

The Rhetoric and Reality of ADR

Hong Kong is on the trough between the first and second waves of ADR. Inevitably, people now question the initially optimistic rhetoric that first supported ADR. It is true that ADR as a whole might embody the advantages expounded by its proponents, but optimal solutions for different factual situations necessitate different dispute resolution mechanisms. No single form of dispute resolution is a panacea.

Perhaps it is the social and cultural context of Hong Kong that causes it to be more receptive to ADR practices. Chinese culture has long favoured settling disputes without recourse to public litigation or arbitration.¹ This is due to the value of face (or honour) held by Chinese society. Parties will usually want to involve the other in settling disputes and will not want their issues discussed in the public arena, not least in any adversarial litigation. Many ADR methods are private, non-adversarial, and confers control to the parties, and hence, are preferred methods of resolving the majority of disputes in Chinese societies. The old Chinese proverb 「山水有相逢」 encapsulates the desire of Chinese generally to maintain good relationships with their acquaintances because they may meet again, like mountains and rivers.

Not only is face and honour important, the Chinese are a practical people. They seek fast and economical ways to resolve their disputes. Most creditors avoid recourse to the courts because court and legal fees are disproportionate to their target debt. The South China Morning Post has regularly reminded the public of Hong Kong's high legal fees and the opaque complexity of the legal

¹ Kwok W.C., "Alternative Dispute Resolution in Construction Industry in Hong Kong", (1992) *Arbitration* 42

system.² Indeed, this has been recognised by both the legal profession in Hong Kong, as well as the Judiciary itself. Mr Justice Nazareth worriedly stated that “the public is being shut out of court because the expense could leave them financially ruined”.³ The system of “loser bears costs” is also discouraging to potential litigants.⁴ Court-related delays have increased since courts have existed, and have not stopped, with waiting times counting over 200 days in 2001 for the Court of First Instance.⁵

Against this background that discourages recourse to the courts, over 93% of disputes are settled outside of court, i.e. using ADR methods. Private negotiation is a major tool used to achieve out-of-court settlements, especially in the business and tort contexts where parties often try their best to avoid the cost and publicity of court. Negotiations have the advantage of being private, voluntarily undertaken, and can result in innovative settlements beyond the reach of traditional court-based litigation. Furthermore, contractual settlements are enforceable by the courts if breached. The voluntary nature of negotiations maintain and can even enhance the relationships between the parties.

Other forms of ADR have garnered increased attention in Hong Kong. Mediation is a form of ADR where a neutral third party assists two sides to reach mutually beneficial agreements through voluntary negotiations. It has proven to be successful in the scope of matrimonial disputes in Hong Kong. Family mediation is not new to Hong Kong. Non-governmental organizations have been providing the said service since 1985,⁶ however, it received official recognition when the Government launched a three-year Pilot Scheme on Family Mediation

² See C. Chow, “High court costs undermining competitiveness”, South China Morning Post (SCMP) and J. Moir, “Dicing with Debt”, SCMP, 20 May 2001

³ Quote taken from C. Buddle, “Costly court bills frighten retiring judge”, SCMP, 28 Jan. 2000. A solicitor confirmed this, stating that a High Court civil trial would cost at least \$250,000

⁴ M. Wilkinson, “Reform of the Civil Justice System” (March 1999) at p.20

⁵ *ibid.* at appendix

⁶ Sullivan P.L., “Culture, Divorce, and Family Mediation in Hong Kong”, 2005 43 *Family Court Review* 109

in 2000 and was free for participants. According to an independent evaluation (the “survey”) conducted by the Polytechnic University of Hong Kong, the Scheme was effective and efficient with over 80% of respondents favouring mediation over litigation for matrimonial matters. Around 80% reached full or partial agreements. Many respondents thought that the mediation process was educational and so could help the parties arrive at better solutions. Children benefited from the peaceful negotiations as neither they nor their parents had to sit through adversarial proceedings in court. It was also calculated that 204.3 court-days were saved under the Scheme.⁷ Mediation has also been popular in the construction industry and elsewhere because it can save time and money. It is also important that the mediator can focus the parties’ energy on important issues and avoid the emotional “blindfold” that parties in disputes often have. Since settlements are arrived at voluntarily, compliance normally takes place. Relationships are often saved from alienation and parties can continue working together in an amicable fashion.

Following the success of mediation in matrimonial matters, Hong Kong launched a pilot scheme on financial dispute resolution (FDR) in 2003. In Hong Kong’s form of FDR, the judge does not sit as an arbitrator, but instead as a facilitator in the parties’ negotiations on allocating property after the breakdown of marriage. Only if negotiations fail does a (different) judge step in for ‘formal’ judicial proceedings. During the negotiations, the judge provides his opinion on settlement options and the likely outcome of the matter. This process avoids intentional delay by either party with the motive to escalate costs. It also facilitates speedy, consensual negotiations. The process has found support amongst family lawyers.

⁷ The pilot scheme has come to end, but its effects continue through the efforts of NGOs and the Mediation Coordinator’s Office

It can be seen that in the context of family disputes, ADR is becoming more popular, testament to its consensual, effective and low-cost process. However, there remain limitations to its scope. Mediation is a private process of compromise and where there are power imbalances, it cannot fully protect one's rights. Where disputes involve domestic violence, sexual abuse or financial imbalances, the courts may be the venue of choice to mitigate the effects of the power imbalance.⁸ A weaker party cannot properly negotiate if he or she is subject to threats of violence or other disadvantages in the home.

Hong Kong is a small place where construction disputes arise almost daily. Arbitration clauses are often used to avoid having the parties resort to the courts. However, even arbitration, with its less formalised procedure and possibly more efficient turnaround, may not be suitable for minor disputes as it is disproportionately more time consuming and expensive, and only takes place after the contract is substantially completed.⁹ It also displaces goodwill, essential to the ongoing working relationship between the parties. Hong Kong's business community is a tight knit group and parties have a strong desire to maintain amicable relationships. In light of these limitations concerning arbitration and litigation, the construction industry uses ADR clauses heavily, allowing disputes to be referred to dispute resolution boards, mediation, etc.¹⁰ Such referral is designed to expedite dispute resolution in the privacy of a suitable forum before resorting to arbitration and / or litigation. The negotiation facilitator or adjudicator is usually an experienced practitioner with the requisite experience to be able to evaluate the technical background of the matter in dispute and actually assist in resolving the dispute. Mediation has been effective with records of about 80% of cases settling.¹¹ Dispute resolution boards, with their low cost, have

⁸ Fiss O.M., "Against Settlement", (1984) 93 *Yale Lj* 1073

⁹ Kwok M.C., "Alternative Dispute Resolution in Construction Industry in Hong Kong", (1992) *Arbitration* 42

¹⁰ Wong Y.L., "The Benefits of Mediation" {2006} *Asian Dispute Resolution* 100

¹¹ *ibid.*

prevented many minor disputes from burgeoning into larger ones. The use of a comprehensive ADR system comprising different schemes in Hong Kong's new airport construction project has catalysed their use in the construction industry as more come to realise their speed and effectiveness in resolving disputes particular to the construction industry.

From the above examples, it can be seen that Hong Kong is beginning to embrace ADR as a viable alternative to traditional in-court litigation. The low cost, speedy turnaround, flexibility and amicability of different ADR methods have proven popular to family and construction disputes. Other sectors have also caught on.¹² According to ADR expert Mary Thomson, ADR in Hong Kong regularly results in tailored, innovative solutions that can not be fashioned by traditional courts of law.

Having discussed the reasons behind the success of ADR schemes, we must also realise that many forms of ADR (save arbitration) do not provide for a binding conclusion to the dispute. Parties can walk away anytime before settlement, and usually without penalty (unless provided for by contract). This may prove to be unsatisfactory if a party enters into ADR merely to delay litigation and to gather as much information as he can before litigation commences. To avoid these unfortunate abuses of ADR, ADR should be entered into when both parties want to resolve the dispute amicably. Where international agreements are concerned, enforcement of awards may become problematic. Any hindrance in enforcing awards would render ADR useless however fast, inexpensive or creative it is. This was illustrated recently when great uncertainty beset the enforcement of arbitral awards in Mainland China on the handover of

¹² The Housing Authority's Rating and Valuation Department operates a mediation service to resolve housing disputes such as possession, eviction and rents outside of court. The service has proved to be cost-effective in dealing with these matters. Mediation has also seen its way into insurance disputes in the way of pilot schemes.

Hong Kong to the PRC,¹³ subsequently repaired by the signing of an arrangement concerning enforcement of arbitral awards between the Mainland and Hong Kong SAR on 25 June 1999 and the passing of the Arbitration (Amendment) Ordinance 1999 and 2000. Internationally, Hong Kong is at the forefront of enforcing international arbitral awards with its domestic adoption of the UNCITRAL Arbitration Rules.

Courts remain necessary for their public-ordering functions and expression of normative values. Criminal sanctions and human rights abuses, among other public issues should remain with the courts, whatever the merits of ADR. The constitutional landscape of Hong Kong would be very different if its Right of Abode controversy and flag desecration case was settled out of court. Similarly, society's resources might be strained if convicts could negotiate their fines or terms or imprisonment out of court. Moreover, as illustrated by the limitations of family mediation above, where power imbalances are inherent or where parties do not enter into ADR voluntarily (e.g. hostile parties), ADR may not provide an appropriate forum in which settlements or remedies can be fashioned. Judges and formal procedures tried and tested through time may offset the power imbalance back in favour for the vulnerable.

We return to the observation that non-court litigated ADR processes are not a panacea to all disputes. There are a myriad factors to take into account in choosing which form of dispute resolution to use. Each form has its comparative advantages and disadvantages, but ADR has loosened the grip that traditional adversarial litigation held over disputes and in many cases, has proven to be cheaper, faster, more constructive and less straining on the parties' relationship compared to in-court adjudication.

¹³ R. Morgan, *The Arbitration Ordinance of Hong Kong*, (1997) at p.11. See also the confusion and debate generated: R Morgan, "Mutual Enforcement of Arbitral Awards between Mainland China and Hong Kong: Past, Present and Future" (1999)