafting is always preferable and will be insisted upon by any competent mediator<sup>19</sup>



## MEDIATION CONFIDENTIALITY IN HONG KONG

The *Mediation Ordinance* (Cap 620) (MO) was enacted on 1 January 2013 and applies (prospectively and retrospectively) to mediations conducted in Hong Kong (or where Hong Kong law is expressed to apply). It stipulates that 'all mediation communications' are regarded as confidential and inadmissible as evidence in any proceedings unless specifically allowed.

'Mediation communications' mean communications for the purpose of or in the course of mediation but excludes the agreement to mediate and the settlement agreement (section 2).

A mediation communication may be admitted in legal proceedings only with the court's leave (section 9). The court must take into account a range of matters listed in section 10(2) (generally, whether section 8(2) factors apply or if it is in the public interest to disclose it). In *Lincoln Air Conditioning & Engineering Co Ltd and another v Chan Ping Fai Ricky and others*<sup>20</sup>, the court struck out parts of a defence and evidence contained in an affidavit on the basis that they contained information exchanged during a mediation and were protected by the confidentiality provisions in section 9.

It is important to note that under section 8(2) certain documents may be disclosed without leave of the court where:

- The parties and mediator give consent
- The information is already available publicly (except an unlawful disclosure)
- The information is subject to discovery/disclosure
- The information is subject to similar procedures in which parties are required to disclose documents in their possession, custody or power

## 5. WHAT HAPPENS BEFORE, DURING AND AFTER THE MEDIATION?

Once the mediator is selected and a mediation agreement is in place, the parties must prepare for the mediation, exchange position papers/documents, and attend the mediation. In complex cases the preparation and time spent can be substantial - equivalent to a major interlocutory hearing (especially if an overseas mediator is involved).

The process is entirely flexible but the following format is often adopted. If the dispute falls within the scope of PD 31, the pre-mediation process is slightly different as a Mediation Certificate, Mediation Notice, Mediation Response, and Mediation Minute should be produced by the parties.

The flow chart below sets out some of the principal aspects to consider at each stage.

### BEFORE THE MEDIATION

- Parties agree to mediate, settle the terms of the mediation and appoint a mediator
- Undertake a thorough risk assessment, building on the factors considered when deciding to mediate (see pages 8 and 9) to determine current and future costs, reputational and other risks. In Hong Kong, a mediator will likely ask for cost estimates to trial so prepare and have these ready for the mediation and make them available to the mediator promptly
- Determine what information or documents the parties will need to reach a solution and ensure they are available
- Consider whether further advice/information on liability, quantum, commercial, or technical issues may assist to unlock issues
- Assemble best team (individual(s) from the business involved in the dispute with authority to settle, internal and external legal advisors as appropriate, possibly a technical expert, depending on the nature of the dispute)
- Define a negotiation strategy - the level of initial offers, anticipated counter offers, range of potential settlements, commercial bargaining positions, non-financial elements (apologies, public statements, confidentiality undertakings, future joint ventures)
- Prepare the business representatives and decision-makers for their roles at the mediation - usually the more extensive the role they take the better. Discussions at the mediation can be confrontational (and emotional) and they need to be prepared for this, as well as for the almost inevitable 'downtime' involved during the mediation whilst the mediator holds private caucuses with the other party
- Distil your primary position into a short position paper. Its purpose is to explain your case to your opponent and the mediator in a short, accessible way - it is not a legal pleading and should be short and commercially focused, aimed at convincing your opponent why they should settle and the risks they face if the dispute continues. These are exchanged and sent to the mediator, usually with an agreed core document bundle 7-14 days before the mediation
- The mediator usually speaks to each party by phone to understand the main issues in dispute. Use this as an opportunity to get to know the mediator, build rapport and influence his/her approach and style. Confidential matters, outside of your position paper, can be addressed with the mediator now or in a separate confidential position paper addressed to the mediator only

### DURING THE MEDIATION

#### OPENING SESSION (ALL PARTICIPANTS PRESENT)

- Ensure the right people attend: individuals on behalf of each party with authority to settle and possibly senior management, typically in house and external lawyers, occasionally experts. The mediation represents a key opportunity to settle the dispute and encourage real engagement by the business individuals concerned. Insurers may not attend but should be available at the end of the phone if necessary, to approve any settlement offer
- Parties typically sign the mediation agreement (usually on the mediator's standard terms) at the start of the mediation
- Mediator establishes ground rules for the day, reaffirming confidentiality
- Business principal ideally (or lawyer) from each party makes an opening statement (perhaps 10-15 minutes long) presenting their best points from their perspective. This will typically reflect the position paper but consider visual aids which may achieve more than words. Tone and content must be appropriate and communicate the key messages clearly and effectively. It is usual also for the party to make clear that it has a desire to settle. Inflammatory language is unhelpful; choose language carefully and use internationally understood terms if there is likely to be confusion (for example if not all attendees are fluent in the language spoken - consider translators if necessary and/or bilingual mediators). It is necessary to prepare and rehearse the opening statement. It will be necessary to listen to the opponent attentively and without interruption

## AFTER THE MEDIATION (IF NO SETTLEMENT REACHED)

### PRIVATE MEETINGS

- Mediator conducts a series of private meetings with each party and their representatives to learn more about their expectations and strengths/weaknesses of their case
- Share with the mediator. It will be confidential unless you authorise him to tell the other side. He also has confidential information from the other side, and may be able to see an overlap or commonality
- Parties must define issues clearly and ensure the mediator understands their position and what they wish conveyed to the other side
- "Shuttle diplomacy" by the mediator aims to broker a commercial settlement. Bear with it. There may appear to be long gaps, but the mediator is working hard, even if he is letting both parties cool off for a while. The less you see the mediator, the more he is working on the other side

### FURTHER JOINT MEETINGS

- The mediator may wish to take the business principals aside to help them engage in direct commercial negotiations. This is often the 'crunch time' of the mediation. Individuals should take a few moments to collect their thoughts, take advice, and reflect on the progress they have made before such sessions
- Occasionally, the mediator may wish to speak to other representatives from both sides (lawyers, experts)

### SETTLEMENT

- Drawing up of settlement agreement by lawyers (or parties and mediator if no lawyers). It is advisable to prepare a draft settlement agreement advance and bring it to the mediation for amendment on the day should settlement result
- Settlement becomes binding on signing of agreement

- The mediator may contact the parties to explore whether settlement may be achieved in the weeks following the mediation
- Business representatives should consider maintaining direct contact with their counterparts: often progress made at the mediation and lines of communication (re)established provide scope for further negotiation to reach settlement in the subsequent weeks/months. This was shaped at the mediation but could not be concluded on the day
- Parties may pursue (or continue to pursue) their rights through litigation or arbitration
- Anything said or documents prepared for the mediation cannot be disclosed in later litigation/ arbitration (unless required by law)



## THE HISTORICAL CONTEXT

Mediation in Hong Kong originated in the mid-1980s, where it was trialled and later standardised in certain public sector construction contracts. In 1994, the Hong Kong Mediation Council (HKMC), a division of the Hong Kong International Arbitration Centre (HKIAC), was established to promote mediation in relation to commercial, construction, family and general disputes. By 2009, 21 mediation service providers existed in Hong Kong. The scope to engage in private mediation was already broad, yet the pool of practising mediators and the number of mediations undertaken remained very limited.

Within the court system, various court-annexed pilot schemes evolved (sometimes using the term "conciliation" rather than "mediation", though the process was the same). But it was not until 2010 that mediation took centre stage. On 1 January 2010, PD 31 to the CJR came into force. PD 31 applies to almost all<sup>21</sup> civil proceedings in the Court of First Instance and the District Court. It was interpreted in practice as introducing a requirement to attempt mediation in the context of litigation. A Mediation Code of Conduct was also established in 2010, to provide practical guidance on mediation.

In the arbitration context, in line with the spirit of the CJR, the *Arbitration Ordinance* (Cap 609) (AO) came into force on 1 June 2011, specifically providing for a hybrid procedure whereby an arbitrator sitting in Hong Kong may mediate a dispute provided the parties consent in writing. Take-up has been very limited, however. See page 4 for information on the use of mediation in the context of arbitration.

Several notable schemes have evolved in recent years to assist consumers in Hong Kong to mediate disputes. Individuals with claims up to HK\$500,000 against financial institutions can mediate (and subsequently arbitrate) disputes through the Financial Dispute Resolution Centre (FDRC); customers in dispute with their telecommunications service providers can mediate through the Customer Complaint



Settlement Scheme (CCSS); and building management cases receive assistance with mediation through the Building Management Mediation Co-ordinator's Office (BMMCO), an adjunct to the Lands Tribunal. Despite encouraging settlement rates, these schemes are little-used in practice.<sup>22</sup>

In an effort to provide a formal legal framework for conducting mediation in Hong Kong, the *Mediation Ordinance* (Cap 620) (MO) was enacted in January 2013.

This does not apply to mediations conducted pursuant to the AO, or to certain conciliation and mediation procedures referred to in various labour laws<sup>23</sup>. The MO addresses the important issues of confidentiality and legal privilege in mediation. It was hoped that this would allay any perceived concerns within the user community that information disclosed at mediation could be used in subsequent litigious proceedings should the mediation be unsuccessful.

# CLIENT PERSPECTIVES: MEDIATION IN HONG KONG FIVE YEARS ON

Each year in Hong Kong, over 15,000 civil claims are lodged in the Court of First Instance and over 20,000 in the District Court.<sup>1</sup> The overwhelming majority of these will settle before the court delivers its judgment.

Yet many settlements occur very late in the proceedings, often during the trial itself, after the parties have sacrificed significant time and cost and damaged on-going business relationships. Five years ago, in a bid to encourage parties to settle at an earlier stage, Hong Kong's Chief Justice enacted [Practice Direction 31](#) (PD 31). This required most litigants to attempt mediation or face costs sanctions for unreasonably refusing to do so.

On its face, PD 31 makes sense. But has it worked? There is no easy answer to this question: the confidential nature of mediation means there is a paucity of reliable data on its usage and, critically, what works and what doesn't. As the pre-eminent dispute resolution firm in Asia, we felt it was necessary to assess the impact of PD 31 in Hong Kong and the use of ADR more generally across Asia. We sought the views of 30 clients from a broad range of sectors including banking, insurance, manufacturing, investment funds, accountancy, leisure, and energy on their use of mediation and other processes in Hong Kong over the past five years. We summarise here our findings from our interviews and shed light on how multinationals are using ADR in Hong Kong and beyond.

We thank all of our clients for supporting our research. We hope our findings allow organisations to benchmark themselves against peers and competitors and to review their own procedures and the steps they may take to resolve their disputes more cost-effectively.

"As sophisticated users, mediation has always been part of our armoury. As such, the roll out in Hong Kong has not necessarily been vital to us, but it's been helpful in engaging our counterparties"

## KEY FINDINGS

Our research on how organisations approach mediation in Hong Kong shows that five years on:

- 1) Mediation is firmly cemented within the litigation landscape in Hong Kong but it is clear that more is required from the various stakeholders to ensure its optimum use in settling disputes
- 2) Users (and lawyers) have interpreted Hong Kong law and procedure as a requirement to attempt mediation in the context of litigation
- 3) One of the key obstacles remains one or both parties' unfamiliarity with mediation
- 4) In keeping with our research in 2007, actual use of mediation in Hong Kong lags behind positive attitudes to it
- 5) Parties that embrace the mediation process can achieve tactical advantages even if the mediation does not achieve a settlement
- 6) Organisations hold the key to mediation success – by entering into it with the right mind-set they can be empowered to resolve their own dispute
- 7) External lawyers have a critical role to play – in educating their clients (and themselves) on how best to deploy mediation to maximise chances of settlement
- 8) In house lawyers should attempt to make ADR a strategic imperative in their interactions with their business units and senior management
- 9) Renewed judicial activism in particular to stamp out hollow attempts to mediate is required (but this will require piercing the veil of privilege which rests with the parties themselves)
- 10) Mediation usually requires only a small commitment in time, minimal compared to the time and resources required to litigate/arbitrate a dispute to conclusion

## ARE PARTIES MEDIATING MORE OFTEN?

"We thought we had to mediate or the court would be critical"

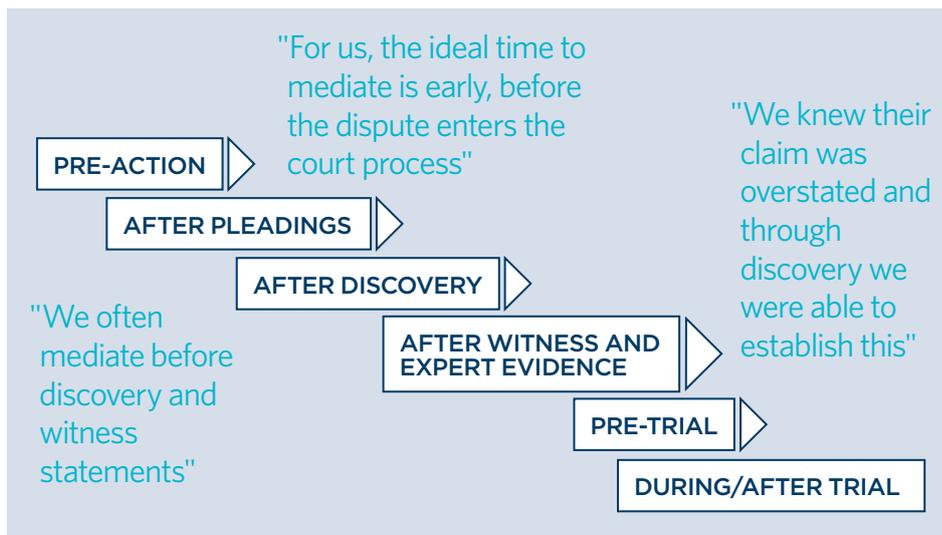
"Although we do not think mediation will be helpful every time, we do it anyway because it is compulsory"

Based on our findings, PD 31 has changed the way litigating parties and their advisors think about mediation in Hong Kong. Despite falling short of imposing an absolute requirement to mediate, our research shows that it has been interpreted as just that: a necessary stage of the litigation cycle. In fact, this change has occurred even though the threat of costs sanctions for an unreasonable refusal to mediate remains largely unexplored. The few relevant cases typically arose soon after its enactment when stakeholders – parties, their advisors, and the judiciary – were testing the water. Whilst PD 31 captured the spirit of pre-existing law (pre-PD 31, parties could be punished on costs for unreasonably refusing to mediate), what PD 31 has done effectively is to force the mediation debate. Through the Timetabling Questionnaire and Mediation Certificate, parties, their lawyers, and the court must engage with each other about mediation after pleadings are filed. All those surveyed have met the requirement to state whether they are prepared to attempt mediation by indicating a willingness to do so. None have been so bold as to refuse.

### The procedure

"Mediating under the court rules is helpful as it takes away the stigma that it's a sign of weakness"

Our clients explained that their approach is to serve and file Mediation Certificates, after which the parties – through their external lawyers – discuss mediation and progress it outside of the court system. As such, a limited number of Mediation Notices, Responses and Minutes have been filed at court. Court statistics show that, each year, around 2,800 Mediation Certificates are filed in the Court of First Instance, versus around 1,000 Mediation Notices and Responses.<sup>2</sup> Our clients' responses are consistent with this trend: the filing of Mediation Certificates triggers a mediation dialogue necessitating limited involvement of the court. We reported in November 2011 in [Hong Kong Civil Justice Reform \(taking stock 30 months into the new regime\)](#)<sup>3</sup> that, 18 months into PD 31, some judges and masters were informing parties at an early stage that they would look unfavourably on a failure to mediate and this in turn tended to lead quickly



to mediation. We are seeing less judicial activism now, as parties approach mediation as a *de facto* mandatory stage in the proceedings.

### The frequency

"We will mediate every case"

Despite PD 31, the message we heard time and again throughout our interviews was that clients are not actually mediating very much. This goes for almost all sectors (insurers, as professional users of the courts, were perhaps not surprisingly an exception to this general observation). Clients in all other sectors had mediated between one and 10 times in the past five years. Some (notably those surveyed in the leisure and energy industries) hadn't mediated at all in the context of litigation. Instead, they tended to escalate disputes internally to senior representatives, before arbitrating, but importantly, had not attempted mediation before or during arbitration.

### EXTERNAL LAWYERS IMPORTANT

"Lawyers play a key role in preparing the parties and choosing the mediator. The lawyers also advise on the merits and therefore set the boundaries for the mediation"

The vast majority of those surveyed said they deferred to their external lawyers on the question of mediation. This places considerable responsibility on the legal advisor as a stakeholder to mediation success. We identified in our market leading research in 2007 on [how blue chips are using ADR](#)<sup>4</sup> that there was a clear correlation between the attitude of an organisation towards ADR and its experience with external counsel. In Hong Kong, due to mediation's relative infancy, this axis is brought into even sharper focus. Organisations are

relying on their external lawyers to advise them on the requirement to consider mediation, when and how to deploy it, and who to appoint as mediator (see Mediator Selection on page 18-19). If any criticism can be levelled at PD 31 it is this: by crystallising mediation within the litigation procedural landscape, it risks becoming an overly legalistic device. In our view:

- To deploy mediation most successfully, the parties, not their lawyers, should feel empowered, knowledgeable and confident about using it. First and foremost it is a form of structured negotiation (something clients rightly class within their skill set), not an adjunct to an adversarial process.
- Mediation is a flexible process which can be undertaken at any time. Anchoring it to litigation may render it too procedurally regulated.
- This places a significant burden on lawyers to understand mediation and use it correctly. Several of the clients canvassed noted a disparity between the experience of international law firms who practice in multiple jurisdictions including those where mediation is more common, and local law firms for whom mediation remains a relatively new concept. Ensuring that legal advisors are well versed in mediation is essential.

### WHEN ARE PARTIES MEDIATING IN THE DISPUTE CYCLE?

The vast majority of those surveyed said that they approached this question on a case by case basis, guided by their external lawyers. Those surveyed noted that PD 31 encourages parties to address mediation early in the proceedings (after pleadings are served) and the majority went on to mediate before discovery. Around a third had mediated later in the dispute cycle, noting that mediating after discovery (usually one of the most labour and cost intensive stages in the litigation) was sometimes helpful, as it forced the

counterparty to "suffer some pain". Discovery may also, they said, help clarify the quantum of the claim such that mediation can be attempted with less disparity between the parties' respective positions. In a couple of cases, clients had waited until after witness statements had been served, but none had mediated mid or post-trial/arbitral hearing, recognising that commercial settlement was most likely to resolve disputes at that stage.

Whilst there is an obvious cost incentive to mediate early, clients must balance this against the likely chances of the mediation succeeding. A mediation attempted too early, with inadequate information, is less likely to succeed. It was noted by clients that, in appropriate cases, for example where there had been considerable pre-action correspondence and exchange of information, a dispute may be ripe for mediation pre-action. Moreover, some clients thought that if there was an on-going business relationship to salvage, an early mediation may be ideal. There are in reality very few extraneous reasons why it may be necessary to issue proceedings before mediation (for example the imminent expiry of a limitation period, or the need for interim relief, such as an injunction). Ultimately, the question of when to mediate may be best addressed by focussing on what information is truly necessary to enable the relevant decision-makers to act with reasonable prudence and how that information can be provided most efficiently (either through or in parallel with the litigation process).

#### WHAT ABOUT ESCALATION CLAUSES?

"We don't include escalation clauses requiring parties to attempt ADR before litigation as it is almost always too early to be successful in commercial disputes"

"We don't usually have escalation clauses as standard but wouldn't always strike them out"

The use (or not) of dispute resolution clauses in underlying contracts is relevant to the question of when to mediate. Some organisations - increasingly US corporates and some European companies - include dispute escalation clauses as standard in their contracts. Such clauses either require or permit parties to undertake ADR, usually mediation, before or during litigation or arbitration. None of the clients we surveyed, however, deployed this approach in Hong Kong. Whilst a very small number said they may use bespoke escalation clauses in very limited circumstances, the vast majority



did not want to anchor themselves to such prescribed dispute resolution procedures at the contracting stage. In the context of litigation in Hong Kong, it was recognised that PD 31 had effectively introduced a mediation stage and there was therefore a *de facto* contractual election if a contract provided for disputes to be resolved through litigation before the Hong Kong courts applying Hong Kong law. The use of mediation within arbitration proceedings is supported in both law and practice. However, the clients we surveyed had not tended to use mediation alongside arbitration, nor provided for this in their contracts.

#### HOW MANY SETTLE?

"Mediation as a forum to gain intelligence is very useful. You learn what is really grating the other side and that may have nothing to do with legality. It may, for example, come down to an apology"

"For the 50% that fail, we still find it useful to understand more about the other side's case. We also get to see direct interaction between the counterparty and their lawyers"

"PD 31 has enhanced the chances of parties settling"

Almost all those surveyed put their settlement rate at around 50% - defined as settlement at the mediation or shortly afterwards. This accords broadly with market trends for commercial disputes. When asked whether those mediations that failed were nevertheless worthwhile, the resounding response from almost all clients was 'yes'. Some failed mediations were instrumental in initiating a later settlement process. Even where they did not put the dispute on track for settlement, they enabled clients to learn more about the respective parties' cases, and/or served to narrow the issues in dispute. A good number valued the opportunity to engage with the other side directly, rather than through inter-solicitor correspondence with their lawyers or across a courtroom. The discipline of preparing for a mediation thoroughly, including engaging senior management on both sides, often provided a much needed commercial and legal case assessment. But for the mediation, this would not have taken place until much later in the litigation.

The above comments help to redefine 'success' in the context of mediation: a perceptive litigant will treat a mediation as meeting its objectives ('successful') where they use the process to gain an insight into their opponent's position even if it does not immediately settle the dispute.



### TICK THIS BOX, JUMP THROUGH THAT HOOP...

"It is easy for the counterparty to run down the clock and say they genuinely mediated"

"This 'box-ticking' attitude is prevalent. In many of these cases our adversaries nominate junior mediators due to their relatively minor fees"

"Although we have no intention of providing a number, we mediate as we don't want a costs order against us. Such mediations only last a few hours. Usually the other side comes up with a ridiculous figure and we walk away"

Nearly all clients with experience of mediation in Hong Kong said that they had experienced it being used tactically. No one had encountered an outright refusal to mediate from a counterparty but some had experienced resistance and delay. Many explained that they had experienced mediations where a party had attended with no real intention to settle, or sent only their lawyers or a low ranking individual simply to show that they had "turned up". Those surveyed said that it was not difficult under PD 31 to establish a minimum level of engagement which made recouping wasted costs or alleging an unreasonable refusal to mediate practically impossible. In England and Wales (on whose system Hong Kong's mediation procedure is based), case law has evolved to the effect that an unreasonable delay in mediating, or an

unreasonable stance at mediation, may attract costs sanctions. The courts in Hong Kong have not developed the law in this way yet - and indeed the Mediation Ordinance (see page 11), increases the confidentiality of the process. Only in exceptional cases will parties agree to waive confidentiality. The opportunity for the parties to examine the parties' conduct at mediation is extremely limited and it is unlikely that case law will develop in this way in Hong Kong.

The judiciary are alive to the problem, however. Soon after PD 31 was enacted, the judiciary expressed concern about parties not mediating in good faith. In a Law Society Circular published in October 2010<sup>5</sup>, solicitors were reminded that they had an obligation to make a genuine effort in mediation pursuant to the Solicitor's Guide to Professional Conduct and that (any conduct that brings the profession into disrepute... may lead to disciplinary consequences...). Yet, by mid-2011 the head of the Joint Mediation Helpline Office commented publically that (mediation isn't being taken seriously), suggesting the problem had not been rectified. He cited, as one of the main problems, that many litigants and their lawyers are paying lip service to the process purely to avoid the adverse costs and other consequences of not mediating. As our research shows, this approach continues to pervade some areas of the market. Greater understanding about mediation and its benefits is required to bridge the knowledge gap and ensure parties and their lawyers engage meaningfully in mediation.

### IF AT FIRST YOU DON'T SUCCEED...

"We'll mediate every time its proposed and I don't expect to mediate successfully the first time"

"It's a case of burning resource until there is sufficient pressure to sit down and mediate again"

Several clients, particularly those with a larger disputes docket, were pragmatic about undertaking multiple mediations in the context of a single dispute. An unsuccessful, early mediation did not put them off. These organisations tended to approach the definition of 'settlement' broadly (see above, how many settle?), and remain open to the benefits of mediation throughout the lifecycle of the dispute, rather than viewing it as a one-off event.

On the other hand, some clients surveyed explained that they felt they were on safer ground refusing to mediate a second time in light of an earlier failed mediation. This in turn made multiple mediations within the context of Hong Kong litigation less likely, as it was difficult to get buy-in from all parties to re-attempt mediation after the first attempt had failed.

### WHAT MEDIATION HAS BEEN UNDERTAKEN OUTSIDE OF PD 31?

It is clear from our research that PD 31 represents the catalyst for mediating disputes in Hong Kong. Despite the plethora of mediation services (some of them free) available in Hong Kong, very few clients had mediated outside of litigation. None had used sector-specific schemes such as the FDRC (for low value claims against financial institutions). Nor did clients tend to use the services of ADR providers, instead relying on their external lawyers to arrange mediations and appoint mediators. Greater awareness of the ADR services available in Hong Kong is needed to increase the use of the various services and schemes available.

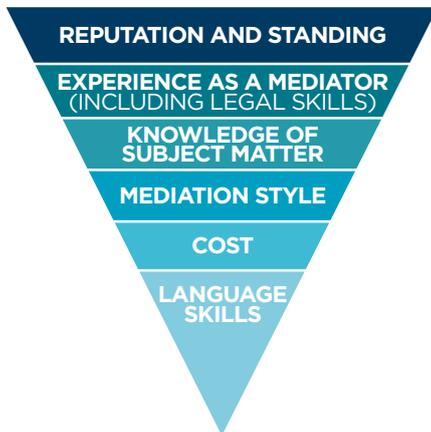
As referred to above, mediation in the context of arbitration was virtually unheard of amongst those surveyed.

### MEDIATOR SELECTION

"It's very important for us to suggest in good faith mediators who command gravitas"

"Having a mediator who was creative - in terms of their approach on the day and by way of follow-up - got us to the other side of the bridge"

Those surveyed said that choosing the right mediator was key. This is consistent with other research. Responses highlighted the following as relevant factors in decreasing order of priority:



Parties defer in large part to their lawyers to come up with a list of mediators based on their own experience. No-one surveyed had asked the court to assist the parties in appointing a mediator. Clients and their lawyers are generally not deploying the services of the multiple Hong Kong mediation providers, preferring to appoint mediators and arrange mediations themselves. In contrast, a client with experience of commercial mediation in Singapore commented that the Singapore Mediation Centre was usually appointed to deal with appointment and arrangements for local mediations.

The process for mediator selection in Hong Kong again requires external lawyers to be sufficiently experienced in mediation and knowledgeable about individual mediators. It was noted that a tendency to recommend cheap mediators had been observed on occasion, fuelling the fear that mediation is undertaken without serious intent to settle, to tick the box and move on with the litigation.

For those surveyed, reputation and standing was time and again the most important factor in mediator selection. Organisations want a mediator who will command the respect of their counterparty, which invariably means having sufficient legal, sector and negotiating skills. In Hong Kong, such standing tends to equate to Senior Counsel (SCs) with experience both as mediators and (ideally) the underlying subject matter of the dispute. None of those surveyed had flown mediators in from elsewhere, suggesting that the pool of quality mediators in Hong Kong is growing. Clients noted, however, that there were still only very few high quality mediators with dual language (English and Chinese). Language skills were observed as vital in some disputes, particularly those involving a counterparty from the PRC.

#### Evaluative or facilitative?

"Evaluation adds much more value as often times, the claimant won't accept our position. An evaluative mediator tests the counterparty's legal advice"

"We look for a commercially sensitive outcome and having a facilitative mediator helped"

"Good mediators are nimble and can adjust their style to the parties and the time in the day. A very good mediator will build rapport with both sides and only express a view much later to overcome stalemate"

"On the documents, we are often in a good position, it's the end of the relationship and therefore we want an evaluative mediator"

Almost all those surveyed said that legal ability was a must but how the mediator deployed legal skill depended on the dispute. We observed a slight preference for evaluative mediators amongst those surveyed. At first blush this was surprising, given the more Eastern consensus-driven approach to resolving conflict. However, the litigious approach to dispute resolution in Hong Kong, partnered with a mis-understanding in some ranks of the role of a third party neutral with no decision-making power, may explain the desire for evaluators.

#### ASSEMBLING THE CAST

"It's important to have the right decision-makers there. In fact, in a pre-action mediation, lawyers weren't involved and that was helpful. Sometimes lawyers protect their client so much that it makes commercial settlement unviable"

In almost all cases the attendees at mediations were:

- Member from the business unit (typically with authority to settle)
- In-house lawyer
- External lawyer

Variations on this included:

- Insurers available by phone but not in person
- Additional bilingual lawyer attending to assist with translation and interpretation
- No external lawyer present - a small number of the larger organisations relied instead on their experienced in-house counsel for pre-action mediations undertaken

The message throughout was that experts engaged for the litigation did not attend mediations unless they were critical to the subject matter (exceptional examples included insolvency and insurance disputes). Nor were barristers involved as mediation advocates. In many cases, clients took centre stage - delivering the opening statement in the plenary discussions and playing a central role in negotiations as the mediation developed. This kept the mediation anchored to commercial as opposed to legal goals, and the mediations were invariably more successful as a result. Clients noted that they required careful preparation and assistance from external lawyers, however. Mediation advocacy is a distinct skill which, if mastered, can transform a mediation for the parties and their lawyers. Herbert Smith Freehills offers mediation advocacy training to the majority of its disputes lawyers as well as bespoke coaching to clients.

#### ENGAGING SENIOR MANAGEMENT

Our survey indicates that benefit is often gained in involving senior management in mediation. Several clients commented that mediation under PD 31 presented a good opportunity to put senior management at the heart of the process and expose them (in short form) to the issues and arguments in dispute as well as, critically, to the other side. Those surveyed with relevant experience commented that it was important to manage expectations and forewarn senior management about the 'downtime' often encountered as the mediator shuttles between the parties in private caucus.

#### CONFIDENTIALITY CONCERNS

"Given my background as a lawyer there is always a concern. If you don't have to say it, don't"

"There is a niggling concern but mediators are usually very clear about confidentiality"

"There are contagion issues but there is nothing we can do about these risks. At the end of the day you have to hope that the parties observe the confidentiality provisions in the mediation agreement"

Mediation is a confidential process and generally nothing said, nor information shared at the mediation, should make its way into the public domain should the mediation fail. Moreover, nothing said to a mediator privately should be disclosed to the other side without express consent. Despite enshrining mediation confidentiality in PD 31<sup>6</sup>, the legislature felt there was a need to cement the principle more firmly within the legal landscape and the Government enacted the *Mediation Ordinance* (MO) in January 2013.

One theory for the slower take up of mediation in Hong Kong is that some parties remain uncertain about how to deploy and protect statements and documents in mediation. Examples include a party attempting to ambush the other at a mediation with previously undisclosed material, a reluctance to produce formal position statements despite their 'without prejudice' status, and an unwillingness to have private discussions with the mediator outside the mediation.

We asked clients whether they had encountered any issues in relation to mediation confidentiality. Some acknowledged it was a concern, and something that members of their business units in particular have questioned. Generally, however, they had faith in the rule of law and were reassured by the confidentiality provisions in the mediation agreement (typically echoed by the mediator orally at the start of a mediation). None had encountered any issues in practice, but stated that such concern might inform the parameters of their concessions and discussions at the mediation. There is clearly a residual concern amongst some parties about making a concession which could anchor the parties going forward in the litigation. Another issue raised by a number of clients was having to 'push-back' on counterparties assembling a very large cast to attend the mediation, preferring to limit the number of people privy to confidential information shared at the mediation.

#### OTHER ADR PROCESSES UNDERTAKEN?

"In most cases in our view, a better and more cost effective result can be achieved through without prejudice negotiations"

"The majority of our disputes settle through negotiation"

Whilst those surveyed were open in principle to using other ADR processes, there was a lack of experience and understanding about the options available outside of mediation. Some of those surveyed had heard of expert determination and early neutral evaluation (ENE), but not encountered them in Asia. Outside of the energy and construction contexts, adjudication, Dispute Adjudication Boards (DABs), and expert determination had not been encountered in Asia amongst those surveyed.

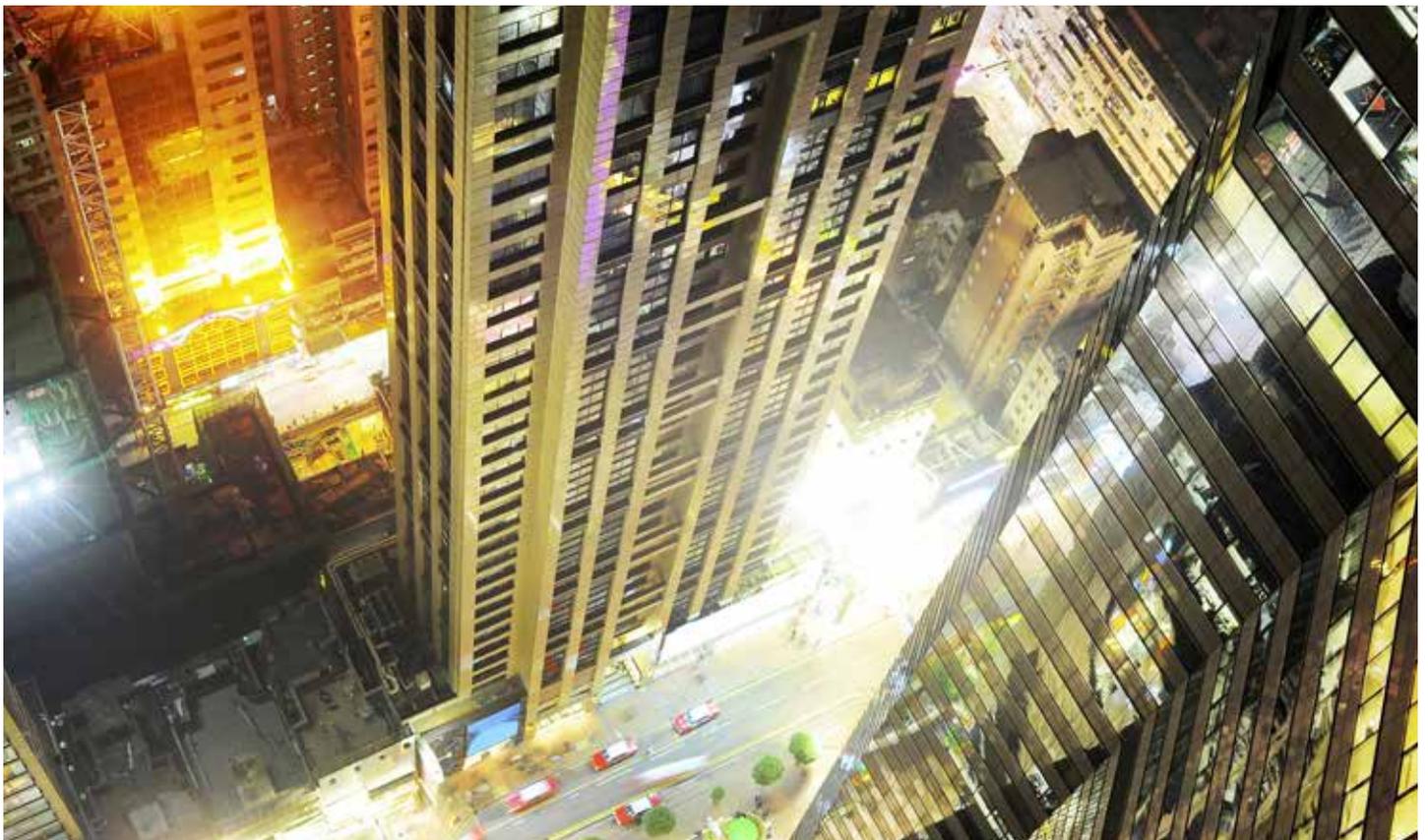
Many commented that commercial negotiation remains their primary tool of settlement - over mediation or any other process. This was particularly so where there was or could be an ongoing business relationship to preserve.

In terms of mediation undertaken outside of Hong Kong, Singapore was the other major centre in the region.

#### COMPANY-ENDORSED ADR POLICIES/METRICS

"We certainly have early case assessment and utilise time-cost saving analysis"

"We do not have a formal ADR policy but we will evaluate the merits and costs of each case"



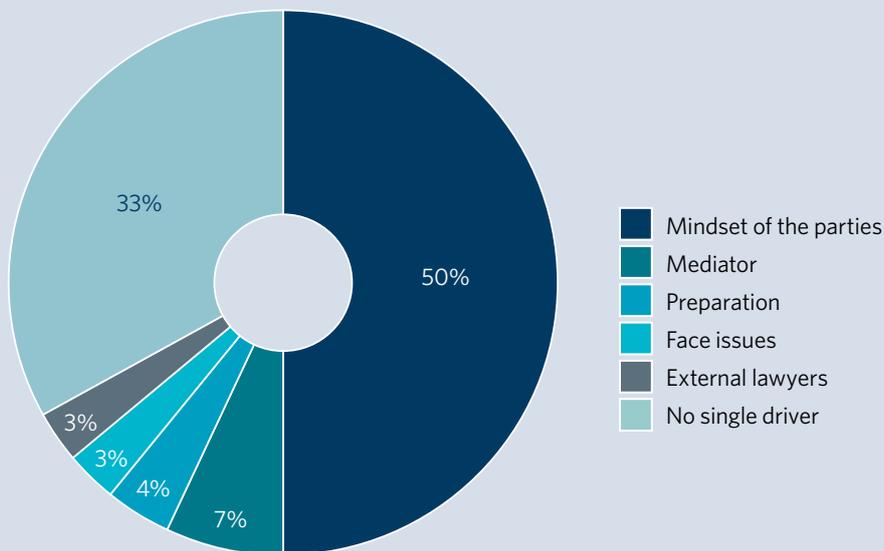
"The most important factor is that both parties come to it with the right mind-set"

"The commercial mind-set of the parties - if they are open minded it can bear fruit"

"On the actual day, I don't think the mediator helped but the process of preparing for it was helpful as it crystallised the issues for both sides"

**WHAT IS THE MOST IMPORTANT FACTOR FOR ADR SUCCESS?**

The overriding response here was telling: the willingness of the parties to compromise. In terms of dispute resolution, organisations are in control of their own destiny. Other stakeholders - lawyers, mediators, judges - can influence them but it is ultimately in-house lawyers, the business units and, critically, senior management who can develop an holistic approach to mediation and maximise its use.<sup>8</sup> The second most important factor was the mediator. The organisations who cited this noted that the right mediator could influence the mind-set of the parties by bridging an impasse.



We asked clients whether their organisations officially promoted ADR in resolving disputes - through a policy, early case assessment (ECA) procedures, or time/cost saving metrics. Whilst the resounding response was "no", it was clear that the preference is to resolve disputes by negotiated settlement wherever possible. As such, the question of settlement was almost always approached on an *ad hoc* basis on advice from lawyers.

**Early case assessment**

It is clear that the most sophisticated organisations treat dispute avoidance and dispute management as highly important. Some have developed processes requiring reporting of disputes in particular formats and timeframes to promote regular and systematic case review and assessment against prescribed objectives. Such systems work best when there is a close dialogue between the business units and in house lawyers at an early stage to identify disputes before the parties become polarised. Dispute management policies can assist organisations to take a considered, rather than, reactive approach to conflict.

Herbert Smith Freehills can work with you to devise and implement such strategies. We view "early case assessment" as fundamental in any dispute, irrespective of whether a formal ECA process is adopted.

It is always vital at an early stage to:

- Understand the commercial aims and imperatives
- Undertake an initial assessment of the legal and factual merits of the dispute
- Identify any key factual or legal points that require further investigation
- Estimate the costs of litigating or arbitrating the case

This information enables an informed discussion of strategy, including whether, when and how to try to resolve the dispute amicably (eg, through mediation) and to ensure the company is in the strongest possible position if it is necessary to fight the case. This should not be a one-off exercise. Our *ADR Toolkit*<sup>7</sup> contains information and guidance on ECA systems, the use of metrics and other incentives to promote ADR within your organisation.

**Providing for ADR in contracts**

The overriding view amongst those surveyed was that ADR clauses requiring or permitting the parties to attempt ADR before and/or during litigation or arbitration were currently neither used nor liked in Hong Kong, or more generally across Asia. With respect to mandatory clauses, clients said that mandating mediation as a pre-cursor to litigation or arbitration was likely to be unsuccessful, as the parties' positions are either too unclear or too polarised to make

settlement successful. Even non-mandatory clauses (permitting but not requiring the parties to undertake mediation before or during litigation/arbitration) were not used.

Our research suggests that commercial parties are not ready or willing to insert such clauses at the contract stage, preferring instead to agree and undertake mediation *ad hoc* as the dispute develops.

Our 2007 research also identified that the priority for most organisations was to retain maximum flexibility in their dispute resolution options, rather than anchoring themselves to mediation at a particular point in time. This preference applies in Asia some seven years on.

## THE NEXT STEP: AN IPAD APP TO EXTEND THE DEBATE

To both test and complement the results of our client survey (summarised on pages 15-21), our Hong Kong ADR team worked with software consultants to develop a bespoke Herbert Smith Freehills iPad app. The app enabled real time voting on mediation usage by 70 stakeholders from a range of industries and sectors at an interactive event in Hong Kong on 29 January 2015.

Questions posed included how many mediations delegates or their organisations had undertaken in the past five years, what in their view is the greatest advantage of mediation, how they choose a mediator, and what is the most important factor in a successful mediation.

Voting produced further valuable market insights, and the results reinforced the findings of our earlier client survey.

Importantly, they confirmed that mediation remains under-utilised in practice, despite being regarded as a mandatory requirement in the context of Hong Kong litigation, and a flexible process which can save time and cost. Perception of mediation's benefits was again at odds with its limited use in practice. This further underlined the 'knowledge gap' our earlier survey revealed.

### AT A GLANCE

# 28%

had mediated between 1 and 4 times in the past 5 years (24% had mediated between 5 and 10 times and 22% had not mediated at all)

# 43%

said that cost and time savings were the greatest advantage of mediation; for a quarter of the delegates, the flexibility of outcomes was the biggest draw

# 47%

When it came to mediator selection, 47% said they relied on recommendations from contacts in the market, whilst 38% deferred to the advice of their external lawyers

# 53%

of delegates said they want a mediator who commands the respect of the parties and has gravitas. Just over a quarter said subject matter knowledge was the most important factor; only 3% voted legal knowledge the critical aspect

# >50%

of the respondents said that the 'mindset of the parties' was the single most important factor in a successful mediation



Gareth Thomas, head of the Hong Kong commercial litigation practice, chaired the event, whilst senior client panellists (Andrew Chung, managing director and senior counsel at Goldman Sachs and Fiona Stewart, regional director at Aon) contributed valuable corporate user insights. May Tai and Julian Copeman, both partners and accredited mediators, joined our client panellists to offer their perspectives. Our specialists share below their views on the results.

### WHAT CLIENTS WANT OUT OF MEDIATION

Gareth opened the seminar by noting that: "disputes are an unavoidable cost of doing business and we know that our clients want a quick, cheap determination of their disputes, often in circumstances of confidentiality." Despite an appreciation amongst delegates that mediation offers the potential for all these things, nearly a quarter went on to reveal that they had not mediated at all. Gareth commented: "I hope that our research and guide help organisations to understand mediation better and to benchmark themselves against their peers when it comes to addressing their dispute resolution options."

May, who has practised in the UK, the PRC and Hong Kong, commented: "In other Asian jurisdictions, mediation is often more readily embraced, particularly as an adjunct to arbitration and litigation (for example in the PRC). In Hong Kong it still lags behind, despite a developed mediation support infrastructure."

May added: "In my experience, flexibility and the ability to find creative solutions are absolutely key to Chinese clients. It gives them the option to come up with a face saving solution. It can be a win-win solution for both sides. The confidentiality of mediation is attractive too, and contrasts with the often wide disclosure obligations applicable to litigation or arbitration in Hong Kong."

"In other Asian jurisdictions, mediation is often more readily embraced, particularly as an adjunct to arbitration and litigation (for example in the PRC). In Hong Kong it still lags behind, despite a developed mediation support infrastructure"

### THE ROLE OF EXTERNAL COUNSEL

Julian was closely involved in the earlier survey and commented: "What we heard throughout our client interviews, as echoed by delegates who voted via the iPad app, is that organisations defer in large part to their external lawyers when it comes to considering mediation, when and how to deploy it, and who to appoint as a mediator. The legal advisor is therefore a key stakeholder to mediation's success and growth in the territory."

### MEDIATOR SELECTION

In line with our earlier survey, delegates said they want a mediator who commands the respect of the parties and has gravitas. On this May commented: "From my experience in the PRC, this is also the case. The role of the mediator is key, yet Hong Kong corporates don't really use third parties or their own lists when choosing a mediator. 47% said they relied on recommendations from contacts in the market and 38% deferred to the advice of their external lawyers. This again places a significant burden on lawyers to be well versed in mediation and be able to match the right mediator to a dispute."

A number of those surveyed noted that evaluative mediators often added more value as they would robustly test the counterparty's case. Several found that a purely facilitative mediator was too passive and did not gain the respect of the parties.

"In practice, PD 31 encourages mediation after pleadings but this may not be the best time. In many cases, mediations which take place then are simply 'box-ticking' exercises"

### WHAT IS THE MOST IMPORTANT FACTOR IN A SUCCESSFUL MEDIATION?

The view here was clear: 56% of those who voted via the iPad app said it was the mindset of the parties. 18% said timing was the second most important. On this Fiona Stewart of Aon commented: "Timing has to be judged on a case by case basis, but it is vital to try to mediate at the right time. An early mediation, forged on too little information, is less likely to succeed. A mediation very late in the day occurs when significant costs (eg of discovery, witness statements, trial preparation) have already been incurred. In practice, PD 31 encourages mediation after pleadings but this may not be the best time. In many cases, mediations which take place then are simply 'box-ticking' exercises."

### EARLY ENGAGEMENT OF MANAGEMENT

In voting that the mindset of the parties is the most important factor, it is clear that gaining a better understanding of the process and, critically, engaging the right people (usually senior management) is essential. When undertaken meaningfully, and at the optimum time, mediation forces everyone into an earlier appraisal of their case. Julian concluded: "when done properly, mediation brings forward that moment when management focuses on settlement, and brings the decision makers back into the room."

"What we heard throughout our client interviews, as echoed by delegates who voted via the iPad app, is that organisations defer in large part to their external lawyers... The legal advisor is therefore a key stakeholder to mediation's success and growth in the territory"

# OUR ADR PRACTICE

The delivery of innovative, creative and cost-effective solutions through ADR has, for many years, been a pivotal aspect of our pre-eminent dispute resolution brand. Our award-winning ADR practice encompasses our entire disputes division, and extends to our international network of offices.

We have a deep understanding of how corporates develop and refine strategies for using ADR at both the policy and operational level. We can provide high impact insight and value adding strategic advice regarding ADR process options, dynamics and influence management.

We have extensive expertise in a wide range of ADR processes including:

- **Mediation** – we are committed to leadership in mediation advocacy and understand the critical role of cultural and communication styles in international negotiation and ADR
- **Expert determination** – we have a wealth of experience in advising on expert determination, in particular in relation to energy, projects and completion account disputes
- **Adjudication** – we have advised and acted in relation to many adjudications, including three of the largest adjudications ever conducted in the UK, international construction disputes involving bespoke variations on the UK adjudication procedure, and adjudications conducted under Australian Building and Construction Industry Security of Payment legislation
- **Bespoke solutions and other ADR processes** – we have experience in designing and executing multi-stage, bespoke ADR solutions for the largest international commercial disputes, as well as conducting early neutral evaluations and baseball arbitrations

## Mediation

- **High value mediations** involving:
  - shareholder issues
  - construction and engineering
  - energy
  - insurance and reinsurance
  - product liability
  - banking and finance
  - class actions
  - joint venture disputes
  - employment
  - IP/IT/TMT
  - real estate
  - media and fraud

At mediation we have represented:

- **Hong Kong banks and private wealth managers** in disputes with account holders over alleged incidents of mis-selling or unauthorised trading
- An **Australian financial services business** in fiercely contested copyright and related Federal Court claims. Settlement was secured shortly after the mediation
- A **European industrial company** in a mediation held in Singapore under ICC ADR Rules, relating to cost and time overruns in the construction of an industrial chemicals complex in Malaysia
- **Hong Kong solicitors** over professional negligence claims by clients
- **Mining companies** in Australia to resolve a dispute with insurers over coverage of losses arising from flooding
- **Tenants** in Hong Kong property disputes
- **Australia Securities Exchange (ASX) listed entities** in the settlement of class actions brought on behalf of shareholders
- An **international hotel management company** in a mediation held in Singapore under the auspices of the Singapore Mediation Centre, relating to a dispute with a property owner under a management contract for a 5-star hotel property in Bangkok, Thailand (agreement and settlement achieved)
- **Shareholders** in a number of joint venture disputes in the financial services, energy and gaming sectors
- **Australian banks** in the recovery of funds from borrowers and valuers
- An **IT consultant** in a dispute over a project with a regional government agency
- In Australia, representing administrators of **Sons of Gwalia** in multi-million dollar actions against directors and auditors for breach of duty and driving settlement via mediation
- A **manufacturer** in a dispute with a mainland Chinese supplier
- Representing an **international contractor** on a multi-million dollar negligence claim in relation to the collapse of a drilling rig of the

coast of South Australia. The claims were successfully settled at a two day mediation

- An Asian subsidiary of a **major European pharmaceutical company** in a dispute concerning the termination of a co-promotion agreement.
- A **Thai mobile phone network operator** in an ad hoc mediation held in Alabama, USA, leading to the successful settlement of a dispute with a US technology company concerning handset design and development
- Representing a **Chinese State-Owned Enterprise (SOE)** as mediation counsel in a mediation to resolve disputes with a US counterparty around the financial value of trade secrets
- An **ASX top 100 client** in USD 40 million Supreme Court litigation and related mediations. Settlement was successfully reached concerning product liability, negligence and misrepresentation claims
- A **major ASX listed infrastructure fund** in Federal Court proceedings and related mediation against the Australian Tax Office

## Expert determination

- **Advising a consortium of leading multinational energy companies** in expert determination proceedings against a Central Asian Republic. The case concerned budget and schedule disputes worth US\$9 billion in a high-profile politically significant dispute concerning one of the world's largest oil and gas projects
- Successfully acting for an **ASX listed iron ore mining company** about the proper construction of a price review mechanism in a long term offtake agreement with a Chinese SOE
- A **global energy super-major** in an expert determination in The Hague, Netherlands, to set a new price for chemical feedstock for a chemical manufacturing plant in South East Asia
- **Acting successfully for a group of oil majors** in an expert determination regarding price review provisions in long term gas sales agreements

- In Australia, acting for a **global insurance company** in relation to A\$140 million expert determination following the sale of a regional business unit, including tax and cross-border pricing issues
- **Advising the seller of a well-known group of recruitment and temporary staffing agencies** on a claim made by the purchaser arising out of a completion accounts calculation process
- In Australia, acting for **major utility companies** in expert determinations concerning changes to pricing indices and asset valuations
- **Advising the sellers of a hedge fund** against purchasers in relation to a contractual expert determination
- Successfully resolving a joint venture dispute for one of Australia's **major oil and gas** companies
- **Acting on an expert determination** concerning non-payment of milestone payments under a pharmaceutical drug licensing agreement
- **Advising experts themselves** in relation to, for example, questions of jurisdiction and the interpretation of expert determination clauses

### Adjudication

- An **Indian client**: acting in relation to an international *ad hoc* adjudication against a Tanzanian company under a contract governed by Indian law
- **Shell**: acting for Shell in an adjudication and subsequent litigation in the Supreme Court of New South Wales concerning the upgrade of an oil refinery
- A **major international chemical company** in two statutory adjudications in Kuala Lumpur, Malaysia, relating to construction works for a major petrochemical facility
- A **leading electricity distribution company**: advising on the adjudication and mediation of contractor disputes relating to network assets
- **Successfully defending a major public transport supplier** in a test case adjudication brought by its contractor for US\$350 million. In the short time frame permitted, we prepared detailed written submissions, 21 witness statements and four expert reports
- **Eastlink Tolling Project**: acting on the adjudication and subsequent mediation of significant claims arising out of this major project in Australia

### Other / bespoke processes

- **Docklands Gasworks Remediation project**: advising in relation to the tailored structuring, management and successful implementation of a staged consensual alternate resolution process concerning significant claims, in number and value, associated with this project, the largest remediation project of its kind in Australia
- **Negotiating and implementing a unique and tailored fast track international arbitration process** focusing on defined key issues to successfully achieve a resolution of fundamental issues for the major XOM PNG LNG project, within critical project timeframes to the mutual satisfaction of all parties
- **Developing a number of bespoke dispute resolution procedures** for very large infrastructure clients, in which the firm has developed an holistic approach with adjudication being an important component of a multi-stage dispute resolution procedure
- **BHP Billiton-Mitsubishi Alliance**: acting for the BHP Billion-Mitsubishi Alliance in mediating the settlement of its billion dollar business interruption claim arising from the 2008 floods to its central Queensland coal mines. The process involved six months of presentations and meetings of various experts culminating in a five day mediation in Singapore with representatives of 37 reinsurers as counterparties
- **Winterthur Swiss Insurance Company**, a member of the Credit Suisse Group: advising in a major dispute with XL Insurance

(Bermuda) Limited, a subsidiary of XL Capital, which was resolved in Winterthur's favour following what is believed to be the world's biggest ever 'baseball arbitration'

- A **FTSE 250 company**: advising in relation to its dispute with a government department regarding the interpretation of particular contractual provisions referred to non-binding ENE
- **Columbus Stainless**, a South African supplier of stainless steel, and its UK based insurers: acting in the successful settlement of a US\$100 million claim brought against our client and other participants involved in the design and manufacture of Australian coal wagons. The firm was instrumental in development a bespoke ADR process that ran for two years to achieve a settlement with minimal litigation
- **Lend Lease group** of companies: acting in relation to the World Trade Centre clean-up litigation, where over 18,000 plaintiffs sued the City of New York and several prime contractors for respiratory diseases alleged to have resulted from the WTC clean-up operations. The litigation is reported to be one of the largest mass tort actions in the United States. We drove a resolution which involved a mass settlement and the enactment of federal legislation in the United States (the *James Zadroga 9/11 Health and Compensation Act of 2010*), the result of which now means that Bovis Lend Lease's exposure is effectively limited to available insurance

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Gareth is a commercial and insurance litigator with wide-ranging experience in disputes, arbitration and mediation matters. His expertise in dispute matters covers banking, commercial contracts, defamation, employment, fraud, insolvency, negligence, product liability, restraint of trade and shareholders' disputes, as well as cases involving bonds, structured products and other derivatives. He also advises on private client related matters, including family and probate disputes.

Gareth also advises clients on all aspects of contentious and non-contentious international insurance and reinsurance law and practice.

Gareth is a co-author of *Hong Kong Civil Procedure*, *Halsbury's Laws of Hong Kong - Insurance*, *Chitty on Contracts (Hong Kong)*, and *Hong Kong Law of Insurance*. He regularly lectures to lawyers and industry bodies on a number of topics.



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May specialises in cross-border China-related and regional Asian disputes including international arbitration, litigation and regulatory investigations.

Her practice covers a range of commercial and regulatory issues. She has advised governments, government-owned entities and commercial clients (including financial institutions and energy companies) in Asia, Europe and the United States. She has also acted as counsel and advocate in arbitrations under various rules and court proceedings.

May is based in Hong Kong but also spends time in Herbert Smith Freehills' Shanghai and Beijing offices, and has also practised in London, Singapore and Tokyo. She has published several articles on arbitration and dispute resolution, and speaks Bahasa (Malaysian and Indonesian), Chinese (Mandarin and Cantonese) and English, and is qualified as a solicitor of England and Wales and Hong Kong.

May is a CEDR accredited mediator.



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Julian is based in Hong Kong and is head of Greater China. He is an English solicitor advocate and an accredited mediator with CEDR (the Centre for Effective Dispute Resolution). He has been rated as 'an amiable individual and a practical, determined litigator' by *Chambers UK 2011*, and as being 'commended for his responsiveness and commercial acumen' by *Chambers UK 2012*. He is also ranked as a notable practitioner in both the 2013 and 2014 editions of *Chambers UK*.

He has written and lectured widely on topics such as privilege, asset tracing and civil procedure, and wrote the chapter on English civil procedure in *The Lawyer's Factbook* (Sweet & Maxwell).



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Anita is a professional support lawyer. She trained with the firm and has worked in our London, Paris and Hong Kong offices. She has experience of a broad range of dispute resolution processes including litigation, arbitration, mediation, expert determination and adjudication. Anita specialises in thought leadership initiatives and has been a core member of our global ADR practice since 2007. She has taken a central role in our client research projects on mediation, set up the firm's ADR blog ([hsfadnotes](http://hsfadnotes.com)), and was closely involved in the editorship of the 4th edition of *Kendall on Expert Determination*. Anita also works on bribery and corruption-related matters.

# PUBLICATIONS AND ACCOLADES

## ADR BLOG

'ADR notes' is Herbert Smith Freehills' alternative dispute resolution know-how blog, where you will find the latest developments on ADR topics.

It has been created as a way to share updates and insights in an effective and user-friendly manner. There are a number of ways to navigate around the site, depending on what you require.

Please click on the link below for ADR notes.  
<http://hsfnotes.com/adr>

Our other ADR guides can be accessed at  
<http://hsfnotes.com/adr/key-adr-publications>

## OTHER BLOGS

Asia disputes:  
<http://hsfnotes.com/asiadisputes>

Arbitration:  
<http://hsfnotes.com/arbitration>

Corporate crime/FSR:  
<http://hsfnotes.com/fsrandcorcrime>

## RANKINGS AND AWARDS

We are consistently ranked Band 1/Tier 1 for dispute resolution and international arbitration across Asia Pacific (including China, Hong Kong, Indonesia, Japan, Singapore and Thailand) by *Chambers Asia Pacific* and *Asia Pacific Legal 500*. In Australia, we are the only firm to have achieved a band 1 ranking for dispute resolution, and have been ranked the number one firm in Australia since 2008.

Our global ADR practice has received awards from the Centre for Effective Dispute Resolution (CEDR) and the International Institute for Conflict Prevention and Resolution (CPR). This guide and accompanying iPad app was shortlisted for the FT's Innovative Lawyers Awards Asia Pacific 2015.

In addition, our partners are often recognised in legal guides and awarded accolades. Recently, two of our partners were recognised by Best Lawyers: Konrad de Kerloy (Best Lawyers 2015 Perth Alternative Dispute Resolution lawyer of the year) and Elizabeth Macknay (2015 Best Lawyers in Australia for Alternative Dispute Resolution). Hong Kong partner Justin D'Agostino was also named Disputes Star of the Year in the AsiaLaw Asia Pacific Disputes Awards 2015. Justin, Julian Copeman, Brenda Horrigan and Gareth Thomas are all classed as leading individuals by Legal 500 in their 2016 Asia Pacific rankings.

Some of our 2015 awards include:

"INTERNATIONAL LAW FIRM  
OF THE YEAR"  
ASIALAW ASIA PACIFIC  
DISPUTES AWARDS 2015

"DISPUTE RESOLUTION LAW  
FIRM OF THE YEAR"  
ALB HONG KONG LAW AWARDS  
2000-15

"LITIGATION LAW FIRM  
OF THE YEAR"  
ALB ASIAN LEGAL BUSINESS  
AWARDS 2015

"DISPUTE OF THE YEAR"  
ASIALAW ASIA PACIFIC  
DISPUTES AWARDS 2015

"INTERNATIONAL DISPUTES  
FIRM OF THE YEAR"  
CHINA LAW & PRACTICE  
AWARDS 2015

ARBITRATION LAW FIRM  
OF THE YEAR  
ALB ASIAN LEGAL BUSINESS  
AWARDS 2015

# ENDNOTES

## WELCOME

1. See *The inside track – how blue-chips are using ADR* (<http://www.herbertsmithfreehills.com/-/media/HS/Insights/Guides/PDFs/Alternative%20dispute%20resolution%20-%20the%20inside%20track/1%206398ADRreportD4.pdf>) and "Landmark convention in London produces new data on what corporate users need from ADR" (<http://hsfnotes.com/adr/2014/11/10/landmark-convention-in-london-produces-new-data-on-what-corporate-users-need-from-adr/>)
2. <http://legalref.judiciary.gov.hk/lrs/common/pd/pdcontent.jsp?pdn=PD31.htm&lang=EN>

## COMMON ADR PROCESSES: AN OVERVIEW

1. A corollary is Early Expert Evaluation (EEE), where an independent expert provides an expert opinion.
2. Both the Hong Kong Institute of Construction Managers (HKICM) and HKIAC have a panel of trained adjudicators with region and sector specific experience. Furthermore, the HKIAC offers Adjudication Rules based on English law sources, standard international construction contracts (ICE and JCT), and Hong Kong sources. These Rules pertain to be suitable for non-construction contracts. HKIAC also provides a Code of Ethical Conduct for Adjudicators. To date no adjudications have been undertaken by the HKIAC.
3. *Building and Construction Industry Security of Payment Act*, (Chapter 30b).
4. *Construction Industry Payment and Adjudication Act 2012*.
5. *Construction Contracts (Security of Payments) Act 2004 (NT)*; *Building and Construction Industry Security of Payment Act 2009 (SA)*; *Building and Construction Industry Payments Act 2004 (Qld)*; *Building and Construction Industry Security of Payment Act 1999 (NSW)*; *Building and Construction Industry Security of Payment Act 2002 (Vic)*; *Building and Construction Industry (Security of Payment Act) 2009 (ACT)*; *Building and Construction Industry Security of Payment Act 2009 (Tas)*; *Construction Contracts Act 2004 (WA)*.
6. See *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGH C146, summarised on our Arbitration notes blog at <http://hsfnotes.com/arbitration/2014/09/12/singapore-court-of-appeal-decides-interim-awards-are-enforceable/>
7. For example, the Hong Kong courts have generally held that an expert determination will not be set aside due to a procedural breach or because the court would have reached a different conclusion. Consequently, for the court to consider overruling the expert, a severe breach of natural justice or the expert's mandate must have occurred in relation to the determination. Similarly, the courts in Singapore have generally only considered setting aside an expert determination for a material departure from instructions, manifest error, or fraud and partiality.
8. Article 51 of the *Arbitration Law of the People's Republic of China* enshrines ArbMed in law. In addition, both CIETAC Arbitration Rules 2015 and the Beijing Arbitration Commission (BAC) Arbitration Rules 2015 provide for ArbMed, in keeping with previous editions of the respective rules.
9. See Article 38(4) of the *Arbitration Law (Law No. 138 of 2003)* and Rules 54 and 55 of the Japan Commercial Arbitration Association (JCAA) Rules (latest version dated 1 February 2014). Note that Rule 54 of the JCAA 2014 Rules provides for the arbitrator and mediator generally to be different individuals and Rule 55 imposes procedural and evidential restrictions where the parties agree they should be the same individual(s).

10. Section 32 and 33 of the *Arbitration Ordinance* (Cap 609).

11. The Singapore International Arbitration Centre (SIAC) provides for ArbMed in its rules. The Singapore International Mediation Centre (SIMC) launched in November 2014 a new Arb-Med-Arb Protocol, but the arbitrator(s) and mediator(s) will "generally" be different individuals (unless otherwise agreed). This represents a departure from the traditional notion of ArbMed, where the arbitrator(s) also act as mediator(s).

## THE WHY, WHAT, WHEN AND HOW OF MEDIATING IN HONG KONG

1. The Hong Kong court acknowledged these benefits in *iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd* [2008] HKEC 1337, and found that "the mere fact that negotiation between solicitors fails to result in a settlement does not mean that the parties would not benefit from mediation conducted by a skilled mediator". Furthermore, it observed that parties to mediation were sometimes (able to narrow down their differences during the course of mediation and come up with a full settlement at a later stage).
2. [2010] HKEC176.
3. In Hong Kong, such clauses are rarely seen and may be difficult to enforce. In the recent case of *Schindler Lifts (Hong Kong) Ltd v Sui Chong Construction and Engineering Co Ltd* [2014] HKEC 1967, the District Court addressed a clause purporting to require the parties to mediate before referring a dispute to arbitration. The court found that the non-satisfaction of mediation in a multi-tier clause was not sufficient to show that the arbitration agreement was inoperative. In other common law jurisdictions, notably England & Wales, a mediation/ADR clause will generally be enforceable if it is sufficiently certain in terms of procedure, the mandatory nature of the obligation to participate, and the timeframes involved.
4. In *Leung Catherine v Tary Ltd* [2009] HKEC 1669, reflecting on the new CJR and prospective PD31, the court stated that: (mediation is a voluntary process and a party is not forced to undergo mediation, but unreasonable refusal to attempt mediation (especially when the other party has made the request) is relevant conduct in litigation in the exercise of the discretion on costs).
5. See PD 31 Appendix B for a sample Mediation Certificate.
6. See PD 31 Appendix C for a sample Mediation Notice.
7. See PD 31 Appendix D for a sample Mediation Response.
8. Non-compliance with the court's directions will likely have an effect on any possible subsequent cost order.
9. [2010] HKEC 841.
10. [2010] 5HKC 317.
11. See endnote 2 above.
12. [2011] 2 HKLRD 985.
13. [2013] HKEC 7.
14. See endnote 3 above.
15. See *Emirates Trading v Prime Metal* [2014] EWHC 2104 (Comm), a judgment of the English High Court.
16. See endnote 9 above.
17. This contrasts with the position in certain countries, notably within the European Union. The Mediation Directive (as implemented domestically) treats the expiry of the limitation period as occurring at some point after the end of the mediation. The Mediation Directive applies to European cross-border mediations.

18. [2010] HKEC 1257.

19. The Hong Kong Law Society provides a model confidentiality clause on its website.

20. [2013] HKEC 93.

21. The limited number of exempted proceedings are set out in Appendix A. These specialist proceedings contain very similar provisions on mediation or conciliation: see PD 6.1 (Construction and Arbitration List); PD 18.1 (The Personal Injuries List); PD 18.2 (The Employees' Compensation List); PD 3.3 (Voluntary Mediation, which deals with voluntary mediation in respect of petitions for the winding up of companies).

22. Based on their annual reports and online sources, in 2013 the FDRC mediated a total of 25 cases, of which 72% settled at mediation; in its trial year to 31 October 2013, 106 cases were referred to the CCSS, of which 72% settled before mediation and the remainder settled at mediation; in 2013, mediation was conducted in 69 of 79 cases referred to BMMCO, of which 52% settled at mediation.

23. The MO standardised the Chinese terms for 'mediation' and 'conciliation' such that certain previous enactments referring to conciliation instead of mediation were repealed and replaced with mediation. For the purposes of the Labour Relations Ordinance (Cap 55), the distinction between mediation and conciliation as separate processes was maintained.

## CLIENT PERSPECTIVES: MEDIATION IN HONG KONG FIVE YEARS ON

1. The Court of First Instance has unlimited jurisdiction and the District Court has civil jurisdiction to hear monetary claims between HK\$ 50,000-1,000,000, and may hear certain property, labour, tax and family claims.
2. The number of Mediation Certificates, Notices and Responses filed in the District Court is significantly higher but the trend remains the same (around 9,000 Mediation Certificates year on year, 1,500 Notices and 1,100 Responses, generally following a slight upward trend year on year).
3. <http://www.herbertsmithfreehills.com/-/media/HS/Insights/Guides/PDFs/Asia%20guides/Short%20versions/The%20Civil%20Justice%20ReformFINAL%202011%20version%20Short.PDF>
4. <http://www.herbertsmithfreehills.com/-/media/HS/Insights/Guides/PDFs/Alternative%20dispute%20resolution%20-%20the%20inside%20track/1%206398ADRreportD4.pdf>
5. Circular 10-630 (PA) of 18 October 2010.
6. Part A, Paragraph 6.
7. <http://www.herbertsmithfreehills.com/-/media/HS/Insights/Guides/PDFs/Alternative%20dispute%20resolution%20-%20the%20inside%20track/2%206462A5ADRToolkitD3.pdf>
8. An overwhelming majority of the 150 delegates canvassed at a conference Herbert Smith Freehills moderated in London in October 2014 voted in similar fashion. 33% cited the skills and approach of in-house lawyers, and 26%, the knowledge and approach of the company's senior management as the most important factors influencing how effectively a company uses ADR (for details on the conference and a link to the voting results (session 1, question 3) see: <http://hsfnotes.com/adr/2014/11/10/landmark-convention-in-london-produces-new-data-on-what-corporate-users-need-from-adr/>)







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