

THE REGULATION OF MEDIATORS IN ENGLAND AND WALES, THE UNITED STATES AND AUSTRALIA — LESSONS FOR HONG KONG



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Hong Kong, after some delay, has followed the international fashion in seeking to develop alternatives to the traditional methods of resolving legal disputes. Mediation, in particular, is being encouraged by the territory's government and judiciary as a way of avoiding what is perceived to be costly and lengthy litigation. Those serving as mediators will be crucial to the success of these endeavours. As yet, however, the accreditation, training and supervision of mediators are in their infancy. This article looks at the regulation of mediators in those common law jurisdictions closest to Hong Kong in their form and substance and considers what — if any — lessons the territory may draw from their experiences.

Introduction

Hong Kong's government is committed to promoting the territory as a "hub" for international dispute resolution services in the Asia-Pacific region.¹ Irrespective of the merits of such an ambition, Hong Kong's judges, lawyers, arbitrators and mediators will be crucial to its realisation. It is almost *de rigueur* in advanced economies for the activities of professionals, be they lawyers or otherwise, to be subject to (often rigorous and often statutory) regulation. Such regulation is seen as vital to both the performance of such professionals and public confidence in their performance. This is very much the case in Hong Kong — except for mediators. At present the regulation of mediators in the territory is something of a work in progress, which is of consequence to the development of mediation itself.

The first part of this article discusses and compares the regulation of mediators in Hong Kong with that in several other common law regimes

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¹ See Keynote Luncheon Speech by Mr Rimsky Yuen, SC, Secretary for Justice at the Chartered Institute of Arbitrators Centennial Conference in Hong Kong held on 20 March 2015, available at <http://www.doj.gov.hk/eng/public/pdf/2015/sj20150320e.pdf>.

including England and Wales. For ease of reference, this first part is broken down into three sections:

- (1) accreditation and training;
- (2) supervision; and
- (3) disciplinary action.

The second part of this article contains an analysis of the similarities and differences between the jurisdictions, culminating with an observation on what “lessons” there may be for Hong Kong. When identifying these “lessons” for Hong Kong, the article also draws on the research of such distinguished commentators as Klaus J Hopt, Felix Steffek and Nadja Alexander.

Before moving to the substance of this article, however, it is important to clarify that its objective is the examination of the regulatory frameworks applicable to mediators. It does not look at claims that may be brought or remedies that may be available against a mediator in the courts. Nor does it examine those regulations that may also apply to mediators by virtue of their other professional qualifications, ie as solicitors.² It also refrains from addressing the issue of mediation confidentiality, which is a complex and substantial subject in itself, deserving separate analysis. Finally, the scope of the article is limited to civil and commercial mediations (ie it does not address family mediations).

Accreditation and Training

Hong Kong

On 22 June 2012, the Hong Kong Legislative Council (LegCo) enacted the Mediation Ordinance (Cap 620). The legislation, which came into force on 1 January 2013, despite its all-encompassing title, deals only with the confidentiality of “mediation communications”.³ Although the judiciary has issued Practice Direction 31 in relation to the role of mediation in civil litigation,⁴ and whilst there are various other Practice Directions, guidelines and initiatives (both public and private) on mediation, there is no legislation that touches upon the regulation of the mediator “profession” in Hong Kong.

² The Hong Kong Law Society’s “The Hong Kong Solicitors’ Guide to Professional Conduct” contains a number of provisions relating to solicitors acting as mediators. The Guide is available at http://www.hklawsoc.org.hk/pub_e/professionalguide/volume1/default.asp.

³ The text of the Ordinance is available at <http://www.doj.gov.hk/eng/public/pdf/2013/cape.pdf>.

⁴ The text of Practice Direction 31 is available at <http://legalref.judiciary.gov.hk/lrs/common/pdf/pdcontent.jsp?pdn=PD31.htm&lang=EN>.

In August 2012, the Hong Kong Mediation Accreditation Association Limited (HKMAAL) was incorporated as a non-statutory, industry-led body, the aim of which is to “create the premier mediation accreditation body in Hong Kong”.⁵ Its primary task is to set standards for the accreditation of mediators in Hong Kong. HKMAAL’s founding members, including the Hong Kong Law Society and Bar Association, subsumed their own mediator accreditation regimes into that of HKMAAL, as have other subsequent members. Thus, it is well on its way to becoming the *de facto*, if not the *de jure*, leading accreditation body in the territory.

Accreditation by HKMAAL requires three years’ full-time work experience, followed by attendance at an approved training course (of not less than 40 hours’ length) and an assessment at which the applicant must successfully mediate two simulated cases.⁶ HKMAAL does not provide such mediator training or assessments itself. Instead, there are numerous institutions in Hong Kong which offer mediator training courses, some of which are approved by HKMAAL and lead to its accreditation and others which are not (but are no less worthwhile for that).⁷ In addition, bodies such as the Financial Dispute Resolution Centre (FDRC)⁸ maintain their own mediator panels. On the whole, there is a growing tendency for the initial training and accreditation of would-be mediators to comply with the standards laid down by HKMAAL.

England and Wales

There is no legislation pertaining to mediator accreditation in England and Wales nor does the European Union (EU) Directive on Mediation provide any particular guidance on the subject, except that it encourages mediator training for the purpose of improving the quality of mediators.⁹ The Legal Services Act 2007, which regulates the legal profession in the jurisdiction, specifically excludes those acting as “mediators” from its ambit.¹⁰ Hence, in theory, anyone can perform the role of a mediator without needing “accreditation”. In practice, however, it is common for

⁵ The HKMAAL website is available at <http://www.hkmaal.org.hk/en/index.php>.

⁶ The details on becoming a HKMAAL general mediator are available at http://www.hkmaal.org.hk/en/HowToBecomeAMediator_G.php.

⁷ A list of HKMAAL-approved mediation training courses is available at http://www.hkmaal.org.hk/en/trainingcourse_notes.php.

⁸ The FDRC website is available at <http://www.fdrc.org.hk/index.php?lang=en>.

⁹ Article 4 “Ensuring the Quality of Mediation”, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008.

¹⁰ Section 12(4) states that “legal activity” does not include any activity of a judicial or quasi-judicial nature (including acting as a mediator). The full text of the Legal Services Act 2007 is available at <http://www.legislation.gov.uk/ukpga/2007/29/contents>.

parties (and their legal advisers) to make use of those mediators who have obtained accreditation in some form or another rather than those who have not.¹¹

A market has arisen in which numerous providers compete to offer a wide variety of mediation training services leading to self-accreditation. The Centre for Effective Dispute Resolution (CEDR), for instance, awards a certificate of accreditation to those who successfully complete its five-day training course and who may thereafter refer to themselves as a “CEDR Accredited Mediator”.¹² The Chartered Institute of Arbitrators (CI Arb) offers mediation and arbitration training in more than 110 countries and awards its participants with a hierarchy of forms of accreditation.¹³ In some cases, accreditation and training providers mutually recognise each other’s forms of accreditation, eg, accreditation offered by UK Mediation is approved by the CI Arb.¹⁴

In addition to the self-accreditation model, many providers are registered with the Civil Mediation Council (CMC).¹⁵ Registration is not mandatory; nevertheless, it serves as a quality assurance for the users of mediation. For the purposes of registration with the CMC, each provider is expected to conduct mediator training courses leading to accreditation of not less than 40 hours, including theory and role-playing exercises, followed by a formal assessment. In addition to the CMC, there are other independent bodies, such as the Law Society, which operate their own mediator accreditation and panels.¹⁶ That said, it appears that the majority of training and accreditation providers have adopted the minimum standards set down by the CMC which, in effect, has led to a common standard of mediator training and accreditation across England and Wales.

United States — California

Whilst there is the Federal Mediation and Conciliation Service (FMCS), which assists federal, state and local agencies to resolve workplace

¹¹ The Ministry of Justice maintains a directory of all civil mediation service providers which also offers training services. This is available at <http://www.civilmediation.justice.gov.uk/>.

¹² Details on CEDR training are available at <http://www.cedr.com/skills/mediator/>.

¹³ CI Arb membership benefits are available at <http://www.ciarb.org/membership/membership-benefits>.

¹⁴ More details on the UK mediation training courses are available at <http://www.ukmediation.net/commercial-mediator.html>.

¹⁵ The CMC of England and Wales was initially set-up as an unincorporated association of members for the purpose of promoting the use of mediation and setting standards. On 1 January 2015, the CMC became a not-for-profit company limited by guarantee called Civil Mediation Council Limited. Details are available at <http://www.civilmediation.org/about-cmc>.

¹⁶ Details of the Accreditation Scheme of the Law Society are available at <https://www.lawsociety.org.uk/support-services/accreditation/civil-commercial-mediation/>.

disputes by mediation,¹⁷ there is no national body that regulates mediator accreditation, training or conduct in the US. In August 2012, a report by the American Bar Association (ABA) addressed “mediator credentialing” (ie the US equivalent of “accreditation”) and concluded that, given the diversity of views on establishing mediator competence, it would not be appropriate to set up a nationwide credentialing system.¹⁸ The Association for Conflict Resolution (ACR), on the other hand, has released and adopted “Model Standards for Mediator Certification Programs”, the aim of which is to guide entities to establish and maintain certification programmes.¹⁹ Attempts have been made to draw a distinction between “certification” and “credentialing”, where the latter is construed to be a broader term and includes the former. Such efforts cannot, however, hide the fact that there is little unity among industry stakeholders on the “credentialing” of mediators.

At the state level, the Dispute Resolution Programs Act (DRPA) 1986 facilitates the establishment and funding of informal dispute resolution programmes across California.²⁰ The regulations which supplement the DRPA deal with the orientation and training of mediators.²¹ Other than this, no legislation regulates the “credentialing” and training of mediators who conduct privately held mediations. Moreover, no institution — statutory or voluntary — sets out any uniform criteria or minimum standards for the credentialing of mediators.

An ad hoc committee of the Southern California Mediation Association (SCMA) recently recommended the creation of a voluntary certification programme and the formation of a consortium which would operate as the governing body for such a certification process.²² Unless and until such a mechanism is put in place, the term “certified mediator” within California refers to those mediators who meet the minimum training standards set out in the DRPA. To be eligible to act as a mediator under the DRPA, one must complete a 25-hour training programme.²³

¹⁷ The Federal Mediation and Conciliation Service website is available at <https://www.fmcs.gov/>.

¹⁸ Alternative Dispute Resolution Section of the American Bar Association, Task Force on Mediator Credentialing Final Report (August 2012), available at http://www.americanbar.org/content/dam/aba/images/dispute_resolution/CredentialingTaskForce.pdf.

¹⁹ The Model Standards are available at [http://www.imis100us2.com/acr/ACR/Resources/Model_Standards.aspx?hkey=315fc2bd-2cac-422b-82bf-b3160b6a1b08](http://www.imis100us2.com/acr/ACR/Resources/Model_Standards/ACR/Resources/Model_Standards.aspx?hkey=315fc2bd-2cac-422b-82bf-b3160b6a1b08).

²⁰ The entire text of the DRPA 1986 is available at http://www.dca.ca.gov/publications/drpa_statutes.shtml.

²¹ The entire text of the DRPA Regulations is available at http://www.dca.ca.gov/publications/dpra_regs.shtml.

²² The text of the entire SCMA Ad-Hoc Committee Report on Voluntary Mediation Certification is available at <http://www.scmmediation.org/wp-content/uploads/2014/09/FAQ-Jack-and-Barbara-edits-final.pdf>.

²³ DRPA Regulations s 3622.

Mediators practicing within the California courts are expected to comply with their requirements in respect of experience, training, education and other qualifications. Mediators are also obliged to continuously assess their skills and ascertain whether they are able to mediate disputes effectively.²⁴ Further, there are two categories of organisations which offer professional mediator training in California — private organisations and not-for-profit bodies funded under the DRPA. For example, Community Boards, a DRPA-funded organisation in San Francisco, offers a 40-hour mediator training programme covering theory and practice.²⁵ Similarly, the Asian Pacific American Dispute Resolution Center (APADRC), another not-for-profit organisation in Los Angeles, operates a 40-hour basic mediation training programme.²⁶ Private institutions include the Straus Institute for Dispute Resolution at Pepperdine University, which offers its flagship mediator training programme “Mediating the Litigated Case” over a six-day period.²⁷ In the absence of an overall governing body or regulations, the “credentialing” or “certification” of individual mediators very much depends on their professional affiliations.

United States — New York

The Alternative Dispute Resolution (ADR) office of the Unified Court System (UCS) of the State of New York is actively engaged in organising and promoting training programmes pertaining to mediation, albeit does not certify mediators itself.²⁸ Instead, it partners with local non-profit organisations called Community Dispute Resolution Centers (CDRCs), which offer mediation services and training programmes. The New York State Judiciary Code specifically provides for the training requirements of community mediators connected with a CDRC.²⁹ There is a similar eligibility provision in the administrative rules of the UCS.³⁰ Moreover, the CDRC manual contains detailed training requirements for mediators

²⁴ California Civil Court Rules r 3.856.

²⁵ Details of the training course offered by Community Boards are available at <http://communityboards.org/training/become-a-mediator/>.

²⁶ Details of the training course offered by APADRC are available at <http://apadrc.org/training/basic-mediation-training/>.

²⁷ Details of Mediating the Litigated Case are available at <http://law.pepperdine.edu/straus/content/mlcflifer.pdf>.

²⁸ Details of the work of the ADR office are available at <http://www.nycourts.gov/ip/adr/about-us.shtml>.

²⁹ Article 21-A, s 849-b of the New York State Judiciary Law are available at <http://codes.lp.findlaw.com/nycode/JUD/21-A>.

³⁰ Sub-Part 116.3 of Pt 116 titled “Community Dispute Resolution Centers Program” of the Rules of the Chief Administrative Judge is available at <http://www.nycourts.gov/rules/chiefadmin/116.shtml>.

practicing in the CDRCs³¹ and there are specific training guidelines for those who wish to serve as mediators on court rosters.³² There is, however, no legislation on the credentialing and training of mediators who wish to practice independently of the CDRCs and court rosters. Therefore, insofar as private mediations in New York are concerned, anyone irrespective of their background can at least claim to be a mediator.

Mediators who wish to serve on court rosters are expected to have at least 40 hours of mediation training and recent actual experience in mediation.³³ CDRCs which seek funding from the UCS are expected to ensure that their mediators are trained for at least 24 hours in conflict resolution techniques.³⁴ To this end, the Community Mediation Services Training Institute³⁵ offers a five-day training programme certified by the Office of Court Administration, and the Institute for Mediation and Conflict Resolution offers a 40-hour training programme.³⁶ In addition to the CDRCs, there are numerous professional bodies which offer mediator training programmes in New York and elsewhere. The American Arbitration Association (AAA) is one such body that offers a 40-hour mediator training programme over five consecutive days covering classroom lectures and simulated mediations.³⁷ Consequently, despite the fact that there is no single body dedicated to setting minimum standards for mediator training and credentialing, a consistency in the programmes offered by various entities has developed.

Australia

Australia is known for its progressive approach to the development of ADR, in general, and mediation, in particular. It enacted the Civil Dispute Resolution Act 2011 with the object of ensuring that “people take genuine steps to resolve disputes before certain civil proceedings are

³¹ Chapter 7 titled “Standards and Requirements for Mediators and Mediation Trainers” of CDRC Programs Manual is available at http://www.nycourts.gov/ip/adr/Publications/Program_Manual/Chapter7.pdf.

³² Part 146 titled “Guidelines for Qualifications and Training of ADR Neutrals Serving on Court Rosters” of the Rules of the Chief Administrative Judge is available at <http://www.nycourts.gov/ip/adr/Part146.shtml>.

³³ *Ibid.*, Pt 146.4 titled “Qualifications and Training of Neutrals” of the Rules of the Chief Administrative Judge.

³⁴ Article 21-A of the New York State Judiciary Law and Pt 116 of the Rules of Chief Administrative Judge.

³⁵ Details of the training course offered by “Community Mediation Services Training Institute” are available at <http://mediatenc.org/training/>.

³⁶ Details on the training course offered by “Institute for Mediation and Conflict Resolution” are available at <http://www.imcr.org/training/basictraining.html>.

³⁷ Details on the training course offered by “American Arbitration Association” are available at <https://www.aaau.org/courses/essential-mediation-skills-for-the-new-mediator/15omedb1302o/>.

instituted".³⁸ In spite of this, however, the accreditation and training of mediators is unregulated and dominated by private professional bodies.

A voluntary industry system, the National Mediator Accreditation System (NMAS) was established by the Mediator Standards Board (MSB)³⁹ to protect the interests of mediation consumers by laying down "Approval Standards"⁴⁰ for those bodies that wish to train and accredit mediators. Once the Approval Standards are adopted, such bodies may apply to the MSB to be classified as Recognised Mediator Accreditation Bodies (RMABs).⁴¹

The process of individual mediator accreditation under NMAS is outlined in its Approval Standards.⁴² The Law Society of Western Australia and⁴³ the Law Society of New South Wales (NSW)⁴⁴ are, for instance, registered as RMABs under NMAS. It is not mandatory, however, for a mediator to be accredited under NMAS. For example, the Australian Commercial Dispute Centre (ACDC) runs its own programme and awards successful participants with an accreditation certificate.⁴⁵ Lawyers Engaged in Alternative Dispute Resolution (LEADR) and The Institute of Arbitrators and Mediators Australia (IAMA) also offer self-accreditation which is managed by the LEADR Accreditation Committee.⁴⁶

The Approval Standards specify that mediator training courses must be taught by RMABs for a minimum of 38 hours with an additional 1.5-hour assessment.⁴⁷ The MSB has also devised Practice Standards⁴⁸ to be followed by mediators who are accredited under NMAS. ACDC offers an intensive 40-hour mediation training course and is open to anyone

³⁸ The text of the Civil Dispute Resolution Act 2011 is available at http://www.austlii.edu.au/au/legis/cth/num_act/cdra2011296/.

³⁹ Mediator Standards Board Limited is a company limited by guarantee established with the objective of, amongst other things, develop, maintain and amend the NMAS including the Australian National Mediator Standards. Details on the constitution and objectives of the MSB are available at <http://www.msb.org.au/sites/default/files/documents/MSB%20constitution.pdf>.

⁴⁰ The NMAS Approval Standards are available at <http://www.msb.org.au/sites/default/files/documents/Approval%20Standards.pdf>.

⁴¹ MSB, National Mediator Accreditation System (NMAS) – A History of the Development of the Standards, available at <http://www.msb.org.au/sites/default/files/documents/A%20History%20of%20the%20Development%20of%20the%20Standards.pdf>.

⁴² The Approval Standards are available at <http://www.msb.org.au/accredited-mediators/becoming-accredited-mediator>.

⁴³ The Law Society of Western Australia's accreditation details are available at <http://www.lawsocietywa.asn.au/mediation-accreditation/>.

⁴⁴ The Law Society of New South Wales, Dispute Resolution Kit, December 2012, Pt 1, sub-pt 3.

⁴⁵ ACDC self-accreditation is available at <http://www.acdcld.com.au/training/mediation-accreditation>.

⁴⁶ Lawyers Engaged in Alternative Dispute Resolution (LEADR) and The Institute of Arbitrators and Mediators Australia (IAMA) merged at the beginning of 2015. Details of LEADR's and IAMA's self-accreditation are available at <http://www.leadriama.org/accreditation/accreditation>.

⁴⁷ NMAS Approval Standards (n 40 above) s 5.

⁴⁸ The NMAS Practice Standards are available at <http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf>.

who wants to be a mediator.⁴⁹ LEADR offers a mediator training course over five days with no prerequisites for participants.⁵⁰ IAMA, on the other hand, offers a four-day training module with two-day supervised coaching and an assessment module (again with no prerequisites on participants' qualifications).⁵¹ The Accord Group also offers a 40-hour core mediation training course.⁵²

To become a panel member of the Law Society of New South Wales (NSW), one needs to demonstrate that he is already a member of the Law Society, holds a practicing certificate, carries professional indemnity (PI) insurance, has five years of experience and is accredited under NMAS.⁵³ The Law Society of NSW also operates a separate accreditation scheme for dispute resolution professionals. In Queensland, a person is eligible to be appointed as a mediator only if he has the knowledge, skill and experience to discharge mediator's functions. There is no clarity, however, on what exactly the terms "knowledge, skill and experience" mean.⁵⁴

Therefore, there is a pattern of training courses abiding with the minimum standards set out under NMAS. Finally, from 1 July 2015, revisions to NMAS and its standards came into effect.⁵⁵ By and large, however, there is no change in the fundamental structure of NMAS and its standards and, therefore, reference shall be made to the proposed NMAS only where the deviation is worthy of notice and can affect the conclusions set out in this article.

Observations

It would appear that England and Wales, the two US states and Australia have not attempted to legislate for the structure of the mediator "profession". Despite that, with respect to accreditation (leaving aside New York and California), there appears to be a consistent pattern of moving towards a common set of standards, with such standards being enunciated by a single body, ie, the CMC or MBS. As far as New York and

⁴⁹ More details of ACDC Mediation Training are available at <http://www.acdcltd.com.au/training/mediation-training>.

⁵⁰ Details of LEADR Mediator Training are available at <http://www.leadriama.org/training/mediation-training/leadr-mediator-training-and-assessment>.

⁵¹ Details of IAMA Mediator Training are available at <http://www.leadriama.org/training/mediation-training/iama-practitioners-certificate-in-mediation>.

⁵² Details of the Accord Group's Core Mediation Training are available at http://www.accordgroup.com.au/tr_cmt.html.

⁵³ Law Society of New South Wales Mediators Panel Selection Criteria, November 2011.

⁵⁴ Section 27AB "Mediators", Dispute Resolution Centres Act 1990, Queensland, Australia.

⁵⁵ Details of the same are available at <http://www.msb.org.au/>.

California are concerned, views are divided as to whether or not there should be a single set of standards for credentialing mediators and a single body responsible for the same.

When it comes to the training course offerings, there is a notable amount of consistency across the jurisdictions, including New York and California. First, most training providers offer training to any person desirous of becoming a mediator irrespective of his pre-existing qualifications. Second, most of the training courses contain theoretical as well as practical assessment components. Third, the training courses are very short in length when compared to the training required to become a legal practitioner, with an average duration of approximately 35-40 hours.

Supervision

Hong Kong

Accreditation granted by HKMAAL is valid for a period of three years with renewal dependent on compliance with prescribed Continuing Professional Development (CPD) requirements. A mediator is expected to demonstrate that he has undertaken a minimum of 15 hours of CPD during the three-year cycle. HKMAAL-accredited mediators are not associated with any CPD training provider or body which reports to HKMAAL. Many of the bodies that provide the training leading to accreditation also provide CPD courses. It is left open to mediators how they wish to fulfil their CPD requirement and, in addition, gain advanced knowledge in approved areas that may be of interest to them. As the regulatory structure is relatively simple and since mediators may obtain training from any provider of their choice, there is no distinction *per se* between monitoring of mediator activity and the fulfilment of the CPD requirement.

There are few other requirements placed upon mediators who wish to remain on HKMAAL's panels. They are not, for example, required to file reports on the number of mediations they have conducted. Under the Hong Kong Mediation Code, which was initially promulgated by the Department of Justice (DoJ) Working Group on Mediation⁵⁶ and subsequently adopted by HKMAAL,⁵⁷ mediators are not obliged to obtain

⁵⁶ A history of the Hong Kong Mediation Code and its promulgation is available at <http://www.doj.gov.hk/eng/public/mediation.html>.

⁵⁷ HKMAAL, The Hong Kong Mediation Code, available at <http://www.hkmaal.org.hk/en/HongKongMediationCode.php>.

PI insurance.⁵⁸ The Mediation Ordinance is also silent on the topic of PI cover. The FDRC leaves the decision to obtain PI insurance to the mediator.⁵⁹ There have, however, been discussions in HKMAAL to offer PI insurance to all HKMAAL mediators with the cost to be borne by HKMAAL.⁶⁰ It remains to be seen if Hong Kong will adopt an approach similar to that in England or Australia, where PI insurance is one of the prerequisites for any mediation.

England and Wales

Providers and individual mediators registered with the CMC must re-register annually in accordance with the CMC Provider Registration Scheme.⁶¹ The CMC providers are responsible for ensuring that the individual mediators registered with them maintain a minimum standard of CPD and “practice requirements” on an ongoing basis.⁶² Existing mediators are required to observe or conduct two mediations of civil/commercial/workplace nature every 12 months before re-registration (or they can attend two simulated practice sessions or one community mediation or two telephone mediations). In addition, they must undertake six hours of mediation-specific CPD per annum.⁶³ Private entities, such as the CI Arb, also monitor the performance of mediators and encourage feedback on mediations from disputing parties.⁶⁴

Every provider registered with the CMC is required to have PI insurance cover of (ie approximately HK\$1 million at August 2016 exchange rates) and they are expected to either provide or ensure that each mediator connected with them has cover of not less than £1,000,000. In mediations dealing with disputes that involve higher sums, the provider is responsible for appropriate insurance cover.⁶⁵ The same position applies to individual mediators registered with the CMC.⁶⁶ Solicitor mediators who are accredited under the scheme run by the Law Society are expected to carry appropriate PI cover.⁶⁷

⁵⁸ *Ibid.*, para 6.

⁵⁹ Paragraph 6 of Ethics Code for FDRC Mediators is available at http://www.fdr.org.hk/en/doc/Ethics_Codes_for_FDRC_Mediators_en.pdf.

⁶⁰ Progress Report from HKMAAL for the meeting (LC Paper No CB(4)939/13-14(02)) (22 July 2014), para 6.

⁶¹ CMC Provider Registration Scheme 2015, paras 13, 14, 18 and 19.

⁶² *Ibid.*, para 6E.

⁶³ *Ibid.*

⁶⁴ Practice Guideline 2: Selection and Appointment of Mediators by the Institute (CI Arb), para 4.

⁶⁵ CMC Provider Registration Scheme (n 62 above) para 6F.

⁶⁶ CMC Individual Registration Scheme 2015, para 6.5.

⁶⁷ “Professional Indemnity Cover”, Law Society Code of Practice, s 8.

United States — California

The Evidence Code regulates mediation proceedings but does not deal with the mediator profession itself.⁶⁸ As already noted, there is no institution in California responsible for the mediator profession at least when it comes to privately conducted mediations. Thus, the supervision of mediators and their CPD requirements largely depends on the body to which they are affiliated. There is, for instance, no framework for recertification or the renewal of one's status as a mediator. This is also the position for those mediators who claim to be certified as per the DRPA, as there is nothing therein that deals with the maintenance of minimum standards of competence on a regular basis. In addition, the minimum continuing legal education (MCLE) requirements laid down by the State Bar of California are only applicable to attorneys practicing in the state.⁶⁹

Whilst there is no institution that regulates the continuing education requirements of mediators, a number of providers have taken it on themselves to ensure that mediators upgrade their skills and maintain a minimum standard of competency. For instance, Community Boards offer advanced training courses for mediators.⁷⁰ One of the common requirements for attending these advanced courses is that participants should have already undergone the basic-level mediation training.

The DRPA and its accompanying regulations do not provide any requirements or guidelines on PI insurance cover for mediators and mediation service providers. Several insurance companies do, however, offer insurance products to mediators.⁷¹

United States — New York

The supervision of mediators in New York is more advanced than that in California. The UCS regulates those mediators who provide services within the court rosters and CDRCs. Other private professional bodies have their own internal frameworks to perform supervisory tasks over mediators associated with them.

⁶⁸ Chapter 2, Division 9, Evidence Code are available at [http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=EVID&division=9.&title=&part=&chapter=2.&article=.](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=EVID&division=9.&title=&part=&chapter=2.&article=)

⁶⁹ MCLE requirements by the State Bar of California are available at <http://mcle.calbar.ca.gov/>.

⁷⁰ Details of Community Boards Advanced Course offerings are available at <http://communityboards.org/advanced-trainings-workshops/>.

⁷¹ The LMIC Arbitration/Mediation Insurance Program is available at http://www.lmic.com/policies_offered/arbitration_mediation_program. The insurance products offered by Complete Equity Markets across United States are available at <http://cemins.com/additional/mediators.html>.

Mediators on court rosters are monitored for a period of two years before a decision is taken for their renewal, which is based on recent experience, compliance with continuing educational requirements and a review of any complaints.⁷² As far as CDRCs are concerned, their operations are supervised on a regular basis by the Chief Administrator of the courts.⁷³ CDRCs are to ensure that mediators are trained in accordance with “Chapter Seven of the Program Manual”.⁷⁴ Mediators serving on court rosters must obtain six hours of continuing education every two years on a programme approved and monitored by the UCS ADR office.⁷⁵ The New York City Bar runs one such advanced training programme of three days for mediators who wish to specialise in commercial cases.⁷⁶

For mediators offering services to CDRCs, the continuing education requirement is that of six hours on a yearly basis and they are also expected to conduct or co-conduct three mediations every year.⁷⁷ Other bodies, such as AAA, also run advanced mediation training programmes on a regular basis for all members of the general public and qualify for continuing legal education (CLE) credits in New York, California and Pennsylvania.⁷⁸ There is no regulation on private professional bodies that train and certify mediators. Therefore, the policies pertaining to the supervision and monitoring of mediators who conduct private mediations are left open to the discretion of such bodies.

Mediators on court rosters or connected with a CRDC are not required to obtain PI insurance before conducting any mediations. Nor are those who conduct private mediations in New York. There is, however, a market in New York — just as there is in California — for insurance products for mediators. For instance, the ACR has partnered with insurance companies to offer cover to its members.⁷⁹ Similarly, Mediate.com offers mediator liability insurance in partnership with Complete Equity Markets.⁸⁰

⁷² Rules of the Chief Administrative Judge (n 32 above) Pt 146.3.

⁷³ Rules of Chief Administrative Judge (n 30 above) Pt 116.

⁷⁴ Chapter 5 “Operational Policies” of the CDRC Program Manual is available at http://www.nycourts.gov/ip/adr/Publications/Program_Manual/Chapter5.pdf.

⁷⁵ Rules of the Chief Administrative Judge (n 32 above) Pts 146.4 and 146.5.

⁷⁶ The “Advanced Commercial Mediation Training” offered by the New York City Bar is available at <http://www.nycbar.org/cle-offerings/advanced-commercial-mediation-training/>.

⁷⁷ Chapter 7 “Standards and Requirements for Mediators and Mediation Trainers” (n 31 above).

⁷⁸ Advanced Mediator Training Series by AAA are available at <https://www.aaau.org/courses/advanced-mediator-training-series-the-extent-or-limit-of-mediator-influence-to-effect-settlement/150meda1301o/>.

⁷⁹ ACR, Professional Liability Insurance for ACR Members is available at http://www.imis100us2.com/acr/ACR/Membership/ProfessionalLiabilityInsurance/ACR/Membership/Professional_Liability_Insurance_for_ACR_Members.aspx?hkey=e99f22fe-4581-485e-a3eb-bfcf8ded5f25.

⁸⁰ Mediate.com, Arbitrators and Mediators Professional Liability Insurance is available at <http://www.mediate.com/articles/insurance.cfm>.

Australia

As per the Approval Standards under NMAS, re-accreditation is required every two years upon satisfaction of the criteria set out therein.⁸¹ Most RMABs assist accredited mediators to achieve these requirements by conducting various courses, seminars, workshops and conferences.⁸² The re-accreditation requirements of private schemes are left open to the bodies that operate them.

The NMAS Approval Standards require every mediator to satisfy his RMAB that he is in compliance with the continuing accreditation requirements. A mediator must obtain 25 hours of practical experience in conducting mediations (including co-mediation and conciliation) and 20 hours of CPD every two years to be eligible for re-accreditation.⁸³ If he is unable to satisfy the practice requirements, a RMAB can require him to complete 10 hours of mediation with a “top-up” training or reassessment.⁸⁴ The Law Society of NSW also requires its panel mediators to undertake five hours of continuing legal education every year and participate in co-mediation or mentoring. The status of this panel membership is reviewed every two years.⁸⁵

Under the NMAS Approval Standards, every mediator must provide evidence to the RMAB of PI insurance.⁸⁶ There are also requirements for additional insurance depending on the style of mediation being performed by the mediator. RMABs, such as LEADR and IAMA, offer insurance services and guidance.⁸⁷ There is no specific requirement stated under NMAS for the amount of cover save and except that it uses the words “relevant” which denotes that it is to be decided on a case-to-case basis. The Law Society of NSW also requires solicitor mediators to carry appropriate PI insurance.⁸⁸

Observations

It appears that there is little in common between the jurisdictions when it comes to the maintenance of mediator accreditation or credentialing, supervision and the requirement for PI insurance. This divergence in

⁸¹ See NMAS Approval Standards (n 40 above) s 6.

⁸² CPD.

⁸³ NMAS Approval Standards (n 40 above) s 6(1)(b).

⁸⁴ *Ibid.*, s 6(1)(a).

⁸⁵ Law Society of NSW Mediators Panel Selection Criteria (n 53 above).

⁸⁶ NMAS Approval Standards (n 40 above) s 3(4).

⁸⁷ Details of the insurance services offered by LEADR/IAMA are available at <http://www.leadriama.org/membership-information/pi-pl-insurance>.

⁸⁸ Law Society of NSW Mediators Panel Selection Criteria (n 53 above).

approaches is of interest when contrasted with the fact that most of these jurisdictions appear to be moving in the same direction when it comes to the initial accreditation and training of mediators.

One approach, demonstrated in England and Australia, is of an authoritative body, such as the CMC and the MSB, framing a set of supervisory rules which are then followed by the rest of the mediation community, without necessarily being obliged to do so. In this respect, it should not be forgotten that the mediators accredited with the CMC and under NMAAS are in fact associated and supervised by their training providers and not directly by the CMC and MSB themselves.⁸⁹

The positions in New York and California differ from other jurisdictions and each other. The UCS provides a degree of unity in the supervision and monitoring of court mediators and community mediators. By contrast, in California there is no such uniformity. In turn, the administrative functions are left open to the organisations with which the mediators are associated. In short, the market is pretty much left to its own devices.

Discipline

Hong Kong

The Mediation Ordinance does not deal with those situations where any party is aggrieved by an act or omission on the part of any mediator nor are such matters addressed either within the Rules of the High Court (RHC) (or Rules of the District Court) or Practice Direction 31. Instead, such matters are dealt with on a “voluntary” basis. In 2013, HKMAAL adopted a set of rules for complaints against accredited mediators by which an aggrieved party may lodge a complaint for “improper conduct” directly with the body.⁹⁰ What amounts to such improper conduct and the manner in which a complaint is to be treated are addressed in HKMAAL’s rules. For example, a mediator accredited with HKMAAL is expected to abide by the Mediation Code. A finding that a mediator is guilty of improper conduct may result in removal of that mediator from all the HKMAAL panels. Other institutions such as the FDRC also have their own ethics code, although there does not appear to be a FDRC complaint-handling scheme similar to that adopted by HKMAAL.

⁸⁹ There is one exception. With the introduction of CMC Individual Registration Scheme 2015, as individuals registered directly with the CMC, the situation may change.

⁹⁰ Rules for the Handling of Complaints against an Accredited Mediator adopted by HKMAAL on 24 January 2013 available at http://www.hkmaal.org.hk/en/MediationRules_RulesForTheHandling.php.

England and Wales

CMC providers and individual mediators adopt a code of conduct that is no less rigorous than the EU Model Code of Conduct published in 2004.⁹¹ Providers registered with the CMC must have a system in place to handle complaints against both itself and its mediators.⁹² The position is similar when it comes to individual mediators directly registered with the CMC.⁹³ CMC also offers a Complaint Resolution Service for its members and the clients of its members whereby a complaint can be made to the CMC after the complainant has exhausted a provider's internal complaint-handling system. This service is in the form of mediation and is provided for a fee.⁹⁴ CMC has also introduced an independent complaint review scheme, which is also provided for a fee.⁹⁵

It is also common for professional bodies which operate self-accreditation schemes to provide complaint-handling mechanisms. CI Arb mediators are bound by its "Code of Professional and Ethical Conduct" which clearly stipulates that a breach is tantamount to professional misconduct.⁹⁶ The CI Arb has a structured approach for dealing with complaints involving multiple reviews. Ultimately, if a complainant succeeds, depending on the nature of charges, a CI Arb member may lose its chartered status, be reprimanded, suspended or expelled and made to pay costs.⁹⁷

Similarly, CEDR's Code of Conduct requires mediators to respond to and cooperate with any complaint procedure initiated by CEDR pursuant to any complaint by a party.⁹⁸ CEDR has a two-tiered complaint resolution mechanism whereby any aggrieved party may file a complaint with CEDR and expect a reply within 14 days. If the user is not satisfied with this reply, the matter is referred to the Chief Executive who will take all reasonable steps to ensure that the parties reach a satisfactory resolution.⁹⁹

⁹¹ CMC Provider Registration Scheme (n 62 above) para 6C and CMC Individual Registration Scheme (n 67 above) para 6.2.

⁹² CMC Provider Registration Scheme (n 62 above) para 6D.

⁹³ CMC Individual Registration Scheme (n 67 above) para 6.3.

⁹⁴ CMC's Complaints Resolution Service is available at <http://www.civilmediation.org/governance/13/complaints-resolution-service>.

⁹⁵ Independent Mediation Complaints Review Scheme 2009.

⁹⁶ CI Arb Code of Professional and Ethical Conduct for Members (October 2009).

⁹⁷ CI Arb Complaint Resolution Procedure is available at <https://www.ciarb.org/docs/default-source/default-document-library/complaints-booklet1.pdf?sfvrsn=2>.

⁹⁸ CEDR Code of Conduct for Third Party Neutrals, para 8.

⁹⁹ CEDR Complaints Procedure is available at <http://www.cedr.com/miscellaneous/terms.php>.

United States — California

As already noted, the “supervision” of mediators in California is largely market-driven. When it comes to dealing with resolving conflicts between consumers and mediators or mediation service providers, the situation is no different. Mediators providing services under court programmes are subject to a complaints procedure laid down under the Civil Rules. Upon receipt of any complaint, an investigation is carried out and, if the mediator is found culpable of any misconduct, appropriate action is taken, up to and including removal of that mediator from the court’s panel.¹⁰⁰

There is nothing in the DRPA and its regulations dealing with complaints from mediation users against providers or individual mediators. Therefore, consumer complaints are left to the organisations that provide mediation services and maintain mediator panels. Community Boards and the APADRC do not seem to have any specific regime for dealing with consumer complaints. As far as independent professional bodies that provide mediation services and training are concerned, each has its own complaint resolution mechanism.

United States — New York

In respect of mediators practicing on court rosters, an aggrieved party may make a complaint to the UCS ADR office, which will conduct an investigation into the matter under the relevant courts’ complaint-handling procedure.¹⁰¹ Such complaints are taken into account whilst reviewing the performance of mediators and ascertaining their eligibility for redesignation on court rosters.¹⁰² The same procedure can be followed with respect to mediators involved with CDRCs, given that these are governed by UCS. Aggrieved parties may, however, use the CDRC’s own complaint-handling mechanism before approaching the UCS ADR office. Even if the CDRC does not have any formal scheme for complaints, an aggrieved party can always approach the CDRC or make a complaint in writing with the CDRC for further investigation. Private professional bodies, such as the International Institute for Conflict Prevention and Resolution (CPR),¹⁰³ have

¹⁰⁰ Rules 3.865–3.872, Art 3 “Requirements Addressing Complaints about Court-Program Mediators” Civil Rules, Title 3, Division 8, Ch 3 (effective 1 January 2007).

¹⁰¹ For instance, the procedure to file a complaint against a court employee is available at <http://www.nycourts.gov/howdoi/courtempolyee.shtml#clerks>.

¹⁰² Rules of the Chief Administrative Judge (n 32 above) Pt 146.3(b).

¹⁰³ Conflict Prevention Resolution Institute of Dispute Resolution.

developed principles to be followed by ADR organisations which specifically include complaint and grievance mechanisms.¹⁰⁴

A mediator who is found to be culpable following an investigation by the UCS ADR office may be struck off from the court's roster. Similar treatment may result from any complaint against a mediator providing services to a CDRC. The UCS ADR office has laid down certain standards of conduct to be followed by mediators whilst conducting mediations.¹⁰⁵ Similarly, professional bodies such as ACR have an internal ethics committee that periodically reviews the ethical principles followed by its members in addition to its model code of conduct.¹⁰⁶ Similar standards of conduct have been adopted by ABA and AAA.¹⁰⁷ Therefore, a mediator must ensure that the mediation is conducted in accordance with basic ethical principles, failing which, he may be subject to disciplinary action from a court, a CDRC or a professional body.

Australia

The mechanism for handling complaints depends as to whether a mediator is accredited under NMAS or not. In a case where the mediator is accredited under NMAS, the complainant can approach the associated RMAB. Alternatively, where the mediator is not accredited under NMAS, the complainant would approach the professional organisations with which the mediator is associated.¹⁰⁸ Every RMAB is required to have a complaint system comparable to industry-based consumer dispute resolution or to make provision for referring the complaint to a scheme under the statute.¹⁰⁹ For instance, LEADR's policy addresses both complaints against LEADR itself and those against its members. In the former case, the response may be in the form of an apology, explanation or an action taken to resolve the situation. In the latter, the complaint

¹⁰⁴ CPR and Georgetown University Law Center, Principles for ADR Provider Organizations — VI. Complaint and Grievance Mechanisms, available at <http://www.cpradr.org/RulesCaseServices/CPRRules/PrinciplesforADRProviderOrganizations.aspx>.

¹⁰⁵ ADR Office of UCS, Standards of Conduct for New York State Community Dispute Resolution Center Mediators, available at http://www.nycourts.gov/ip/adr/Publications/Info_for_Programs/Standards_of_Conduct.pdf.

¹⁰⁶ ACR, ACR Standards of Practice and Ethical Principles, available at http://www.imis100us2.com/acr/ACR/Resources/ACR_Stand/ACR/Resources/Standards_of_Practice.aspx?hkey=5f21719d-8d65-4ced-8931-2a31d6b676a9.

¹⁰⁷ Model Standards of Conduct for Mediators September 2005 adopted by AAA (8 September 2005), ABA (9 August 2005) and ACR (22 August 2005).

¹⁰⁸ MSB, How Do I Make a Complaint against a Mediator? available at <http://www.msb.org.au/faqs/how-do-i-make-complaint-against-mediator>.

¹⁰⁹ NMAS Approval Standards (n 40 above) s 6(c).

may, at one extreme, be dismissed or referred to the LEADR Board.¹¹⁰ Ultimately, the LEADR member may be subject to disciplinary action and the termination of his membership.¹¹¹

Under the post-July 2015 NMAS, every mediator must inform the parties about the manner in which the parties can provide feedback and make complaints against him at the preliminary meeting with the parties.¹¹² By introducing this provision, the MSB aims to ensure greater transparency in the mediation process and affirms its commitment to maintain a high standard of conduct for the mediator profession.

Every NMAS-accredited mediator agrees to comply with the Practice Standards formulated by the MSB and each RMAB may terminate its arrangement with the member.¹¹³ Even though NMAS is voluntary in nature, mediators would prefer not to lose their accreditation. Once an RMAB decides that a mediator's membership should be terminated he would not only lose the same but also lose the status of being a nationally accredited mediator.

Observations

In those jurisdictions with some form of complaints procedure, it is a common sanction for a mediator who is found culpable of misconduct to lose his accreditation status and be removed from an institution's panel of mediators. It is also common for any investigation to be conducted by the same entity that is responsible for the supervision of mediators, rather than any independent body.

There are however, differences in the complaints handling processes. For instance, though one may equate the functions of the CMC in England and Wales to those of the MSB in Australia, the MSB does not actually deal with any complaints. Instead, this responsibility is delegated to the RMABs. In England and Wales, both the providers registered with the CMC and the CMC itself deal with complaints. In New York, it is the ADR office of the UCS which deals with complaints against certain class of mediators. In California, individual entities deal with complaints themselves.

¹¹⁰ LEADR Policy, Compliments, Suggestions and Complaints, available at <http://www.leadriama.org/about-leadr/compliments-suggestions-and-complaints>.

¹¹¹ LEADR, By-Laws for the Investigation and Discipline of Members, available at <http://www.leadriama.org/documents/item/1129>.

¹¹² Proposed NMAS Practice Standards, para 3.1(b).

¹¹³ NMAS Approval Standards (n 40 above) para 1(3).

Lessons for Hong Kong

From the foregoing review, it can be seen that there are notable similarities in the approaches adopted by prominent common law jurisdictions towards the regulation of mediators. It is not feasible, in an article of this length, to identify and discuss all the factors behind these differences which range from the way in which litigation is funded to the business culture in a jurisdiction. It is, however, possible to derive some findings that may be useful for the development of the regulatory regime for mediators in Hong Kong.

To Regulate or Not to Regulate

As is clear from the foregoing discussion, different jurisdictions have adopted different approaches to the promotion of mediation as a means to resolve civil (and other) disputes. A number of them have enacted legislation on the practice and regulation of mediation (eg those US states which have implemented the Uniform Mediation Act (UMA)), whereas others have not.¹¹⁴ Those who argue against such legislation on mediation — and its regulation — have often stressed the fact that mediation is intended to be an informal, voluntary process which should be controlled (as far as is possible) by the parties and be free from external constraints. How best to resolve a dispute, they say, depends on the nature of the dispute itself; the parties' (and, to some extent, their legal advisers') views; and the ability of the mediator. These are not matters which can be legislated for. Indeed, it can be argued that legislation may be counterproductive to the “philosophies” or “qualities” of mediation — confidentiality, voluntariness, empowerment, neutrality and the provision of unique solutions.¹¹⁵

In particular, it can be argued that the regulation of mediation is unnecessary on a practical level, given the relatively low level of risk or potential harm to, or dissatisfaction for, participants. There are, in reality, relatively few claims against mediators, and PI insurance is widely available to cover those which do arise. Moreover, overly prescriptive regulation has the potential to increase costs, which would be passed on to disputing parties (and reduce its attractiveness when

¹¹⁴ See the US Uniform Law Commission website on the UMA, available at www.uniformlaws.org/Act.aspx?title=Mediation%20Act.

¹¹⁵ These “qualities” are referred to, among other texts, in R Charlton, *Dispute Resolution Guidebook* (2000) and R Charlton and M Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (2nd ed., 2004).

compared to litigation). Finally, as indicated in the preceding paragraph, “voluntariness” is one of the essential qualities of mediation — nobody is obliged to take part in the process (except in those jurisdictions, such as Ontario, where there is an element of compulsion). In this respect, Lord Judge observed “too much regulation would result in mediation becoming increasingly formalised and procedural ... Just one more part of the expensive process that all of us are trying to avoid”.¹¹⁶

Notwithstanding the arguments against mediation legislation, the international trend is moving in that direction. The passage of the Mediation Ordinance demonstrates, quite profoundly, that Hong Kong has joined the pro-legislation “camp”. This is hardly surprising, given that the DoJ Working Group on Mediation stated in its February 2010 Report:

“Provided the legislation goes no further than is necessary and does not impose unnecessary control over mediators or undue restraint over the mediation process, the introduction of legislation on mediation can provide a clear and predictable legal framework within which mediation can be conducted as flexibly as may be necessary”.¹¹⁷

The Report went on to give five reasons for the introduction of legislation on mediation including, first, that such legislation “can provide a proper legislative framework within which mediation can be conducted in Hong Kong”. In light of such sentiments, it would be a sterile exercise to discuss the pros and cons of the statutory regulation of mediation and mediators at any length. Indeed, Brooker has suggested that “it may be impossible for any alternative [to the judicial process] to remain outside the law, some argue because the formal system will not allow challenges to their jurisdiction”.¹¹⁸ Alexander is more direct:

“In short, the current debate about whether or not to regulate mediation is misinformed. Regulation is occurring already and it cannot be — and could not have been — avoided. An exceedingly more useful question relates to the appropriate regulation of mediation in the context of culture and legal-political traditions”.¹¹⁹

¹¹⁶ The Rt Hon the Lord Judge, Speech to the Civil Mediation Council Conference (14 May 2009).

¹¹⁷ The Report of the DoJ Working Group on Mediation is available at <http://www.gov.hk/en/residents/government/publication/consultation/docs/2010/Mediation.pdf>.

¹¹⁸ P Brooker, *Mediation Law: Journey through Institutionalism to Juridification* (London: Routledge, 2013).

¹¹⁹ N Alexander, “Mediation and the Art of Regulation” (2008) 8(1) *QUTLawJl* 1.

Alexander's above advice will be followed here with an examination of the "evolution" of mediation and what she described as the "appropriate regulation" of mediation.¹²⁰

Mediation — Four Phases of Evolution

In one of her most recent studies on mediation in Hong Kong, Alexander suggested that the development of mediation in most jurisdictions passes through four phases of evolution.¹²¹ The first is an initial "pioneering" phase in which small mediation pilot projects, with limited resources and no state intervention, are established in order to gain support for "ADR" from litigants and their advisers. The second phase is the "honeymoon" phase where, after the initial acceptance of mediation as a means of dispute resolution, some methods of formal regulation are introduced to promote the use of mediation. Next is the "competition" phase, where a number of professional bodies emerge and compete with each other for a share in the growing mediation market, giving rise to a discussion on the need for institutionalisation. The final phase of this evolutionary process is the "collaboration" phase, in which mediation becomes an important feature of the jurisdiction and there is a movement to take stock of the situation and design a framework for the future.

The establishment of HKMAAL was identified by Alexander as a product of the fourth "collaboration" phase. In the same study, Alexander asserted that Australia, the United States and England and Wales have each spent a considerable amount of time experimenting in the first three phases before entering the fourth phase. It is striking that Alexander gives Hong Kong the privilege of being in the same evolutionary "club" as Australia, the United States and England & Wales when one considers the fact that these jurisdictions have a much more mature mediation culture, both in terms of its use and regulation. The explanation given in the study is that Hong Kong has had the privilege of learning from the experiences of these pioneering jurisdictions and therefore has been able to move at a faster pace from phases 2 and 3 to phase 4 of the schema described above. To put it another way, Hong Kong has been standing on the shoulder of giants.

¹²⁰ Those who are, however, interested in the debate over the regulation of mediation and mediators *per se* may wish to consult the DoJ Working Group's Report (n 118 above) pp 73–80; the NADRAC Report, *Legislating for ADR — A Guide for Government Policy-Makers and Legal Drafters* Chs 2 and 3, available at <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Legislating%20for%20Alternative%20Dispute%20Resolution.PDF>; and Della Noce, Baruch Bush and Joseph Folger, *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, pp 59–61, available at <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1169&context=drlj>.

¹²¹ N Alexander, *Hong Kong Mediation Manual* (LexisNexis, 2nd ed., 2014) pp 294–296.

Upon reflecting on the aforesaid study, the first question that comes to mind is whether Hong Kong, in its quest to become a “dispute resolution hub”, has moved too quickly. Arguably, it has sped towards phase 4 with the establishment of HKMAAL and ignored the intrinsic and educational benefits that phase 2 and 3 activities could have offered. Second, would HKMAAL have been established had Hong Kong spent more time in phases 2 and 3? Perhaps an alternative model of regulation, perhaps a unique one not previously tried elsewhere, could have evolved instead. Last, in the same vein, was it wise for Hong Kong to simply adopt the approach followed by say Australia, the US or England & Wales without putting the effort to develop its own model for mediator regulation? Whilst sharing many commonalities with Hong Kong, the other jurisdictions differ widely in their social, cultural and business practices from the territory — all matters which have an impact on the conduct of dispute resolution.

In another of her studies, Alexander had suggested that it would be incorrect to assume that the approaches adopted towards the development of mediation by some common law jurisdictions could be adopted by others.¹²² Indeed, she specifically states the US and Australian approaches may not “be easily exported elsewhere”. In this context, it is worth recalling the words of the then Chief Justice Li in *Solicitor (24/07) v Law Society of Hong Kong*:¹²³

“Bearing in mind that historically, Hong Kong’s legal system originated from the British legal system, decisions of the Privy Council and the House of Lords should of course be treated with great respect. Their persuasive effect would depend on all relevant circumstances, including in particular, the nature of the issue and the similarity of any relevant statutory or constitutional provision. At the end of the day, the courts in Hong Kong must decide for themselves what is appropriate for our own jurisdiction”.

Lord Millett NPJ expressed a similar sentiment in *China Field Ltd v Appeal Tribunal (Buildings) (No 2)*.¹²⁴

Just as the Hong Kong courts should not slavishly follow the judgments of courts in other jurisdictions, even those as esteemed as the UK Supreme Court, the Hong Kong mediation community — including its members from the judiciary and government — should not simply adopt the approach of any particular jurisdiction. It should be recalled, after all, that the Civil Justice Reform (CJR) resulted not in the adoption

¹²² N Alexander, *Global Trends in Mediation* (Kluwer Law International, 2nd ed., 2006) p 31.

¹²³ [2008] 2 HKLRD 576.

¹²⁴ (2009) 12 HKCFAR 342.

of the English Civil Procedure Rules (CPR) — as some had expected and advocated — but in the introduction of some provisions from the CPR and other jurisdictions into the RHC.¹²⁵ Similarly, it would be appropriate to take into consideration a variety of matters particular to Hong Kong, such as the overall regulatory approach, the composition of the mediator profession, supervision of the same and whether there should be a state regulation or self-regulation before deciding upon the regime to be adopted in the jurisdiction.

Mediation — Regulatory Models and Approaches

At this juncture, it would also be worthwhile to identify a number of academic analyses of the regulation of mediation in various jurisdictions.¹²⁶ For ease of reference, these are summarised in Figure 1.

Figure 1: The Regulation of Mediation

Commentator	Regulatory Model or Approach*			
Hopt and Steffek <i>Models</i>	Extensive		Restrained	
Hopt and Steffek <i>Approaches</i>	Authorisation	Incentive		Market
Alexander <i>Approaches</i>	Formal legislative	Formal regulatory	Self- regulation	Market contract

Note: *The extent of “formal” control over the mediation process and the mediation “profession” by third parties, such as the government, is greatest in the left-hand column.

First, Klaus J Hopt and Felix Steffek contend that, at a macro level, there are two main regulatory models adopted by jurisdictions for mediation regulation, namely “extensive” and “restrained”.¹²⁷

The “extensive” model involves the comprehensive regulation by a single entity of all aspects of mediation including the professional conduct of mediators. The proponents of this model cite consumer protection, official promotion of mediation, legal certainty and the need to distinguish mediation and mediators from other forms of dispute resolution and their

¹²⁵ See G Meggitt and F Aslam “Civil Justice Reform in Hong Kong — A Critical Appraisal” (2009) 28 CJK 111.

¹²⁶ DoJ Working Group’s Report (n 118 above) Annexure 11 helpfully sets out a number of models of regulation in different jurisdictions, including those mentioned in this article. Also see K Bradford, Commercial Mediation — A Comparative Review (Linklaters, 2013), available at http://www.linklaters.com/pdfs/mkt/london/mediation_2013_7053.pdf.

¹²⁷ KJ Hopt and F Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 1st ed., 2013) pp 17–18.

practitioners as the justification for adopting a highly regulated approach. The “extensive” regulatory model group includes, largely, civil law jurisdictions such as Austria, France and Japan, in which most aspects of mediation, such as its procedures, education and training, professional rules, ethical rules and so on are extensively regulated or integrated into existing laws. For example, Austria was the first jurisdiction to recognise mediators as an independent profession through legislation.

The “restrained” model, on the other hand, is characterised by a conscious effort on the part of the authorities in the relevant jurisdiction to refrain from the creation of a systematic regulatory model. Those who support this model argue that the concept of “mediation” is relatively new (insofar as its modern expressions are concerned)¹²⁸ and that any regulation would have an adverse impact on its proper development and would also be incompatible with the basic — informal and voluntary — structure and philosophy of mediation as an alternative to the — overly formal and involuntary — litigation system. England & Wales and the Netherlands are two jurisdictions identified as having adopted this “restrained” approach with selective “official” intervention in mediation on such matters as costs sanctions for unacceptable behaviour and the role of Legal Aid.

In addition to the foregoing overall regulatory models, Hopt and Steffek have also identified three approaches (NB this term is used here rather than “model” to avoid confusion) towards the regulation of mediation professionals, these being “authorisation”, “incentive” and “market” based. The “authorisation” approach is described as one where there are comprehensive regulations covering the requirements to be fulfilled before someone is allowed to practice as a mediator. This approach, in its various different forms, has been adopted in a number of different jurisdictions including as Hungary, Italy, Norway, Portugal, France and the Netherlands. As already noted, a sector-specific variant of this approach is said to be found in California, where the courts are responsible for deciding on the eligibility criteria of mediators desirous of practicing on the official court list. As also noted, however, this approach does not apply in California beyond this limited remit.

The “incentive” approach refers to a regulatory framework where certain incentives or privileges are extended to the disputing parties

¹²⁸ The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the “Pound Conference”) in April 1976 addressed the perceived inefficiency and unfairness of the US courts. It is widely seen — at least in the United States — as the start of the modern ADR “movement”. Similar conferences in other jurisdictions at the same time reached similar conclusions about their courts.

if they select registered mediators. Jurisdictions that have adopted this approach include Austria, Japan and Germany. The “incentive” approach is said to provide greater party autonomy than the “authorisation” approach but comes with the danger of occasional incorrect decisions being taken on the basis of incomplete information. Last, the approach followed in England and Wales is described as the “market” approach whereby there is a deliberate attempt by the authorities to refrain from regulating the mediator profession. Mediators in those jurisdictions that adopt this approach are free to decide on the training courses and training provider with which they wish to associate themselves. This approach, when compared to the others, is said to provide greatest party autonomy.¹²⁹

As far as the jurisdictions with which this article is concerned, Hopt and Staffek looked at England & Wales, Australia and California. The authors’ view of first of these has already been mentioned. They went on to identify California as a variant of “incentive” approach (beyond that part of the California system which is identified as following the authorisation approach). Insofar as Australia is concerned, although it is not classified by Hopt and Steffek as specifically following any of the approaches, it seems fair to suggest that it demonstrates the characteristics of the restrained model and market approach in light of there being no legislation governing the training and accreditation of mediators. The two jurisdictions that were not covered, New York and Hong Kong, could — it is suggested — be described as falling between the “authorisation” and an “incentive” approach, in the case of the former, and the “market” approach, in the case of the latter.

In yet another comparative study, Alexander has suggested that regulation in mediation is inevitable and the only difference is in the approach adopted by different jurisdictions.¹³⁰ She identified four primary approaches to mediation regulation. These are the market contract, self-regulation, formal regulatory framework and formal legislative framework model. The market-contract model provides the greatest party autonomy with least state intervention in matters concerning mediation. Freedom to contract and promotion of competition are identified as the foundations of this approach. The potential problem with this model, however, is the assumption that consumers have access to all the relevant information necessary to facilitate their decisions when in fact, this is often not the

¹²⁹ See Hopt and Steffek (n 129 above) pp 80–82.

¹³⁰ N Alexander, *International and Comparative Mediation: Global Trends in Dispute Resolution* (Kluwer Law International, Vol 4, 2009) p 77.

case.¹³¹ This model is akin to the “restrained” model and “market” approach identified by Hopt and Steffek in their study.

As for the “self-regulation” model, the Australian NMAS is identified by Alexander as a classic example of how an industry-led initiative has the power to transform itself into a self-regulatory form without any formal intervention or legislation. It is described as an approach that requires collaborative effort from both private and public bodies for the purpose of setting standards at a nationwide level. Among the few jurisdictions that are said to support this model in some form are the Netherlands, Germany, Texas and France. The CMC in England is also classified as falling into the self-regulatory category. The perceived benefits of this approach include flexibility, room for experimentation, lower administrative costs, better compliance and the elimination of the need to regulate. On the other hand, the potential difficulties with this approach are domination by specific individuals and groups, limited resources and the possibility of more state involvement if resources are exhausted.¹³² This model resembles the “restrained” model and “incentive” approach identified by Hopt and Steffek.

The “formal-regulatory” system is described as being most effective when there is a need to establish a single body to interpret and enforce regulatory issues as they arise. The EU’s Directive on Mediation is cited as an example of this model, given that it acts as a guide for EU member states to regulate their own domestic regulatory systems. Alexander suggests that such an approach could be useful for Australia, to ensure better manageability of its self-regulatory initiatives, but not in the United States, where a formal legislative approach would be more suitable.¹³³

In the “formal-legislative” model, there is extensive regulation of all aspects of mediation accompanied by intervention by the government and judiciary. It resembles the “extensive” model and “authorisation” approach described by Hopt and Steffek. Austria and some other European states have adopted this model. Alexander also posits that the United States may well be inclined towards this approach pursuant to the adoption by various states of the UMA. The approach is described as being beneficial for those jurisdictions that are in the phase of a transition and those that wish to attract foreign investment and enter into transnational arrangements for a variety of economic and political reasons. The problems with this approach are described as the replacement of informal approaches with formal ones, an inability to deal with the non-legal

¹³¹ *Ibid.*, pp 77–80.

¹³² *Ibid.*, pp 80–84.

¹³³ *Ibid.*, pp 84–86.

issues that arise in mediation, the shift from industry expertise to state-controlled agencies and interference by the judiciary. It is suggested by Alexander that it is these reasons that have led to Australia, England and Wales and the United States to refrain from enacting comprehensive legislation and concentrate on sector-specific and personalised solutions instead.¹³⁴

The Place of Hong Kong

As at the time of writing this article, Hong Kong has both a Mediation Ordinance and a Practice Direction relating to the conduct of mediation. Arguably, Hong Kong could be categorised as having adopted a Hopt/Steffek “extensive” or Alexander “formal-legislative” regulatory approach. It is important to appreciate, however, that the Ordinance may define what “mediation” is but it does not cover any subjects related to mediation in any depth beyond the confidentiality of “mediation communications”. The Practice Direction goes further in that it prescribes the steps to be taken in anticipation of mediation; what is expected of parties engaged in mediation, namely in terms of “minimum participation”; and recourse to the courts in the event of difficulties (eg in finding a mediator upon whom the parties can agree to instruct). Perhaps, in light of the relative limitations of the Ordinance and Practice Direction, it would be better to say that Hong Kong aspires to the “extensive” or “formal-legislative” approach.¹³⁵

Even if this is the case, both the Ordinance and Practice Direction are silent on the regulation of the mediator “profession”. All that is required under the Ordinance is that a mediator should be impartial. Therefore, as previously suggested, the actual regulation of mediators in Hong Kong is best described as following the “restrained” or “market”-based model and approach. In fact, this system closely resembles the existing framework in England & Wales and Australia, albeit Australia was classified by Alexander as falling into the “self-regulatory” model and not the “market-contract” model having regard to the operation of NMAS. That said, the Hong Kong approach seems to owe more to Australia, if the Report of the DoJ Working Group on Mediation in Hong Kong is to be believed.¹³⁶

¹³⁴ *Ibid.*, pp 86–89.

¹³⁵ C Wilson, *Hong Kong Mediation Ordinance: Commentary and Annotations* (Sweet and Maxwell, 2013) pp 47–50 addresses some of the “international” aspects of mediation in relation to Hong Kong practice.

¹³⁶ See the Report of the DoJ Working Group (n 118 above).

With regard to the concept of a unified regulatory regime, it is the case that there has been consistent support for the proposition that HKMAAL should become — *de facto* or *de jure* — the single mediator accreditation body in order to ensure consistency and professionalism in day-to-day practice. This is underpinned by a belief that the certifying of mediators does not undermine creativity but instead provides a foundation for the profession to grow.¹³⁷ It should be borne in mind, however, that it is not only the policy decisions of officials and the existence of an accreditation body that would make mediation a success in Hong Kong. The mediator's own education, experience, age, character, personal attributes, training or skills, ethics, PI insurance terms, fee structure and the code of conduct that binds him will all have an effect on whether he is retained to mediate a dispute and the success or failure of that mediation.¹³⁸

Given that the Australian approach seems to be in favour in Hong Kong, it should be appreciated that it is not foolproof. The Law Council of Australia, in its 2013 submission to the MSB on the proposed revisions to the NMAS, highlighted several practical problems with the industry-led voluntary NMAS model.¹³⁹ One of the issues raised was that of the different approaches adopted by RMABs whilst applying the NMAS Approval Standards. This was a consequence of the fact that the interpretation of the Approval Standards is left to the discretion of the RMABs. Hong Kong may not face this problem, however, given that the HKMAAL sets the accreditation minimum standards and is also ultimately responsible for accreditation, training, supervision and disciplinary proceedings. That said, the Australian approach has the advantage of encouraging healthy competition between providers and helps reduce the concentration of regulatory power in just one institution.

Another issue was that of inconsistencies in the mutual recognition of accreditation amongst RMABs. Mediators desirous of practicing on different panels were required to pay fees to several RMABs. Also, problems were identified in relation to attempts by mediators to transfer from one RMAB to another, with respect to the differing standards between them and a lack of clarity on how this process operates. Again, these problems are less likely to arise in Hong Kong as there is no concept akin to an RMAB within the HKMAAL structure.

¹³⁷ S Sihombing, C To and JSP Chiu, *Mediation in Hong Kong: Law and Practice* (Wolters Kluwer, 2014) p 139.

¹³⁸ See Alexander (n 133 above).

¹³⁹ Comments of the Law Council of Australia to the MSB on the revised draft of the NMAS Approval Standards (3 December 2013).

Turning to England and Wales, the CEDR Fifth Audit in 2012 revealed some interesting views on the subject of a single and uniform standard of professional training and a sole regulatory body. Support for a single standard of basic professional training among respondents stood at 52.1 per cent as compared to 71.5 per cent in 2003. With regard to support for a single regulatory body for setting mediator standards, 61.7 per cent favoured this approach as compared to 76.4 per cent in 2003. However, the position was worse in 2010 with only 54.9 per cent participants in favour.¹⁴⁰ The decline in support for a single regulatory body in England and Wales, despite the maturing of the mediation market, is a factor that Hong Kong may want to consider carefully before pursuing such a course in the future. By relying upon HKMAAL to support the entire mediator regulatory framework of Hong Kong, it may end up depriving consumers of the benefits of a free-market approach that has underpinned its growth to date. Moreover, too dominant a monopoly regulator could undermine party autonomy, one of the basic fundamental principles of the mediation process.

By contrast, CEDR's 2014 audit revealed a majority mediators and lawyers in favour of registration by the CMC of mediator training courses and in favour of a plan to introduce a scheme allowing individual mediators to be directly registered with the CMC.¹⁴¹ The findings of this audit, when seen in the context of Hong Kong seem to suggest that Hong Kong is taking the same steps in the same direction. The Hong Kong judiciary is indeed fully supportive of, recognises and promotes mediation as a dispute resolution process. Next, even the requirements pertaining to registration of mediation training programmes are met as these have to be approved by HKMAAL in accordance with the set standards. Last, HKMAAL follows a relatively simpler model regarding registration of mediators and therefore need not concern itself with the last part of this audit.

Conclusion

As indicated above, Hong Kong appears to aspire to an “extensive”, “authorisation” and “formal legislative” model or approach to the regulation of mediation and of the mediator “profession”. Actual practice to date, however, leans towards the “restrained”, “market” or “market-contract”

¹⁴⁰ CEDR's The Fifth Mediation Audit (2012), available at <http://www.cedr.com/docslib/TheMediatorAudit2012.pdf>.

¹⁴¹ CEDR's The Sixth Mediation Audit (2014), available at <http://www.cedr-asia-pacific.com/cedr/uploads/articles/pdf/ARTICLE-20140603120956.pdf>.

end of the regulatory spectrum (as it were). Which one shall prevail? Which one should prevail?

The answers to these questions depend on the priorities of those in a position to decide which course to take. Making Hong Kong into a “hub” for international dispute resolution services in the Asia-Pacific region would, at first sight, seem easier to achieve if there is one, single regulator — perhaps in the form of the HKMAAL — and one, single code of conduct. That said, such an approach is at variance with that followed in California and New York, arguably the most successful centres for the development of ADR, in general, and mediation, in particular. It is also at variance with the approaches adopted in England and Wales and Australia, the two jurisdictions with, perhaps, the greatest influence on the development of the law and the legal profession in Hong Kong.

Moreover, as already noted above, such an approach would appear to be at variance with the very nature of mediation. According to Ruth Charlton, a solicitor in New South Wales, experienced mediator and General Editor of the *Australasian Dispute Resolution Journal*, mediation has five qualities or “philosophies” — confidentiality, voluntariness, empowerment, neutrality and the provision of unique solutions. The quality of “voluntariness” reflects the fact that the parties attend mediations because they have made a positive choice to do so. This quality, as with “empowerment”, is reflected in the HKMAAL’s own description of mediation:

“Mediation is a voluntary, confidential, non-binding, private dispute resolution process in which a neutral person, the mediator, helps the parties to reach their own negotiated settlement agreement”.

The parties’ choices over how to settle their dispute and the identity of the third party or parties who will assist them to do will be restricted if there is just one source of “accredited”, “certified” or “approved” mediators. This will be the case even if such mediators are not seeking to burnish their own credentials with the body that accredits them.

