

# Recent Mediation Developments in Hong Kong



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## Introduction

Mediation has become a hot issue in Hong Kong's alternative dispute resolution (ADR) development. With the incorporation of the Hong Kong Mediation Accreditation Association Limited (HKMAAL) on 28 August 2012 and the commencement of the Mediation Ordinance on 1 January 2013, the HKSAR Government has marked some milestones in Hong Kong's dispute resolution arena.

This paper highlights the major developments in Hong Kong mediation from the establishment of the Working Group on Mediation by the Department of Justice (DoJ) to the latest mediation updates.

## Back to 2007 – the Overture

Mediation is not a new idea in Hong Kong's ADR history. Before 2007, it had been introduced in construction contracts or discussed on various occasions. The Hong Kong Airport Core Projects (ACP) adopted it as a way to settle disputes before resorting to arbitration. Schedule 12 of the General Conditions of Contract (Civil/Buildings) defines the Mediation Rules and execution process. Mediation has been successful, with over 70 percent of disputes being solved throughout the mediation process. The ACP contracts were milestones in the development of mediation in Hong Kong.

In October 2007, the Policy Address of the Chief Executive of the HKSAR mapped out plans to employ mediation more extensively and effectively in Hong Kong. It is used to handle higher-end commercial disputes and relatively small scale local disputes. Since then, mediation has been put in the spotlight.

## 2008 – Working Group on Mediation

In 2008, a Working Group on Mediation was set up and chaired by the Secretary for Justice, Mr Wong Yan Lung. The Working Group reviewed the then-current developments in mediation and their provision in Hong Kong. There were three sub-groups under the Working Group, which focused on Public Education & Publicity, Accreditation & Training, and Regulatory Framework. All of these sub-groups had conducted discussions, consultations, or even promotions on mediation.

Meanwhile, a pilot scheme to promote mediation in building management cases in the Lands Tribunal was introduced. The Pilot Scheme for Building Management Cases was scheduled to run from 1 January to 31 December 2008 with the aim of 'streamlin[ing] the processing of building management cases and to encourage parties to make attempts to resolve their differences by mediation'. The scheme was extended for another six months in 2009.

## 2009 – Civil Justice Reform

The Civil Justice Reform (CJR) commenced on 2 April 2009. It had a number of underlying objectives and one of them – 'to increase the cost-effectiveness of any practice and procedure to be followed in relation to civil proceedings before the Court' – was closely related to mediation. 'Parties were encouraged to resolve their disputes by means other than litigation in court, and one of the [most] common ways is mediation.'

On 7 May 2009, a briefing reception was held to promote the 'Mediate First Campaign'. This campaign aimed to promote an awareness and the use of mediation to the commercial sector and companies, trade associations, and organizations, which were invited to sign the 'Mediate First' pledge.

On 21 May 2009, the Pilot Scheme for Building Management Cases was designated by the Lands Tribunal as a standard procedure and practice. Parties with building management disputes were encouraged to resolve them by mediation, either before or after they issued proceedings to the Lands Tribunal.

## 2010 – The Report & Practice Direction 31

The Report of The Working Group on Mediation was published by the HKSAR Government in February 2010. The Working Group on Mediation set up in 2008 had 48 recommendations in the report, which outlined the preliminary route of mediation development in Hong Kong. A Mediation Task Force chaired by the Secretary for Justice was set up in December 2010 to implement the recommendations. This represented a concrete step in the growth of mediation.

Practice Direction 31 was promulgated on 1 January 2010, when parties in disputes were requested to consider if they needed to adopt mediation. The Practice Direction stated that the court could consider 'all relevant circumstances' and make adverse cost orders against any party on the grounds of an unreasonable failure to engage in mediation. This Practice Direction drew the attention of those parties that intended to settle their disputes in court, as well as that of legal practitioners, on the use of mediation. Hence, the incentive to mediate was amplified.

### 2011 – Mediation Bill

The Mediation Bill was first introduced to the Legislative Council on 30 November 2011. Its main objective was to provide a legal framework for the development of mediation. It focused largely on the confidentiality of mediation communications and the admissibility of such communications as evidence. The ordinance finally took effect on 1 January 2013.

Moreover, the Pilot Mediation Scheme under the Land (Compulsory Sale for Redevelopment) Ordinance, administered by the Joint Mediation Helpline Office Limited (JMHO), was introduced in 2011. This pilot scheme was a response to Recommendation 9 of the Working Group Report and remains effective. Over 200 cases have been handled by the JMHO thus far.

### 2012 – Steering Committee on Mediation

In May 2012, a two-day mediation conference on 'Mediate First' was held to promote mediation to the public and allow local and overseas mediation experts to share their views and experiences. Besides, a pilot scheme was commenced by the Family Council on family mediation services to sponsor any organization that was interested in offering such services.

A Steering Committee on Mediation was set up to further promote and develop mediation in Hong Kong after the completion of the work of the Mediation Task Force in September 2012. The Steering Committee is chaired by the Secretary for Justice, Mr Rimsky Yuen, and helps promote and develop the mediation process in Hong Kong.

### 2013 – HKMAAL

A single accreditation body is always preferred by the industry to maintain the quality of mediators in Hong Kong. In view of this and in response to the recommendation of the reports of the Working Group on Mediation, the Hong Kong Mediation Accreditation Association Limited (HKMAAL) was established and officially began operations on 2 April 2013. The HKMAAL is a non-statutory body supported by the

government and judiciary and intends to become a premier accreditation body for mediators in Hong Kong.

The HKMAAL is working to set the standards for the accreditation system and implement the relevant mediation training courses in Hong Kong. Stakeholders were invited to offer their comments and attend its various forums and information sessions. Our President also reported that he represented the HKIS at a joint institutes' dinner on 18 July 2013 to discuss the grandparenting arrangement between the HKMAAL and the HKIS's accredited mediators. The HKMAAL will seek statutory backing after it has successfully established itself.

Although the four founding members, namely the Hong Kong Bar Association (HKBA), the Law Society of Hong Kong (LSHK), The Hong Kong Mediation Centre (HKMC), and Hong Kong International Arbitration Centre (HKIAC), were the leading mediation organizations in Hong Kong, it was assured that the HKMAAL would not be limited to prospective participants from a single profession.

### What's Next?

The HKMAAL has and will continue to play a significant role in future mediation developments in Hong Kong. Apart from formulating the accreditation policy, it will also establish a complaint-and-disciplinary procedure for mediators. Standards for mediation training courses will also be implemented and guidelines will be promulgated to collect information on mediation for more research and for its further development in Hong Kong.

At this critical moment, it is very important for different professionals and fields to contribute their experiences and knowledge to this practice. Mediators who are architects or surveyors should actively participate in construction mediation developments. ■

1. Evaluation Report on Mediation for Building Management Cases in the Lands Tribunal of the Judiciary.
2. Final Report, Chief Justice's Working Party on Civil Justice Reform, March 2004.
3. Raymond H.M. Leung, Hong Kong Mediation Handbook, Thomson Reuters, 2009.
4. HKMAAL Forum on 17 April 2013.
5. HKMAAL Forum on 11 September 2013.
6. Report of the Working Group on Mediation, Department of Justice, HKSAR Government, February 2010.
7. Surveyors Times, Vol.22, NO.07, p.3-4, July 2013.

## Interpreting the latest guidance letter issued by Hong Kong Exchanges and Clearing Limited on property valuation and market reports



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Recently, Hong Kong Exchanges and Clearing Limited (HKEx) issued a guidance letter on the compilation of property valuation and market reports related to IPO cases. The letter placed great emphasis on enhancing the level of disclosure in property valuation reports, so as to enable investors to better understand the various bases and assumptions adopted by property valuers in property valuation and market report preparations when they read prospectuses and related IPO documents. As the new guidance letter comes into effect, property valuers will be required to provide details of comparable properties and/or the parameters of discounted cash flow analyses to justly illustrate the relevant material risks of the property market and provide a sensitivity analysis of the impact of the value fluctuations of a property on a company's profits. The above information will provide investors with more specific professional advice that should enhance the overall transparency of the relevant listing applicants.

The promulgation of this guidance letter should have a positive impact on the definition of the functions and consolidate the status of property valuers in IPO preparations. Naturally, the letter will catalyze industry-wide growth and further the development of property valuation. It will also highlight property valuation sections as key contents of a prospectus. I suggest the following interpretations of the letter:

### 1. Background of the guidance letter

At present, Mainland China's real estate industry has limited channels to obtain funds. In order to raise funds for international expansion and diversify the fund sources, established property developers such as Vanke, Ludi, etc., have already taken steps to develop a market listing, dubbed a "backdoor listing," by acquiring a controlling stake in a relatively obscure firm of comparatively low capital (the shell). Other small-to-medium developers are proactively looking for ways to get listed on the Hong Kong Stock Exchange.

China's real estate policies and market price levels often fluctuate, thus causing the following phenomenon:

- a. China promulgates the "State Five Measures" and enforces home purchase restrictions in order to

dampen property price increases in the country's medium-to-large cities.

- b. According to the figures obtained from The National Bureau of Statistics of China, property prices in 70 medium-to-large cities increased by 9.3% compared to same period last year, whilst the saleable area of all commercial housing nation-wide fell by 10.1%.
- c. Various cities attained record-breaking land transaction prices. The Ministry of Land and Resources recently released the latest figures on this. From January to July 2013, the sale of state-owned land use rights totaled RMB2.0151 billion, which was an increase of 49.4% compared to the same period last year.
- d. Cities like Wenzhou and Ordos experienced an acute drop in residential property prices, showing early signs of alarm for the whole property market.

We believe that the above phenomena illustrated the existing policy, market, and operational risks of China's property sector. In order to enable overseas investors to better understand the country's fluctuating property market conditions, it is necessary to ensure that necessary disclosure be made on the operational environment, market risks, ascertained property value, and impacts of future price fluctuations of Mainland property developers that seek a market listing on the Hong Kong Stock Exchange.

### 2. Goals of the guidance letter

The newly-issued letter requires property valuation reports to disclose the bases of and justifications for the key parameters (e.g. discount rate, terminal capitalization rate) when using the discounted cash flow method to value property interests. Details of comparable properties must also be disclosed if the comparison method is used.

We believe that HKEx promulgates the above policies for the following reasons:

- a. The above two methods are the most common methods of property valuation.
- b. Since China is reinforcing its ever-tightening policy on the residential property market, Mainland property developers have focused their investments

on commercial properties. Commercial property valuations are usually done by using the discounted cash flow method.

- c. There are relatively few cases of whole block building transaction sales in China, as single unit sales are more common. When using the comparison method to value property interests, property valuers must pay extra attention to their comparable property choices.
- d. Mainland land transactions now run on the system of tender, auction, and "listed for sale". Final transaction prices fluctuate substantially when the comparison method is used to conduct property valuations, so one must exercise extreme care when defining bases and related variables.

In summary, the guidance letter requires that the bases of and justifications for key parameters must be sufficiently disclosed so as to ensure that investors fully understand the incomes generated by and performances of their properties, as well as the market value of comparable properties or properties in the same district. This would enable them to accurately assess and review their investment objectives.

### 3. Impacts on property valuers

A property valuer needs to deal with many formalities during an IPO preparation. In the past, property valuations that were prepared for IPOs did not fully exemplify the exact details and extent of the work of a property valuer. In other words, the practice diminished the importance of property valuation.

The introduction of this new set of guidelines tends to better illustrate the role of a property valuer and the specific contributions this profession makes to the entire IPO preparation process, which includes the following:

- a. The requirement of disclosing various bases and parameters that property valuers must follow in the preparation of their property valuation reports is not a measure to increase their work burden. It merely requires the valuer to include all assumptions and parameters used during the calculation process in the valuation report.
- b. The disclosure requirement answers the many questions investors may have in relation to property valuation. This helps them better understand the current property market conditions and helps them make better decisions as to whether or not they should invest.
- c. The disclosure requirement requires property valuers to exercise extreme care and closely observe the relevant rules and guidelines when conducting property valuations. Valuers must pay extra attention to market trends and carefully select comparable

properties and assumption bases.

- d. The new guidance letter increases the functional importance of property valuation and enhances the role of a property valuer during the IPO preparation process. This highlights the professionalism of a property valuer and fosters the healthy growth of this profession.
- e. The enhanced disclosure requirements, having been laid out clearly and specifically in the new guidance letter, serve to outline the role of property valuers in the IPO preparation process and align it with the functions performed by other professional intermediaries, including bankers, lawyers, and accountants. The new rules will better synchronize all these due diligence efforts performed by the key professional intermediaries involved in IPO cases, thus offering more comprehensive protection to all professional parties.
- f. Property valuers can offer much needed assistance to applicants when preparing a well-supported valuation report. This is of crucial importance in the ultimate success of a listing application that requires comprehensive communication between the applicant and the valuer.

### 4. How should property valuers respond to this guidance letter?

The development of the valuation profession has been a topic long contemplated by current industry professionals. In this regard, the new guidance letter provides an excellent summary of guideline and a clear sign in the property valuation aspect to property valuers and valuation institutes. Property valuers are no longer an insignificant part of the team in IPO cases. They are now entrusted with ultimately conducting a property valuation – which, instead of being part of a supplementary report, now forms part of the essential disclosure required in a prospectus. Ultimately, the new guidelines will strengthen investors' confidence and trust in the quality and reliability of property valuation reports by general practice surveyors in Hong Kong.

The issue of the guidance letter provides directions on how the property valuation profession should grow and evolve:

- a. Require the property valuer to be independent, objective, and impartial when conducting a property valuation.
- b. Enhance the overall ethical standards, personal values, and professional sentiments of property valuers.
- c. Establish the professional image of property valuers.
- d. Require valuation institutes to observe a valuer's work.
- e. Allow property valuations to play an increasingly important role in future IPO preparations. ■