

Mediation gains more ground in Hong Kong

MONDAY, 04 JANUARY 2010

Mediation looks set to become more prevalent in Hong Kong, in the wake of a new practice direction requiring parties to submit to it before all civil court proceedings as well as arbitrations.

Practice Direction 31, which came into force on 1 January, says parties must consider voluntary mediation before they litigate – or face an adverse costs order if they unreasonably refuse. In an article published in *GAR* today, partner **Steven Yip** and senior associate **James Yeung** from Minter Ellison in Hong Kong explain that parties will have to file a mediation certificate at the same time as a questionnaire setting out the timetable for the case, indicating whether they are willing to mediate the dispute and giving good reasons if they are not. The direction is similar to one issued in 2009 – Direction 6.3 - which requires parties in proceedings under the arbitration and construction and personal injuries lists to submit to voluntary mediation or face cost penalties. That direction followed a three year trial period.

Some lawyers practising in Hong Kong say that the two directions could lead to a general growth in the use of mediation as a precursor or alternative to other forms of dispute resolution. "I do believe that, if properly applied, the directions will serve to reduce the number of instances where arbitration is selected at the outset," says **Paul Starr**, practice team leader for construction and dispute resolution at Mallesons Stephen Jaques in Hong Kong. "The only antidote to that which I can see is to make arbitration more affordable and quick." Starr adds that dispute lawyers "sadly" need to ask more than ever before whether arbitration really is the correct mechanism for their client. In some 80 per cent of cases he thinks mediation is a good option, offering a "useful tool" to parties to avoid bitter proceedings. Indeed Starr even questions whether the reforms should have gone further, making mediation of disputes compulsory rather than voluntary.

Others are more optimistic about the future of arbitration in Hong Kong. **Andrew Aglionby**, a partner at Baker & McKenzie, says he believes it will take time for voluntary mediation to become accepted and established in international commercial arbitrations as opposed to domestic cases – particularly if parties and counsel come from jurisdictions that are unfamiliar with the process. He adds that it will be interesting to see how far arbitrators and judges are willing to support mediation by allowing timetable adjustments or making costs orders when parties refuse to mediate.

Kim Rooney, a lawyer at Gilt Chambers in Hong Kong thinks the pick-up rate of voluntary mediation will depend on how rigorously Hong Kong judges apply their cost sanction powers against parties who have "unreasonably" declined to engage in the process. She says the threat of costs means that prudent parties should in future consider the pros and cons of mediation before launching court or arbitration proceedings or applying to a court for interim relief.

However, an independent Hong Kong mediator and assistant professor at the Chinese University of Hong Kong, **Sarah Hilmer**, has concerns - saying that forcing parties into mediation through costs sanctions does not raise awareness of its natural advantages over arbitration - including the scope it leaves for parties to litigate the dispute in the future.

"Parties might be more concerned with avoiding adverse costs than attempting to appreciate the real benefits of a mediation process," she says.
