

REVISITING THE ISSUE OF MEDIATOR IMMUNITY: THE WAY FORWARD FOR PROSPECTIVE MEDIATION LEGISLATION IN HONG KONG



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Mediator immunity has been identified as one major issue for possible future mediation legislation in the 2010 Consultation Paper released by the Hong Kong Government. So far there is no uniform stance on the issue around the world. This paper analyses relevant methods for determining mediator liability and the scope of that liability in different countries. Hong Kong's revised Arbitration Ordinance has taken a forward through its qualified immunity position with respect to the issue of mediator liability under the arbitration framework. This position is commendable for adapting to the current trend of dispute resolution. The paper concludes that a similar approach should be adopted in future mediation legislation in Hong Kong.

Introduction

Mediation plays an important role in oriental culture. Confucianism espouses values such as harmony, care and affection and mediation is the important link towards realisation of those Confucian ideologies. Confucian values have a far-reaching influence in the Greater China area and Confucian values contribute to a certain extent to the maintenance of the long-standing and well-established Chinese cultural tradition. The traditional mediation system is thus the natural by-product of the combination of tradition and cultural values.¹ It is precisely because of this that China has traditionally emphasised mediation to resolve

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¹ Gang Li (ed.), "Introduction to People's Mediation (Ren Min Tiao Jie Gai Lun)", p 49, Beijing, Zhong Guo Jian Cha Publishing House (June 2004).

disputes and prefers to avoid court litigation.² Mediation has existed for a long time in China and the mediation system has developed with distinct Chinese characteristics.³ The success of mediation in China has opened up a new prospect for dispute resolution.⁴ Mediation can be more widely used and relied on as a dispute resolution method.

The use of mediation has been accepted by most countries around the world and it has been widely applied to different aspects of social life.⁵ However, western countries have far exceeded Chinese efforts in establishing regulation for mediation and the practical application of mediation.⁶ Hong Kong has affirmed the greater use of mediation in dispute resolution in its recent civil justice reform and believes that the benefits of mediation itself can resolve the problems which the current Hong Kong litigation system is unable to resolve.

Because mediation is being actively promoted in the area of dispute resolution, it is inevitable that the process will involve the set-up of a specific regulatory framework for mediation. One of the most important questions related to the setup of a regulatory framework is whether there is a need for legislation on mediation and if so, the contents of the proposed legislation. In early 2010, the Hong Kong Government published a public consultation paper with respect to the above issue.⁷ The consultation paper provides an in-depth and comprehensive analysis on the issue of mediation regulation. One of topics discussed is the issue of mediator liability, that is, whether mediator should enjoy exemption from suits arising from their mediation or whether they should be held legally liable.

In view of the crucial impact of the issue of mediator immunity on the development of the mediation profession in Hong Kong, this paper conducts a study of the above issue to fill in the gap for the regulation of mediation in the region. The second part of this paper summarises and analyses relevant methods of determining mediator liability and the scope of that liability in different countries. The third part is in

² Yu Fan, Changqing Shi & Xingmei Qiu, "Mediation System and Regulations on Mediators – Comparison and Experience (Tiao Jie Zhi Du Yu Tiao Jie Ren Xing Wei Gui Fan – Bi Jiao Yu Jie Jian)", p 15, Beijing, Tsinghua University Publishing House (June 2010).

³ Xianjue Xiong, "Revisiting China's Legal System (Zhong Guo Si Fa Zhi Du Xin Lun)", p 214, Beijing, Zhong Guo Fa Zhi Publishing House (1999).

⁴ See Yu Fan & Hao Li, "Dispute Resolution – Theory, System and Skills (Jiu Fen Jie Jue – Li Lun, Zhi Du Yu Ji Neng)", p 57–62, Beijing, Tsinghua University Publishing House (May 2010).

⁵ See Joel E. Davidson, "Successful Mediation: The Do's and Don'ts" (1998) 53 *Dispute Resolution Journal* 26; Richard M. Calkins, "Mediation: The Gentler Way" (1996) 41 *San Diego Law Review* 277.

⁶ Kwang-Taeck Woo, "A comparison of Court-Annexed Mediation in Florida and Korea" (1997) 22 *Brooklyn Journal of International Law* 605; Robert Perkovich, "A Comparative Analysis of Community Mediation in the United States and the People's Republic of China" (1996) 10 *Temple International & Comparative Law Journal* 314.

⁷ Department of Justice, Hong Kong Special Administrative Region, Report of the Working Group on Mediation, Feb 2010.

response to the mediation consultation paper that the Hong Kong Government published; it discusses an appropriate model for mediator liability and further clarifies the application of possible liabilities in different situations. Based on the above analysis, this section of the paper proposes that the model of qualified immunity should be the position that the future Hong Kong legislation should adopt. The last part of the paper concludes that the issue of mediator immunity cannot be generalised but should be distinguished according to its specific situation. This applies to not only the jurisdiction of Hong Kong but equally to other common law and civil law jurisdictions. Jurisdictions that are actively promoting mediation should deal with the question of mediator liability cautiously. Hong Kong's proposed legislation on mediation and its related discussions on the issue of mediator liability will provide these countries and jurisdictions a positive reference.

The Regulations and Practices of Mediator Immunity in Different Jurisdictions

Regulatory Regimes

There are three major sources for defining the issue of immunity: common law, contractual arrangement and legislation. Different countries have different methods and models to deal with the issue of mediator immunity. Even within one country, such as the USA, different states adopt different approaches.⁸ As such, the issue of mediator immunity becomes even more complicated. A further study of these different regulatory methods reveals that there are generally three models. The first model specifies clearly in the laws that a mediator is entitled to absolute immunity in relation to the mediation session he or she is engaged in, that is, a mediator enjoys a type of immunity similar to a judge's judicial immunity. As a general legal principle at the common law, judges are entitled to absolute immunity in the performance of judicial functions.⁹ Such immunity does not apply to criminal acts or internal disciplinary sanctions.¹⁰ Moreover, judicial immunity cannot be invoked in the following two situations: first, the judge's conduct in question does not constitute judicial act; second,

⁸ James J. Brudney, "Mediation and Some Lessons From the Uniform State Law Experience" (1998) 13 *Ohio State Journal on Dispute Resolution* 795.

⁹ K.G. Jan Pillai, "Rethinking Judicial Immunity for the Twenty-First Century" (1995) 39 *Howard Law Journal* 104; Jeffrey M. Shaman, "Judicial Immunity from Civil and Criminal Liability," (1990) 27 *San Diego Law Review* 2.

¹⁰ *Braateli v United States*, 147 F.2d 888 (8th Cir. 1945); *McFarland v State*, 109 N.W.2d 397 (Neb. 1961); *Pulliam v Allen*, 466 U.S. 522 (1984).

the judge's conduct exceeds its scope of authority.¹¹ Absolute immunity serves the following purposes: first, it ensures that judges can perform their judiciary functions independently, without fear of interference from individuals or organisations;¹² second, it removes the effort involved in defending frivolous suits from dissatisfied litigants;¹³ third, it protects the finality of a related judgment and upholds judicial efficiency. In its regulations on judicial immunity, the state of Florida confers upon court-appointed mediators similar immunity to that of a judge.¹⁴

The second model used specifies clearly in the laws that a mediator is entitled to qualified immunity in relation to the mediation session he or she is engaged in. In this model, mediators are entitled to immunity subject to certain restrictions. For example, in the state of Iowa, mediators are not liable for statements or decisions made in process of dispute resolution except where acting in bad faith, with malicious purpose or in a manner exhibiting willful and wanton disregard of human rights, safety or property.¹⁵ Some states such as Arizona further restrict the scope of immunity to merely those mediation sessions conducted under the order of a court or where mediation sessions are conducted in accordance with related laws.¹⁶

In the third model, jurisdictions do not provide any provisions on the issue of mediator immunity. Indeed, quite a number of jurisdictions do not regulate mediator immunity, so the question of liability is determined according to relevant common law principles. At least eight common law principles and theories can apply to the issue of mediator liability: false advertising, breach of contract, fraud, invasion of privacy, defamation, outrageous conduct, breach of fiduciary duty and professional negligence.¹⁷ Most of these theories are well established at law, and can be translated to the context of mediation without difficulty. However, liabilities arising from breach of fiduciary duty have been subject to vigorous academic debates. Most scholars criticise the extension of fiduciary duties to mediators on the ground that it disregards the different institutional settings and compensation arrangements in which mediators function

¹¹ *Bradley v Fisher*, 80 U.S. 335, 351 (1871); *Mireles v Waco*, 502 U.S. 9, 11-12 (1991).

¹² *Pierson v Ray*, 386 U.S. 547, 554 (1967).

¹³ *Bradley v Fisher*, 80 U.S. 335, 347 (1871); *Stump v Sparkman* 435 US 349, 363 (1978).

¹⁴ Florida Statutes s 44.107 confers mediators who are conducting mediation sessions under the order of the court judicial immunity. See J. Sue Richardson, "Mediation: The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators" (1990) 17 *Florida State University Law Review* 623.

¹⁵ Iowa Code Ann. para 679.13 (West 1998). See also *Postma v First Fed. Savings & Loan*, 74 F.3d 160 (8th Cir. 1996).

¹⁶ Arizona Rev. Stat. Ann. para 12-2238 (West 1997).

¹⁷ Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (Jossey-Bass 1984) 339.

and the professional expertise they offer.¹⁸ Practical problems of proof exist when the law of professional malpractice is applied to mediators. To date, there has been no consensus as to the standard of care. Even if one can ascertain what constitutes a reasonably competent mediator, it will be difficult for the plaintiff to demonstrate that the failure to achieve that minimal standard caused provable damages.

Practices in Different Jurisdictions

Mediator liability can arise out of several contexts, including liability for breach of contract and tortious liability, or even criminal liability in serious cases. More specifically, the existence of a conflict of interest between the mediator and subject matter or the parties in dispute, a breach of the confidentiality agreement, defamation, negligence, mediation activities being carried out in the absence of mediator qualification or failing to satisfy the pre-agreed standards, etc. can all result in losses to the parties and subsequently give rise to the issue of mediator liability.¹⁹

Many situations can give rise to mediator liability, but according to the current research, very few court judgments have touched on this issue and there are even fewer cases that directly address the issue. So far there is still no case or report successfully holding a mediator liable.²⁰ However, in discussions on the liability of evaluators or other neutral third parties, judges often relate these discussions to mediators. In most cases, judges have conferred upon neutral third parties, including mediators, the right of immunity. It is necessary to go through some of the leading cases to determine what factors judges consider and the rationale lying behind and the factors that determine the immunity of mediators.

In the 1994 American case *Wagshal v Foster*, a case evaluator was assigned to make a case evaluation of the dispute in question.²¹ During the first meeting, the plaintiff questioned the neutrality of the case evaluator. The case evaluator thus retired from the case evaluation. When retiring from the case evaluation, the case evaluator told the judge that he

¹⁸ “The Sultans of Swap: Defining the Duties and Liabilities of American Mediators” (1986) 99 *Harvard Law Review* 1876; Joseph B. Stulberg, “Mediator Immunity” (1986) 2 *Ohio State Journal on Dispute Resolution* 85 ; Michael Moffitt, “Suing Mediators” (2003) 83 *Boston University Law Review* 147.

¹⁹ Cassandra E. Joseph, “The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity” (1997) 12 *Ohio State Journal on Dispute Resolution* 630.

²⁰ Michael Moffitt, “Suing Mediators” (2003) 83 *Boston University Law Review* 148–150; Jennifer Schulz, “Mediator Liability in Canada: An Examination of Emerging American and Canadian Jurisprudence” (2000-2001) 32 *Ottawa Law Review* 271; Andrew Lynch, “Can I Sue My Mediator? – Finding the Key to Mediator Liability” (1995) 6 *Australian Dispute Resolution Journal* 113.

²¹ 28 F3d 1249 (D.C.Cir.1994).

thought the case was suitable for mediation and that the plaintiff should participate in the relevant mediation session in good faith. The plaintiff believed that the conduct of the case evaluator may have influenced the judge's handling of the matter. After the case was finalised by mediation, the plaintiff sued the evaluator in court on the grounds that he was forced to participate in the mediation session against his will and the mediation settlement resulted in far less benefit than if he had pursued the claim in civil court proceedings. The plaintiff claimed that the evaluator's behaviour had violated his right to due process, his right to a jury trial and other constitutional rights; furthermore, the plaintiff alleged the evaluator had engaged in defamatory behaviour, invaded his privacy and intentionally inflicted emotional distress, etc.²² The evaluator claimed that the activities in question should be entitled to judicial immunity.²³

In determining if the evaluator in question and mediator should enjoy the right of judicial immunity, the judge analysed three main factors: whether the functions of an evaluator and mediator are comparable to those of a judge, whether the nature of the controversy would lead to harassment of the mediator by dissatisfied parties, and whether the existing legal system can protect parties whose interests have been harmed because of mediator conduct. First, the plaintiff argued that an evaluator and mediator played a non-judiciary administrative role. However, the judge was of the opinion that although the two engaged in seemingly different activities, they were still very similar in various aspects. Regarding the second factor, whether the nature of the controversy was intense enough that there was a realistic prospect that an evaluator would be harassed or intimidated by the parties in dispute in the future, the judge believed that there was a realistic prospect that a party who was unsatisfied with the result will undertake harassing or intimidating behaviour. As to the third factor, whether the existing legal system contained adequate safeguards to protect those whose interests have been harmed by the relevant conduct of an evaluator and mediator, the judge thought that such measures existed. The plaintiff could have submitted a request to the judge in the first instance to avoid mediation before the case actually proceeded to mediation. However, in this case, the plaintiff did not make such a request at all. After considering the above three factors, the judge held that the evaluator and mediator should enjoy the right to judicial immunity.²⁴ The finding of this case is significant because it sets out the situations and factors that should be taken into account in determining if the right to judicial immunity

²² *Ibid.*, at 1250–1251.

²³ *Ibid.*, at 1252.

²⁴ *Ibid.*, at 1252–1254.

should be extended,²⁵ this was also the first time that a judge specifically provided an analysis and explanation on the issue of mediator immunity.

The next relevant case is the American case *Howard v Drapkin* in 1990.²⁶ A psychologist made a behavioural evaluation of both the parties in dispute. The parties agreed that other than making an evaluation, the psychologist would also offer non-binding conclusions and suggestions. Thereafter, one of the parties brought a legal action against the psychologist alleging misconduct as well as a non-disclosure of a conflict of interest, which caused him to suffer losses. The psychologist claimed that he was entitled to the right of judicial immunity.²⁷ The plaintiff argued that such judicial immunity was only applicable to public officials. The judge adopted a functional analysis approach and held that a neutral third party who helped resolve disputes, either in a voluntary or mandatory manner, was similar to a judge. Mediators assist the parties in making a binding decision, and they make recommendations to the court or use alternative dispute resolution methods to resolve the underlying conflict and therefore, should be entitled to judicial immunity. The judge in his reasoning extended the absolute judicial immunity to neutral third parties in mediation, conciliation, evaluation and other similar dispute resolution systems.²⁸ The judge added that due to the heavy caseload in courts, such neutral third parties were urgently required to help resolve disputes and to relieve court congestion. These neutral third parties were similar to a judge, regardless of whether they were required to make binding decisions or non-binding recommendations; both were impartial and neutral third parties. Judicial immunity is necessary on the one hand to protect the finality of judgments and on the other hand, to assist the judge in reaching an independent judgment without having to worry about other interferences.

From the above two important cases, it can be deduced that courts are generally inclined to extend judicial immunity to neutral third parties involved in a dispute resolution process. Such an attitude is partly due to the court's consideration of the nature of the activities in which the neutral third party is engaged and partly due to the fact that the use of alternative dispute resolution, like mediation, helps relieve case congestion and related problems in the courts. Nevertheless, several scholars have raised doubts about the judges' findings in the above two

²⁵ "Brian Dorini, Institutionalizing ADR: *Wagshal v Foster and Mediator Immunity*" (1996) 1 *Harvard Negotiation Law Review* 190.

²⁶ 222 Cal. App. 3d 843 (Cal. Ct. App. 1990).

²⁷ *Ibid.*, at 847–848.

²⁸ *Ibid.*, at 860.

cases and questioned the appropriateness of granting judicial immunity.²⁹ This will be further discussed in the next part of the paper.

The 2003 Australian case *Tapoohi v Lewenberg (No 2)*³⁰ deserves attention as the judge adopted a different attitude. The plaintiff alleged that, among other things, the mediator was professionally negligent in concluding a settlement agreement in the course of the mediation session, which failed to take into account taxation implications. The mediator possessed substantial experience and was a senior barrister specialising in commercial litigation. One of the mediator's defenses was immunity. In this interlocutory matter, Habersberger J held that under the facts of the case, an unusual contract existed between the mediator and the parties and therefore the mediator owed duty of care, similar to those implied in contract and tort, to the disputing parties.³¹ Only after looking at the entire case did the judge approach the question of what was an acceptable standard of care and whether the mediator should be entitled to immunity for his conduct. Obviously, the judge in this case adopted a different view from those in the above two earlier cases. Regrettably, this case never proceeded to a full hearing as the parties reached a settlement agreement therefore the court did not have the opportunity to rule on the issue of mediator immunity.

Unlike the earlier two decisions, the judge in this case was not ready to extend the right of immunity to the activities conducted by a neutral third party. He cast doubt on the arguments supporting how mediators gain immunity under legislation and the common law, in a consensual mediation.³² Secondly, he observed that immunity against actions for negligence is rare. Unless stronger policy grounds exist to the contrary, there is an overriding public policy requirement that those who cause damage to other through a breach of their legal obligation to take reasonable care should be answerable in the courts and compensate those to whom they have caused damage by their negligence.³³

The Way Forward for Hong Kong

Hong Kong has already paved the way forward for civil reform. The use of mediation has become an irreversible trend and the question for

²⁹ See Amanda K. Esquibel, "The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity" (1999) 31 *Rutgers Law Journal* 131 ; Arthur A. Chaykin, "The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation" (1986) 2 *Ohio State Journal on Dispute Resolution* 47.

³⁰ [2003] VSC 410 (Supreme Court of Victoria, Commercial and Equity Division) (21 Oct 2003).

³¹ *Ibid.*, para 55.

³² *Ibid.*, para 90.

³³ *Ibid.*, para 89.

now is how to provide an appropriate legal framework to regulate the mediation activities. With respect to the issue of mediator immunity, the Hong Kong Government has not advanced a particular position, but has opened up the issue for consultation in order to come up with an appropriate approach. The first required determination is whether there is a need to legislate the issue of mediator immunity. Once that legislation is deemed necessary, then the appropriate model for mediator liability must be chosen in order to define the scope of immunity.

Necessity of Legislation

As mentioned earlier, not all jurisdictions provide rules on the issue of mediator immunity; common law principles can also be applied in certain scenarios to define this issue. In addition, the disputing parties in the mediation process sometimes put down in the agreement provisions concerning the mediator liability. The Report of the Working Group on Mediation distributed by the Department of Justice in Hong Kong is of the view that there should not be statutory immunity for mediators. Four justifications were provided for this position. First, facilitative mediation is the type of mediation most commonly conducted in Hong Kong. The mediator assists disputing parties in communicating with each other and exploring possible settlement options with the view of reaching a final settlement without going into the contents of the dispute or having adjudication on the case.³⁴ Furthermore, there is no mandatory or court-annexed mediation in Hong Kong; as such, the Department of Justice believes that the conditions for judicial immunity do not exist. Second, based on the experiences of other common law jurisdictions, the chances of mediators being sued is slim. Third, mediators can include provisions for immunity in their contracts of appointment. This is a common practice and generally accepted by the parties. Fourth, mediators often take up liability insurance,³⁵ as such, their mediation activities have already been protected, at least financially, from the risk of being sued.³⁶ The four reasons listed above have been used to a large extent to indicate that legislating on mediator immunity is not a matter of urgency; however, counter-arguments to the above reasons, as well as additional arguments illustrate the necessity and urgency of legislating on mediator immunity.

³⁴ Gerald S. Clay & James K. Hoenig, "The Complete Guide to Creative Mediation" (1997) 52 *Dispute Resolution Journal* 9-10.

³⁵ For example, some district courts in the American state of Ohio request that mediators are insured against their liability.

³⁶ For more on the reasons, see Department of Justice, Hong Kong Special Administrative Region, Report of the Working Group on Mediation, Feb 2010, p 121.

First, be it facilitative mediation or evaluative mediation, the ultimate aim is to assist the parties in dispute to reach a settlement.³⁷ This is the same as any other dispute resolution mechanism that aims to resolve disputes. As different types of disputes arise, different forms of resolution methods and strategies develop and give rise to different dispute resolution mechanisms. Each mechanism adapts to the needs of a developing society and adopts a different method and attitude to satisfy the needs of resolving different natures of disputes.³⁸ Denying immunity solely based on the differences in resolution methods and strategies of the mechanisms will create an unfair result, which will be detrimental to the development of alternative dispute resolution system. It is not beneficial to the development of an alternative dispute resolution mechanism such as mediation if the law favours one over the other. The nature and ultimate purpose of a particular mechanism and not on the difference in the methods adopted by the resolution system or model should be emphasised.

Second, just because the chances of mediators being sued are slim does not mean that they will never be sued, and though they are few, cases do exist. Even though the judges have made rulings in these cases, the rationale behind the judgments has been subject to criticism and scholars take different positions on the issue. It is not good for the development of mediation to leave the issue of mediator liability in an uncertain state: the mediators may be hesitant to conduct mediations, and the disputing parties may have reservations when choosing whether to use the mediation mechanism.

Third, it is true that even under situations where the law does not regulate, mediator liability can still be determined through the written agreement with the disputing parties³⁹ or the common law principles. This reasoning similarly applies to arbitration. The disputing parties and the arbitrator in the arbitration process are required to undertake confidentiality and other similar obligations; these obligations are also often set out in the arbitration agreement or in a separate document. This does not mean that the legislature does not need to regulate confidentiality and other obligations and liabilities of mediators. Actually, the existing Arbitration Ordinance gives a clear answer to the above problem. While

³⁷ Kimberlee K. Kovach & Lela P. Love, "Mapping Mediation: The Risks of Riskin's Grid" (1998) 3 *Harvard Negotiation Law Review* 71–75.

³⁸ See Deborah R. Hensler, "A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation" (1995) 73 *Texas Law Review* 1587; Kent D. Syverud, "ADR and the Decline of the American Civil Jury" (1997) 44 *UCLA Law Review* 1935.

³⁹ See for example, Giovanni De Berti, "The Model Mediation Agreement of the Chartered Institute of Arbitrators" (2010) 76 *Arbitration* 136.

acknowledging that the disputing parties can address the relevant issue in their agreement, the instances where there is no clear agreement need to be considered. Because the promotion of mediation is still at a relatively early stage in Hong Kong, citizens may have not yet fully grasp the nature of a mediator's work and the impact of the mediator's liability on them. Mediators might make use of the parties' lack of knowledge in this respect by having them sign an agreement with a term providing for absolute immunity, which would be unfair to the parties. There needs to be a safety valve to prevent such situations and common law principles have yet to provide a clear direction on the issue of mediator immunity as there are few cases relating to the issue and different countries deal with it differently, it will be a challenging task to search for a suitable common law principle.

Fourth, the availability of liability insurance can and does assist in making sure that the relevant enforcement measures can take place immediately to address the compensation issue when liability arises. However, this only treats the symptoms and not the underlying cause of the problem. The real question is determining when a mediator's duty of care arises and what his or her possible liability is. The existence of liability insurance does not necessarily mean that there is no need for regulations on mediator liability. First the issue of mediator liability should be clarified before considering how this liability should be enforced. As such, the availability of liability insurance should not be one of the reasons in determining the necessity for legislating on mediator immunity.

Of course, in discussing the need for legislating mediator liability, both sides have valid reasons to support their views, and legislators should compare the pros and cons of each side to find a solution suitable for Hong Kong. If no clear provisions are adopted, many confusing issues may arise. It would not be beneficial to the development of mediation if mediators cannot be sure whether they are entitled to immunity. A clear legal provision on mediator liability shall help resolve the concerns of the mediators. Legislating mediator immunity is positive for the disputing parties as well. Not only can they make provisions on the issue of mediator liability in their agreement; if they fail to specify, they can still rely on the relevant legal provision to protect their interests. Additionally, the parties can easily find out about the scope of mediator liability and identify possible problems before engaging in the mediation process, and adopt protective measures accordingly.

Therefore, if the issue of mediator liability is clearly defined through legislation, it will both assist in the promotion of mediation and the citizens' awareness of mediation, and it can substantively protect the actual interests of mediators and the disputing parties by avoiding and

minimising the gray area which exists in mediation. This can only be advantageous to the endorsement and use of mediation in Hong Kong. Before the start of mediation, the mediators will then bear in mind the relevant regulation on liability and seriously consider if he or she should participate in the mediation and, whether he or she is suitable to mediate in the relevant case. Once agreeing to mediate disputes, the mediators will be aware of possible scope of liability, which will encourage them to conduct the mediation session with the utmost caution. At the same time, clear rules and better knowledge of mediation on the disputing parties' side will similarly add to their confidence on the mediation process.

As one important component of modern alternative dispute resolution mechanisms, mediation will also need to keep up with the pace of the development of other alternative dispute resolution mechanisms. It should be noted that the style and form of alternative dispute mechanisms are continually changing and more efforts have existed in recent years to provide clear rules to regulate their operations.⁴⁰ How to regulate the mediation mechanism has already become an unavoidable topic.⁴¹

Factors Determining Mediator Immunity

Since a need exists to legislate the issue of mediator immunity, the question that follows is whether mediators are entitled to immunity? Again, there are different views and rationales. The following section will first examine both the main reasons for and against mediator immunity and then consider whether there is a model that can protect the interests of both the mediators and the disputing parties. The Hong Kong Government's Consultation Paper listed six items for consideration and provided both arguments for and against. A discussion of these six items will assist in resolving the question posed under this section.

First, there must be a comparison of the differences between a mediator and a judge.⁴² The fairness and impartiality that judicial proceedings seek to guarantee are similarly applicable to mediation process.⁴³ Judicial immunity encourages the judges to carry out their judicial work independently, impartially and fairly. Similarly, the availability of

⁴⁰ See Yu Fan, "Theory and Practice of Dispute Resolution (Jiu Fen Jie Jue De Li Lun Yu Shi Jian)", p 187–189, Beijing, Tsinghua University Publishing House (2007).

⁴¹ Nadja Alexander, *Global Trends in Mediation* (Kluwer Law International, 2nd edn, 2006) 29.

⁴² For details, see Department of Justice, Hong Kong Special Administrative Region, Report of the Working Group on Mediation, Feb 2010, p 118.

⁴³ Michael Moffitt, "Loyalty, Confidentiality and Attorney-Mediators: Professional Responsibility in Cross Profession Practice", (1996) 1 *Harvard Negotiation Law Review* 203.

immunity can encourage the mediators to carry out their mediation work independently, impartially and fairly. While carrying out the work in a flexible way as required by the mediation process, the mediators will not need to worry about the likelihood of litigation against them over their mediation work at a later stage. Correspondingly, there are scholars who think that a judge is completely different from a mediator. The relevant discussion has already been presented in the earlier section and will not be repeated here.

Second, mediator immunity encourages compliance with confidentiality and other characteristics of mediation process.⁴⁴ Once a disgruntled party files a lawsuit in court against the mediator, the judge may have to investigate what happened during the earlier mediation session, which will pose a challenge to the confidentiality of mediation. This situation will no doubt undermine the parties' confidence in the confidentiality of mediation; it will further prevent the parties from participating openly in the mediation session, which will ruin the whole mediation process and affect its final outcome. Policymakers should be especially wary of such an adverse scenario. The reason why parties choose mediation and why they agree to openly discuss disputes and offer settlement options during the mediation is, largely, because of the confidential nature of the mediation process.⁴⁵ Although restrictions could be made during the legal proceedings afterwards, this does not effectively address the parties' concerns. This is also closely related to the fact that the scope of confidentiality in mediation has yet to be clearly defined, as such, even if some evidence-related rules are to be interpreted restrictively during the legal proceedings, the fact that the scope of confidentiality is in an uncertain state means that the parties cannot derive enough confidence from such restrictions.

Third, immunity encourages the effective implementation of the final settlement agreement as it prevents the parties from renegeing on their agreement and indirectly avoiding the settlement agreement through suing the mediator.⁴⁶ Indeed, this is also one of the reasons why judges enjoy judicial immunity. However, those who are against immunity think that if the parties are being compelled to reach a settlement and as a result of the mediator's mistake suffer losses, it would be enormously unfair to the parties if they do not have a suitable access

⁴⁴ See Department of Justice, Hong Kong Special Administrative Region, Report of the Working Group on Mediation, Feb 2010, p 118–119.

⁴⁵ Joel M. Douglas & Lynn J. Maier, "Bringing the Parties Apart" (1994) 49 *Dispute Resolution Journal* 34; Michael A. Perino, "Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act" (1995) 26 *Seton Hall Law Review* 1.

⁴⁶ See Department of Justice, Hong Kong Special Administrative Region, Report of the Working Group on Mediation, Feb 2010, p 119.

to a remedy. These individuals further believe that the confidentiality of mediation should be subject to exceptions and appropriate revelations should be permitted to ensure that parties receive a fair outcome.⁴⁷ The court can decide whether to affirm the final settlement agreement after considering the surrounding circumstances of the case. Even if the court thinks that there has been misconduct on the part of the mediator, it can still uphold the final settlement agreement whilst holding the mediator liable. However, there are two sides to the problem and actually, those who hold contrary views are not directly against the immunity itself, but they believe that in situations where there has been misconduct, the mediator should be held liable to that extent necessary to protect the interests of the parties. This issue brings up the question which will be considered in the next section; that is, whether the scope of immunity should be limited?

Fourth, as mentioned earlier, those who are against immunity argue that a mediator is different from a judge as the former does not release a judgment on the case; whilst those who advocate for immunity use this as the basis to differentiate between the mediation process and outcome.⁴⁸ Mediators should be held liable for mistakes that occur during the mediation process but should be entitled to immunity as to the outcome of the mediation. It is doubtful whether this differentiation is reasonable because the mediation process and its outcome are closely intertwined, and once a problem occurs during the process, it will most likely lead to an unfair outcome. Even if the outcome is fair, the public will regard it with speculation. To differentiate strictly between the process and the outcome will be detrimental to the resolution of the issue of mediator immunity. If one can only sue on problems that occur during the process, and that problem leads to a seriously unfair outcome, the parties will be unable to seek a remedy because of the right of immunity with regard the outcome. This will inevitably result in even more unfairness. It follows that the difference in the views of those who are for or against immunity lies not in whether immunity should be given, but the scope of that immunity.

Fifth, those who are against immunity believe that granting the right of immunity would leave parties who have suffered losses as a result of a mediator's misconduct without an opportunity for remedy which is

⁴⁷ Peter N. Thompson, "Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota" (1997) 18 *Hamline Journal of Public Law & Policy* 329; Christopher H. Macturk, "Confidentiality in Mediation: The Best Protection Has Exception" (1995) 19 *American Journal of Trial Advocacy* 411.

⁴⁸ See Department of Justice, Hong Kong Special Administrative Region, Report of the Working Group on Mediation, Feb 2010, p 119.

unacceptable in today's modernised society.⁴⁹ Indeed, this feature is unfair to the parties; it is detrimental to the development of mediation if the relevant mediators are not held liable for their misconduct. Therefore, the key to the question is not whether immunity is necessary, but where to draw the line on situations in which a mediator should be held liable.

Finally, the availability of immunity will directly affect the number of mediators and resources.⁵⁰ If mediation activities might give rise to liability, individuals may not be willing to become mediators or conduct mediation sessions. Immunity can certainly be exercised through agreement, liability insurance or other forms; however, as already mentioned other reasons, which have been discussed, still require the regulation of mediator liability even with these options.

The Report of the Working Group on Mediation lists the reasons it is not necessary to regulate on immunity but these reasons do not absolutely rule out the necessity and possibility of legislating immunity. Earlier analyses have demonstrated that these reasons when approached from another angle, can similarly serve as the rationale for legislating on immunity. Earlier discussions have also illustrated the point that legislating immunity will benefit the promotion and use of mediation in Hong Kong.

Taking into account the above analysis, the authors argue that the issue of mediator liability is not whether or not there should be immunity for the mediators but rather, the level and scope of the immunity. There are valid views for⁵¹ and against⁵² immunity. These different views must be balanced such that, on the one hand, mediators are willing to participate and able to conduct mediation with a peace of mind, and on the other hand, the interests of the parties will not be harmed by mistakes and misconduct by mediators, or even if parties suffer losses a suitable remedy against the mediators exists.

Absolute Immunity versus Qualified Immunity

After establishing the necessity of conferring immunity, the substantive question on mediator immunity must be answered: absolute immunity

⁴⁹ See Department of Justice, Hong Kong Special Administrative Region, Report of the Working Group on Mediation, Feb 2010, p 120.

⁵⁰ See Department of Justice, Hong Kong Special Administrative Region, Report of the Working Group on Mediation, Feb 2010, p 120.

⁵¹ Joseph B. Stulberg, "Mediator Immunity", (1986) 2 *Ohio State Journal on Dispute Resolution* 86-87.

⁵² Arthur A. Chaykin, "Mediator Liability: A New Role for Fiduciary Duties?" (1984) 53 *University of Cincinnati Law Review* 731.

or qualified immunity. A clear answer on this question was given in the earlier section. The objections offered in the Consultation Paper do not entirely rule out the necessity of immunity but may have a bearing on the appropriate scope of immunity. The Consultation Paper itself acknowledges that most countries adopt a qualified immunity position on this issue. In addition, the revised Arbitration Ordinance adopts a qualified immunity position in the relevant provisions on mediator liability. As such, the key discussion under this section is how to determine the exact scope of immunity.

Section 2GM of the Arbitration Ordinance (before revision) states that an arbitral tribunal is liable in law for acts done or omitted, if done dishonestly. Subsection 1 of s 2GM provides, "An arbitral tribunal is liable in law for an act done or omitted to be done by the tribunal, or by its employees or agents, in relation to the exercise or performance or the purported exercise or performance of the tribunal's arbitral functions only if it is proved that the act was done or omitted to be done dishonestly".⁵³ Arbitral immunity is a common sense extension of the concept of judicial immunity, in that arbitrators perform an adjudicatory role like judges. However, quasi-judicial immunity is narrower in scope. It acts as a defense only when arbitrators are pursuing their decision-making function in good faith. The revised Arbitration Ordinance extends a similar provision on qualified immunity from the arbitral tribunal to mediators. Indeed, such an extension is logical since an arbitral tribunal in the course of an arbitral hearing can, with the consent of both parties, conduct mediation on the case, in the capacity of a mediator, and then release the final settlement agreement in form of arbitral award that will be enforceable.⁵⁴ Disputing parties both welcome and use this dispute resolution model that combines arbitration together with mediation.⁵⁵ Applying both mediation and arbitration in the same case is becoming increasingly common. It will not be easy to separate the two components of this hybrid form of dispute resolution. Further, the overriding objective of the neutral party is to assist the parties to settle the dispute voluntarily. It is sometimes difficult to differentiate the roles of the neutral party as a mediator or an arbitrator at a given point in the process. As such, the approach of the amendment extending the provision to mediators is commendable.

⁵³ Section 2GM of the Arbitration Ordinance.

⁵⁴ For relevant discussions, see Shengchang Wang, "Theory and Practice of the Combination of Arbitration and Mediation (Zhong Cai Yu Tiao Jie Zu He De Li Lun Yu Shi Wu)", p 78–79, Beijing, Law Press (2001).

⁵⁵ M. Scott Donahey, "Seeking Harmony – Is the Asian Concept of the Conciliator/Arbitrator Applicable in the West?" (1995) 50 *Dispute Resolution Journal* 74.

The next question is whether the prospective legislation on mediation should fall into line with the newly revised Arbitration Ordinance. Some believe it is necessary to consider mediation conducted under various circumstances: community *pro bono* mediation, court-ordered mediation, mediation under the arbitration system, and other forms of mediation. However, the authors believe that as is similar to the earlier comparison between a mediator and a judge, what matters is the purpose and function of mediation in general sense, not on the specific types of situations in which mediation is carried out. The non-differentiation position is especially meaningful to the mediators since it displays the principle of equality in their work, which does not accord preferential treatment just because it is connected with a court or arbitration. In practice, the nature of work, getting parties in dispute to communicate and reach a settlement, is still mediation regardless of the circumstances in which the mediation activities are carried out. If different treatments were accorded solely on the basis of some differences in the mediation scenarios, then this would lead to substantive unfairness and confusion. To illustrate further, if the future mediation law is different from the relevant provisions on mediator liability in the Arbitration Ordinance, will this mean that the type of mediation activities regulated under the Arbitration Ordinance should be excluded from the relevant future legislation on mediation? If so, should mediation under community *pro bono* schemes or court-ordered mediation be removed as well? Is it necessary to have individual separate legislation to govern the different circumstances under which mediation is carried out above? This reasoning seems ridiculous and unreasonable. The trouble and resulting complicated state of laws is something that the legislators and the judiciary would not like to see.

Therefore, relevant rules on mediator liability in future mediation legislation should adopt the same position as that under the Arbitration Ordinance, in other words, it is re-enacting s 2GM of the Arbitration Ordinance. The specific provision can follow the Arbitration Ordinance with some modifications, such as, “a mediator is liable in law for an act done or omitted to be done by the mediator, or by its employees or agents, in relation to the exercise or performance or the purported exercise or performance of the mediator’s functions only if it is proved that the act was done or omitted to be done dishonestly”.

Conclusion

The issue of mediator immunity has been a contentious issue on which there is so far no uniform stance or approach. This is demonstrated by the national regulations in various jurisdictions and common law cases. In some

court proceedings, judges held that mediators and judges are in a similar position and hence, judicial immunity is granted; this position has been questioned and subjected to criticism from many scholars.⁵⁶ The authors believe that the arguments or criticisms gain footing because of the judge's adoption of absolute immunity. Examining the regulations and related measures of various jurisdictions, many jurisdictions adopt a qualified immunity position, which is also the position supported by most scholars. Hong Kong's newly revised Arbitration Ordinance has taken the forward leap in its legislation by taking up a qualified immunity position with respect to the issue of mediator liability under the arbitration framework. For mediation carried out under other circumstances, the authors believe that the same approach as that of the Arbitration Ordinance should be followed and that there should be no differentiation between mediations carried out in different circumstances. A qualified immunity position also indicates that mediators are not absolutely exempted; instead, their immunity is qualified depending on the factual circumstances. This can increase the mediator's standard of care in fulfilling his or her duty during the mediation, and it can effectively protect the legal interests of the disputing parties.

Although the mediation mechanism has existed for many years, its degree of importance differs in various countries. In today's modern society, many countries are increasingly aware of the importance of mediation and are emphasising on the use of mediation in dispute resolution. Mediation has long existed in Mainland China and has been applied to a wide range of sectors, but as of today, Mainland China has yet to set up a reasonable legal framework. Even though the People's Mediation Law of the People's Republic of China was recently enacted, its regulatory scope is limited to the people's mediation, a mediation system with Chinese characteristics, and does not include judicial mediation or other forms of mediation. There is no regulation on the issue of mediator immunity. The only relevant provision is Art 15 of the said law, that is, "Where a people's mediator commits any of the following acts in the mediation work, the people's mediation commission which he belongs to shall criticize and educate him and order him to correct; if the circumstances are serious, the entity which recommends or appoints him shall dismiss him from the position or employment: (1) showing favoritism to a party concerned; (2) insulting a party concerned; (3) asking for or accepting money or goods, or seeking for other illicit benefits; or (4) divulging the individual privacy or trade secret of a party concerned".⁵⁷ This article

⁵⁶ See Scott H. Hughes, "Mediator Immunity: The Misguided and Inequitable Shifting of Risk" (2004) 83 *Oregon Law Review* 107.

⁵⁷ Article 15 of the People's Mediation Law of the People's Republic of China.

neither covers the issue of legal liability nor how to protect the interests of the parties. In this sense, Hong Kong's related discussion on legislating mediator liability will be a useful reference for Mainland China and other jurisdictions that do not have mediation laws or are in the process of mediation legislation.

One cannot deny the fact that it is difficult to reach a consensus on the issue of mediator liability within a short period. However, from the above discussions, it is not hard to discover the dominant views and methods at the international level. With this in mind and incorporating the consideration of national characteristics, it is not difficult to proceed to legislation and come up with an appropriate provision on mediator liability. Whether viewed from a legislative or practical point of view, Hong Kong's ongoing discussions on mediation legislation will have a deep and far-reaching impact on the local mediation activities and will be meaningful for the promotion and development of mediation in Hong Kong. Such an impact can well go beyond the region to other jurisdictions.