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### THE CASE FOR (AND AGAINST) COMPULSORY COURT-ANNEXED MEDIATION IN HONG KONG

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# THE CASE FOR (AND AGAINST) COMPULSORY COURT-ANNEXED MEDIATION IN HONG KONG

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## INTRODUCTION

Since the 1970s widespread dissatisfaction with the perceived cost, delays and complexity of litigation has resulted in the growth of Alternative Dispute Resolution (“ADR”)<sup>1</sup>. Whilst the progress of ADR has been more marked in common law jurisdictions than in their civil law counterparts, both have witnessed this aspect of the “third wave” of legal reform<sup>2</sup>. It is widely acknowledged that mediation is the most common form of ADR in use and it is credited with enabling parties to settle disputes of all shapes and sizes.

Yet, despite sharing the litigation problems of other jurisdictions, Hong Kong has not seen a comparable growth in the use of mediation. Mr Wong Yan Lung SC, the Hong Kong Secretary for Justice, acknowledged this in November 2007<sup>3</sup> -

“...in his policy address delivered in October, our Chief Executive pledged to develop mediation services in Hong Kong. Mediation has been in use in Hong Kong for some time. But it is fair to say its application is still relatively narrow”

It is also fair to say that the Hong Kong government, judiciary, legal profession and business community are now conscious of the need to promote mediation. The Chief Executive’s policy address<sup>4</sup>, together with speeches by the Secretary for Justice and Chief Justice Li – most significantly at the Ceremonial Opening of the Legal Year 2008<sup>5</sup> - demonstrate a desire to “catch up” with other jurisdictions. The most concrete evidence of this desire is the creation of a cross-sector working group on mediation<sup>6</sup>.

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<sup>1</sup>The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the “Pound Conference”) in April 1976 addressed the perceived inefficiency and unfairness of the US courts. It is widely seen – at least in the US – as the start of the ADR “movement”. Similar conferences in other jurisdictions at the same time reached similar conclusions about their courts.

<sup>2</sup> M. Cappelletti and B. Garth (eds.), *Access to Justice: A World Survey*, Vol. I, Milan, 1978. The “first wave” in the growth of “access to justice” was public funding for poorer litigants i.e. legal aid. The second included class (multi-party) actions and public interest litigation. The third wave included (or includes) the development of less adversarial and less formal means of dispute resolution

<sup>3</sup> At the “Mediation in Hong Kong: The Way Forward” conference. See <http://www.doj.gov.hk/eng/public/>

<sup>4</sup> See <http://www.policyaddress.gov.hk/07-08/eng/policy.html> “A New Direction for Hong Kong” at paragraph 85.

<sup>5</sup> See <http://www.doj.gov.hk/eng/public/pdf/2008/sj20080114e.pdf> for the Secretary of Justice’s speech and <http://www.info.gov.hk/gia/general/200801/14/P200801140146.htm> for the Chief Justice’s speech

<sup>6</sup> The Secretary for Justice indicated that the Working Group would hold its first meeting in February 2008.

The question, of course, is how to promote mediation. One of the most problematic aspects of this question is that of compulsory (or mandatory) court-annexed mediation. The Secretary for Justice identified this very issue in his November speech -

“...some are convinced that voluntary take-up of invitations to engage in mediation is not effective and there must be certain degree of judicial compulsion to ensure mediation will take off, as we have heard this morning. However, there are also others who believe that willingness to participate in mediation is critical to its success and thus the emphasis should be placed on facilitation, education and encouragement”

This paper examines the development of mediation in Hong Kong to date before turning to the approach of several other common law jurisdictions to compulsory mediation. It then examines the advantages and disadvantages of compulsion and concludes with what lessons, if any, the Hong Kong experience may have for other jurisdictions.

## **1. THE OPTIONS FOR MEDIATION IN HONG KONG**

### **1.1 What is court-annexed mediation?**

“Mediation” and “conciliation” have been used to describe both the same and different processes, which has often led to confusion. The UNCITRAL Model Law on International Commercial Conciliation<sup>7</sup> states –

“For the purposes of this Law, “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute”

Similarly, the Interim Report and Consultative Paper (the “Interim Report”)<sup>8</sup> of the Chief Justice’s Working Party on Civil Justice Reform in Hong Kong (“CJR”) commented “Conciliation is generally considered to be the same as mediation”<sup>9</sup>.

Some have observed that the term “conciliation” is used in civil jurisdictions whilst the Anglo-American preference is for “mediation” (with “conciliation” being used when the “third person” has an advisory or evaluative role<sup>10</sup>). The Centre for Effective Dispute Resolution (“CEDR”) in the UK holds that –

“Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a

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<sup>7</sup> See <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf>

<sup>8</sup> See <http://www.civiljustice.gov.hk/ir/index.html> (published in November 2001)

<sup>9</sup> Interim Report (IR) page 234, paragraph 627.3

<sup>10</sup> Alexander N (ed) *Global Trends in Mediation*, chapter 1, page 2

dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution”<sup>11</sup>

The USA’s CPR Institute for Conflict Prevention and Resolution (“the CPR Institute”) maintains “Mediation is a process in which a third party neutral - a mediator - sits down with the disputing parties and actively assists them in reaching a settlement”<sup>12</sup>. For the sake of simplicity, this paper will adopt the Anglo-American usage of “mediation” and will do so to refer to the “non-evaluative” process (unless stated otherwise).

By “court-annexed”, this paper means mediation which is directed, encouraged or promoted by the courts in the context of anticipated or ongoing litigation. “Private” mediation is instigated by the parties on their own initiative, possibly under a dispute resolution clause in a contract or by an agreement to mediate once a dispute arises. It is, of course, entirely possible for such “private” agreements to become the subject of litigation themselves, not least on their enforceability<sup>13</sup>. This paper acknowledges the importance of such “private” arrangements but will focus on court-annexed processes.

## 1.2 Mediation in Hong Kong to date

It would be very wrong to suggest that Hong Kong has made no progress in the development of mediation. On the contrary, mediation has a long and distinguished role in Chinese culture and society<sup>14</sup>. What is true, however, is that “modern” mediation is not as common here as elsewhere, at least for “non-specialist” matters.

Such use that has been made of mediation has been led by the construction industry (as it often has elsewhere). For example, mediation was employed to resolve many of the contentious issues that arose out of the construction of the Hong Kong International Airport in the 1990s<sup>15</sup>. In 1991, the Hong Kong government introduced a standard mediation clause in its General Conditions of Contract for certain types of public works<sup>16</sup>. In addition, the Hong Kong Mediation Council (“HKMC”) was established in 1994 to promote the development and use of mediation<sup>17</sup>. Further, the Hong Kong Mediation Centre was created in 1999 by local “mediation advocates” to “practise, promote, develop and institutionalize mediation as a way of life”<sup>18</sup>.

Yet, Hong Kong’s development of court-annexed mediation has been limited to pilot mediation schemes for construction claims, commercial disputes, family cases and – most

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<sup>11</sup> See [http://www.cedr.com/CEDR\\_Solve/services/mediation.php](http://www.cedr.com/CEDR_Solve/services/mediation.php)

<sup>12</sup> See [http://www.cpradr.org/med\\_intro.asp?M=9.2.10](http://www.cpradr.org/med_intro.asp?M=9.2.10)

<sup>13</sup> See *Cable & Wireless plc v IBM United Kingdom Limited* [2002] 2 All ER 104

<sup>14</sup> See Bee Chen Goh, *Law Without Lawyers, Justice Without Courts: On Traditional Chinese Mediation*

<sup>15</sup> See <http://www.pcicb.gov.hk/eng/meeting/download/p-PCICB-034-e.doc> from the (now defunct) PCICB website and the General Conditions of Contract for the Airport Core Programme Civil Engineering Works

<sup>16</sup> See clause 86 of its General Conditions of Contract for Civil Engineering Works

<sup>17</sup> See [http://www.hkiac.org/HKIAC/HKIAC\\_English/main.html](http://www.hkiac.org/HKIAC/HKIAC_English/main.html)

<sup>18</sup> See <http://www.mediationcentre.com.hk/>

recently – Lands Tribunal matters<sup>19</sup>. It is this perceived lack of progress that lies behind the government’s recent initiatives.

### 1.3 Mediation and the Courts – the options

The “push” for mediation in Hong Kong comes at the same time as the CJR programme is reaching fruition. It is anticipated that the “new” Rules of the High Court (“RHC”) will come into effect on 2 April 2009. The CJR draws heavily upon the English Civil Procedure Rules (“CPR”), especially in the area of case management. The Interim and Final Reports<sup>20</sup> both addressed the relationship between ADR and the courts. Of particular interest was the attention given to compulsory mediation.

The Interim Report observed that it would not be possible to compel parties to mediate as this would infringe Article 35 of the Basic Law, which grants Hong Kong residents the right of access to the courts<sup>21</sup>. Any “compulsory” ADR could only be introduced in conjunction with the option of going to court if ADR failed. Similar concerns have been raised in England, where it has been suggested that compulsory mediation infringes Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”)<sup>22</sup>.

The Interim Report listed six options (the “Options”) for promoting ADR. Under them, ADR can be -

- A. made mandatory by a statutory or court rule for all cases in a defined class;
- B. made mandatory by an order issued at the court’s discretion in cases thought likely to benefit;
- C. made mandatory by one party electing for ADR;
- D. made a condition of getting legal aid in certain types of cases;
- E. voluntary but encouraged by the court, with unreasonable refusal or lack of cooperation running the risk of a costs sanction; or
- F. entirely voluntary, with the court limiting its role to encouragement and the provision of information and facilities<sup>23</sup>.

From litigants’ point of view, there is little to choose between A and B whilst C and E are a halfway-house between compulsion and the freedom of choice embodied by F. Option D may have little bearing in some jurisdictions and may be considered unfair where it does. From the Secretary for Justice’s standpoint, the distinction is between Options A-B and Options E-F.

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<sup>19</sup> See note 3 above

<sup>20</sup> See <http://www.civiljustice.gov.hk/index.html> (the Final Report was published in March 2004)

<sup>21</sup> See [http://www.info.gov.hk/basic\\_law/fulltext/](http://www.info.gov.hk/basic_law/fulltext/) Article 35 reads “Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies. Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.”

<sup>22</sup> See <http://conventions.coe.int/Treaty/en/Treaties/Word/005.doc> for the full text of the ECHR

<sup>23</sup> IR page 237, para 639 – the lettering A to F is the author’s

The Interim Report incorporated the Options as its Proposals 63 to 68 (i.e. Option A was Proposal 63 and so on) for consultation. The response, as indicated by the Final Report, was mixed<sup>24</sup>. Options A and C were rejected by the consultees; B, D and E received a mixed response; and F was generally supported. As a consequence, only Options D, E and F formed part of the Final Report's Recommendations.

Many commentators were disappointed by this limited set of Recommendations and were further displeased by their absence from both subsequent consultation documents and the Civil Justice (Miscellaneous Amendments) Ordinance 2008 that forms the statutory basis of the CJR<sup>25</sup>. This criticism may have been assuaged by the Government's subsequent activity but the Secretary for Justice's question of how to encourage mediation remains. The choices available remain – subject to a few minor caveats – Options A to F.

## **2. COMPULSORY COURT-ANNEXED MEDIATION IN OTHER JURISDICTIONS**

The paper now examines the choices of England<sup>26</sup>, Australia, Canada, the USA and Singapore. Other than their shared common law background, why choose these jurisdictions?

First, as already noted, the new RHC draw heavily upon the English CPR. Second, Australia is a leading proponent of mandatory mediation, as is Canada. In addition, Canada is a mixed civil and common law country, as is Hong Kong (with the Chinese civil law system alongside the local common law system). The USA is where, many argue, ADR was “born”. Finally, Singapore is, like Hong Kong, one of Asia's leading commercial centres.

One further point is that this paper concentrates on court-annexed mediation in the principal courts of each jurisdiction. It is quite correct that all these jurisdictions operate a variety of “private” and other “public” mediation schemes but the focus here is on what the courts do. This part of the paper is also largely descriptive.

### **2.1 England**

#### **(i) The CPR**

The CPR replaced the separate High Court and County Court rules in April 1999. Their introduction followed Lord Woolf's “Access to Justice” report<sup>27</sup>, which criticised the previous systems for being expensive, slow, uncertain and overly adversarial. The CPR were designed to overcome these failings by changing the culture - not just the procedures - of civil litigation.

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<sup>24</sup> Final Report (FR) pages 423 to 459.

<sup>25</sup> ADR Chambers (HK) Limited expressed its disappointment in a letter to the Legislative Council Secretariat of 5 June 2007.

<sup>26</sup> “England” is used rather than “England & Wales” to save space (with apologies to Welsh colleagues)

<sup>27</sup> See <http://www.dca.gov.uk/civil/final/contents.htm>

This desired cultural change is at its clearest in the “overriding objective” of CPR 1 which is “of enabling the court to deal with cases justly”<sup>28</sup>. This overriding objective is central to the role that ADR plays in England. For example, by CPR 1.4(2)(e), the courts must further the overriding objective by “encouraging the parties to use [ADR] if the court considers that appropriate and facilitating the use of [ADR]”. The courts have the power to adjourn hearings, stay proceedings and extend procedural timetables to “facilitate” such ADR<sup>29</sup>.

ADR is also relevant to the question of costs. CPR 44.5(3)(a)(ii) states “The court must also have regard to... the efforts made, if any, before and during the proceedings in order to try to resolve the dispute” when awarding costs. Nor are the parties passive observers in this process given that CPR 1.3 establishes that they “are required to help the court to further the overriding objective”.

The CPR is accompanied by nine pre-action protocols<sup>30</sup>. One of their objectives, as set out in paragraph 1.4(2) of the Practice Direction-Protocols – and in the protocols themselves - is “to enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings”. Paragraph 2A.1 of the Pre-Action Protocol for Disease and Illness Claims states -

“The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs”<sup>31</sup>

Paragraph 2A.4, however, adds “It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR”.

## (ii) Individual Court initiatives

Section G of the Commercial Court Guide emphasises the court’s “primary role” as a

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<sup>28</sup> CPR 1.1(2) continues “Dealing with cases justly includes, so far as is practicable – (a) ensuring the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

<sup>29</sup> By CPR 26.4 the courts may order a month’s (or longer) stay for ADR

<sup>30</sup> See [http://www.justice.gov.uk/civil/procrules\\_fin/menus/protocol.htm](http://www.justice.gov.uk/civil/procrules_fin/menus/protocol.htm) Their coverage includes Personal Injury, Defamation and Professional Negligence claims

<sup>31</sup> See [http://www.justice.gov.uk/civil/procrules\\_fin/contents/protocols/prot\\_dis.htm](http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_dis.htm)

forum for deciding claims whilst, at the same time, encourages ADR. Similarly, Chapter 17 of the Chancery Guide, paragraph 6.6 of the Queen’s Bench Guide and Section 7 of the Technology & Construction Court Guide all address ADR<sup>32</sup>.

In addition, the Central London County Court and other courts have operated mandatory mediation pilot schemes. The outcomes of these schemes are discussed later in the context of the advantages and disadvantages of compulsory mediation.

(iii) Case law

In *Dunnett v Railtrack plc* [2002] 2 All ER 850, one of the earliest decisions on the subject, the Court of Appeal deprived the successful defendant of its award for costs because it had turned down the defeated plaintiff’s earlier offer to mediate – a decision which came as a shock to many at the time. In *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 it was reiterated that a winning party (at trial) could forfeit its costs award if the losing party demonstrated that its opponent had “unreasonably” refused to mediate. When deciding whether a party had acted unreasonably the court must remember the benefits of mediation over litigation and consider all the circumstances of the case, including the nature of the dispute; the merits; the extent to which other settlement methods had been attempted; and whether mediation had a reasonable prospect of success.

It can be seen then that, with the exception of the pilot schemes referred to above, England selected Option E.

## 2.2 Australia

The position in Australia is complicated by the fact that there are separate State and Federal Court systems. Having said that, the use of mediation is well developed across them all and, moreover, mandatory mediation is quite common. There follows a short summary of the approaches adopted by the three most populous States, together with the Federal approach.

(i) New South Wales

The New South Wales’ Courts Legislation (Mediation and Evaluation) Amendment Act 1994 introduced a new section 110K to the Supreme Court Act 1970, giving courts the power to order mediation in appropriate circumstances with the parties’ consent. Thus, as at this stage, New South Wales chose Option F.

This soon changed with the Supreme Court Amendment (Referral of Proceedings) Act 2000 which permitted the courts to refer any civil proceedings to mediation without the parties’ consent. This leap to Option B can be explained, in part, by the appointment in 1998 of Chief Justice James Spigelman AC, who has been a strong advocate of mediation for many years and whose views are shared throughout the State.

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<sup>32</sup> See [http://www.justice.gov.uk/civil/procrules\\_fin/menus/court\\_guides.htm](http://www.justice.gov.uk/civil/procrules_fin/menus/court_guides.htm)



The progress of compulsory mediation did not stop here. Section 26(1) of the Civil Procedure Act 2005<sup>33</sup> enhanced the regime –

“If it considers the circumstances appropriate, the court may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned....”

Section 27 adds “It is the duty of each party to proceedings that have been referred for mediation to participate, in good faith, in the mediation”. This paper will return to “good faith” later.

Part 20 of the Uniform Civil Procedure Rules 2005, supplemented by Supreme Court Practice Note “No SC Gen 6 Mediation”, covers the nuts-and-bolts of referrals. The latter reiterates that courts can, at any stage, refer the parties to mediation without their consent if this appears “appropriate”. Having said that, the Practice Note adds “It is not the intention of the Court that mediation will be ordered in all proceedings”. It also mentions that the parties can agree on their mediator or, if they do not, the court may select someone; refer the matter to a registrar or court officer, who will meet the parties and report back on the case’s suitability for mediation; or decide against referring the dispute to mediation<sup>34</sup>.

Thus, in contrast with England, New South Wales has chosen Option B.

(ii) Victoria

The “garden state” also has considerable experience of mediation. The Victoria Supreme Court (General Civil Procedure) Rules 2005<sup>35</sup> contain detailed provisions on referrals to mediation. For this paper, the most significant is rule 50.07(1) which states that the court may “at any stage of a proceeding...with or without the consent of any party, order that the proceeding or any part of the proceeding be referred to a mediator”. In contrast with some jurisdictions the referral does not stay the proceedings unless the court orders otherwise.

The mediator must “endeavour to assist the parties” in settling the proceedings or particular issues. He or she may also be required to make a report to the court when the mediation is completed. It is also possible, by rule 50.07.1 for a Master to mediate proceedings.

Victoria has, like New South Wales, chosen Option B, albeit with different features.

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<sup>33</sup> See [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/cpa2005167/](http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa2005167/)

<sup>34</sup> See [http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_procedures](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_procedures)

<sup>35</sup> See <http://www.supremecourt.vic.gov.au/>

(iii) Queensland

As with its neighbours to the south, the courts in Queensland have much experience of ADR and have also embraced compulsion. Section 95 of the Supreme Court of Queensland Act 1991<sup>36</sup> defines “ADR” as “a process of mediation or case appraisal under which the parties are helped to achieve an early, inexpensive settlement or resolution of their dispute”. Section 102(1) permits the court to “require the parties or their representatives to attend before it to enable the court to decide whether the parties’ dispute should be referred to an ADR process”. ADR processes include “case appraisal” and mediation.

Section 103 is headed “Parties must attend at ADR process if Supreme Court orders” and the text reflects this. The parties “must attend before the ADR convenor appointed to conduct the ADR process” and “must not impede the ADR convenor”. The Supreme Court may impose sanctions on any malefactor including staying any claim for relief and taking his behaviour into account when awarding costs.

Queensland’s Uniform Civil Procedure Rules 1999<sup>37</sup> set down how these statutory provisions operate in practice. The mediator has considerable control of the mediation. By rule 326(2) he decides whether a party may be represented at the mediation and, if so, by whom. His authority is reiterated in rule 325 which requires the parties to “assist” him by acting “reasonably and genuinely” in the mediation and rule 322 which defines when a party is deemed to “impede” the process by, for example, failing to attend. Rule 321 states that the proceedings are stayed until six business days after a report certifying the completion of the ADR is filed with the court registrar.

It can be seen then that Queensland has also chosen Option B but with its own particular features.

(iv) The Federal Courts and other States

The Federal Court has had the power to refer matters to mediation without the consent of litigants since 1997<sup>38</sup>. Section 53A(1A) of the Federal Court of Australia Act 1976 (as amended) reads “Referrals...to a mediator may be made with or without the consent of the parties to the proceedings”.

The conduct of court-annexed mediation is regulated by Order 72 of the Federal Court Rules, whilst Order 10 rule 1(2)(g) gives the court the power to refer a matter to mediation. Interestingly, the Federal Court Rules do not repeat section 53A’s provision that the court need not obtain the parties’ consent for a referral to mediation.

Western Australia, South Australia and Tasmania also have court-annexed mediation (or ADR) schemes which permit mandatory references over the objections of the parties.

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<sup>36</sup> See <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/S/SuprCrtQA91.pdf>

<sup>37</sup> See <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/S/SuprCrtQUCPRu99.pdf>

<sup>38</sup> See <http://www.fedcourt.gov.au/>

Once again, it can be seen that the Australian approach is to choose Option B.

### 2.3 Canada

Like Australia, Canada has a federal system albeit comprising Provinces, rather than States, and Territories. A further complication is that both English and French are official languages at the Federal level. Moreover, Quebec (the largest Province by area and its second largest by population) has a civil law rather than common law system – a feature of its French colonial origins.

#### (i) The Federal Court

The Federal Court's rule 257 states that, within 60 days after the close of pleadings, the parties' representatives should "discuss the possibility of settling any or all of the issues in the action" and apply to the court to "refer any unsettled issues to a dispute resolution conference"<sup>39</sup>.

Rules 386 to 391, under the heading "Dispute Resolution Services" set out the details. The court may order any proceedings to be referred to a dispute resolution conference, which should be completed within 30 days of the referral. This conference may be conducted by a case management judge who may conduct a mediation; carry out an early neutral evaluation; or hold a mini-trial. The proceedings themselves may be stayed for up to six months whilst ADR is attempted.

Option B is clearly the choice here.

#### (ii) Ontario

Cases in the Superior Court of Justice are governed by the Rules of Civil Procedure<sup>40</sup>. Rule 24.1 is entitled "Mandatory Mediation" and its purpose is "to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes". The rule has a varied application across the Province as, for example, it covers actions commenced in Toronto from January 4, 1999 but those commenced in Ottawa-Carleton only between January 4 and December 31, 1999. There are also several exceptions to the rule, such as actions that were mediated "under section 258.6 of the Insurance Act" less than a year before "the delivery of the first defence". Parties may also apply to exempt their claim from the rule.

According to rule 24.1.09(1) mediation is generally expected to take place within 90 days of the defence being filed. The parties may choose a mediator or one may be assigned for them. Rule 24.1 also prescribes the steps leading up to the mediation, including the preparation and service by each party of a statement of issues. The parties (and their lawyers) are "required to attend the mediation session", as is a representative of any insurer involved in the matter (i.e. if that insurer is indemnifying a party). It is expected

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<sup>39</sup> See <http://laws.justice.gc.ca/en/showtdm/cr/SOR-98-106//?showtoc=&instrumentnumber=SOR-98-106>

<sup>40</sup> See [http://www.e-laws.gov.on.ca/html/regs/english/elaws\\_regs\\_900194\\_e.htm](http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm)

that those in attendance will have authority to settle or have “ready telephone access” to someone who does.

If a party does not attend the mediation within 30 minutes of its start, the mediator cancels the session and files a “certificate of non-compliance” with the court. The court may then impose various sanctions, up to dismissing the claim or striking out the defence. If the mediation succeeds, the agreement is recorded in writing. If a party subsequently breaches the settlement’s terms, any other party may apply to the court for judgment in its terms or continue the claim on the basis that there was no agreement.

Here, the choice is Option A or a very strong form of Option B.

(iii) British Columbia

The Supreme Court of British Columbia<sup>41</sup> operates a “Notice to Mediate” process, which differs from the Federal and Ontario schemes in that the requirement to mediate is initiated by a party to the action. It was first introduced for motor vehicle actions in April 1998 and extended to cover the majority of Supreme Court actions by the Notice to Mediate (General) Regulation in February 2001.

A party’s Notice can only be served between 60 days after the filing of the defence and 120 days before trial, unless the court orders otherwise. There are a limited number of exemptions to the Notice’s compulsion to attend mediation, such as when all parties have already participated in a mediation. A party may also apply to adjourn a mediation which, in its view, has been sought prematurely. Also, a Notice can only be used once in relation to a claim, unless the court orders otherwise.

The parties must agree who is to act as mediator and the mediation must take place within 60 days of his appointment. If the parties cannot agree, a mediator may be appointed for them by the British Columbia Mediator Roster Society<sup>42</sup>. If a party refuses to attend the mediation, any other party may file an “Allegation of Default” and apply to the court for an order that the claim be stayed until the defaulting party attends the mediation and that the miscreant also be penalised in costs.

British Columbia has therefore chosen option C.

(iv) Quebec

The Quebec courts operate on the civil law basis. They have also developed a particular form of court-annexed mediation. Article 4.3 of the Quebec Code of Civil Procedure<sup>43</sup> states -

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<sup>41</sup> See <http://www.ag.gov.bc.ca/dro/index.htm>

<sup>42</sup> See <http://www.mediator-roster.bc.ca/>

<sup>43</sup> See <http://www.canlii.org/qc/laws/sta/c-25/20050809/whole.html>

“The courts and judges may attempt to reconcile the parties, if they consent, in any matter except a matter relating to personal status or capacity or involving public policy issues. In family matters or matters involving small claims, it is the judge's duty to attempt to reconcile the parties.”

Articles 151.14 to 151.23 of the Code set out the provisions of what is referred to as “an amicable dispute resolution conference”. There are also “Operating Rules” to assist the parties and their legal advisers<sup>44</sup>. By Article 151.16 the aim of this conference is “to facilitate dialogue between the parties and help them to identify their interests, assess their positions, negotiate and explore mutually satisfactory solutions”.

The chief justice or chief judge may, on his own initiative or upon the parties’ request, order such a conference. He will also designate a judge to preside over it. If the parties have requested the conference, their request must contain “a summary of the questions at issue”<sup>45</sup>. The conference is private; free of charge; and informal. It may be attended by the parties, their legal advisers and third parties (i.e. experts) “if the judge and the parties consider that their presence would be helpful in resolving the dispute”.

The judge presiding over the conference is responsible for setting down its “rules” and agenda, in conjunction with the parties. He may also “modify” the procedural timetable, albeit there is no stay. As with the Ontario process, Quebec’s requires the parties to ensure “that the persons who have authority to conclude an agreement are present at the settlement conference” or that such persons may be contacted at “at all times” to provide their consent.

If the conference achieves a settlement, the judge can be asked to sanction its terms. If, however, the conference is unsuccessful, the judge will be excluded from any involvement in the proceedings thereafter (i.e. trial).

It can be seen, then, that Quebec has chosen option F.

## 2.4 USA

As with Australia and Canada, but on a much larger scale, the USA has both State and Federal courts. As with Canada, the USA is also predominantly a common law jurisdiction whilst possessing – in Louisiana – a civil jurisdiction. Given the scale and complexity of the USA, it would be futile to summarise its numerous forms of ADR here. Suffice it to say, most of the familiar methods of ADR are used and, often, were developed in the USA.

The US Alternative Dispute Resolution Act 1998 requires the US Federal District Courts to provide ADR services to parties. Mediation is the most popular form of ADR, as elsewhere. A summary in 2005 by the Federal Judicial Center in 49 District Courts

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<sup>44</sup>See [http://www.tribunaux.qc.ca/mjq\\_en/c-quebec/Modes\\_alternatifs\\_de\\_reglement\\_anglais/fs\\_CRACivil\\_FonctionnementAng.html](http://www.tribunaux.qc.ca/mjq_en/c-quebec/Modes_alternatifs_de_reglement_anglais/fs_CRACivil_FonctionnementAng.html)

<sup>45</sup> The request specifically provides for all parties’ consent

revealed that 15,555 cases were referred to mediation out of 24,835 cases that involved some form of ADR<sup>46</sup>. Despite the fact that the District Courts apply the same federal laws, they have a variety of approaches to mediation. For example, mediation is mandatory in the Western District of Washington (the State, not the US capital) under Local Civil Rule 39.1<sup>47</sup> but this is not the “default” position.

At State level, there is a multiplicity of approaches not only between States but among the courts in any one State. Such is the variety that no one (as of yet) has been able to compile a national review of the types of ADR used, let alone their success rates. This remains the case despite the National Conference of Commissioners for Uniform State Laws’ (“NCCUSL”) Uniform Mediation Act<sup>48</sup>.

The US Federal and State courts have chosen almost all the Options A to F.

## 2.5 Singapore

The Singapore Supreme Court consists of the Court of Appeal and High Court, with the Subordinate Courts consisting of the District Court and the Magistrate's Court. The High Court is the court of first instance, generally for claims beyond the Subordinate Courts’ jurisdiction.

In 1994, the Subordinate Courts began operating Court Dispute Resolution (“CDR”). This, in the words of the Subordinate Court’s website is “a voluntary settlement process by which the parties reach a satisfactory solution with the aid of a neutral third person, the Settlement Judge”<sup>49</sup>. CDR involves the parties (and their lawyers) attending a settlement conference, which is presided over by “an experienced and impartial Settlement Judge”. The Subordinate Courts Practice Directions state that conferences may be convened by the court on its own initiative or upon any party’s request. They also suggest that, in order to achieve the best result, conferences should not take place before the close of pleadings<sup>50</sup>.

The parties submit an opening statement in advance and are “expected to be thoroughly prepared to discuss their respective cases” at the conference. Expert witnesses may also attend if this is deemed necessary. The aim is “to encourage litigants and solicitors to negotiate freely before the Settlement Judge”. If the parties are unable to resolve their dispute, the judge will order the necessary directions for trial and then play no further part in the proceedings. In response to the question “Is attendance at the CDR by the parties required?” the website states “Yes, if party is not represented by lawyer. If they are represented by lawyers, their attendance will be dependent on the advice of their lawyers or upon direction by the Settlement Judge”.

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<sup>46</sup> See “In Resolving Disputes, Mediation Most Favored ADR Option in District Courts”, *Newsletter of the Federal Courts* Vol. 38, Number 7 (July 2006)

<sup>47</sup> See <http://www.wawd.uscourts.gov/CourtServices/AlternativeDisputeResolution.htm>

<sup>48</sup> See <http://www.law.upenn.edu/bll/archives/ulc/mediat/UMA2001.htm>

<sup>49</sup> See <http://app.subcourts.gov.sg/subcourts/page.aspx?pageid=4419>

<sup>50</sup> See [http://app.subcourts.gov.sg/Data/Files/File/Master%20PD%20\(20.3.08\).pdf](http://app.subcourts.gov.sg/Data/Files/File/Master%20PD%20(20.3.08).pdf)

The Practice Directions also provide for pre-trial conferences (PTCs) in District Court actions involving claims over \$100,000. Legal advisers must ensure that their clients are fully informed about the possibility of using ADR prior to the PTC. If the parties agree at the PTC to mediation at the Singapore Mediation Centre<sup>51</sup>, the matter will be so referred.

PTCs are also held in Supreme Court matters<sup>52</sup>. The court's powers here are considerable. Order 34A rule 2(2) states –

“the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with any such information as it thinks fit, and may also give all such directions as appear to be necessary or desirable for securing the just, expeditious and economical disposal of the action or proceedings”.

Such information and discussions will not, however, be made known to the court conducting the trial if the matter proceeds. Parties who settle at a PTC may have their agreement recorded before the registrar. If the matter cannot be resolved, a trial date will be arranged instead.

Singapore has therefore chosen Option B.

### **3. THE ADVANTAGES AND DISADVANTAGES OF COMPULSION**

Even this brief survey reveals a divergence of approaches to promoting mediation. Ontario and New South Wales sit at one end of the scale, choosing “compulsion” in the form of Options A and B, whilst England and Quebec choose the “encouragement” of Options E and F. There are, of course, varieties of “compulsion” and “encouragement”. It is also true that the “compulsion” courts often exercise their discretion not to order mediation. In addition, there is the distinction between mediation which is carried out “privately”, as in Ontario, and that which is presided over by a judge, as in Quebec.

These differences, even among those who apparently chose the same Option, reflect different cultural and legal traditions and demonstrate that there is no single “right” answer to the question of whether Hong Kong should compel mediation. This may come as a revelation to those who are, perhaps, unnecessarily dogmatic in their adherence to compulsion<sup>53</sup>.

So, if there is no clear Option for Hong Kong, what course should it take? The answer to that question actually depends on the answers to three further questions. What are the

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<sup>51</sup> See <http://www.mediation.com.sg/>

<sup>52</sup> See <http://app.supremecourt.gov.sg/default.aspx?pgID=1>

<sup>53</sup> The author has attended ADR conferences where at least one speaker (often a lawyer) has expressed the view that parties should accept mandatory mediation because they didn't know (whereas lawyers did) what was “good for them”!

qualities of mediation? What are the aims of mediation? Is compulsion compatible with those qualities and aims?

These questions and their answers, which very much depend on one's point of view, have determined which Options have been selected elsewhere and why. Finally, before proceeding further, it is important to appreciate that these questions are distinct from what tends to be the main preoccupation of those interested in mediation - its advantages and disadvantages when compared to litigation.

### **3.1 The qualities of mediation**

According to Ruth Charlton<sup>54</sup> mediation has five qualities or “philosophies” –

1. Confidentiality
2. Voluntariness
3. Empowerment
4. Neutrality
5. The provision of unique solutions

“Confidentiality”, in that the parties’ oral statements and written documents are protected from future collateral use or disclosure, is widely acknowledged to be one of the major “selling points” of mediation over litigation. “Voluntariness” reflects the fact that the parties attend mediations because they have made a positive choice to do so. This quality, as with “Empowerment”, is reflected in the words “with the parties in ultimate control of the decision to settle and the terms of resolution” in CEDR’s definition of mediation.

The “Neutrality” is that of the mediator, who merely facilitates the parties’ attempts to reach a settlement and does not pass judgment on the parties, their cases or the terms of the settlement (unless he is a “conciliator”). Finally, mediation offers the parties the ability to “solve” their dispute in “Unique” ways beyond paying damages. This can be especially important when the parties wish to maintain an ongoing business relationship.

Many other experts, including David Spencer and Michael Brogan<sup>55</sup>, share this interpretation of mediation and it is, accordingly, adopted here also.

### **3.2 The aims of mediation**

The aims of mediation (and their relative importance) depend on one’s point of view. Perhaps the first aim is for a more efficient process for resolving disputes which – unlike litigation - is not dogged by delay, excessive cost, uncertainty and hostility between the parties (and their lawyers)<sup>56</sup>. This allows the parties to get on with their lives<sup>57</sup> and

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<sup>54</sup>See Charlton, R. 2000. *Dispute Resolution Guidebook* and Charlton, R. & Dewdney, M. 2004. *The Mediator’s Handbook. Skills and Strategies for Practitioners*. (2nd edition)

<sup>55</sup> See Spencer, D & Brogan, M *Mediation Law and Practice*

<sup>56</sup> Some of the faults observed by Lord Woolf in “*Access to Justice*”



reduces the workload of court administrative staff and the judiciary. Another benefit is the freeing up of court time for other disputes. Hence, this aim also encompasses increasing “access to justice” as envisaged by the proponents of the “third wave” of legal reform. This first aim, then, is one that can be appreciated by parties, lawyers, courts and the governments that run and fund the courts.

A second aim of mediation is to increase the “power” of the parties. Many writers, including Albert Fiadjoe, have referred to an “ADR spectrum” with negotiations at one end and litigation at the other<sup>58</sup>. This spectrum can be represented in the following way –

Negotiation – Mediation – Expert determination – Mini-trial – Arbitration - Litigation

This is a very simplified version of the spectrum as it does not include every form of ADR but the concept is clear. An ADR technique’s place in this spectrum depends upon who has power over it; its formalities; whether it is public or private; and its outcome. In negotiation, the parties have pretty much unlimited power in a process which can be as informal as a private telephone call where the parties reach (or decide not to reach) a “deal” about their dispute. Moreover, the parties are not limited – in the way that the courts are – on the form of this “deal” (provided it is not unlawful)<sup>59</sup>. This aim reflects the qualities of mediation set out above and is clearly one which appeals to the parties, especially businesses and industry groups that would rather avoid the proverbial public “washing of dirty laundry” (i.e. professionals facing negligence claims from disgruntled clients). It is not one, beyond a concern for fair and lawful outcomes, in which the courts may be interested.

A third aim is called “transformation”<sup>60</sup>. This has two aspects. The first is the transformation of the dynamics of the dispute itself in that the parties move from focusing on their narrow self-interests to their shared relationship (and the mutual benefits thereof). The second aspect is a wider “social transformation” in which communities - geographical, social, economic or ethnic - take control of resolving their disputes from the courts. This aim of mediation is, arguably, the province of politicians and sociologists. It is also more appropriate to disputes between, for example, family members or employers and employees than to, say, personal injury claims arising from road traffic accidents in which the parties have no “relationship” outside the events giving rise to the dispute.

Whilst there is scope for argument over the exact number of aims and the distinctions between them<sup>61</sup>, it is submitted that those set out above are comprehensive. What is more problematical is the priority given to them. This is determined by the attitudes and influence of those concerned. Prescience is not required to appreciate that courts may be

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<sup>57</sup> The “cost” to parties is not just the fees paid but the “downtime” spent meeting lawyers; in correspondence; and attending court.

<sup>58</sup> Fiadjoe, *A Alternative Dispute Resolution: Developing a World Perspective*

<sup>59</sup> Common law jurisdictions provide for injunctions and specific performance but these tend to be exceptional rather than commonplace outcomes of litigation

<sup>60</sup> See note 10 – *Global Trends* at page 11

<sup>61</sup> See note 10 – *Global Trends* at pages 9-12. Alexander refers to six

more interested in eliminating trial backlogs than in litigants' "happiness" at ending their disputes at trial or mediation. Such distinctions explain why Options A and B have as many (perhaps more) supporters as Options E and F.

### 3.3 Compatibility

Is compulsory mediation, in the form of Options A and B, compatible with these qualities and aims?

Starting with the qualities of mediation (and the second of the three aims), it would appear – at first sight - that the confidentiality of a mediation session is disturbed if it is ordered by the court and destroyed if it is actually presided over by a judge. Given that the purpose of this confidentiality is to encourage open discussions leading to settlement (on the "without prejudice" basis), its partial or complete removal damages the efficiency of the mediation process. Whilst some compulsory mediation schemes seek to obviate this problem by preventing a judge/mediator from having any further involvement in a matter, others take a contrary path. As has already been noted, the Victoria courts may order a mediator to file a report on a mediation session. This sits uneasily with the confidentiality terms in most voluntary mediation agreements and the statutory protections on mediation confidentiality in some jurisdictions<sup>62</sup>. All the Options, save F, could be said to be incompatible with this quality.

What of "voluntariness" and "empowerment"? Clearly someone who attends mediation under order is not a "volunteer". Does this matter? Some commentators have written of importance of the "willingness factor" in mediation<sup>63</sup>. This desire to attend mediation and reach a settlement is, it is claimed, crucial to a successful outcome. Further, almost all the literature on mediation stresses the importance to success of building trust between the parties and between the parties and the mediator. A party that is obliged to attend mediation may not only do so without this desire to settle but, in some situations, may resent both the process and the other attendees. This has been recognised by courts in "compulsion" jurisdictions, for example in *Morrow v chinadotcom* [2001] NSWSC 209, Barrett J observed –

"The present proceedings involve commercial parties engaged in a commercial transaction. They may be taken to possess a reasonable degree of business sophistication and acumen...If, with the benefit of [the knowledge of ADR] and the advice of their solicitors, they do not see sufficient value in resort to [ADR] there is, it seems to me, very little, if anything, that is likely to be gained by the Court compelling them to pay lip service to it"

Barrett J's views, expressed before the New South Wales courts obtained the power to mandate mediation, were not shared by his colleague Hamilton J in the subsequent case of *Remuneration Planning Corp Pty Ltd v Fitton* [2001] NSWSC 1208 -

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<sup>62</sup> The UMA's main concern is confidentiality

<sup>63</sup> See note 55 - *Mediation Law and Practice* at page 267

“It has become plain that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show willingness to do so may appear a sign of weakness, yet engage in successful mediation when mediation is ordered.”

Chief Justice Spigelman agrees –

“One matter that appears somewhat counter intuitive is the conferral upon courts of a power to order mediation. This was once thought to be pointless because it appeared unlikely that a party who was ordered to mediate would be prepared to enter such negotiations in a co-operative manner. That has proven to be false. Reluctant starters have often proved to be willing participants in the negotiation process.”<sup>64</sup>

The message, at least from New South Wales, seems to be that voluntariness and party empowerment are only justified when they lead to mediation and, if they do not, they should be sacrificed in the name of efficiency. This view is not confined to New South Wales, given that Lightman J has argued for increased English court pressure on parties to mediate on the basis that it works elsewhere<sup>65</sup>. This is the essence of the creed of those who back Options A and B, and the view rejected by those who back E (to some extent) and F.

One way of encouraging “reluctant starters” to take mediation seriously has been to require parties to participate in “good faith” or not “impede” the mediation. In *Modern Merchandising P/L v Brown & Anor* [1998] QSC 69 the Queensland Supreme Court utilised section 103 of the of the Supreme Court of Queensland Act 1991 to stay a defendant’s counterclaim as it had not attended a case appraisal. In *Laporte v. Ridgewell*, 2007 CanLII 2805, the Superior Court in Ontario ordered the defendants to pay the mediator’s fee and the plaintiff’s costs for a mediation session which they failed to attend (they were also ordered to attend a rescheduled session).

Whilst good faith and trust are crucial to the success of mediation, it is questionable whether it can be engendered by court order. There is also the problem of distinguishing between “bad faith” and adopting a robust negotiating stance – when does a refusal to accept what one perceives to be a poor offer from the other side become a refusal to participate in the mediation? Moreover, the combination of mandatory mediations and “good faith” provisions could pressure some parties, especially unrepresented litigants, into accepting poor settlements<sup>66</sup>.

Such “good faith” provisions also threaten the confidentiality and neutrality of the mediation. Who, for example, is to report the parties’ lack of faith to the court? Who else but the mediator in the form of, for example, an Ontario certificate of non-compliance. The mediator may, therefore, be a “snitch” or “tell-tale” in the eyes of the parties...and

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<sup>64</sup> See [http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_spigelman091007](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman091007)

<sup>65</sup> <http://www.adrgroup.co.uk/voice/documents/JusticeLightman.pdf>

<sup>66</sup> See note 55 - *Mediation Law and Practice* at pages 266-267

no one trusts a snitch<sup>67</sup>. Once again, aspects of Options A and B sit uneasily with the aims of mediation. Indeed, such is the debate over whether US courts should be able to penalise parties for “bad faith” in court-annexed mediation that the American Bar Association (“ABA”) prepared the following resolution –

1. Sanctions should be imposed only for violations of rules specifying objectively-determinable conduct.
2. The content of mediators’ reports to the court or court administrators should be narrowly restricted.
3. Court-mandated mediation programs should engage in collaborative planning efforts and establish educational programs about mediation procedures for participants<sup>68</sup>

Finally, do compulsory mediations lead to less-creative solutions? There is no reason to think that they do per se but one of the great selling points of mediation is the fact that mediators do not necessarily need to be lawyers. They can, instead, be members of other professions which may assist when the dispute relates to technical matters. A judge/mediator may lack such technical expertise and therefore the ability to help the parties come up with “creative” solutions to their impasse<sup>69</sup>.

So, should Hong Kong reject compulsory mediation? Perhaps, but it is worth recalling the other side of the argument. Advocates of compulsory mediation, as has been seen, assert that it eliminates the fear that a party may look “weak” for proposing mediation to its opponent. They also maintain that it is mediation that is mandatory, not settlement, and therefore parties may still proceed to trial if they wish<sup>70</sup>. It is also much better than voluntary mediation at both promoting efficient dispute resolution and educating parties (and their lawyers) about the benefits of mediation and settlement<sup>71</sup>. The first point seems to be at variance with both the growth of voluntary mediation and the peculiarly common observation that over 90% of cases in almost all jurisdictions settle – lots of people must be willing to look “weak” by suggesting mediation or settlement! The second point overlooks the difficulties caused by “good faith” clauses. What of the third? Does the evidence demonstrate that mandatory mediations increase the efficiency of dispute resolution?

The Supreme Court of New South Wales’ Annual Review for 2006<sup>72</sup> records that 64% of court-annexed mediations settled (at mediation) in 2002, rising to 67% in 2004 and falling to 58% in 2006. Why the decline? The Reviews do not record “private” mediations so perhaps only the most recalcitrant litigants are being dealt with by the

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<sup>67</sup> See Boettger, U Efficiency Versus Party Empowerment-Against A Good-Faith Requirement In Mandatory Mediation (*The Review of Litigation*)

<sup>68</sup> See <http://www.abanet.org/dispute/webpolicy.html>

<sup>69</sup> An ABA resolution for non-lawyers to be eligible to act as “neutrals” was passed in 1999, see <http://www.abanet.org/dispute/webpolicy.html#connected> . CEDR’s mediators include HR directors and architects, see <http://www.cedr.com/conflict/people/>

<sup>70</sup> One of Lightman J’s points in his speech at note 65 above

<sup>71</sup> See Adams, GW *Mediating Justice: Legal Dispute Negotiations* at page 256

<sup>72</sup> See [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_annrev](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_annrev)

courts. If so, then perhaps the number of litigants who have not accepted the benefits of ADR is not as great as feared.

The Supreme Court of Queensland's 2005-06 Annual Report<sup>73</sup> records 126 consent orders to ADR by the parties and 212 mediation orders by the court (with 86 without the consent of at least one party). In terms of settlement, 239 claims were certified as settled at mediation and 133 as not settled (a 64% settlement rate).

An independent evaluation of Ontario's rule 24.1 was carried soon after its adoption<sup>74</sup>. In 1999-2001, 2,500 Ottawa and 3,000 Toronto cases were referred to mediation (there were fewer than 100 exemptions). It was reported that mandatory mediation had reduced the time taken to dispose of cases; cut costs; and produced widespread satisfaction among parties and lawyers. Yet, it should also be recalled that only 41% of Ottawa mediations and 38% of Toronto mediations produced a settlement at or within 7 days of the session. It is also worth noting that Toronto amended its case management Practice Directions in 2005 because both court waiting times and costs were growing<sup>75</sup>. Mandatory mediations were retained but their time limits extended<sup>76</sup>.

In England, the Exeter, Manchester and Reading County Courts conducted compulsory mediation pilot schemes for small claims (i.e. beneath £5000) from June 2005 to May 2006. In Exeter, 34% of cases were referred to mediation, although only 53% actually mediated and - of these - 65% settled (N.B. parties were allowed to withdraw from the mediation after referral following *Halsey*). In Manchester, 27% of all small claims were referred in the first six months of the scheme, of which 41% were actually mediated with an impressive 86% settlement rate. In Reading, 204 cases were referred, of which just 49 (25%) settled. All the schemes, however, reported a reduction in judicial workloads<sup>77</sup>.

One of the most recent – and comprehensive - research reports on court-annexed mediation is “Twisting arms: court referred and court linked mediation under judicial pressure” by Professor Dame Hazel Genn on behalf of the UK Ministry of Justice<sup>78</sup>. From April 2004 to March 2005, the Central London County Court (“CLCC”) ran an Automatic Referral to Mediation (“ARM”) pilot scheme which randomly referred cases to mediation with judges having the power to override the parties’ objections<sup>79</sup>. “Twisting Arms” explored the consequences of operating this “Ontario” style scheme in London.

A total of 1,232 cases were referred to mediation, of which only 14% of were mediated by the scheme's end. Objections to mediation were raised in 81% of the cases (where the court actually received a reply to its referral notice). The settlement rate declined from

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<sup>73</sup> See <http://www.courts.qld.gov.au/1340.htm>. The 2006-07 report is silent on this matter.

<sup>74</sup> See [http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/eval\\_committee.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/eval_committee.pdf)

<sup>75</sup> See Jacobs, P A Recent Comparative History Of Mandatory Mediation Vs Voluntary Mediation In Ontario, Canada (IBA Mediation Newsletter, April 2005)

<sup>76</sup> See <http://www.ontariocourts.on.ca/scj/en/notices/pd/toronto/casemanagement.htm>

<sup>77</sup> See <http://www.dca.gov.uk/civil/adr/index.htm#4>

<sup>78</sup> See [http://www.adrgroup.co.uk/voice/documents/ADRg%20Twisting-arms\\_full\[1\].pdf](http://www.adrgroup.co.uk/voice/documents/ADRg%20Twisting-arms_full[1].pdf)

<sup>79</sup> The CLCC has operated a voluntary scheme since 1996

69% in May 2004 to 38% in March 2005<sup>80</sup>. Within this overall percentage, the rate was 55% where both parties consented to mediation but only 48% where they had objected. The report also noted that the majority of cases in the ARM scheme actually settled without mediation. Another interesting point is that 72 cases were mediated under the court's voluntary scheme in 1999, whilst 293 were mediated in 2004, following the decision in *Dunnett v Railtrack*. Unfortunately, the settlement rate fell from 62% to 45% over the same period<sup>81</sup>.

These figures, especially those from the CLCC, are worth comparing to those in CEDR's third mediation audit published in November 2007. CEDR projected that the English "civil and commercial mediation market" was 3,400 to 3,700 cases per annum. Further, those mediators who participated in the audit reported that 75% of their cases settled on the day of the mediation, with a further 13% settling shortly thereafter, giving an aggregate settlement rate of 88%<sup>82</sup>. These mediations were, of course, predominantly voluntary. Their performance outstrips almost all the compulsory schemes.

There are – of course – lies, damned lies and statistics but the evidence appears to be that mandatory mediation does not encourage the settlement of disputes, only the number of mediations. In accountancy terms, turnover is improved but at the sake of profitability. Does this matter if the overall number of settlements increases - as it may if all cases have to mediate with stringent good faith clauses? This rather depends on one's view not only of the objectives and aims of mediation but of the courts themselves.

There is also one other vital factor. A settlement or judgment is not necessary the last chapter of a dispute. One analysis of US cases has suggested that parties are much more likely to need the courts to enforce agreements reached at mandatory mediations than those which resulted from voluntary mediations<sup>83</sup>. Returning to the accountancy analogy, increased turnover is of little value if it is accompanied by additional transaction costs.

#### **4. WHAT LESSONS THE HONG KONG EXPERIENCE MAY HAVE FOR OTHER JURISDICTIONS IN THE REGION**

We return then to the choice identified by the Secretary for Justice – compulsion or encouragement. It could be argued that any informed choice should be left until the various pilot schemes have run their course. It is worth noting at this juncture, however, that the Legal Aid Department has already reported that making mandatory mediation a pre-condition of legal aid "would not serve to promote the use" of the Family Mediation Service<sup>84</sup>.

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<sup>80</sup> This is attributed to *Halsey* in part

<sup>81</sup> See [http://www.adrnow.org.uk/go/SubPage\\_134.html;jsessionid=a4SSN7\\_ytdv-](http://www.adrnow.org.uk/go/SubPage_134.html;jsessionid=a4SSN7_ytdv-)

<sup>82</sup> See <http://www.cedr.com/gfx/TheMediationAudit2007.pdf>

<sup>83</sup> See Weisberg AN, *The Secret to Success: An Examination of New York State Mediation Related Litigation*, Fordham Ub LJ Vol XXXIV

<sup>84</sup> Report of the Hong Kong Legal Aid Department for the 28<sup>th</sup> Meeting of the Steering Committee on Family Mediation

In the meantime, one is left with Genn's conclusion that "Facilitation and encouragement [of mediation] together with selective and appropriate pressure are likely to be more effective and possibly more efficient than blanket coercion to mediate"<sup>85</sup>. This favours Options E and F. Advocates of compulsory mediation, in the form of A or B, need to produce better evidence than that which is already available to counter this finding and, moreover, demonstrate that any efficiency gains outweigh the reduction of litigants' freedoms.

In the absence of such evidence, a sensible interim course would combine education and encouragement. Education should be for the judiciary, lawyers, business community and wider public. Chief Justice Li has called for ADR to be a compulsory part of the professional courses leading to qualification as a solicitor or barrister in Hong Kong<sup>86</sup> – why stop there? Why not introduce ADR into business degree courses and training for other professions i.e. insurers, or even at school level? The HKMC and Hong Kong Mediation Centre could play an important role in such work.

On the "encouragement" side, the courts could require the parties to confirm in writing that they had considered ADR and, if appropriate, explain why they had rejected it. This should be by a letter signed by the party, rather than by a standard form, and could include an acknowledgment of the potential costs savings of mediation together with a statement of the current and projected costs of the case, which would concentrate minds. The courts could require such letters more than once e.g. at the close of pleadings and at immediately before trial, and stay the proceedings pending their receipt. Such letters, as with Singapore PTC discussions, could be kept out of the trial bundles - but could and should be considered when costs awards are made.

Finally, CPR-style cost sanctions should be available. This paper has not questioned the benefits of mediation, only the benefits of compulsory mediation. If parties are free to choose their own course of action, they must take responsibility for their choices and bear the costs of the same. The virtue of such sanctions is that they can be imposed on a case-by-case basis. Further, since *Halsey*, the rationale for such sanctions has been generally accepted.

Such a programme of action in Hong Kong - a jurisdiction which, hitherto, had only a "narrow" experience of mediation - could provide valuable information on the effectiveness of mediation; its relationship with litigation; and on promoting public awareness of legal issues. It could and should be built upon when the pilot schemes are concluded and their results analysed. This would benefit all those interested in tackling the difficulties which have led to the rise of mediation over the last thirty years.

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<sup>85</sup> *Twisting Arms* page v

<sup>86</sup> See note 3 - in his speech at the November 2007 conference.