KOBE UNIVERSITY

LAW REVIEW

INTERNATIONAL EDITION

No. 40

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2006

GRADUATE SCHOOL OF LAW, KOBE UNIVERSITY

ROKKODAI, KOBE, JAPAN
CDAMS International Symposium
at Kobe on 16 September 2006
Blending Cultures in Mediation

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Thank you for honouring me with this invitation to Kobe. As Professors Kashimura and Mr. Bellman have done, I begin with a definition, although one that needs an immediate disclaimer. The word “mediation”, even within the same jurisdiction or legal system, may mean a number of things and is often used interchangeably with “conciliation”. For example, the Hong Kong Arbitration Ordinance refers to “conciliation”, when everyone knows it means - or at least includes - “mediation”. The definition from the U.S. is worth repeating here as a starting point: “It is (1) a non-compulsory procedure in which (2) an impartial, neutral party is invited or accepted by (3) parties to a dispute to help them (4) identify issues of mutual concern and (5) design solutions to those issues (6) which are acceptable to the parties.”. As we will see, the definition can become blurred when crossing national borders.

Mediation in western countries has grown substantially over the past few decades. Harold Bellman has spoken of the U.S. history, with its skepticism of the court system, as one element contributing to the development of alternate means of dispute resolution in America. Mediation there has been a response to systemic problems with rights-based systems of litigation and arbitration. In some western countries, cost and delay have produced a crisis of access to justice, when only the very rich or the legally-aided can afford to litigate. Over-preparation by sophisticated advocates and long court lists illustrate the old maxim, “Justice delayed is justice denied.” In terms of the commercial relationship, destruction of trust, hostility, and bad publicity accompany litigation and arbitration, making future business unlikely.

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2 The International Chamber of Commerce created its Court of Arbitration in 1923. Its 1924 Report No. 3 listed 100 cases, of which 40 had settled 75 by arbitration, 7 by conciliation, 26 by mutual agreement and 2 by another organization after intervention by ICC. Of 51 cases that settled, 46 were because a party had refused to conciliate; in only 3 was the conclusion “fruitless”. (Nine were still pending.) Figures for recent years are very different: around 600 arbitration cases per year, but only a couple of dozen under conciliation or mediation rules.
Mediation in the west may mean one or a combination of several models: facilitative, evaluative, transformative; we have heard from Howard Bellman about how those are used today in the United States. Whatever model is used, the key in the west is party autonomy, the free will of the parties to accept or reject the negotiated agreement. Of course, if the agreement is rejected, the next step will be to arbitration or litigation, if the parties choose to take their dispute further.

In contrast, as I understand it, conciliation in Japan means negotiation with or without a third party, whereas in Japanese mediation, a third party acts as shuttle between parties in separate locales and is expected to offer evaluation and proposals for solutions. Although the notion of party autonomy persists, the Japanese mediator seems to play a far more active role in fashioning solutions.

Where the western system was born more recently out of discontent with the cost, length and destructiveness of rights-based procedures, Japan has an established tradition of respected elder “fixers” whose evaluations and advice for settlement will usually be carried out by parties (in principle at least, voluntarily). Here in Japan, I understand that mediation dates back to the 17th century. We heard today about lay mediators in court-annexed mediation, and a number of administrative and other schemes established and supported by law. Supported by courts, familiar, practical and - in the case of court-annexed mediation - giving rise to an enforceable agreement, mediation is well established here. However, I have also heard that it faces competition from other forms of dispute resolution: Japanese people are becoming more concerned about rights and their protection, and hence more litigious.

I understand that private mediation in Japan - which we can call “societal mediation” - existing within society at large, but completely outside the court system - will soon be regulated by the new ADR legislation coming into force in 2007. We will hear more about that from the next speaker, Mr. Nakamura. The drafters of this law aim to exert government quality control over mediators and the mediation process. This is an interesting field for discussion, where the U.S. experience may be instructive. Where I live, in Hong Kong, this topic is a “political hot potato” among dispute resolvers. Howard Bellman said in our preparatory discussion yesterday: “Be careful what you pray for - you just might get it.”

The paragraphs that follow will sketch a picture of the state and

3 Reiko Nishikawa, Alternative Dispute Resolution in Japan, paper delivered at Keio University, July 2000.
practice of mediation in Hong Kong and in Mainland China, each of which shares some characteristics with Japanese mediation. Perhaps this comparison can provide some insight about future directions for mediation and its place in all our legal systems.

MEDIATION IN MAINLAND CHINA

To understand the current approach to mediation in Mainland China, we need to know some background. Chinese recorded history dates back many thousands of years, but for our purposes going back to the turn of the last century will suffice. The history of dispute resolution in Mainland China has ebbed and flowed with China’s changing politico-social periods, and these currents help to explain the situation today.

The Qing Dynasty (1644-1912)
Many commentators have written about the Confucian principles of li (ethics or morals guiding behaviour to achieve universal harmony) and fa (formal legal codes). During the Qing Dynasty, the Confucian traditions of harmony and morality dominated Chinese thought, which however was also experiencing the influence of European traders. It was a hierarchical and paternalistic society, in which each person, whatever their role, had a responsibility to maintain balance. To resort to litigation was considered morally reprehensible. Traditionally, Chinese disputes have been resolved more through li than fa, and there was widespread distrust of courts. “It is better to enter the tiger’s mouth than to go into a court of law.” Nevertheless, during the Qing period, the state courts certainly did adjudicate many cases.

Dr. Philip Huang, a Chinese historian at UCLA, has just published a fascinating analysis of court mediation in China, from which I will borrow shamelessly in the following paragraphs. Professor Huang studied over 300 real civil cases from two Chinese counties over a period of nearly 50 years. He begins by identifying four variations of mediation, which I have arranged to look like this:

<table>
<thead>
<tr>
<th>Mediation “tiaojie”</th>
<th>Adjudicative Mediation</th>
<th>Mediatory Adjudication</th>
<th>Adjudication “tiaochu”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary Facilitated negotiation with moral overtones</td>
<td>Persuasion, coercion, but voluntary compliance</td>
<td>Strongly evaluative mediation, with imposed decision</td>
<td>Imposed decision regardless of will of disputants</td>
</tr>
<tr>
<td>Private - “elders”</td>
<td>Private - “elders”</td>
<td>Public - judge</td>
<td>Public - judge</td>
</tr>
</tbody>
</table>

4 Huang, P., in Modern China V 32 no 3 July 2006, p 275-314
On this spectrum, the mediator’s authority would be minimal on the tiaojie side, and increase to what amounts to coercion on the tiaochu side.

In the Qing Dynasty, societal mediation, which is just another name for "private" mediation, would be conducted outside the court system, by a neutral third party, typically a "wise elder". On the other hand, court mediation would be conducted by the judge hearing a dispute, as part of his role in resolving it.

Huang shows evidence to demonstrate that, contrary to what is usually believed, the Qing courts did adjudicate. While acknowledging that Qing philosophy, with its emphasis on maintaining social order rather than protecting individual rights, led judges to attempt mediation first, and then try heavy moral suasion, Huang found that Qing courts did in fact often rule according to law. If societal mediation was the ideal, civil laws were in fact "plentiful and specific, many of them in the form of sub-statutes that originated from actual case experiences reported by local officials." This sounds rather familiar to the common lawyer! In the discussions following the oral presentation of this paper, one commentator pointed out that since the concept of res judicata was not developed in China at this period, there was nothing to prevent a disappointed litigant from trying again, once the judges moved on and were replaced.

The Guomintang and the Republic (1912-1949)

In 1912 nationalists revolted and overthrew the Qing emperors, bringing to an end the last of the dynasties. In 1929, the republican government borrowed extensively from the German Civil Code, with its emphasis on personal rights and their protection. The courts thus became protectors of rights rather than guardians of harmony. Although some attempts were made at mediation in order to alleviate long court lists, most cases did end up being adjudicated, since judges made little serious effort to work out a compromise between disputants. This Guomintang period we can see as the "ebb" of mediation in Mainland China.

Maoist China (1949-1979)

Mao's return to Confucian ideology, the socialist ideal of "the people" rather than the individual, and the accompanying disdain for adversarial western justice brought about a renewed emphasis on mediation. Disputes "contradictions" were classed as "against the people" (requiring punishment) or "among the people" (requiring amicable, peaceful settlement). Maoist China developed a three-tiered system of mediation:
folk mediation at grass roots level, administrative mediation by local officials, and judicial mediation by the courts. Party cadres aggressively promoted settlement in order to keep the number of “contradictions” down to a level acceptable to their superiors. Education, social pressure, political pressure and even material inducements (such as a better job for one of the parties) were routinely used to terminate or minimize disputes. The Maoist period was characterized by highly interventionist judges who would visit the disputants in their village to resolve the dispute by working out a solution. During this period, the lines became blurred. According to Huang, the word “tiaojie” took on a far broader meaning, to include even adjudication.

Again according to Huang’s research, ideology focused “not on establishing legal right or wrong, but rather on minimizing conflict and working out a compromise.” He describes cases in which a woman involved in an accident with a young boy, although found not to be at fault, was persuaded by the Court to settle, by contributing to the boy’s medical expenses, because they had to live in the same small community. This solution was compassionate and would prevent lasting enmity.

During the Cultural Revolution, private property was virtually non-existent, and the role of the courts as adjudicators became even more miniscule, as courts were derided as bourgeois, law schools were closed, and disputes were resolved by reference to the party and its ideals. Mediation, although perhaps not in a form recognizable by western practitioners, had reached its zenith. Tiaojie expanded to include what would, under Qing, have been tiaochu.

Modern China (1979 - present)

The opening of China following the death of Mao and the fall of the Gang of Four caused yet another shift in ideology and in attitudes to the courts. Beginning in the 1980’s, China is returning to the rule of law, and mediation is becoming less prominent. That said, certain vestiges of Maoist China persist: practical moralism in legal thinking, a high degree of authority of the mediator, and the use of combined mediation and adjudication in the same system.

As late as 1995, one western practitioner in China remarked that only about 10% of commercial disputants actually went to court, with the vast majority being settled by negotiation or mediation instead. In the last

8 Ibid 292
9 Ibid 293
10 Ibid 298
decade, however, there has been a sea change. State owned enterprises are being privatised and once more the concepts of private property, and individual rights to that property, have been resurrected. With more laws, the renaissance of contractual relationships, more civil disputes, and longer court lists, judges could no longer devote much time to trying to arrange settlements. However, judges in China continue to intervene, and in fact are quite used to passing judgment on an issue of “fault” before encouraging the parties to settle. If the parties then fail to agree on the consequences of that fault, the judge then adjudicates the dispute. This system, considered very strange in the minds of western parties, in fact bears some resemblance to “Med-Arb”, a concept familiar to some Europeans and North Americans.

Western parties most frequently encounter this interventionist attitude when they find themselves involved in arbitration in Mainland China. For decades, European and American lawyers and arbitrators have brought home stories of the practice in the conduct of CIETAC arbitrations. At any time during the arbitration, at the request of a party or on its own initiative, the arbitral tribunal may interrupt the proceedings to try to mediate the dispute. The Arbitration Law does provide that the parties must agree to mediation, so usually the tribunal will hear the evidence, and then encourage the parties to compromise, at this point when each has heard the other's case, and the parties are in the best position to gauge the probable outcome of an adjudicated decision. In the event the mediation is unsuccessful, the tribunal returns to the arbitration procedure, and renders a binding award. A significant proportion of CIETAC arbitrations do settle in this manner. One is tempted to wonder whether there is not a strong impetus to settle on the part of western parties who may be nervous about returning to arbitration according to law by the same tribunal that has just been attempting to arrange a mediated compromise, and may therefore be privy to information that it can not properly consider in arbitration.

MEDIATION IN HONG KONG

People living or doing business in Hong Kong tend to forget how tiny a place it is. Once called “that barren rock” by the English governor sent to rule it, Hong Kong's freewheeling, super-capitalist society, its multi-billion dollar economy, forests of skyscrapers, state of the art technology and enviable standard of living sometimes give us a rather interesting

12 Huang p 301
13 Article 61
14 Presentation by Dr. Wang Sheng Cheng, then Vice President of CIETAC, to Chartered Institute of Arbitrators in Hong Kong 2001
perspective on our relationship with the Mainland. Although part of China, Hong Kong is a unique blend of east and west. It is uniquely placed to bring together contrasting philosophies and practices in achieving social harmony while protecting individual rights. Its empathy with the Asian traditions of mediation, reinforced by government policy, has created the prime centre in Asia for the resolution of disputes, mainly through arbitration.

Established in 1841 as a British colony, Hong Kong inherited most of the statute and common law in place in England at that time. For the most part, governors sent from England administered English law for a few thousand Chinese farmers and fishermen, against a backdrop of thousands of years of Chinese culture. The result was unique: English commercial laws operated alongside existing Chinese law which, for example, allowed concubines and had its own system of inheritance.

In 1997, after nearly a century and a half of British colonial rule, China regained sovereignty of Hong Kong. However, under the "One country, two systems" policy, Hong Kong retains its common law system, apart from that of Mainland China. Much English law remains today in Hong Kong, which also has received a certain number of laws from Mainland China\(^1\).

Unlike Japan, Hong Kong has no specific legislation to govern mediation. The Arbitration Ordinance (Chapter 341 of the Laws of Hong Kong) provides the legislative support for arbitration. Section 2B of the Ordinance provides that an arbitrator may act as a conciliator, that material information obtained during an unsuccessful mediation must be disclosed to the other party by the arbitrator resuming the arbitration, and that a person should not be precluded from acting as arbitrator solely because he or she has previously conciliated in the same case. As noted earlier, in Hong Kong, the terms conciliation and mediation are interchangeable. There is some suggestion that Hong Kong might adopt the UNCITRAL Model Law on Conciliation, but to say that it is under serious consideration at this moment would be an exaggeration.

Who are the players on the Hong Kong mediation stage?

The major mediation institution in Hong Kong is the Hong Kong Mediation Council (HKMC), which operates under the auspices of the Hong Kong International Arbitration Centre (HKIAC). Established in 1994, the HKMC was the first organization to promote the use of mediation in Hong Kong. With its four interest sub-committees\(^2\), HKMC brings together a

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15 Notably, the Basic Law, a law promulgated by the National People's Congress of China, which is considered the "Constitution" of Hong Kong.

16 Commercial, Construction, Family and Community groups
good number of mediators and others interested in promoting mediation. It also conducts regular training sessions for new mediators, accreditation exercises, continuing education via talks and seminars. Accreditation itself is the task of a committee of the parent organization, HKIAC, which maintains two lists of approved mediators, one for general cases and one for family matters. We have over 300 accredited mediators in Hong Kong now, with several dozen joining the list each year. Currently, there is probably work for about 10% of that number.

A number of other private entities also offer mediation services. These include the Hong Kong Mediation Center, ADR Chambers and Global Mediation Services, as well as individuals, usually lawyers or social workers, who operate private practices.

In Hong Kong mediation has been used in various kinds of conflicts including family, neighbourhood, and industrial relations disputes; commercial cases mediated include insurance, shipping, financial, company and shareholder issues. Sensitive medical malpractice and intellectual property disputes sometimes go to mediation. A number of high-value international construction disputes have been resolved in Hong Kong, often by mediators imported from other jurisdictions.

Mediators currently practicing in Hong Kong get most of their work in the family and construction areas, largely because of government support. Mediation was used extensively in the Chep Lap Kok Airport construction in the 1990’s, and Hong Kong Government construction contracts now routinely impose one or more dispute resolution options before any party can go to arbitration or litigation.

The Labour Tribunal is a government administrative tribunal, which initially mediates unfair labour practices. Lawyers are not even allowed to attend its hearings.

A court-annexed family law pilot project funded limited mediation services for three years. Although it was considered successful, funding ran out and was not renewed; in the end the only vestige of the project is the office of the Mediation Coordinator. The project did serve to raise public awareness of mediation in the family law context.

Currently, Hong Kong’s Legal Aid fund is providing, under a pilot project, payment to lawyers acting in the mediation of their clients’ family

16 Commercial, Construction, Family and Community groups
law cases. The Mediation Coordinator in the Family Court refers many couples before they see the judge.

Some members of Hong Kong's judiciary are now known to be "pro-mediation" and are working to promote it. Others, accustomed to deciding on the basis of rights of the parties, tend to view with some hesitation any mode of dispute resolution where those rights are not fully explored and protected. This is understandable. Our concept of law requires that a judge, who is imposing a decision on the parties to a dispute, must be scrupulous about fair and equal treatment. Anything less would bring the administration of the justice system into disrepute. The key however, is the word "impose". It presupposes a lack of consent on the part of at least one of the disputants. The essence of mediation, in the western sense, is that no party is pressurized or coerced into accepting an agreement; at all times, the parties are free to abandon the mediation process and return to the adjudicatory models of arbitration or litigation. It is this voluntary aspect that is key to the mediation models used in Hong Kong. In this respect, Hong Kong resembles more the U.S. than the Chinese Motherland.

One unfortunate feature on the Hong Kong landscape is the lack of unity among mediation practitioners. Some Hong Kong commentators have called for court-ordered mediation, or even court-annexed mediation in Hong Kong, but neither of these options has met with government support. With a number of organisations and individuals offering the service, there is no clear standard of what constitutes a competent mediator, nor is there one body to speak for mediators and mediation to judges and to the public. Judges are thus reluctant to direct litigants to what is essentially an unknown quality, and much less to make it a pre-condition to litigation.

There is not really any established scholarship of mediation in Hong Kong. We have imported the U.S. model, via British and American business operators and their counsel, without too much thought about the theory behind it. Perhaps if our judges and the general public could read more about the Hong Kong experience, they might develop more confidence in mediation.

There does seem to be developing among Hong Kong's judges a sort of wary curiosity. To allay the concerns of members of the judiciary, in the spring of 2006, at the request of the Chief Justice, HKMC members conducted a very successful two-day training seminar for judges. This initiative is definitely a step in the right direction.

That said, the most powerful argument in favour of mediation is its
success record. Mediation has proved successful in some very complex and difficult situations. A couple of years ago, an illegal structure fell off a building, killing two people standing in the street below. There was insufficient insurance to cover the ensuing judgment, and in 2005, all of the owners of the flats in the building stood to lose their homes in order to satisfy it. There was a public outcry and this high-profile case was eventually resolved through mediation, thereby casting a positive media spotlight on the process of ADR.

Publications such as ADR Journal, the Mediation Council Newsletter, and articles in various professional journals, do get the word out to a certain extent, although they tend to be more practical than theoretical.

There are good reasons for considering ADR in Hong Kong. It is one of the most expensive places to litigate in the world, with a disturbing proportion of self-represented litigants. Arbitration, traditionally thought of as “faster, cheaper and more efficient” than litigation, has lost those characteristics as it becomes more complex and procedural, often ending up looking very much like state-court litigation. Some parties are seeking to short-cut the expense and time excesses of litigation and arbitration, by first attempting a facilitated settlement of their disputes. In Hong Kong, there is certainly a financial incentive for parties to give mediation a try, before venturing too far down the adversarial path. Mediation in family law cases is now widespread, and the Hong Kong government, as mentioned earlier, routinely puts mediation clauses into its construction contracts.

All the same, there is also considerable reticence when it comes to mediation in the commercial world. My own theory is that a great part of the reticence comes from the hierarchical social structure in Chinese culture. This in turn produces reluctance on the part of many Chinese workers - even at management levels - to assume direct responsibility for what may be an unpopular decision. While in the western countries, managers tend to grasp responsibility (and the credit that often goes with it), Hong Kong’s traditional social structure and colonial history mean that the decision-maker is more concerned about avoiding blame for a wrong move. If the company is going to have to pay for some error, it is better that a judge make the decision about how much. If the worker is seen to have agreed to settle, there will always be the potential criticism: “You should have negotiated a better deal.”

Another social reality in Hong Kong is the tendency to keep business very secret. The vast majority of Hong Kong business had its origins in family-run enterprises, and many remain under family control. It is fine to
demonstrate that one is wealthy, but not how one got that way. Mediation, with it focus on underlying interests, tends to go against the tradition of secrecy and exclusivity which still prevails in Chinese family enterprises.

Another obstacle to the progress of mediation in Hong Kong is the legal profession itself. Solicitors and barristers are trained to see disputes in terms of who has a “right” or conversely, who is at fault. The adversarial system of the common law apportions blame; it does not lend itself to compromise. It requires a very different mindset to see conflict resolution as protecting “interests” rather than “rights”. Many lawyers see the flexibility of the mediation process as a threat to the rights they are paid to defend.

Another objection, this one much more pragmatic, involves self interest. Hong Kong legal professionals usually charge on an hourly rate, and if mediation will solve the case in 15 hours instead of 150, it does not bode well for the lawyer’s bank account. At lunch last year with a noted “silk” (a senior barrister) the conversation turned to mediation and its costs. He asked what mediators charged per hour, and I gave him a range. “Well!” he said, “I earn five or six times that when I go to court, so mediation is of no interest to me at all.” Small wonder that some lawyers refer to ADR (alternate dispute resolution) as “A Decrease in Revenue”!

Sooner or later however, even the lawyers are going to have to bow to pressure - their clients will demand it. The Law Society now maintains a roster of accredited solicitor-mediators. We can see an example of client activism in the form of a recent venture funded by the Hong Kong Federation of Insurers, in co-operation with HKMC.

Two earlier pilot projects of HKMC, both offering mediation either free of charge or at a nominal cost, had failed to generate any enthusiasm. There was simply not enough awareness of the process, among lawyers, judges, government officials and the public. Consequently, prospective users of mediation - the policyholders - were suspicious of a programme initiated by insurers. Anecdotal evidence suggests that they assumed that any programme launched by the insurers would result in lower payments to the insured.

In July 2006, the HKMC, supported by a $250,000 grant from the HKFI, launched a pilot project for mediating cases between insurance companies and workers injured at their place of work, and thus covered under Hong Kong’s mandatory Employee Compensation Scheme. With the wisdom of past experience, HKMC and the HKFI were careful to lay the groundwork carefully, with briefings to social workers, pamphlets
distributed in Employee Compensation Scheme offices and information sessions offered to all stakeholders. A number of insurance companies pledged to mediate under the scheme if any insured requested it.

The first case under the new scheme took place in August 2006. Mr. Chan* a construction worker, had suffered serious injuries in a three-meter fall at work. The social worker at the Employees’ Compensation Scheme office suggested that Mr. Chan attend an information session about the new mediation project, and he volunteered for the programme. At the end of the information session, Mr. Chan received a list of mediators and a list of counsel who were willing to participate in the scheme. Having had some initial contact with the insurance company representative, who was a woman, Mr. Chan decided he wanted a woman mediator and a woman lawyer, “so they could talk well together”.

At the end of the day, as the mediation ended, I had the opportunity for private interviews with those involved. Mr. Chan was pleasantly surprised by the informal, friendly and co-operative atmosphere, and said he was very pleased with the settlement they had worked out. Mr. Chan’s lawyer confirmed that the settlement amount was towards the higher end of the range she had recommended to him, and the insurance company lawyer said that it was also well within their settlement range.

The lawyer representing the insurer, after this very first experience with mediation, confessed that she had had no idea of what to expect. She said that while both the settlement amount and the process were satisfactory, she still preferred traditional, written exchanges to negotiate. She conceded however, that of course she would participate in mediation again, if requested by her client.

As for the injured worker, Mr. Chan received full payment within four weeks - a far cry from the 6 to 9 months he could expect, had he gone to court. The HKMC will be doing more work to advance this scheme and to use such positive experiences to educate and reassure the public.

We need also to reach the lawyers. My view is that we can do it best in law school, while student minds are still open to new ways of thinking. My own students realise that by the time they graduate as barristers or solicitors, they will need to know about mediation, as one of the essential tools in their professional repertoire. I go as far as to tell them that in some instances, failure to advise a client about the possibility of mediation could one day amount to professional misconduct.
The threats are backed with education. Not only do students learn about mediation, and why to use it, they also receive training in the microskills of mediation - trust-building, questioning, issue identification, probing for interests, reframing, summarizing, and handling impasses. Those who wish can take the experience further and use a live assessment of their mediation skills as part of their final grade. Many do so enthusiastically; with the open minds of youth they are quick to see the logic. Many of them have come back to tell me that this was not only the most fun, but also the most useful class of their law school career. That is because the skills that mediators use are transferable: even a lawyer who never mediates can still retain listening and persuasive skills learned in mediation training.

The education process has now crept even further down the educational ladder. Peer mediation is another area in which Hong Kong people are becoming more aware of non-adversarial means to resolve conflicts. In a two-year pilot project funded by HSBC Foundation, 240 senior pupils in secondary schools have received training from professional social workers from Hong Kong's Family Welfare Society. These young mediators intervene to resolve conflicts among their fellow students, including bullying, name-calling, and even some elements of violence. In so doing, they are practicing skills which are valuable not only in the mediation process, but also in their social and family situations. Mediation skills are generic, flexible, life management skills.

One usually associates mediation with civil rather than criminal cases. A divorce, a breached contract, a boundary dispute, a community policy - all these are matters which we can routinely negotiate. However, there is also in Hong Kong, a new movement involving elements of mediation in the criminal law field. Dennis Wong, a teacher at City University, founded the Centre for Restoration of Human Relationships in 2000. Backed by educators and social workers, this volunteer organization promotes Restorative Justice as an alternative to prosecution of juvenile offenders. The aim of RJ is to achieve a fine balance: holding juvenile offenders accountable to their victims, while allowing them the chance to rehabilitate themselves, and at the same time protecting community safety. Wong freely admits that in his youth he himself narrowly escaped a lifetime of crime and exclusion. By reintegrating juvenile offenders into society through atonement and forgiveness, he aims, through RJ, to prevent them from going down the "path of no return under a retributive justice system."

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17 Dennis Sing-Wing Wong, Restorative Justice for Juveniles in Hong Kong: Reflections of a Practitioner, in Building a Global Alliance for Restorative Practices and Family Empowerment, Part 3
18 ibid
Wong's research highlighted the collective values and preference for harmony in Chinese culture as compatible with the tenets of RD - namely, positive shaming practice, forgiveness, positive peer culture and inclusion/interdependency. Inspired by a Canadian programme of Victim-Offender Mediation, since 1997 Wong has been working with social workers to deal with juveniles in the Police Discretionary Scheme to provide an alternative to prosecution in cases of minor crimes such as shoplifting and common assault.

So, in Hong Kong we are making slow but visible progress. There remains much to be done in educating the public and their lawyers. With more and more clients become aware of the advantages of an amicable settlement over an imposed decision, there is a growing consensus among Hong Kong mediators that mediation is gaining acceptance and will be used more and more frequently in Hong Kong.

THE CULTURES MEET

So, when an American or European party becomes embroiled in a legal dispute with a Chinese partner, what happens? If there is an arbitration clause, chances are the procedure will take place in China, perhaps under the auspices of CIETAC\(^1\). The western party, arriving with western juridical baggage, understandably feels insecure. The judge or arbitrator at home is dedicated to uphold the law, to establishing who has a legal right, and to protecting that legal right at any cost. Procedural protections such as rules of evidence and knowing the other party's case are fundamental to western concepts of justice. According to the rules of the arbitration game in the west, there will be a winner, and a loser. Western parties in arbitration under the auspices of CIETAC in Mainland China are astonished to see the "neutral" chairman of the tribunal intervening to confer privately with the other side, or making very strong suggestions about how the case should be settled. Our western minds separate the two ends of the tiaojie - tiaochu spectrum very clearly. However, given the Chinese historical perspective, especially the Maoist heritage which still looms strong in the minds of the older generation, the blurring of the lines between adjudication and mediation is understandable.

Let me relate a story I heard recently from an American lawyer who

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\(^1\) CIETAC, formerly the Chinese International Economic and Trade Arbitration Commission, described as a private and independent non-governmental organisation for arbitrating international disputes, was once the only option. Today, hundreds of other arbitration commissions have sprung up all over China, and CIETAC, while still the largest, is losing market share.
knows China well. She was taking an advanced mediation course in
Beijing, with a bilingual, bicultural group. The American trainer was
focusing heavily on western-style facilitative mediation, asking the trainees
to suggest ways for encouraging the parties to come up with resolutions
of their mock cases. The Chinese participants played the game, but at the end
of the course remarked one, “They’ll never get Chinese parties to really do
this. You can’t talk to Chinese parties and ask them to make the decision.
They want to be told how the case should come out. That’s what the neutral
is for!”

On Hong Kong’s island of skyscrapers raised in homage to the gods of
capitalism, one is keenly aware of the influence of generations of western
thought and practice. But on the sidewalks only a couple of streets away, it
is common to see fruit and burnt offerings and tiny red temples in honour of
the spirits. English laws overlying ancient traditions and laws have
created a unique blend of cultures. The 1949 exodus of tens of thousands of
Mainland Chinese to Hong Kong added to the mix and heightened the
contrasts. Janus-faced, Hong Kong looks both east and west. Hong Kong
may seem very western, but beneath its concrete and glass veneer lies a
very oriental mindset.

Thus, while the law consecrates the rights of the individual, most Hong
Kong people have been reluctant to use it, preferring instead to rely on
traditional concepts of hierarchy and harmony. These elements of Chinese
society - with its emphasis on the whole society rather than on individual
rights - encourage disputing parties to comply with “suggestions” from
those who are older or in authority.

That situation is changing. With divorce on the rise, and increasingly
mobile families, traditional Hong Kong family ties are loosening. In a
ripple effect, other values are being diluted by exposure to western culture
and practices. Hong Kong society is still close-knit when compared to the
west, but it is evolving fast. Today’s “wise elders” are apt to find themselves
seggregated from society in old age homes.

What does this evolution mean in terms of dispute resolution? Among
Chinese people (including Hong Kong), at least in the short term,
facilitative mediation is probably not going to end up as the prevailing
model. We teach law students the facilitative model, because frankly, it is
safer. A mediator who sticks to the facilitative model may not settle every
case, but with no suggestion of coercion, it’s unlikely that he or she will
worsen the situation between the parties. On the other hand, an
interventionist, evaluative mediator with a heavy hand could seriously
damage a party’s perception of justice and respect for the system. Any experienced mediator will probably say that there is a time and place for different approaches. Mediators in Hong Kong and in Mainland China, while they may try to remove themselves from the evaluation process, will probably be far more involved in the fashioning of a solution than their western counterparts. Chinese parties will expect it of them.

This means of course, that the mediator in an international case will have to be extremely sensitive to the differing expectations of each party. The mediator will probably have to offer some evaluation, in order to satisfy the Chinese, but must also be wary, to ensure that tiaojie doesn’t slide over the line into tiaocha - that the line between persuasion and adjudication is not crossed to deprive the parties of natural justice.

LESSONS FOR JAPAN?

It appears that the intermingling of ancient traditional values, modern innovation and western culture in Japan is reminiscent of the brew of cultures that has been steeping in Hong Kong for more than a century and in Mainland China over the past three decades. In Hong Kong, mediation is likely to gain ground because of the deficiencies of our state justice system and of arbitration. In Japan, dissatisfaction with the status quo seems already to have brought about substantial change in Japanese attitudes toward the law, lawyers and the courts.

If the status quo isn’t quite right, then what do we want to see? Howard Bellman has raised a number of issues which are interesting not only in the U.S context, but for us too here in Asia as we focus on mediation in its many forms. What is success? Is success where the parties go away content, even if it means they failed to settle? Is success an agreement of any kind, even if absent stakeholders may suffer as a result?

Professor Kashimura has mentioned the importance of educating the public about mediation and about the role of the mediator. I agree with this, but would like to think of it as the roles of the mediator. Depending on the context, the mediator may have different roles, or may play several roles within the same case. These roles, like the improvisational actor or jazz musician introduced to us by Mr. Bellman, will call into play different skills, perhaps even different mind-sets.

By comparing notes perhaps we will be able to come up with some suggestions about new directions for mediation’s roles in Japanese justice -

and in the process take those back to our own countries to consider as well.

With that, I thank you for your attention, and hope that we will have a fruitful discussion this afternoon.