

HKIS CPD SEMINAR

**CONSTRUCTION MEDIATION -
Specialising Facilitative Mediation
FOR EFFICIENCY AND EFFECTIVENESS**

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THE SPEAKER AND HKCAC

Speaker

- Member of HKMAAL Mediation Accreditation Committee and Working Group on CPD / Course Application
- Member of CIC Working Group on Construction Dispute Resolution
- Programme Leader of HKCAC Construction Mediation Stage 1&2 Accreditation Programme
- HKMAAL Accredited Mediator, HKCAC Construction Mediator, HKIA/HKIS Mediator, JMHO Cap. 545 Mediator
- Thesis : **FROM RIGHT TO INTEREST - SPECIALISED FACILITATIVE MEDIATION (CONSTRUCTION)** 釋權取利 – 專業化促進式調解 (建築業)
- JMHO Conference 17 December 2013 “The Amazing Changes with the New Mediation Ordinance and Latest Development in Hong Kong Mediation” on “**Ethical and Practical Issues**”.

THE SPEAKER AND HKCAC

HKCAC

- Unique **Professional Organisation** and **Service Centre** focused on Construction Dispute Prevention & Resolution
- Member of CIC Working Group on Construction Dispute Resolution
- Train, Accredite, List and Appoint Construction Arbitrators, Mediators, Adjudicators and Expert Witnesses
- Supported by Industry's Renowned Individuals and Stakeholders including HKIS as Honorary Advisor, etc.
- Promote expedient use of Specialised Dispute Prevention and Resolution Process at ALL levels

THE SPEAKER AND HKCAC

HKIS Members now entitles

- ✓ Free 1st year HKCAC Membership
- After being HKCAC Member ...**
- ✓ Eligible to enter into the HKCAC List of Arbitrators, Mediators and Expert Witnesses
- ✓ 20% starting discount on fees to HKCAC Events and Courses.
 - ✓ Free Visit to HKCAC Reference Library

Download Application Form at below:-

[www.hkcac.net/HKCAC/caseFiles/Form MA-01HA Membership Application 2014 - Honorary Advisors.pdf](http://www.hkcac.net/HKCAC/caseFiles/Form%20MA-01HA%20Membership%20Application%202014%20-%20Honorary%20Advisors.pdf) Or call 2545 1500 for assistance



Form – MA-01HA

FILL UP
AND
POST

Hong Kong Construction Arbitration Centre 香港建築業仲裁中心
HONG KONG CONSTRUCTION MEDIATION CENTRE 香港建築業調解中心

本中心為一非牟利機構，致力改善及推動以優良糾紛預防及解決方式改善建築業操作的和諧和成就。HKCAC is a non-profit taking organisation aimed to improve the harmony and achievement for the construction industry, by adopting and promoting quality dispute prevention and resolution.

Membership Application Form – For Members of Honorary Advisors

Part 1 : Personal Particulars

Title (Mr / Ms / Dr / Ir / Prof)*: Family Name : _____ Given Name: _____
Sex (M / F) _____ Nationality : _____ Occupation: _____
Address: _____
Telephone: _____ Fax: _____ Mobile : _____ Email : _____

Place a recent
photograph
here

Part 2: Profession and/or Occupation

I am a Member of HKIA / HKIS / HKGBCA / HKCSA / CASA* Membership No : _____ (attach certificate copy)

I am a or Staff Member of New World / Chun Wo* Staff No : _____ (attach staff card copy or affix company stamp here)

Affix
company
stamp
here

I also serve as an **Employer / Arbitrator / Mediator / Expert Witness / Dispute Resolution Advisor / Adjudicator / Project Manager / Architect / Surveyor / Engineer / Construction Manager / Contracts Manager / Auditor / Solicitor / Barrister / Counsel / Educator / Property Manager** (please circle) / **Others** _____ (please specify)

For Fellow Membership Only

I have _____ (#please call HKCAC to consult on the latest list)

Bachelor degree or above in
construction or legal subjects

AND Fellow membership of
approved organisation#

AND Submitted a 3,000 words article on
construction disputes

Signature of applicant : _____

Date: _____

After completion, please send to HKCAC by email at cs@hkcac.net or by fax : +852 2545 2500 to complete the application process.

MEDIATION SATISFACTION CHART

- WIN-WIN
- Parties' Satisfaction, Consensual Agreement
- Interest-Based - What Does it Mean besides concerns, wish, ?

Concept of Interest :

“the time preference or human impatience of wishing for present enjoyment owing to the existence of ‘marginal loss of desirabilities’ if it is only available in the future.”

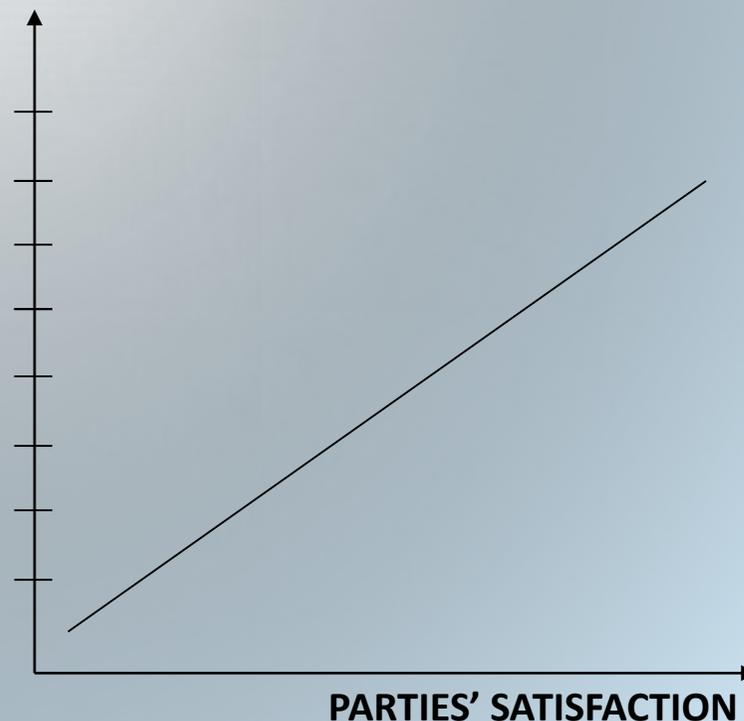
Fisher, Irving

“The Theory of Interest – As Determined by Impatience to Spend Income and Opportunity to Invest It” The MacMillan Company. 1930.

MEDIATION SATISFACTION CHART

ACHIEVEMENTS IN MEDIATION

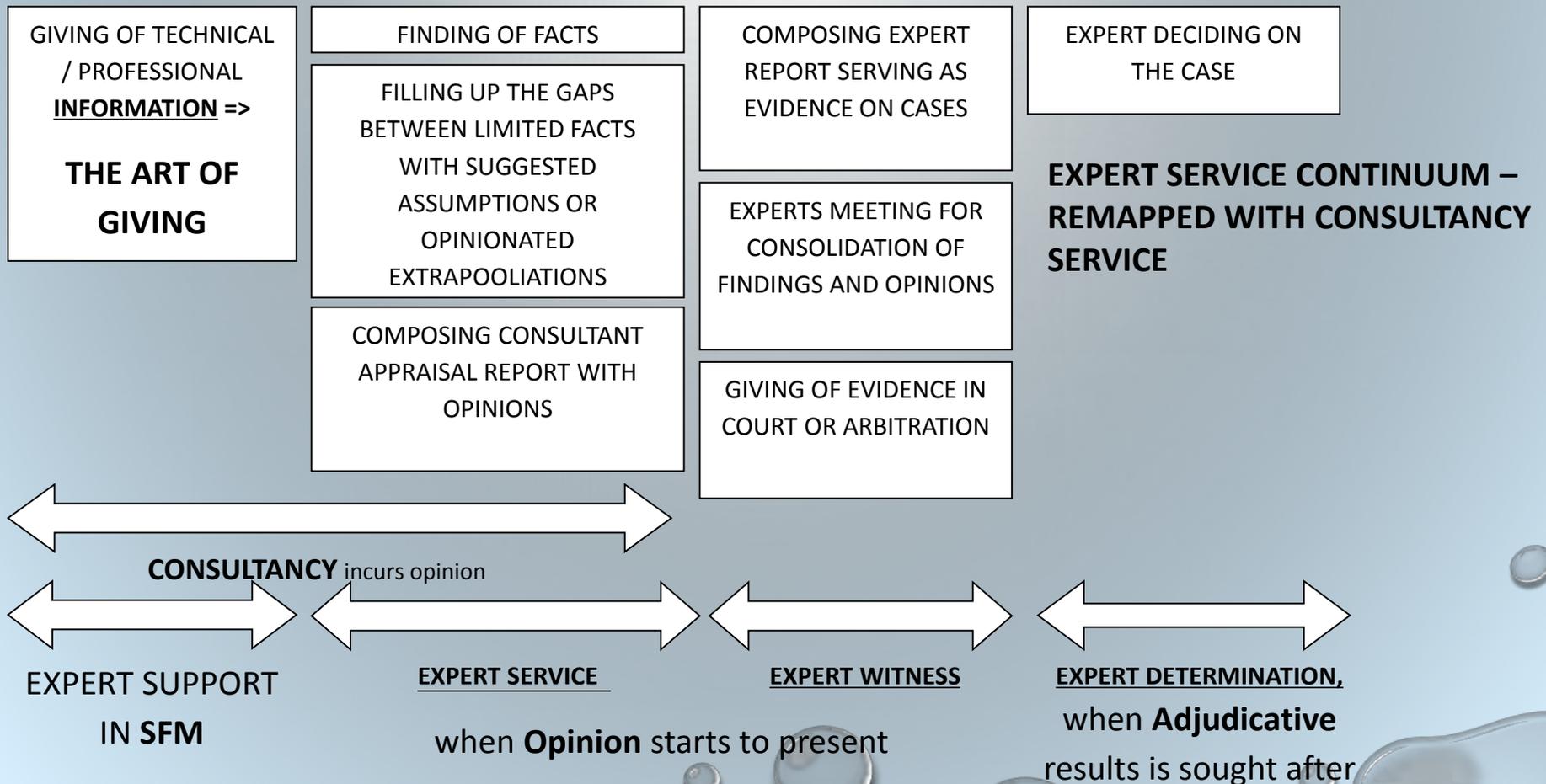
- innovative **mutual settlement arrangement** (case / interest)
- mutual **acceptance** (case / interest)
- mutual **understanding** (case / interest)
- mutual **awareness** (case / interest)
- voicing out of individual's **perceptions** (case / interests)
- self-enlightenment** of position of **rights / interest**
- sheer compromise



SPECIALISED FACILITATIVE MEDIATION

- Facilitating through **Specialisation**
- Specialisation by **Construction Competence** through **Knowledge, Process and Skills**
- **Competence by**
 - ✓ **“The” Process** – Procedure, Objectives, Progression [Cognitive]
 - ✓ **Skills** – Dynamics, Tactics, Strategies [Behavioural, Emotional]
 - ✓ **The Case** – Contract, Practice, Relationship, Ethics [Cognitive]
 - ✓ **The Parties** – Industrial background, Inherent Interests, Anticipated Tactics, Needs and Values [Cognitive]
 - ✓ **The Results** – Contextual Provisions, Anticipated Interests, Enforcements [Cognitive]

SPECIALISED FACILITATIVE MEDIATION



THE 5 IMPERATIVES OF SFM

- IMP 1 – Technical Competence
- IMP 2 – Cognitive, Behavioral and Emotional Skill
- IMP 3 – Resolving People before the Case
- IMP 4 – Reality Checks on Issues and Settlement Options
- IMP 5 – Start from Right-Based and Settle at Interest-Based

*All the above **IMPs** have Different Application in Different Fields and Different Groups of Disputes - **Specialisation***

ILLUSTRATION

The Foundation Contractor submitted claims for an EOT of 20 weeks with a VO totalling at \$2,570,000 arising from:-

- (i) 10 piles going down for another 15 metres deep with every metre priced at \$5,000, giving a total of \$750,000
- (ii) rock excavation of 1,000 square metres x 20% coverage x 7 metres deep x \$1,000 per cubic metre, giving \$1,400,000.00, &
- (iii) extended preliminaries for the 20 weeks EOT at \$3,000 per day giving \$420,000.

What do you See, as the Mediator, Foundation Contractor, the Employer, or as a Surveyor?

ILLUSTRATION - OPENING

- **Employer** : *My case is simple. All the claims of the Contractor is not accepted. My project has already been delayed for 20 weeks. All along, I did nothing to cause such a delay. I have not asked for changes in design or anything at all. The contract is a lump sum contract which means the Contractor has been allocated under the contract with all the risks he is to undertake including the unforeseeable ground conditions and complete the specified works on time. Even though the ground conditions are not as shown on the site investigation report attached to the tender / contract, such report has been marked as “for reference only” which means I do not have any responsibilities to its accuracy at all! It is always the Contractor’s duties to ascertain what is unforeseeable item as required by the tender, and have them included as part of their tender offer before they submitted so. I definitely won’t accept any of his claims on EOT nor would I agree on his stipulation of extended preliminaries. There is no contract provision on how this is to be calculated even though when he obtains any EOT grant from the Architect. Regarding the contract variation owing to the rock cutting, which I agree as a matter of fact, I cannot accept it as a VO for the same reason that the Contractor is fully liable for anything happening underground.*

ILLUSTRATION - OPENING

- **Employer** : *At the moment, the Architect has not given any of his advice on the Contractor's claims, which came in so fast that no one can have time to react to it. Since I am not the one in default, it would either be the fault of the Contractor or the Architect. I lose 20 weeks now, and the Contractor is not proceeding with the works! Works must be resumed within days so that no more delay will be caused, and I must be compensated for the damage already done because of the 20 weeks delay by the Contractor AND / OR the Architect.*

ILLUSTRATION - OPENING

Suggested Mediator's Tasks :

- Identify Missing Case Details -
 - Amount of LD & Proportion to Contract Sum
- Confirm Case Status
 - Employer's keen and, hence, are willing to follow Contract Provisions for the rightful protection of original rights wherever it provides
 - Architect's / QS's Professional view on the matter is outstanding

ILLUSTRATION - OPENING

Suggested Mediator's Summary on Employer's Case :

- *“You have a view that based on the way the contract was drafted as a lump sum contract with the site investigation report being indicated as “for reference only”, you maintain that all Contractor's claim for EOT, associated EP, and VO must be included as part of the Contractor's contractual obligations. In the case, you consider that you are not in default. Hence, you consider that all the contractor's claims are not established, and you are rightfully entitled for compensation in terms of LD in a total sum of \$1.12 million. And you wish the project to be resumed to normal progress and completed as soon as possible, presumably, by the effort of the Contractor in front of you, as well as the Architect to assist along. Am I correct?”*

SUBCONSCIOUS BIAS CHECK

Hunter R. Huges "How Our Subconscious Bias Impacts Negotiations and the Mediation Process"

- **Self-serving bias and related heuristics**
 - individuals tend to believe that **they perform better than others**
 - taking **how one performs as the norm**
 - false-consensus effect meaning how one **over-estimates the extent to which a decision-maker agrees with his own intended position**
- **Base Rates** – tendency of **choosing to ignore**
- **Over Confidence** – inflated **self-worth**
- **Endowment Effect** – over-value everything that is **believed to be mine.**
- **Availability Heuristic** – judgments made based on **readily available** or easily **identified information**, often causing comparison to wrong basis
- **Pattern Recognition and Emotional Tagging** – intuitively relying on **prior experiences** and **judgments** with drawings of assumptions on similarities or patterns seen in other cases or occasions; **emotional information** attached to someone's prior experiences

ILLUSTRATION - CAUCUS

Contractor : *Well, I understand the situations. But, as I say, all I want is to be fairly treated, having my cost paid out on the VO – piling and rock excavation back, and cash in as soon as possible. These are all matters of righteousness albeit what rightfulness or rights are meant by the contract. How can someone expect me to read the thick book before tendering? First, there isn't always enough time. Second, we never have such resources, smart intellects to read them through as it costs dearly. Third, every contractors are doing the same because all having the same problems. If I am forced beyond fairness, I'm gonna have to do the reckless, foolish things where all parties lose. I wouldn't give a damn anymore to whatever project delay caused to the project. I would even do*

ILLUSTRATION - CAUCUS

SFM Mediator : *Mr. Contractor, it's really not necessary for you to think like that. Things are moving closer already instead of falling apart. So, please first relax and let me ask you a few more things and I'm sure the solution is just right in front. Alright?*

You mentioned that you wish to be fairly treated. Don't worry. In mediation, no one will decide for you except yourself. You have all the rights to walk out of the room or, alternatively, move on with the negotiation for a better one if you think you are not satisfied with any settlement options. I will be all along guide things through and please, trust me.

You also mentioned that you wish to have your cost paid out back. Can you enlighten me with the costs behind your claim for, ie, \$750,000 for piling and \$1.4M for rock excavation?

ILLUSTRATION - CAUCUS

SFM Mediator : *Okay. At his particular moment of time, how would you wish to go by these outstanding bills and your claims against the Employer, which I can see a difference of about \$1.15M?*

Contractor : *Sure, I wish to receive as much as I can! But, as a realistic man, my bottom line is to get my cost back.*

SFM Mediator : *And here is your third expressed concern – when and how would you wish your cash to be back to you?*

Contractor : *As soon as possible! If we manage to settle the dispute today, I would like to receive the total sum either in one go within a week. If not, 50% within a week and the rest within another week.*

ILLUSTRATION - CAUCUS

SFM Mediator : *In the communication stage, both yourself and the Architect have shared your understanding about lump sum contract. I can also see that the Contractor may have similar idea although he considered the contractual arrangement has been unfair and impractical to be taken in owing to shortcomings on time, resources and market practice. Of course, I don't see any reason for changing everyone's common idea on this point. But if today we cannot resolve the dispute as I can see that there is still quite a big difference in terms of EOT and VO claims, and if the case moves on to other adjudicative processes like arbitration or litigation, this very one thing will be brought up which may affect the understanding of yours, and that of the Contractor the Architect.*

Employer : *What is that?*

ILLUSTRATION - CAUCUS

SFM Mediator : *Before I let you know, please understanding that what I am giving you are general information that is available in the public, and is not particular for your case. It is just that I don't find the kind of understanding among you, the Contractor and the Architect. If ever you need to know a bit more in details or context to your case, you must need to ask your other or legal advisers to confirm. Alright?*

Employer : *Okay.*

SFM Mediator : *Yes. Do you know that there are three types of lump sum contracts which means quite different things, especially, in relation to the scope of works of the construction contract?*

Employer : *Really?! All I know is just one type. Could you give me some more information?*

ILLUSTRATION - CAUCUS

SFM Mediator : *Besides serving as construction SFM mediator, I also sometimes serve as Architect, expert witness and arbitrator. From some decided cases or legal authorities like Keating, the three types of lump sum construction contracts are:-*

- i) lump sum contract without very exactly detailed documentations in the contract documents;*
- ii) lump sum contract with Bills of Quantities (BQ); and*
- iii) lump sum contract with relatively accurate design documentations.*

Simply put, the first type is an all inclusive type, like simply asking someone to build a house. In this case, all essential works necessary to build the house are inclusive in the contract. For the second type, the contract becomes a re-measurement contract because the BQ is an accurate description on the scope of the contract which means, all work done are remeasurable based on the quantities that are built in the BQ of the contract. The third type is an it-all-depends type. The more accurate is the design documentation, the more likely that the lump sum contract is a re-measurable one. Normally, the matter of extent of accurateness has to be decided by the court or in arbitration.

PROFESSIONAL LIABILITY CHECK

Threshold for Lawyers

- Giving of Advice
 - *Giving of wrong advice*
 - *Giving of practical advice*
 - *Failure to give advice*
- Foreseeability
- Misrepresentation
- Reasonable Duty of Care

Thesis : Cap. 5.3 Professional Liability

PROFESSIONAL LIABILITY CHECK

- The general standard of the duty is based on the performance of professionals of reasonable skill and care that is based on an average performance as if the same service is to be handled by an equivalent person, or the practice of the professional institute where qualification is sought.
- Reasonable skill and care at a average / minimum degree of competence
- **Nature of duty of care of a mediator in mediation** - third neutral and impartial person assisting parties in deciding for their own cases and their disputes. Mediator serves all parties of a dispute. Whether the case is settled or not, one party wins over the other, or the mediated settlement agreement is a fair one, are beyond the common measure on how successful a mediation is or mediator has achieved.
- Mediator who does not exercise the minimum competence expected from him or **commits extraneous task** already engages himself into professional negligence.
- It is then **quality of the mediation process including the mediator's performance** that counts leading to "quality" results. It goes back to the discussed measurement scale for quality of mediation that is based on the parties' satisfaction more than the success rate of achieving settlement agreement.

PROFESSIONAL LIABILITY CHECK

- Some disputes are not capable to be resolved via mediation, nor the parties wish to settle their disputes under the interest-based approach. Hence, the usual yardstick that a building must stand, a case must win, or a patient must be cured, which is more of a **single person or a body against the success of a situation**. In mediation, it is the **two parties** in their original adversarial positions against each other to be measured up with how converged their interests in mediation in their individual cases and the case in common instead of who finally get more or less than they once wished.
- The **standard of professional liability of mediators** lies on how much mutual understanding of the parties are reached through the effort of the mediator. While the arrival of mutual acceptance is somewhat already beyond the mediator's control.
- It is submitted that, for the application in SFM, **SFM mediators owe an extra duty** to the parties **in the furtherance of the individual's understanding** of their own cases as well as in the other's case, which are **essential steps leading to the greater mutual understanding of the parties**.
- The extent of the duty is limited to those the mediator directly serves, ie, his clients (the parties) with a view to influence their future conduct.

CONCLUSION

For Effectiveness and Efficiency in Construction Mediation

- ✓ Professional Common Sense vs General Common Sense
 - ✓ Specialised Mediation vs General Mediation
 - ✓ Specialised Disputes vs General Disputes
 - ✓ Specialised Process vs General Process
 - ✓ Specialised Facilitative vs General Facilitative

Construction Mediation Has To Be **Dispute Specific**

Construction Mediation Training and Accreditation Has To Be **Dispute Specific**

(HK Mediation Code Section 9, CJR Interim Report 2001)

HKCAC Construction Mediation Stage 1 & 2 Accreditation Programme

HKCAC SFM Premises

HKCAC Panel and List of Construction Mediators

HKCAC Specialises on Construction Dispute Prevention & Resolution

REFERENCES / Q&A

- HKCAC e-Published Thesis : **“From Right To Interest – Specialised Facilitative Mediation (Construction) 釋權取利 - 專業化促進式調解(建築業)”** at http://www.hkcac.net/HKCAC/HKCAC_digest/e-book/SFM.php
- *Hunter R. Huges “How Our Subconscious Bias Impacts Negotiations and the Mediation Process”* at <http://www.americanjournalofmediation.com/docs/REFORMATTED%20-%20HOW%20OUR%20SUBCONSCIOUS%20BIAS%20IMPACTS%20NEGOTIATIONS%20-%20Hunter%20Hughes.pdf>
- HK Mediation Code “Responsibilities to the Mediation Process and the Public” Section 9 “Competence”
- CJR Interim Report Section K21.6 “Choosing among and implementing the alternatives” para. 632, 21 Nov. 2001