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Mediation and Conflict Resolution— Definitions and Comparisons

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'Urgent mediation. Please call Ms Wong', the note on my desk read. Great, I thought to myself. The mediations are rolling in! So I called the number.

After some pleasantries, I asked Ms Wong if she had been to mediation before.

'Yes, I have. As a small business owner, I am always managing conflict, so mediation is nothing new,' she replied.

Wonderful, I thought. No need to go through the full explanation. But something compelled me to enquire further.

'Ms Wong, you will appreciate then that every mediation is different. So I'd like to ask you about your expectations for this mediation.'

'My expectations?' She seemed surprised. 'Well, we simply need a quick decision and you were recommended to me as an expert in the field.'

I paused. While my potential client indicated that she was very familiar with mediation, I had the strange feeling that we weren't talking about the same thing. In fact, Ms Wong seemed to be talking about a very different conflict resolution process. Added to which, I was not sure in what 'field' she expected me to have expertise.

Compared to arbitration, or even conciliation, professional mediation remains relatively new for many Hong Kong people. This can lead easily to misconceptions about its operation. At the same time, traditional style mediation has a long history, especially in a place like Hong Kong and people associate diverse experiences with it.

So what is mediation? And what is it not?

Introduction

1.01 Mediation is the word of the decade. It's on everyone's lips. It is used in a vast range of contexts, from community engagement to justice reform. Mediation invokes notions of participatory justice, empowerment, self-determination and consultative decision-making change. Mediation is the pin-up process of ADR or alternative dispute resolution—a contemporary movement attracting lawyers, psychologists, judges, business consultants, engineers, educationalists, politicians and people from many other disciplines. Yet, as the new kid on the block, contemporary mediation is still not as well-known as other processes such as arbitration and adjudication; these have existed longer in connection with formal legal systems and, as a result, are better understood and utilised by disputants.

1.02 In this chapter, the phenomenon called mediation is explored from a process-comparative perspective and the following questions are posed: What is mediation? How does it compare to other contemporary conflict resolution processes? Also, in this chapter and throughout the book, examples are used from not only Hong Kong, but also from other countries and cultures. This is

because Hong Kong represents a myriad of cultures and languages and much of the mediation that occurs here is intercultural in nature. Moreover, the growing body of local experience and knowledge on mediation can be augmented by valuable insights from other jurisdictions.

Defining Mediation

1.03 Mediation has both transactional and conflict resolution applications. Transactional mediation is also referred to as 'deal mediation', where it is used to support deal-making. For example, if you want to form a business partnership with another person, you will need to negotiate a myriad of terms and conditions to define your future business relationship. People are usually very optimistic at the beginning of a business venture; focusing on the benefits and gains to be made in the deal. They are not inclined to work through all the details of the arrangement and the risks associated with it, often leaving many aspects of the business to be determined at an appropriate time in the future.

1.04 Involving a mediator in the initial negotiations can be helpful in relation to:

- broaching difficult topics;
- asking hard questions and getting answers;
- considering different perspectives;
- reality testing; and
- working through details.

1.05 Deal mediation minimises the risk of disputes flaring up once the transaction has been concluded. If disputes do arise, a process that has already been worked out for addressing them will come in handy.

1.06 Mediation extends beyond helping people make deals. It is more widely known and used as a tool of conflict resolution where an independent and impartial conflict resolution practitioner—the mediator—assists the disputing parties to address their differences in a constructive manner and make informed choices for the future. Mediators generally use processes that support and encourage parties to:

- identify their interests;
- identify common ground and areas of difference;
- formulate the issues they need to talk through;
- discuss and negotiate their differences;
- generate options for agreement; and
- make decisions about a way to move forward.

1.07 In addition, mediation is usually private, flexible and future-focused. Notably, the first recommendation of the Hong Kong Mediation Report¹

¹ See the HKSAR Department of Justice Report of the Working Group on Mediation, February

identifies the need for a uniform definition of mediation that allows for a degree of flexibility to accommodate future developments in the mediation field.

1.08 This explanation of mediation is consistent with the facilitative model of mediation, which model is endorsed by the standards of the Hong Kong Mediation Accreditation Association Ltd and the provisions of the Mediation Ordinance. Facilitative mediation is therefore the focus of this book. However, definitions of mediation have much scope for variation. Mediation's characteristic flexibility means that people using it may encounter various models and mediator styles. These are:

- Facilitative mediation
- Transformative mediation
- Settlement mediation
- Tradition-based mediation
- Wise counsel mediation
- Expert advisory mediation.

These six models will be examined in Chapter 3.

1.09 Despite this diversity, mediation has distinctive values and objectives that distinguish it from other conflict resolution processes. These add texture and depth to the process and are considered in detail in Chapter 2.

Defining Conflict Resolution Processes and Related Terms

1.10 Given the flexibility of the mediation process and its diversity in practice, it is not always easy to distinguish mediation from other forms of conflict resolution. Yet it is in the interests of parties and practitioners to be able to do so. Increasing regulation of mediation means that the law applicable to mediation may differ from that applicable to other processes. For example, the law of confidentiality may differ in relation to mediation, neutral evaluation and arbitration. It may also differ depending on whether the process is conducted within the private sector or within the auspices of a court-related dispute resolution program or a mediation scheme governed by a particular piece of legislation. In addition, the roles, rights and obligations of participants—parties, lawyers, experts and others—can vary dramatically depending on the conflict resolution process. For example, while parties are generally required to attend mediation in person, this is sometimes not the case for other processes such as neutral evaluation and arbitration. Finally, there is an increasing tendency to blend mediation with other conflict resolution processes in the form of multi-tiered dispute resolution ('MDR') processes and clauses.² By way of example,

² 2010 at para 3.11 ('the Hong Kong Mediation Report'). The Report is available on the Department of Justice website at www.doj.gov.hk/eng/public/pdf/2010/med20100208e.pdf.

² On multi-tiered dispute resolution, see D Jones, 'Dealing with multi-tiered dispute resolution

in the 1990s the Hong Kong Airport Construction Project used an MDR process comprising mediation, adjudication and arbitration.³ In another example, the 2013 Singapore Report on International Commercial Mediation set out a proposal for an arb-med-arb procedure for cross border disputes.⁴

1.11 For these reasons it is useful to be clear on the definitions and parameters of mediation and other dispute resolution processes. Let us begin with an explanation of the terms ADR, conflict resolution and dispute resolution.

ADR

1.12 ADR is an acronym that stands for *alternative dispute resolution*. The word *alternative* generally refers to processes that provide alternatives to formal and traditional forms of determinative dispute resolution such as litigation and arbitration.⁵ With the increasing use of ADR, there have been a number of attempts to replace the word *alternative* with arguably more accurate descriptors such as *appropriate* and *amicable*.⁶ The term *amicable dispute resolution* has enjoyed some success, especially in cross-border dispute resolution settings. It is used by the International Chamber of Commerce ('ICC') and a number of other international bodies.⁷ The term *appropriate dispute resolution* is used to describe certain programmes in North America,⁸ the United Kingdom⁹ and elsewhere. However, *alternative dispute resolution* remains the most widely-used term. In this book, ADR is treated as a term of art in its own right, referring to a range of

process' (2009) 75(2) *Arbitration* 188–198; R Dobbins, 'The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity' (2005) 1 *Hastings Business Law Journal* 159; M Pryles, 'Multi-tiered Dispute Resolution Clauses' (2001) 18 *Journal of International Arbitration* 159; M Wilson, 'Hong Kong's New Airport and the Resolution of Disputes' (1995) 25 *Hong Kong Law Journal* 363. For examples, see the following clauses from Hong Kong, England and Australia respectively: Government of Hong Kong: General Conditions of Contract for the Airport Core Programme Civil Engineering Works (1992), clause 92, and the disputed clauses in *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2004] 2 HKC 505; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 All ER 664; and *State of New South Wales v Banabelle Electrical Pty Ltd* (2002) 54 NSWLR 503 at para 70.

³ See Wilson (1995), above note 2 and M Harrington, 'Comment: A Review and Evaluation of the Hong Kong Airport Core Programme Mediation Rules: Specifically Rules 15 and 16 in the Context of Impasse' (1997) 15 *Boston University International Law Journal* 213.

⁴ Ministry of Law, *Report and Recommendations of the Working Group to Develop Singapore into a Centre For International Commercial Mediation*, November 2013 at 26.

⁵ See Sir Laurence Street, 'ADR: A generic holistic concept' (2002) ALJ 213.

⁶ See eg Sir Laurence Street, 'The Courts and Mediation—A Warning' (1991) 2 *ADRJ* 203; National Alternative Dispute Resolution Advisory Council, 'What is alternative dispute resolution?', available at www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx.

⁷ On the use of amicable dispute resolution by the ICC, see www.iccwbo.org/faqs/frequently-asked-questions-on-icc-adr/.

⁸ See eg the Oregon Department of Justice ADR programme: www.doj.state.or.us/adr/pages/index.aspx.

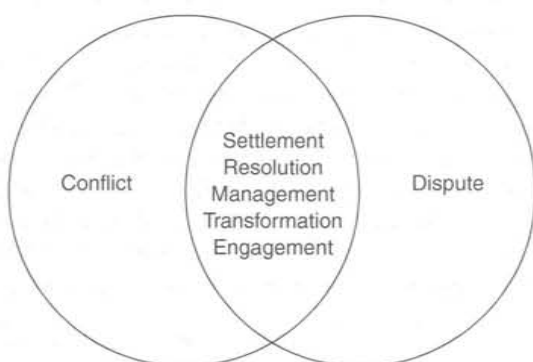
⁹ See eg the family court ADR programme: www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/fjc/guidance/appropriate-dispute-resolution/.

non-determinative conflict resolution processes that offer alternative forums to litigation, arbitration and similar procedures.

Conflict Resolution and Dispute Resolution

1.13 There is a wealth of literature on the meanings of and differences between the terms *conflict* and *dispute* and, by extension, the terms *dispute resolution* and *conflict resolution*. In addition, there is considerable academic debate about the meaning and usage of terms such as resolution, settlement, management, transformation and engagement. Multiple possibilities abound, and the burden of choice for a party can be quite considerable, as Figure 1 below shows.

Figure 1: Conflict and Dispute



1.14 Let's begin with the term *conflict* and turn to Mary Parker Follet, who offers the following insight:¹⁰

As conflict—difference—is here in the world, as we cannot avoid it, we should, I think use it. Instead of condemning it, we should set it to work for us. Why not? What does the mechanical engineer do with friction? Of course his chief job is to eliminate friction, but it is true that he also capitalises on friction. The transmission of power by belts depends on friction between the belt and the pulley. The friction between the driving wheel of the locomotive and the track is necessary to haul the train. All polishing is done by friction. The music of the violin we get by friction. We talk of the friction of mind on mind as a good thing. So in business, too, we have to know when to try eliminate friction and when to try to capitalise on it, when to see what work we can make it do.

1.15 What is striking about these lines, written close to a century ago, is Follet's broad and inclusive understanding of conflict and her attitude of openness and curiosity towards it. Conflict is equated with 'difference', a word which is not burdened with negative connotations and which extends to all manner

of variation in people's relationships and their needs, attitudes, perceptions, feelings, interests and goals. Conflict can range from unarticulated—perhaps even subconscious—irritation or tension, to escalated conflict in the form of highly emotional, aggressive outbursts or even violence. Conflict can refer to both the intra-personal (within a person) and inter-personal (between people).

1.16 Here in Hong Kong, we refer to the Chinese symbol for crisis when thinking of conflict, which consists of two characters: danger and opportunity (as shown in Figure 2 below). Danger can arise when a crisis is not addressed in an appropriate way and escalates as a result. Opportunity is found in the process of change that can accompany a crisis situation. Implicit in this translation is the notion that crisis, and by extension conflict, can have both destructive and constructive consequences depending upon how its energy is harnessed and handled.

Figure 2: Danger and Opportunity

危機

危 (danger) 機 (opportunity)

1.17 Generally, *conflict* enjoys a broader and deeper meaning than the term *dispute* and can connect us with deep-seated and unresolved stories in our lives. The concept of conflict in terms of its material, relational and symbolic dimensions will be further explored in Chapter 4.

1.18 The choice of terminology is likely to be informed by educational, disciplinary, vocational, professional and linguistic backgrounds and by the beliefs that inform a person's world-views—in short, their culture.¹¹ Lawyers and other professionals familiar with procedures such as litigation and arbitration tend to prefer the terms *dispute resolution* or *dispute settlement*. The use of the term *dispute* reflects an emphasis on defined and communicated aspects of a conflict situation, hence the well-worn lawyer's phrase, 'isolating the issues in dispute'. The term *settlement* arises from settlement conferences where lawyers typically negotiate a legal claim in an attempt to *settle* it. It reflects a focus on positions and issues, which might otherwise be dealt with by formal procedures such as investigation, adjudication, arbitration and litigation.

1.19 The term *resolution*, also used in legal circles, enjoys recognition in diverse conflict contexts. Like settlement, it suggests that the goal is a mutually agreed outcome and closure. At the same time, it has the potential to reach beyond the more modest aims of settlement to address underlying challenges relating to interests, needs, feelings and personal values. Some criticise the term *resolution*, because it sets up sometimes difficult-to-attain expectations. The term *conflict management* is an alternative, signalling that conflict interventions may not always lead to a solution and that continuing the conflict in a different and

¹⁰ See E M Fox and L Urwick (eds), *Dynamic Administration: The Collected Papers of Mary Parker Follet* (London: Pitman, 1973) at 1–2. Follet first presented the paper in 1925.

¹¹ On culture, see Ch 4.

'managed' form may be more realistic than resolution. Here, Gandhi's ideas on dealing with conflict come to mind. He promoted the idea that conflicts require restructuring so that they neither escalate into violence nor are suppressed and ignored.¹²

1.20 Conflict *transformation* is another term used to highlight the continuance of conflict as a legitimate outcome of a conflict intervention such as mediation. Unlike *management*, *transformation* is not an umbrella term. Underpinning the philosophy of conflict transformation is the idea that conflict is inevitable. It cannot be extinguished, but it can be transformed so that it occupies a different space, exudes a different energy, encompasses different players and embraces a new identity. In many cases, the old conflict or dispute may not be recognisable in its new form. For example, transforming a legal dispute about a large property development into a public consultation process with managed press coverage may be the best possible short term outcome for parties in a situation where:

- they both have substantial risks and costs in a litigation process;
- media coverage is likely to be favourable to both parties, provided they issue joint press releases;
- media coverage may put pressure on the local government to reduce certain development costs; and
- diverse inputs may contribute to a development that takes a greater array of values into account.

1.21 Finally *conflict engagement* is a term, which, according to Maher:¹³

[M]eans accepting the challenges of the conflict, whatever its type or stage of development may be, with courage and wisdom and without automatically assuming that resolution is an appropriate goal.

Conflict engagement involves addressing the conflict at an appropriate level of depth and being aware of the various ways of dealing with, and intervening in, conflict, which also includes preventative strategies. Maher suggests that the term *resolution* can be a trap that limits abilities to embrace more complex aspects of conflict preventing people from making peace with each other and themselves.

1.22 In this book, the term *conflict resolution* is primarily used. The word *conflict* highlights the potential applicability of mediation to all sorts of latent and manifest conflict situations. The term *resolution* fits with most forms of ADR, including the facilitative model of mediation, which is the focus of

12 See J V Bondurant, *Conquest of Violence: The Gandhian Philosophy of Conflict* (Berkeley: University of California Press, 1965) at 195; and T Weber, 'Gandhian Philosophy, Conflict Resolution Theory and Practical Approaches to Negotiation' (2001) 38(4) *Journal of Peace Research* 493–513 at 495. Compare these to Confucian ideas that manifest conflicts are disruptive to social harmony and that they arise because individuals are not virtuous. By cultivating moral individuals, Confucius aimed to create a society free from manifest conflict and litigation (*wu song* 無訟).

13 B Mayer, *Beyond Neutrality* (San Francisco: Jossey-Bass, 2004) at 184.

this book.¹⁴ The term *ADR* is used to refer to non-binding processes that are alternatives to court adjudication and the term *conflict engagement* as a broad term encapsulating the many ways of addressing differences.

The Conflict Resolution Wheel

1.23 To situate mediation in the context of conflict resolution processes, the Conflict Resolution Wheel, depicted in Figure 3 below, is used. The Wheel categorises the processes using the taxonomies of facilitative, transformative, advisory and determinative processes. It also shows how various conflict resolution processes relate to one another and how they fit into the overall conflict resolution landscape.

1.24 *Facilitative processes* feature assisted negotiation, party autonomy and consensus-based outcomes. The facilitative model of mediation is an example of a process in which the conflict intervener is a process expert with skills in structuring and facilitating negotiations. As will be discovered in Chapter 3, there are many variations in mediation practice. Facilitative mediators may be involved in settlement mediation, group facilitation and a wide range of other processes.¹⁵

1.25 Like facilitative processes, *transformative processes* are consensus-based, leaving substantive decision-making to the participants. They also encourage participant input into the process itself. Generally, transformative processes enable a broader understanding of the conflict as compared with other categories of conflict engagement. In addition, they are less focused on a specific type of outcome, whether it is a decision, recommendation or an agreement. Rather, the focus is on empowering the participants to transform their relationships. As transformation occurs, participants may find themselves in a more constructive space to resolve the current conflict and those that may occur in the future.¹⁶ Transformative processes include some forms of mediation and facilitation; they include group processes such as open space technology ('OST') and deep democracy.¹⁷

1.26 As the name suggests, *advisory processes* fall short of imposing a decision upon the parties to the dispute. Advisory processes include early neutral evaluation, neutral evaluation, case appraisal, conciliation and advisory forms of mediation.¹⁸ Conflict interveners are usually lawyers or technical experts who are limited to providing recommendations and advice. They are

14 For a detailed explanation of facilitative mediation, see Ch 3.

15 On the future search model of facilitation, see the explanation and references later in this chapter.

16 On transformative mediation, see Ch 3.

17 On open space technology and deep democracy, see the explanation and references later in this chapter.

18 On expert-advisory, wise counsel and tradition-based mediation, see Ch 3.

4

Culture and Communication: When East Meets West

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Those familiar with 'The Yellow Calendar' (the traditional Chinese almanac) may be able to predict the specific days in a year that most, if not all, Chinese-made movies commence shooting, complete shooting, and even the days on which they will hit the big screen. Making movies is just one example. The Yellow Calendar is based on the idea that the calculation of constellation activities (for example, moon phase) indicates activities, which are suitable for each day of the year and activities which are to be avoided.

Here our story begins. A young couple—Sally from Canada and Marcus from Hong Kong—are deciding upon the date for their wedding, which is to take place in Hong Kong. February 14th has always been their first choice, however Marcus' mother, Ling Ling, insists on December 18th, which is 'predicted' by the Yellow Calendar to be the most auspicious day of the whole year for weddings. According to Chinese tradition, the family is supposed to make the decision about the wedding date together. When Sally and Marcus try to discuss it with Ling Ling, she refuses to talk about the topic—'there's no way I will agree on another day', she says. In response to their question 'why does everyone need to follow the schedule?', she retorts 'it's just the way it is.' Without any persuasive answers from Ling Ling, the young couple feel frustrated. What is the scientific reasoning behind this calendar and its ability to foresee the success and failure of events depending on the date? What would it be like if everyone strictly followed the schedule and certain activities (for example, weddings, funerals or house moving) always happened everywhere at the same time?

While Ling Ling continues her stubborn insistence on following the Yellow Calendar, the young couple are left with a critical dilemma. They have no idea how to move forward on this and keep family harmony at the same time. Perhaps they can consult the Yellow Calendar to see if it points out a day suitable for 'resolving family conflict'.

Introduction

4.01 Not everything is easily negotiable especially when it relates to values and beliefs. Many things are not open to negotiation or mediation, and these things vary across cultural and national boundaries. When 'East meets West', as in the story of Sally, Marcus and Ling Ling, it can seem that everything seems to matter all at once—social standards, norms, values and laws. Consider these questions: What is unquestioned or unquestionable in your setting? What is unlikely to change, at least in your lifetime? Which political or public figures cannot be approached in your context? What are the consequences of challenging or breaking explicit or unwritten rules related to what is and is not negotiable? When is directness appropriate? Indirectness? How are power and status related to these questions?

4.02 While the answers in Hong Kong will vary from family to family and depending on the individuals involved—for example, a mainland girl marrying an American boy or a Hong Kong girl marrying a mainland boy—pondering

these questions sheds light on cultural assumptions that are deeply embedded in national and cultural consciousness. During conflict, these cultural assumptions can play out in unconscious and unexpected ways.

4.03 This chapter examines how culture shapes ways of perceiving and handling conflicts and disputes as well as communication in mediation processes. Following on from the previous chapter and consistent with the theme of this chapter, examples will be drawn from different cultures and countries, while situating the discussion in Hong Kong. Three dimensions of conflicts—material, relational and symbolic—will be described to set a framework for this exploration. Cultural fluency will be explored as a key tool to foster effective mediation across cultures. This tool will be described in terms of a number of cultural continua: communication starting points that influence the dynamics of mediation in countless important ways. Cultural habits of mediators will be examined for their impact on parties and mediation processes, and approaches to mediation will be analysed for embedded cultural assumptions. Finally, the implications for practice will be outlined, which includes five common mistakes that mediators make across cultures and five essential tools for effective intercultural mediation.

Definitions and Foundations: What is Culture?

4.04 Countless books have elaborated definitions of culture. In the mediation field, many conferences and conversations have addressed cultural dimensions of how conflicts and disputes are handled. Still, much frontier terrain remains. Why? There are two main reasons. One is our habit of seeing the world in particular ways and imagining that others are more or less similar. This leads to repeating challenges: either we learn over and over again that our assumptions are wrong, or, worse, we spend time trying to convince others that our assumptions are right! We are often unconsciously occupied by our cultural mindset of how things function and how we and others ought to respond to various situations. For example, one reason for Ling Ling—Marcus' mother in this chapter's opening story—refusing to engage in 'negotiations' might be that she is used to arranging her agenda according to the Yellow Calendar and recognising the success or failure of events based on its guidance. This may be the way she understands the world, thereby leaving her no room to accept another way of knowing and decision-making.

4.05 Another reason is that we, as humans, always navigate between the poles of separation and belonging, between individuation and group affiliation. Individuation involves increasing differentiation of the 'self'; affiliation involves belonging to groups constellated around geography, religion, generation, language, sexual orientation, social class, profession or type of work, politics, gender, ability/disability and recreational activities, to name a few. Affiliation is a centrepiece of culture; the multiple groups to which we belong give us messages about how to perceive and manage conflict, and what not to do. These

groups generate and reinforce the often unwritten rules about what constitutes conflict, which conflicts can be engaged in and in which ways and who (if anyone) can help. Everyone has experienced conflicting messages between individual and group 'common sense'; thus, conflict is multicultural within us as well as between us.

4.06 Culture is the unwritten, unspoken set of understandings that animate and inform group consciousness. It is the glue that binds, offering belonging and meaning beyond individuality. Culture sweeps up history, belief structures, narratives about 'us' and 'them', traditions, customs, myths and metaphors into dynamic cleavages. It satisfies deep needs of belonging while often—advertently or inadvertently—excluding those outside its boundaries. It is the grammar that gives speech its form; it is the river running beneath the surface that animates life. Everyone is multicultural, as Peter Adler famously wrote in 1977.¹ As multicultural beings, we dance between identities, ours and others', and sometimes get caught on the frayed edges of difference, also known as conflict.

4.07 With this broad definition of culture, it is important to ask what culture is not. Culture is not individual ways of making meaning. It is not only history or tradition or habits of perception shared in a group; it is always these and other factors interwoven. Like an underground river, it is largely out of our conscious awareness until a shift in its course or a blockage draws it into view. It is not static, but ever-changing. It is not amenable to precise analysis because it is always more than the sum of its parts. Culture is patterns, but more than patterns, because there is frequently more variation and diversity within a cultural group than between groups. Cultures are not world-views, a world-view is a broader term referring to cosmology, epistemology, axiology and other pylons of identity. If world-views are philosophical structures that shape human consciousness, cultures are the ways we conceive and enact these structures into day-to-day life.

4.08 Cultural factors are therefore intricately implicated in conflict. There is no such thing as a conflict that does not have cultural textures. While simplistic generalisations identifying culture as causing conflict are to be avoided, culture is a part of how conflicts are perceived, identified and handled. The guidance of *The Yellow Calendar* is a signal of culture differences reflecting different perspectives, yet the parties involved may have perceived a conflict—a difference that mattered—but it was a conflict to be unresolved because it arose within the fabric of a solid cultural tradition and a woman, Ling Ling, whose common sense pointed to deference to prescribed predictions and social beliefs. Differences like this will be considered further in the section on tools for mediating across cultures.

¹ Originally published in R Brislin (ed), *Culture Learning* (Honolulu East-West Center Press, 1977) at 24–41, then republished in L Samovar and R Porter (eds), *Intercultural Communication* (Belmont CA: Wadsworth Publishing Company, 1976) at 362–378.

4.09 If culture is a part of conflict because it shapes our identities and meanings and how we perceive differences, it is necessarily a part of mediation as well. In Chapter 3, a meta-model for mediation outlining a variety of ways to intervene in differences was explored. Each of these ways carries its own cultural assumptions and fits in different ways with parties and their goals. Some approaches to mediation nestle more easily in particular cultural contexts, whether national, regional or professional. Individual mediators bring their multicultural identities to the table, identities that inform what seems natural and appropriate to do in handling conflict. Both the cultural assumptions of the mediator and the cultural bedrock underlying a chosen mediation process will affect who feels at home with or alien to that process.

Dimensions of Conflict: Material Issues

4.10 Given their ubiquitous influence, understandings of culture and cultural dynamics are essential for effective, reflective practice as a mediator. One way to understand them is through analysis of material, relational and symbolic dimensions of conflict. Any set of differences resistant to resolution (and most negotiations are about such differences, or else they would have been resolved through unassisted negotiation) have these three dimensions. The *material* dimension is most obvious and relates to the concrete, measurable things at issue. It may involve identifying, distributing, managing, valuing, expanding, compensating or a whole range of other ways of addressing material aspects of a conflict.

4.11 The Hong Kong dock employee strike at the Kwai Tsing Container Terminal in 2013 was an employee-management dispute from Hong Kong that illustrates the material dimension of conflict and its resolution. There, the Union of Hong Kong Dockers called a strike to demand higher pay and improved working conditions from their contracting companies. After several rounds of negotiation, the parties could not find mutually acceptable terms and the strike was prolonged to 40 days. Ultimately the union secured an agreement of a 9.8 per cent improvement in all workers' pay and thereupon ended the strike.

4.12 While labour relations has various facets and the conflict between the two parties can manifest both superficial and deep relational problems, there remains a need for the parties to reach an agreement on this basic yet critical material issue. Thus, the material dimension is both the most obvious domain and the one from which concrete solutions must be drawn. In psychological terms, it is sometimes called the presenting problem. The simplest conflicts are those over material things in which parties will not necessarily have ongoing personal relations with each other. Examples of such conflicts include sales of goods and accident damage claims. The more clearly defined the material aspects of a conflict are, the easier it will be to resolve. For example, it is easier to come to a jointly agreed price for an automobile than it is to assess the amount of compensation that should be paid to someone whose quality of life was impaired

through medical malpractice. Still harder is determining how to quantify claims of damage to whole cultures and ways of life.

4.13 Mediators should be aware that the material level is always affected by cultural factors. Research indicates that individuals in Asian cultures tend to incorporate contextual information for the purpose of perception and evaluation, while individuals in American cultures are more capable of ignoring the contextual information for that purpose.² Because of this difference, culturally diverse groups may develop distinct perceptions on the value of certain materials. For instance, an Asian perspective is likely to assess the value of a property at 44 Spring Garden Road in Hong Kong together with various contextual factors—such as if the *feng shui* of the property predicts a prosperous future, if the neighbourhood consists of decent residents and if living in the area represents a noble social status. This is referred to as a high context perspective. However, from a typically Western perspective the value may be evaluated in a low context manner, according to which factors directly related to the property matter the most (size, position, structure, quality of property management and so on).

4.14 Across diverse contexts, people have different:

- meanings and associations with material goods and money;
- ways of negotiating;
- ways of measuring and assigning value; and
- ways of assigning priorities.

4.15 Effective mediators are cognisant of how the mediation process itself and their own perspectives on material issues shape the course of conversations among parties and thus, possibilities for resolution. Strategies based in problem-solving, for example, can be very useful provided that they are cast broadly enough to allow for the kinds of differences listed above.³

4.16 An example from Canada illustrates these various points. In recent years, a large number of claims related to residential schools have been made by indigenous people against the Government of Canada and Churches. Residential, church-run schools for indigenous children were first instituted in the late 1800s in Canada, and the last school closed in 1996. Students were taken from their families and forcibly enrolled in institutions where their languages and customs were forbidden in an effort to 'civilise' them. Physical, sexual, emotional and cultural abuse were rampant, and many children emerged with significant scars. Paradoxically, many were also left illiterate, in both their indigenous language and English or French. In this example, the material aspect includes physical injuries originally suffered by students at residential schools, related material forms of compensation including damages for injuries and funds to support literacy and other needs of the individuals and communities involved. Several attempts have been made to address these claims, and alternative dispute resolution processes

² S Kitayama, S Duffy, T Kawamura and J T Larsen. 'Perceiving an object and its context in different cultures: A cultural look at new look' (2003) 14(3) *Psychological Science* 201.

³ On problem-solving in the mediation process, see Ch 6.

continue to be used. However, it was clear early on that monetary relief alone was insufficient to address the cumulative magnitude of insults to cultural and individual dignity. At one point, an expedited process to send cheques to all residential school survivors (many of whom were elderly) backfired when recipients who received computer-generated letters accompanying their cheques were angry at this impersonal treatment.

Dimensions of Conflict: Relational Dynamics

4.17 Disputes like the one discussed in the preceding paragraph, arising from decades of forced placement in residential schools, cannot be fully resolved through actions at the material level, no matter how substantial. Conflict between indigenous and non-indigenous peoples continues to play out in the relational dimension. Trust frays and disrespect and paternalism sour ongoing relations, affecting everything from land claims to child welfare. Attributions further escalate conflict when they evoke blame, ill intentions and unfairness. The relational aspect of conflict turns our attention to a second essential feature of mediation: offering a safe container for communication and ideally building capacity for ongoing improvements in relations.

4.18 If the relational promise of mediation is to be realised, the process will need to be culturally fluent. A culturally fluent mediation process not only takes culture into account—it is responsive to parties' starting points, values and communication norms. Mediators can inadvertently worsen conflicts through aligning with the cultural common sense of one side to the exclusion of another. When mediators fail to focus on the relational dimensions of a conflict (even if they benignly hope it will improve as a result of material progress), they are likely to be implicated in a dance of despair or at least a dance where stepping on the others' toes creates additional bruising. Conflict is essentially relational; it arises in relationships and is salvaged there. If the relational dimension is not recognised and seen as an essential locus of analysis and action in mediation, it is likely to degenerate further.

4.19 The 2013 Hong Kong dock strike also illustrates the relational element of a labour-employer conflict. Perceived organisational support and supportive personnel practices are critical mechanisms for assuring and keeping employees.⁴ Conversely, a perceived lack of support from employers is likely to increase employees' distrusting attitude. Striking dockers may be looking for clues from employers to suggest the resumption or development of a cooperative relationship. Paradoxically the longer they strike, the lower their expectations for cooperation.

4.20 Another example of relational conflict can be seen in the tensions between some NGOs and resident committees in public housing estates. NGOs typically

⁴ D G Allen, G David, M S Lynn and W G Rodger 'The role of perceived organizational support and supportive human resource practices in the turnover process' (2003) 29 *Journal of Management* 99.

8

Mediation Practice in Hong Kong

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'So what did you do today at school?' Dad asks while perusing the business section of the newspaper.

'We mediated.'

'What? You meditated?' interjects Mum. 'Since when is yoga on the curriculum?'

'No', Fun sighs exasperatedly. 'We M-E-D-I-A-T-E-D!'

Now Dad is really focused, slamming the paper shut as he demands, 'Who medicated you?' Mum adds hurriedly, 'They can't do that without your parents' permission ... Can they?'

'It's peer mediation ...'

Surrounded by blank looks, Fun continues. Now she has their full attention. 'Look,' she holds out the front of her top for her parents to see. 'My t-shirt says I'm a school peer mediator.'

'Well, look at that?' Mum admires. 'Good for you. Say, didn't I read something in the newspaper about this mediation thing today?'

Dad says, 'No of course not. That was the Financial Disputes Resolution Centre. It's completely different.'

'No it's not,' pipes Fun. 'It's all mediation. Everyone in Hong Kong is doing it now, even grown-ups.'

Introduction

8.01 In October 2007, the Chief Executive of the HKSAR made a policy address outlining plans to employ mediation more extensively and effectively in Hong Kong, from higher-end commercial disputes to relatively small scale local disputes. He indicated that disputants from all walks of life could expect a transformation of the dispute resolution landscape in the coming years. Hong Kong's ambitious mediation policy goals were reaffirmed by the Chief Executive in his Policy Address in 2013 and 2014,¹ and also and by the Financial Secretary in his Budget Speech in 2014.² The continuing success of Hong Kong's mediation policies were applauded by his Honour Chief Justice Ma in his Welcome Address to the 'Mediation First' Conference 2014.³

1 See CY Leung, *The 2014 Policy Address: Support the Needy, Let Youth Flourish, Unleash Hong Kong's Potential*, Hong Kong, Hong Kong Government 2014, at 12; CY Leung, *The 2013 Policy Address: Seek Change, Maintain Stability, Serve the People with Pragmatism*, Hong Kong, Hong Kong Government 2013, at 9.

2 J Tsang, *The 2014–2015 Budget*, Hong Kong, Hong Kong Government 2014, at 30, referred to in R Yuen, 'Speech at the Opening Ceremony of the 5th Annual International ADR Mooting Competition', 27 July 2014, at 2–3. Available at www.doj.gov.hk/eng/public/pdf/2014/sj20140727e.pdf.

3 G Ma, 'Welcome Address' in Mediation Conference 'Mediate First for a Win-Win Solution' 20 March 2014, at 3–4. Available at <http://mediation.judiciary.gov.hk/en/doc/Welcomer%20address%20by%20Chief%20Justice-Mediation%20Conf.pdf>.

8.02 During this time, three bodies have played a significant role in the development of mediation practice in Hong Kong:

- The Working Group on Mediation (2008–2010);⁴
- The Mediation Taskforce (2010–2012);⁵
- The Steering Committee on Mediation (since December 2012).⁶

8.03 In 2008, the former Secretary for Justice Wong Yan Lung SC established and chaired a cross-sector Working Group on Mediation to review and make recommendations on ways to facilitate and encourage greater use of mediation in Hong Kong, resulting in the Report of the Working Group on Mediation ('the Hong Kong Mediation Report'). In 2010 the Mediation Taskforce was formed to consider and implement the Report's recommendations, which included a Mediation Ordinance and a single mediator accreditation body for Hong Kong. In 2012 the Secretary for Justice, Rimsy Yuen SC, established the Mediation Steering Committee, which continues to monitor and promote mediation practice in Hong Kong.

8.04 In this chapter the various forms of mediation practice in Hong Kong are explored and comments are made as to future trends. First, a systematic framework is introduced for understanding and analysing practice developments in terms of:

- where and how mediation can be accessed in the community; and
- the phase of professional development in which mediation practice finds itself.

8.05 The systematic framework is applied to the Hong Kong jurisdiction with some international comparisons. The major practice areas of mediation in Hong Kong will then be identified and described.

A Systematic Framework: Mediation Landscape and Development Schema

8.06 Mediation practice can be conceptualised in a number of ways. Some commentators focus on the court or the legal profession as a central access point for disputes. While this may seem natural for lawyers and judges, such an approach fails to account for the vast majority of disputes that never see a lawyer, let alone a court. Other commentators focus on private or community-based applications of mediation as well as transactional applications of mediation such as contract negotiations. Still others analyse mediation from the

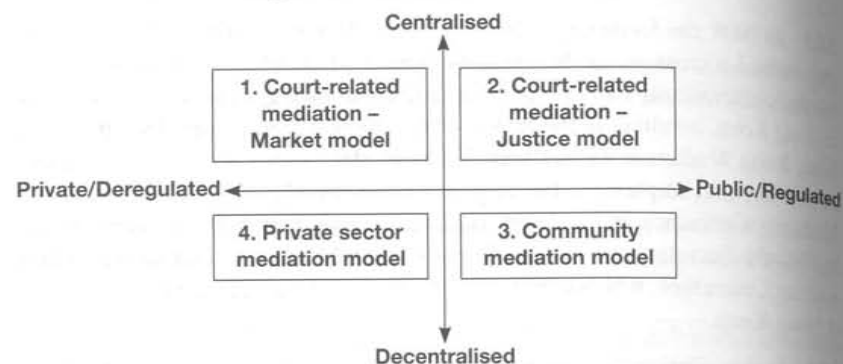
4 Department of Justice, *Report of the Working Group on Mediation*, Hong Kong, Hong Kong Government 2010. Available at www.doj.gov.hk/eng/public/pdf/2010/med20100208e.pdf.

5 Department of Justice, *Mediation Task Force Terms of Reference*, Hong Kong, Hong Kong Government 2010, at 2–3. Available at www.doj.gov.hk/eng/public/pdf/2011/mediation20110729e.pdf.

6 Steering Committee on Mediation, *Terms of Reference*. Available at www.doj.gov.hk/eng/public/pdf/2013/medie1.pdf.

perspective of particular stakeholder groups such as industry, insurers, minority groups, women, mediation organisations and the justice system. It is important therefore to capture the complete picture of mediation practice and to this end the Mediation Landscape represented in Figure 38 below is a useful tool.

Figure 38: The Mediation Landscape⁷



8.07 The vertical axis represents the nature of the distribution of mediation services from a centralised approach at one extreme (the top point of the axis) to a decentralised approach at the other (the bottom point of the axis). Thus, a centralised approach may indicate that mediation services have one primary access point such as the courts. Conversely, a decentralised approach would suggest diverse access points to mediation through different types of public and private entities. The horizontal axis represents the balance between private marketplace input and public/governmental input into ADR services in terms of regulation and financial and other support. The resulting four quadrants represent the main structural trends in the mediation practice.

8.08 Court-related mediation (represented by the two top quadrants) indicates a trend towards a centralised approach to mediation with the court as the central access point for mediation services. The primary distinction in court-related mediation programs relates to whether the provision of mediation services is considered to be (1) an integral part of the justice system and therefore a function of the court (the justice model) or rather; (2) an emerging private sector marketplace for dispute resolution (the marketplace model).

8.09 Quadrant 1, the market model of court-related mediation, represents a privatised form of mediation in which the court outsources mediation services. Mediators are typically external to the court and form part of a list or panel of court-approved mediators who set their own fees. The marketplace model promotes a 'user-pays' system which means that fees are payable by the parties. The parties are free to select their own mediator from the court list or through

⁷ The Mediation Landscape and the commentary accompanying it have been adapted from N Alexander, 'Visualising the ADR Landscape' 7(3) *ADR Bulletin* 2004, 46 and is reproduced here with the kind permission of the publishers.

the Joint Mediation Helpline Office⁸ ('JMHO') discussed below. If parties wish, they may select a mediator not on the list. Courts may also provide information about the mediation process and mediation service providers in general. For example, the Mediation Co-ordinator's Office in the Family Court and the Building Management Mediation Co-ordinator's Office in the Lands Tribunal provide basic information on mediation through mediation information videos and leaflets. If parties wish to appoint mediators, they can choose from a list of mediators containing details including the name, contact details, charges and mediation experience of individual mediators to assist them in choosing their mediators.

8.10 In addition, the JMHO functions as a referral centre to help parties find and appoint mediators. The JMHO is a company incorporated by guarantee and has an office conveniently located in the High Court Building. It was set up as a non-profit-making organisation with a view to promoting the use of mediation as a means of dispute resolution in Hong Kong and providing mediator referral service to parties to a dispute. The founding members of the JMHO include the Law Society of Hong Kong, the Hong Kong Bar Association, the Hong Kong Mediation Council, the Hong Kong Bar Association, the Chartered Institute of Arbitrators (East Asia Branch), the Hong Kong Institute of Arbitrators, the Hong Kong Institute of Architects and the Hong Kong Institute of Surveyors—bodies that have their own panels of mediators. If parties do not know how to find a mediator, the courts may refer them to the JMHO.

8.11 The market place model of court-related mediation originated in common law jurisdictions such as Canada, Australia, England and the United States. It is the dominant model of court-related mediation in Hong Kong.

8.12 The Market Model of Court-related Mediation in Hong Kong is envisaged in the following practice directions and provisions, most of which were introduced by the Civil Justice Reform of 2009. As indicated elsewhere in this book, the Civil Justice Reform comprises the Civil Justice (Miscellaneous Amendments) Ordinance 2008 and the Rules of the High Court (Amendment) Rules 2008 which came into effect on 2 April 2009.

- Practice Direction 15.10 'Family Mediation' ('PD 15.10')
- Direction Issued by the President of the Lands Tribunal Pursuant to section 10(5)(a) of the Lands Tribunal Ordinance (Cap 17) 'Case Management and Mediation for Building Management Cases' ('LTPD BM 1/2009')
- Practice Direction 6.1 'Construction and Arbitration List' ('PD 6.1')
- Practice Direction 1.1 'Admiralty Actions' ('PD 1.1')
- Practice Direction 18.1 'The Personal Injuries List' ('PD 18.1')
- Practice Direction 18.2 'The Employee's Compensation List' ('PD 18.2')
- Practice Direction 27 'Civil Proceedings in District Court' ('PD 27')

⁸ See the JMHO website: www.jointmediationhelpline.org.hk.

- Practice Direction 31 'Mediation' ('PD 31'): relates to all civil proceedings in the Court of First Instance and District Court began by writ except for cases in Appendix A
- Practice Direction 20.2 Probate and Administration of Estate Proceedings (other than Applications under the Non-contentious Probate Rules (Cap 10A))
- Direction Issued by the President of the Lands Tribunal pursuant to section 10(5)(a) of the Lands Tribunal Ordinance (Cap 17) on 'Mediation of Compulsory sale Cases under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545) ('LTPD CS No 1/2011').

8.13 By contrast, the typical features of the justice model of court-related mediation (quadrant 2) are as follows: the parties are referred to mediation by the court. The mediation process usually takes place in the court building and with court-based mediation practitioners. Mediators are drawn from the judiciary, court personnel and panels of mediators attached to the court or an external ADR organisation. Moreover, mediators are chosen and appointed by the court and the costs of the mediation are borne by the justice system. The justice model originated in civil law countries, such as Slovenia, Germany and parts of Scandinavia and continues to be widely practised in civil law jurisdictions. In 2014, it is also found in the courts and tribunals of certain common law jurisdictions, such as Australia, Singapore and England. However, the justice model is not practised in Hong Kong.

8.14 The lower two quadrants of the Mediation Landscape indicate a move away from the courts and away from centralisation. The combination of a high degree of regulation and/or government support with a decentralised approach is represented by the community mediation model in quadrant 3. Here, mediation can be accessed through community-based mediation organisations and often through other organisations, such as refugee and women's shelters, government-sponsored legal centres, legal aid and the police. Mediators include volunteers, employees of community mediation organisations and freelance mediators engaged on a contract basis. Typically, disputants do not pay for the service and where mediation services are not volunteered, the costs are carried or subsidised by the government. Most community practice models follow an interest-based or transformative approach. In Hong Kong, community mediation models can be found in initiatives of the Hong Kong Mediation Centre and the Hong Kong Family Welfare Society. The community mediation services offered by NGOs depend on the availability of government funding, charitable donations and volunteers. The Hong Kong Family Welfare Society set up its mediation centre in July 2001 with the aim of promoting the use of mediation and to provide mediation services to resolve conflicts between family members, colleagues and neighbours. This was the first mediation centre set up by an NGO to provide a range of mediation services.⁹

9 See the Hong Kong Family Welfare Society, 'Peer Mediation Programme: Facilitators Training Manual' (July 2003) at ii, cited in the Hong Kong Mediation Report at 19.

8.15 There are also restorative justice (victim-offender mediation) programs located at the Centre for Restoration of Human Relationships, the Evangelical Lutheran Church of Hong Kong's Integrated Service Center for Reconciliation and the Methodist Centre. The Centre for Restoration of Human Relationships has trained many facilitators with expertise in restorative justice and provides mediation services to numerous educational institutions. The Evangelical Lutheran Church offers free mediation between juvenile offenders and victims.¹⁰

8.16 Community mediation services can be relevant in small business and family business contexts. They are also relevant where disputes involve members of a village or tribe, such as in building and construction matters in a village and investment disputes involving land rights issues. Examples of this kind of traditional community mediation can be found in parts of China and other Asian, African and Pacific countries.

8.17 Private sector mediation (quadrant 4) represents a decentralised, deregulated and private sector approach. Mediation is offered by a range of private sector organisations and freelance mediators on a fee-for-service basis. Mediators represent a wide range of professions with a corresponding range of qualifications depending on organisational, industry requirements and professional standards. Private sector mediation initiatives can adopt a general approach to accreditation, which applies to a broad range of practice areas including commercial, intellectual property, telecommunications, workplace, construction and banking and finance. Hong Kong organisations that have taken this approach include the Hong Kong Mediation Accreditation Association Ltd ('HKMAAL'), the Hong Kong Mediation Council (as part of the Hong Kong International Arbitration Centre ('HKIAC')), the Hong Kong Mediation Centre, the Hong Kong Bar Association and the Law Society of Hong Kong. For example, HKIAC general mediators are able to mediate in the HKIAC administered Surveying Dispute Mediation and Arbitration Scheme ('HKIAC-RICS').¹¹ Private sector initiatives may also adopt a sector-specific approach to certain areas of mediation practice. This is most commonly found in the practice area of family law. HKMAAL offers a specialised family mediator accreditation in addition to its general mediator accreditation.¹²

8.18 Countless variations of mediation practice models can be found within the four quadrants of the Mediation Landscape. Jurisdictions with considerable mediation experience such as Australia and the United States offer mediation

10 See H M Ho, W H Chuk, W H Leung, H Y Lam, L C Lai and W M Law, 'Research Report on the Mediation between Victims and Offenders in Hong Kong. Social Service of the Evangelical Lutheran Church of Hong Kong; and Hong Kong Youth Enhancement Scheme, "Victim-offender Mediation" Service: Theory, Practice and Sharing' Evangelical Lutheran Church Hong Kong Social Service Department (2007) (in Chinese). See also YH Ng and GTW Wong, 'An Alternative to Prosecution: A Comparative Study between Restorative Service Provision in Queensland and Hong Kong' (2012) 1 *Discovery—SS Student E-Journal*, 267–313. Available at <http://ssweb.cityu.edu.hk/download/RS/E-Journal/journal12.pdf>.

11 See www.hkiac.org/en/mediation/appointment-of-mediators/mediation-schemes.

12 See www.hkmaal.org.

11

Online Dispute Resolution ('ODR')

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Queenie is a musician and in her spare time, she designs logos for independent local music bands. She works from a room in her family home in Kowloon Tong, Hong Kong. Recently, her designs have caught the attention of a young up-and-coming English band called Virtually Famous. The band members contact Queenie through Facebook and compliment her on her work. They explain that they wish to engage Queenie to design a logo for them. Excited at the prospect of working with a European band, Queenie quickly agrees and the parties set a time frame and a price. She begins work and after two weeks of late nights, multiple drafts and frequent cyber-chatting with the members of Virtually Famous she completes the design. Virtually Famous decides that it does not like the logo and refuses to pay for the work. Queenie is devastated and angry. She wants acknowledgement and compensation for the product she has created but doesn't know where to turn. Queenie has never engaged the services of a lawyer in her life and has never seen the inside of a courthouse. Yet she is now engaged in her first international commercial dispute—and it is online!

Introduction

11.01 There are many Queenies in the world and their numbers are rising exponentially. They are ordinary people who are using information and communication technology ('ICT') to engage in domestic and international commerce. For many of you reading this book, technology is a way of life: it facilitates social and business communications and networking and is a way to keep in touch, meet new people, purchase goods and services and download books and music. For some of us, it is a new way of communicating—whether as a consumer, business party, family member or friend—and it is one that is increasingly difficult to avoid. Nearly two-fifths of the world's population uses the Internet¹ and the acceptance of the Internet as a trading platform continues to grow.

11.02 The persistent ubiquity of technology is reflected in so many aspects of most of our lives. Even the least technologically-oriented among us will have found it difficult to resist automatic teller machines, email, Google and mobile phones. The new technology infrastructure promises seamless 24-7 transacting, whereas face-to-face encounters increasingly entail delays and expense. In addition to text-based applications such as email and SMS,² users of PCs, mobile phones and laptops can make video phone calls, use instant messaging such as Whatsapp, download music clips, share photographs, scan documents and edit video clips.

1 See the Miniwatts Marketing Group. 'Internet Usage Statistics: The Internet Big Picture—World Internet Users and Population Stats' (2013) available at www.internetworldstats.com/stats.htm.

2 SMS is the acronym for Short Message Service.

11.03 In the business context, the e-revolution has influenced the nature of relationship-building, negotiating, transacting and resolving disputes. It has created a new geography where national boundaries are much less relevant and in which previously unthinkable, or at least very difficult, connections and communications have been made possible. Here we refer to the phenomenal rise in e-commerce, which has blurred the traditional distinction between 'B2C' (business-to-consumer) and 'B2B' (business-to-business) transactions and disputes. The Internet has spawned the growth of a new generation of borderless Internet entrepreneurs from sole operators, such as Queenie, working from their PCs at home to large multi-million dollar businesses.³ In a political context, peace talks among local and international NGOs, government representatives, diverse political leaders, activists and community interest groups have been advanced through the use of online negotiation software.⁴

11.04 When parties do business online, they can also resolve any business disputes using the same technology without using an inordinate amount of additional resources. Colin Rule, Director of ODR at PayPal and eBay, writes:

Eventually, ODR will become an indistinguishable part of the way people around the world resolve their disputes. Whether or not the technology of today is sophisticated enough to fulfil the promise of ODR is not the key issue, because technology will continue to evolve. It may take longer than we previously assumed at the height of the Internet revolution, but the emergence of ODR is all but certain.⁵

11.05 Early applications of ODR focused on e-commerce disputes. The rise of the Internet has created new conflicts that can be addressed via the Internet itself. Examples include disputes over domain names, complaints about privacy and security of transmitted data, disputes with providers of IT services, infringements of intellectual property rights arising from illegal sharing of songs or videos, as well as disputes connected to e-commerce.

11.06 However, ODR is also used to mediate disputes beyond the Internet. It can be used in a variety of ways to manage disputes generated by face-to-face transactions, irrespective of whether the dispute is international or local.⁶ The capability to instantly access the most up-to-date information and know-how through the Internet has augmented telephony technology to make inexpensive and informal dispute resolution a reality for those with access to online resources. This, in turn, has encouraged the sourcing of conflict resolution providers from

3 A E Almaguer and R W Baggott III. 'Shaping New Legal Frontiers: Dispute Resolution for the Internet' (1998) 13 *Ohio State Journal on Dispute Resolution* 711 at 712.

4 For an explanation of the One-Text software, see ODR Cyberweek 2005, at www.odr.info/Cyberweek2005/activities.php.

5 C Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (Jossey Bass: San Francisco, 2002) at vii.

6 E Katsh and J Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco: Jossey-Bass, 2001) at 9.

a global marketplace. Disputants located in Brisbane and Berlin, for example, may elect to use an online mediator from Hong Kong.

11.07 Despite the plethora of ODR programs, Conley-Tyler points out that 'there is a wide variability in the number of cases dealt with by ODR sites: from only one case to over one million disputes.'⁷ The identified programs deal with a range of disputes covering areas such as consumer,⁸ B2B,⁹ family law,¹⁰ Internet¹¹ and workplace disputes¹² as well as political peace negotiations.¹³ While the initial growth of ODR occurred mainly in North America, there are now ODR services on all continents.¹⁴

11.08 In this chapter, various aspects of ODR will be explored: what it is, where it came from and how it is influencing conflict resolution practice. A chronological outline of the development of ODR will be discussed, followed by a description of the main technologies used on ODR platforms and the types of dispute resolution processes offered under the umbrella of ODR. The characteristics and dynamics of ODR will then be examined, with a focus on mediation before responding to the diagnostic question: when is ODR an appropriate choice for the resolution of your dispute. Finally, regulatory initiatives in the field and how ODR may develop in the future, will be considered.

11.09 When reading this chapter, you are invited to think about ways in which you can integrate technology into your mediation practice. Bear in mind also that what is cutting-edge ODR at the time of writing may become standardised and more easily accessible a few years down the road.

The Development of ODR

11.10 The development of ODR can be divided into five phases:¹⁵

1. the amateur enthusiast phase;
2. the experimental boom phase;
3. the commercial boom phase;

7 S Hattotuwa and M C Tyler, 'An Asian Perspective on Online Mediation' (2006) *Asian Journal of Mediation* 1 and M C Tyler, '115 and Counting: the state of ODR 2004' (2005) (paper presented at the Third Annual Forum on Online Dispute Resolution, Melbourne) available at www.mediate.com/odrresources/docs/ODR%202004.doc.

8 See eg Net Consumers Association in Taiwan: www.nca.org.tw/chhtml/index.asp.

9 See eg The Mediation Room at www.themediationroom.com.

10 See eg Family Mediation Canada at www.fmc.ca.

11 See eg The Asian Domain Name Dispute Resolution Centre at www.adndrc.org.

12 See eg Online Resolution, at www.odr.info.

13 See eg One-Text Negotiations and Collaboration Platform in Sri Lanka at <http://ict4peace.wordpress.com/2007/09/03/one-text-negotiations-and-collaboration-platform-in-sri-lanka>.

14 S Hattotuwa and M C Tyler (2006), above note 7.

15 Adapted from E Katsh and J Rifkin (2001), above note 6, at 47 et seq; C Rule, *Online Dispute Resolution for Business* (John Wiley & Sons, Inc, New York, 2001); and S Hattotuwa and M C Tyler, 'An Asian Perspective on Online Mediation' (2005) 1 *Asian Journal of Mediation* at 1.

4. the institutionalisation phase;
5. the regulatory phase.

1. *The amateur enthusiast phase:* Many of the online disputes generated up until 1995 arose out of online text-based discussions on bulletin boards. Disputes were resolved without any special protocols or procedures on a case-by-case basis, although Rule explains that general advice was circulated on how to moderate difficult or inflamed online discussions.¹⁶ During this initial phase, computer-assisted negotiation tools such as SmartSettle, said to be 'the world's first secure multiparty eNegotiation system', were first developed.¹⁷ These tools offered advice on how to negotiate and online workbooks that assisted parties to prepare for mediation and negotiation. Case administration software was also developed during this period to coordinate parties, book venues, manage schedules and follow up with clients. The term 'ODR' was not yet in parlance.
2. *The experimental boom phase:* Between 1995 and 1998, academic and non-profit interest in the Internet grew. In the United States, the National Center for Automated Information Research ('NCAIR') held a seminal conference in 1996, which put ODR on the international map. Media interest in the Internet increased and encouraged new service providers and users of ODR technology. Special online platforms that deal with recurring types of disputes were developed during this phase and numerous trial projects were initiated with the assistance of NGOs and universities. One of these projects, Virtual Magistrate, included a project for arbitration; another, the Online Ombuds Office, was a platform for online mediation. The first use of Internet technology to assist people to participate in a public policy dialogue was RuleNet (1996). Commercial ODR applications emerged during this phase and experienced accelerated growth in the next phase.

3. *The commercial boom phase:* The period between 1999 and 2002 saw the growth of a specialised ODR business sector. A lot of money was invested in ODR during this period, and hundreds of start-up companies were formed—many of which no longer exist. By 1999 it was widely accepted by government, industry and business that many of the problems arising in, and from, the Internet could be resolved there. In addition, there was growing recognition of the applicability of online procedures to disputes that arose beyond the online world, that is, in the offline world.

During this period, blind-bidding dispute settlement companies were formed, largely with money raised from the insurance sector.¹⁸ ODR began to attract the interest of international organisations such as the ICC (International Chamber of Commerce), WIPO (World Intellectual Property Organization) and InfoCamere (the Italian Chamber of Commerce) in

16 C Rule (2001), above note 15.

17 G Oakes, 'Your virtual day in court: How online dispute resolution is transforming the practice of ADR' www.lawyersweekly.ca/index.php?section=article&articleid=737.

18 See eg Cybersettle: www.cybersettle.com.

relation to transboundary disputes and in particular overcoming difficulties associated with the expense and delays associated with cross-border litigation and arbitration.

Importantly, established ADR organisations such as the AAA (American Arbitration Association), JAMS (Judicial Arbitration and Mediation Services), NAF (National Arbitration Forum) and BBB (Better Business Bureau) began their own ODR programs. For example, JAMS provides specialised case administration software for class actions and mass tort cases, while BBB is credited with the creation of seals and trustmarks for online standards.

4. *The institutionalisation phase:* From 2003 onwards, ODR has increasingly been viewed in a broader conflict management context. Entities such as courts, government departments and private ADR service providers have been trialling and integrating elements of ODR, such as case and document management and intake procedure software into their spectrum of dispute resolution services. ODR has been introduced into communities that generate disputes: the transactional environment. The online auction house eBay provides an example of this phenomenon with transactional services and ODR services being offered side-by-side. ODR service providers are increasingly focused on improving the user-friendliness of, and consumer confidence in, their services, for example through the use of trustmarks. This phase has also witnessed the application of ODR technology beyond private disputes to complex political conflicts and emergencies as illustrated by the One-Text Negotiations and Collaboration Platform, which was used in the Sri Lankan peace negotiations.¹⁹
5. *The regulation phase:* Regulation has long been an issue in ODR. Since 2008 there has been considerable progress in international regulatory initiatives to address quality assurance, standards and the need for a global regulatory framework for ODR. As discussed below, international bodies such as the United Nations, the European Union and numerous others have developed regulatory blueprints for the field.

11.11 The five developmental phases of ODR reflect the rapid growth of the field, which has left ODR services with inadequate regulatory infrastructure, especially in relation to quality assurance and accountability of service providers. As this chapter shows, the primary challenges facing the sustainable growth of ODR relate to trust, regulation and the digital divide.

¹⁹ On the One-Text Negotiations and Collaboration Platform, see <http://ict4peace.wordpress.com/2007/09/03/one-text-negotiations-and-collaboration-platform-in-sri-lanka>. For other illustrations, see ICT for Peacebuilding generally at <http://ict4peace.wordpress.com>.

ODR: Terms and Definitions

11.12 In the literature, ODR is also referred to as 'online-ADR', 'e-ADR', 'eDR', 'cyber-ADR' and 'automated ADR'. The last term refers to processes, which are fully automated and use computer programs or other forms of artificial intelligence, such as blind-bidding and decision-making trees.²⁰

11.13 The terms 'online-', 'e-' and 'cyber-ADR' all recognise the fact that *online* dispute resolution has grown out of the application of ICT to *alternative* dispute resolution processes. Here a distinction can be made between traditional offline ADR, on one hand, and online-, e- and cyber-ADR, representing a new generation of ADR processes, on the other. The terms '*online-*' and '*cyber-ADR*' highlight the use of Internet-based applications in ADR, while '*e-ADR*' and '*eDR*' are broader terms referring to electronic applications of ADR. Electronic applications extend beyond online applications to include the use of videoconferencing, mobile telephony, community Internet radio and other forms of electronic technology.²¹

11.14 In terms of expanding ODR applications beyond private economic disputes, developments in the conflict management field extend to preventative and strategic facilitation strategies, online conflict transformation ('OCT') and electronic direct democracy ('EDD').²²

OCT refers to e-applications of conflict transformation in peace-building initiatives such as Infoshare's One-Text negotiation technology which uses meeting room technology and information exchange to help parties work towards conflict transformation.²³

11.15 EDD²⁴ is a form of direct democracy that uses ICT to engage directly in voting and other forms of decision-making on political issues. Such online participatory processes can be used in all situations where groups or multiple parties need to make decisions such as in multi-party joint venture negotiations, town planning, environmental and other disputes involving interested members of the public and land and resource negotiations involving diverse stakeholders such as farmers, government bodies, mining companies and indigenous land owners.

²⁰ E Katsh and J Rifkin (2001), above note 6, at 61. Automated processes are examined later in this chapter.

²¹ S Hattotuwa and MC Tyler (2005), above note 15 at 3.

²² Eg see J Gresser, 'Strategic Alliance Mediation—Creating Value from Difference and Discord in Global Business' 2(4) (2000) *European Journal of Law Reform* 651 at 679. See also S Hattotuwa and MC Tyler (2005), above note 15 at 3.

²³ S Hattotuwa, 'Untying the Gordian Knot: ICT for Conflict Transformation and Peacebuilding' (Paper presented at the Proceedings of the Third Annual Forum on Online Dispute Resolution, Melbourne, 2004). Another example is the Cultures of Peace News Network: http://sites.google.com/site/sanjanah/ICT_for_peace.pdf.

²⁴ See T Western, 'Electronic Democracy 'Ready Or Not, Here It Comes'', available at www.netcaucus.org/books/egov2001/pdf/edemoc.pdf.