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EDITORIAL

We commence this issue of *Asian Dispute Review* with an article in which Sir Vivian Ramsey discusses the challenges facing international arbitration. Jay Santiago then provides an insight into the determination of challenges to arbitrators by HKIAC. This is followed by an article by Koh Swee Yen which looks at the arbitrability of shareholder disputes in Singapore, as well as a piece by Julian Copeman, May Tai and Anita Phillips on recent developments in Hong Kong mediation. Our 'In-House Counsel Focus' article by Man Sing Yeung and Robert Morgan provides an arbitrator's view on how to select institutional international arbitration rules.

Recent developments in arbitration in Hong Kong are discussed in our 'Jurisdiction Focus' by Cameron Hassall and Thomas Walsh. Finally, Robert Morgan reviews Datuk Professor Sundra Rajoo's latest text, *Law, Practice and Procedure of Arbitration*.

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Mediating Commercial Disputes: A Call to Action in Hong Kong

Julian Copeman, May Tai & Anita Phillips

Mediation has failed to flourish in Asia like arbitration, despite earlier market predictions. The authors discuss the results of recent client research on commercial mediation and the outputs of the Hong Kong Global Pound Conference to assess what is required to bring mediation into the mainstream for commercial parties in Hong Kong.

Introduction and background

Mediation has the potential to resolve disputes in a quick, cheap and confidential manner. For commercial parties, who are usually keen to resolve conflict privately, with minimal disruption to management time and in a way that can preserve ongoing business relationships, mediation should be manna from Heaven.

Despite being promoted since the mid-1980s, it is only in the last decade that mediation has become a regular adjunct to litigation in Hong Kong.

(1) Practice Direction 31 (PD 31) to the Civil Justice Reform (CJR) was originally introduced in February 2009. The current version (14 August 2014) applies to almost all civil proceedings in the Court of First Instance and the District Court.[1] Based on the authors' research, PD 31 has been interpreted by parties as introducing a requirement to attempt mediation at some point in the context of litigation, despite being drafted in non-mandatory terms.

(2) In the arbitration context, in line with the spirit of the CJR, the Arbitration Ordinance (Cap 609) provides a hybrid procedure whereby an arbitrator sitting in Hong Kong can mediate a dispute provided the parties consent in writing.[2] Take-up has, however, been virtually non-existent.[3]

(3) The Mediation Ordinance (Cap 620) took effect on 1 January 2013 and essentially puts mediation confidentiality on a legislative footing.[4] Everything said and written in the

context of mediation is inadmissible in later proceedings, unless specifically allowed or required by law.

> "For commercial parties, who are usually keen to resolve conflict privately, with minimal disruption to management time and in a way that can preserve ongoing business relationships, mediation should be manna from Heaven."

Despite a formal legal framework for conducting mediation, enthusiastic governmental and judicial support, the existence of numerous institutions providing mediation services and with over 2,000 accredited mediators in the territory, research shows that it is still largely confined to use by parties already involved in litigation proceedings. Further, mediation is often seen as a 'tick box' exercise by lawyers and parties alike. It has too often become a hoop to be jumped through before continuing with litigation. This is unfortunate and a missed opportunity for parties, their advisers and institutions providing dispute resolution services.

Client research results

The authors' client research five years on from the introduction of PD 31 reached the following conclusions.[5]

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

It was with a view to identifying a knowledge gap amongst certain parties, their advisers and the broader dispute resolution community about what mediation is, why it works, and how and when best to use it, that the Global Pound Conference was convened in Hong Kong in 2017.[6]

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The Global Pound Conference (GPC)

The GPC is assessing how users of commercial dispute resolution deploy mediation and other processes, and how the market is meeting those needs. The latest in the 40-conference global series at the time of writing took place in Hong Kong on 23 February 2017. The event saw over 200 delegates – judges, commercial parties, corporate counsel, arbitrators, mediators, dispute resolution institutions, government officials and academics – come together to identify trends and cultural preferences in a way that had not been possible through previous studies.

The view from the top

Hong Kong's Secretary for Justice, Solicitor General and Chief Justice headlined the conference. Their support for mediation to resolve commercial disputes was clear. In his Keynote Speech,[7] the Secretary for Justice, the Hon Rimsky Yuen SC, called for renewed commitment to promote dispute resolution services to promote the rule of law and access to justice. He set this against the backdrop of economic development and competitiveness in Hong Kong. Its role as an international dispute resolution and commercial centre was clearly highlighted.

In recognising that parties want efficiency when selecting dispute resolution processes, the Secretary for Justice pointed to three measures to promote mediation in the territory:

(1) *third party funding (TPF) for arbitration and mediation*: in this regard, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 was introduced in the Legislative Council (LegCo) on 30 December 2016;[8]

(2) *apology legislation*: this is aimed at promoting the settlement of disputes before parties become polarised, by recognising that an apology will not constitute an admission of fault or affect insurance cover. An Apology Bill received its second reading in LegCo in February 2017;[9] and

(3) *evaluative mediation*: the Department of Justice would consider the use of evaluative mediation for IP and other disputes in Hong Kong. A common complaint of mediation in Hong Kong is that mediators are perceived to be too passive, whereas parties often want and need some sort of evaluation to reality check their cases and assist with settlement.

The Secretary for Justice also highlighted the huge commercial and infrastructure investment expected through the PRC Government's Belt and Road Initiative.[10] This will undoubtedly lead to an upsurge in international disputes arising from the significant investment over the coming decade. The harmonisation of dispute resolution has been provided for in the Blue Book on Dispute Resolution Mechanisms for the Belt and Road,[11] which proposes mediation first, followed by arbitration. This is a complex area, involving 60 countries with different legal systems (some common law, some civil law), but it offers a great opportunity for mediation as a preferred dispute resolution process.

Recognising the GPC as a driver for change in his Closing Address, the Hon Chief Justice Geoffrey Ma highlighted (1) that a culture shift was required to promote collaboration over traditional adversarial approaches to dispute resolution, and (2) the Judiciary's support for mediation. He concluded by describing mediation as the most significant development in the administration of justice in Hong Kong in the last 10-20 years. He identified it as an integral part of Hong Kong litigation that has the potential to provide access to justice in large measure. In his view, however, mediation could do much more, and more people needed to be convinced of its benefits.

> "… [A] shift from treating ADR as 'alternative dispute resolution' to 'appropriate dispute resolution' was overdue."

How did delegates vote at the Hong Kong GPC?

Set around four interactive sessions, the GPC series addresses, through a web-based voting app:

(1) the demand side (user perspectives (session 1));
(2) the supply side (what advisers and providers are delivering to users (session 2));
(3) the key obstacles and challenges to access to justice (session 3); and
(4) what action items need to be addressed and by whom (session 4).[12]

Session 1

By contrast with other GPC events, this session highlighted that, in terms of outcomes, it appeared to be all about the money in Hong Kong. Financial outcomes (eg damages, compensation, indemnities) were judged to be the top priority by all stakeholders (parties, advisers, providers, academics and policymakers). This contrasted with other venues, notably Singapore, where action-based outcomes were ranked most highly by parties, mediators and influencers, showing a disconnection there between what parties looked for and what the market (advisers and providers) prioritised.

Whilst mediation is often championed as a process allowing for more creative, action-based outcomes than adversarial processes, this does not seem to be its draw card in Hong Kong; nor was preserving relationships, which also ranked low down on delegates' priority lists when it came to outcomes.

In keeping with other GPC events, efficiency was judged to be a priority by stakeholders when assessing parties' dispute resolution options, as was parties and lawyers working collaboratively rather than lawyers serving as mere advocates. This suggests support for mediation and other less formal processes. The 'tick box' approach to mediation under PD 31, highlighted in the authors' earlier research discussed above, was raised both by panellists and in questions posed by delegates, indicating that this remained an issue.

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Session 2

This session was concerned with how the market was addressing parties' conflict resolution preferences and needs. Again, financial outcomes were judged to be of highest importance to those providing dispute resolution services, showing that the demand and supply sides of the market were aligned in Hong Kong. There was overwhelming recognition that mediation could reduce cost and expense.

However, perhaps surprisingly, acquiring better knowledge about the strengths and weaknesses of the case was judged by parties to be the most important part of non-adjudicative processes. Whether this implies that mediation is being used cynically as a 'fishing expedition' in Hong Kong is open to debate. In many quarters, sophisticated users of mediation will regard mediation as meeting their objectives if they walk away knowing more about their opponent's case, what or who is driving the counterparty's position etc, and this may assist in later settling the dispute. These are all possible by-products of mediation, and calling this a fishing expedition does not do justice to the complexity of mediation and dispute resolution.

In keeping with session 1, preserving relationships was not judged to be a high priority by the market, indicating that mediating in the territory was not driven by a desire to maintain commercial relationships.

Finally, there was a high preference for combining adjudicative and non-adjudicative processes in Hong Kong. This was in

keeping with other GPC events and suggests that PD 31, through embedding mediation in the litigation landscape, is to be applauded. By contrast, more needs to be done to see mediation used more readily as an adjunct to arbitration, as it is in Mainland China, Japan and several European countries.

Session 3

In this session, technology and TPF took centre stage. Ms Abigail Cooke of software developer kCura urged delegates to consider technology as a time- and cost-saving device, rather than as an additional expense. Mr Craig Arnott of global funder Burford Capital discussed his experience in the UK, where the funding market is more developed. He applauded the steps taken in Hong Kong to open up the funding market in the context of arbitration and mediation.

In terms of the voting results, combining non-adjudicative and adjudicative processes was again judged to be vital to improving the future of commercial dispute resolution processes. The use of pre-escalation and other dispute resolution clauses was also ranked highly, indicating that parties and lawyers should bring forward the point at which they consider dispute resolution, thereby encouraging or compelling parties to attempt non-adjudicative processes earlier in the dispute resolution cycle. Legislation was also judged to be important to improve commercial dispute resolution, specifically in the sphere of recognition and enforcement of settlements. With the Hague Convention on Choice of Court Agreements (2005) and the proposed UNCITRAL convention on enforcement of mediated settlements, reform in this area is likely to be welcomed.

> “… [A]cquiring better knowledge about the strengths and weaknesses of the case was judged by parties to be the most important part of non-adjudicative processes. Whether this implies mediation being used cynically as a ‘fishing expedition’ in Hong Kong is open to debate.”

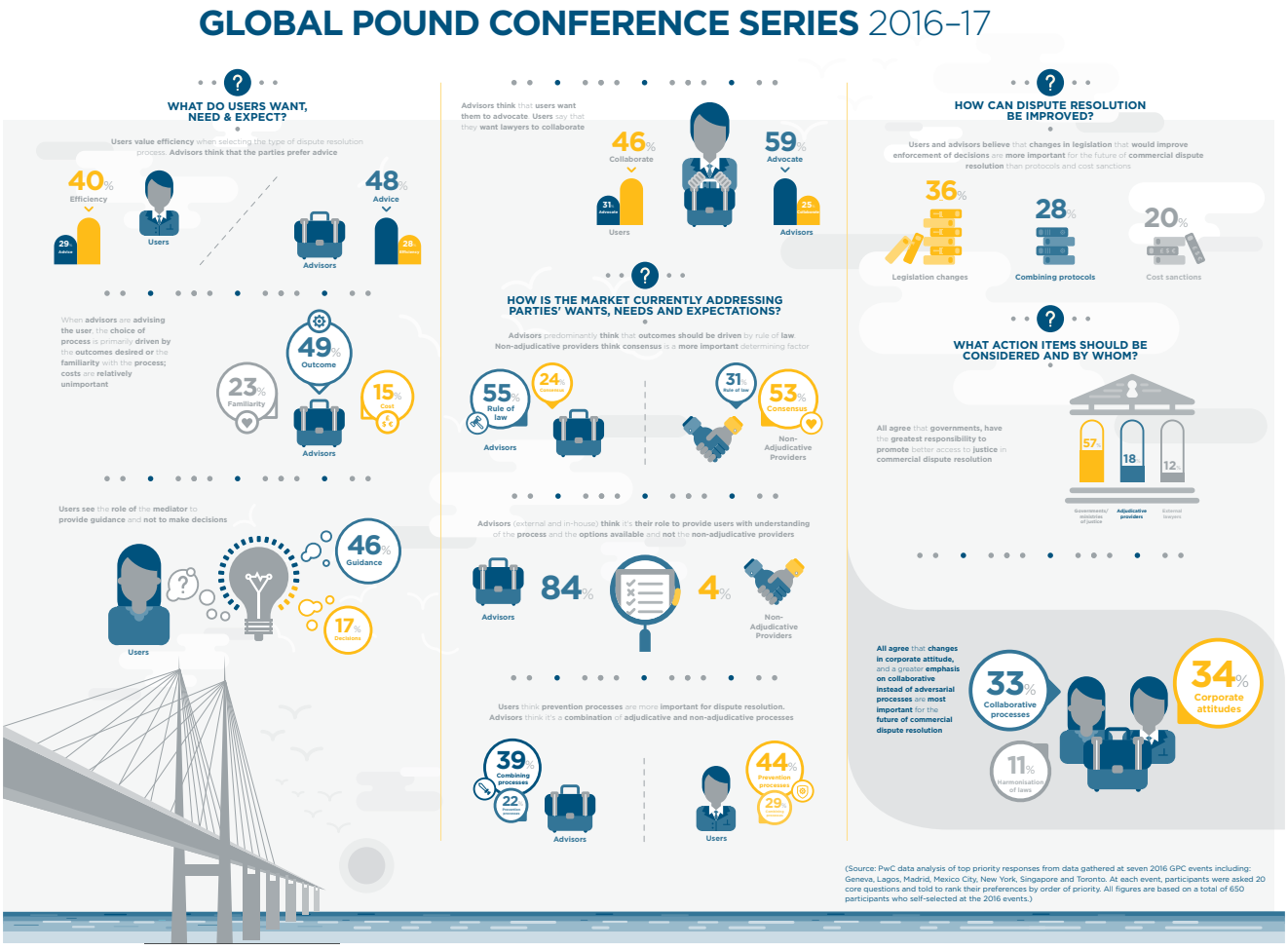
Finally in this session, the stakeholder identified as the most resistant to change in dispute resolution was the external lawyer. This created the paradox whereby external lawyers were both resistant to change and yet the most likely to be able to effect it. As the stakeholder at the centre of most disputes, interfacing with other stakeholders (including clients, the courts and institutions), there was considerable responsibility on the shoulders of external lawyers to educate themselves and their clients about available dispute resolution options and when and how best to deploy them.

Session 4

This session pulled the various topics together and, critically, identified who had the greatest responsibility in Hong Kong for taking action to promote better access to justice in commercial disputes. In keeping with other GPC events, governments and ministries of justice scored most highly, with all stakeholders in agreement on this. The Solicitor General, Mr Wesley Wong SC, highlighted education and technology as keys in effecting change. He also encouraged delegates not to overlook what was already working well, pointing to the pending legislation on TPF, apology and the resolution of IP disputes as catalysts for change. The panel agreed that a shift from treating ADR as ‘alternative dispute resolution’ to ‘appropriate dispute resolution’ was overdue.

How did the Hong Kong results compare to those of other GPC events?

PricewaterhouseCoopers (PwC) has undertaken in-depth analyses of top priority responses from data gathered at the first seven 2016 GPC events held in Geneva, Lagos, Madrid, Mexico City, New York, Singapore and Toronto. At each event, participants were asked 20 core questions and told to rank their preferences by order of priority. All figures were based on a total of 650 participants who self-selected at the 2016 events. The results are highlighted in the diagram below and show not only some clear similarities with the Hong Kong data outputs but also some interesting differences, as discussed above.



> "… [C]ombining non-adjudicative and adjudicative processes was … judged to be vital to improving the future of commercial dispute resolution processes. The use of pre-escalation and other dispute resolution clauses was also ranked highly, … thereby encouraging or compelling parties to attempt non-adjudicative processes earlier in the dispute resolution cycle."

Conclusion

It is too early to say how the global data will develop, with around 30 GPC events still to take place at the time of writing. It is clear, however, that the GPC series will produce unique quantitative data on dispute resolution to shape development and change at both the Hong Kong and international levels. The data will serve to 'sense check' current and proposed policies in a way that has previously not been possible due to a paucity of data, particularly in relation to mediation and other confidential processes.

In Hong Kong, stakeholders have now given a clear indication that financial outcomes are top priority, with preserving relationships and more action-based outcomes being of far less significance. Efficiency of processes and collaboration between parties and their advisers

are important, as is combining adjudicative and non-adjudicative dispute resolution processes. The next phase of the GPC conversation is transforming these ideals into tangible action.

1 *Editorial note*: For commentary, see *Hong Kong Civil Procedure 2017: Arbitration and ADR* volume, section V6.

2 *Editorial notes*: For commentary, see *ibid*, section U1 at U1/32 and U1/33. The Ordinance came into effect on 1 June 2011. Sections 32 and 33 substantially re-enact ss 2A and 2B of the now repealed Arbitration Ordinance (Cap 341) and, in so doing, substitute the term 'mediator' for 'conciliator'.

3 *Editorial note*: See generally *ibid* at U1/33/1.

4 *Editorial note*: For commentary, see *ibid* at V1, in particular on confidentiality, admissibility and disclosure at V1/8-V1/10.

5 *Editorial note*: See also Julian Copeman, May Tai & Gareth Thomas, *Client Perspectives: Mediation in Hong Kong Five Years On*, Hong Kong Lawyer (April 2015), available at http://www.hk-lawyer.org/content/client-perspectives-mediation-hong-kong-five-years.

6 *Editorial note*: See generally *Global Pound Conference* [2016] Asian DR 58 and *Global Pound Conference, Hong Kong* [2017] Asian DR 45, which focused on the results of the Singapore conference (March 2016). See also Julian Copeman & Anita Phillips, *Litigate, Arbitrate or Mediate? Putting It all on the Table at the Global Pound Conference in Hong Kong*, Hong Kong Lawyer (February 2017), pp 36-39, available at http://www.hk-lawyer.org/content/litigate-arbitrate-or-mediate-putting-it-all-table-global-pound-conference-hong-kong.

7 *Editorial note*: *The Development of Dispute Resolution in Hong Kong: Past, Present and Future* (23 February 2017), available at http://www.doj.gov.hk/eng/public/pdf/2017/sj20170223e1.pdf.

8 *Editorial notes*: Available at http://www.legco.gov.hk/yr16-17/english/bills/b201612301.pdf. See p 96 below for a summary of the provisions of the Bill.

9 *Editorial notes*: Available at http://www.legco.gov.hk/yr16-17/english/bills/b201701271.pdf. See p 96 below for a summary of the provisions of the Bill.

10 *Editorial notes*: For discussion, see Cameron Hassall & Thomas Walsh, *Hong Kong Country Update* at pp 87-92 below. See also the presentation by the Secretary for Justice entitled *The Belt and Road Initiative: Impact on the Future of Dispute Resolution*, 5th Asia Pacific ADR Conference, Seoul, South Korea, 12 October 2016, available at http://www.doj.gov.hk/eng/public/pdf/2016/sj20161012e2.pdf.

11 *Editorial note*: Launched by the International Academy of the Belt and Road at its Fourth International Forum on Belt and Road, Beijing, 11 October 2016.

12 *Editorial note*: For a compilation of the Hong Kong voting results, see *Local Voting Results: HONG KONG, February 23, 2017*, available at http://globalpoundconference.org/Documents/GPC%20Series%20Hong%20Kong%202017%20Voting%20Results.pdf.