

MAKING PEACE

A new ordinance may boost Hong Kong's development into a regional arbitration hub. Accountants are training to take advantage of the opportunities, writes [Ellen Sheng](#)

Illustrations by David Humphries

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ike it or not, accountants are often on the front lines of corporate disputes, so it is vital to learn how to handle the situation, says Jackson Yeung, chief executive of management consultancy CFO Solutions Ltd.

“Very often accountants are the gatekeepers because they look after the risk of the business... If a dispute does impact liability to the company, accountants are often the first to take action – whether that means passing it on to the legal team or some other department. If the dispute is first passed on to lawyers, litigation is a likely outcome,” Yeung, an Institute member, explains.

Litigation is often an adversarial process that is both expensive and time-consuming. That is why there has been a shift towards alternative dispute resolution methods such as arbitration and mediation. In arbitration, one or more independent third parties, called arbitrators, are appointed by or on behalf of the parties in dispute to determine a case rather than go through a court. In mediations, the mediator helps the parties negotiate an agreement themselves.

While Hong Kong has been lagging behind the U.K. and Australia in adopting arbitration or mediation, both methods are becoming more popular in the city thanks to recent regulatory changes. They are seen as the more efficient and inexpensive options to litigation. And unlike a court case, the process remains confidential.



New arbitration law

Last November, Hong Kong passed an arbitration ordinance that unifies domestic and international arbitration as well as extends international standards to all arbitration cases in the territory. Some hope the change will further establish Hong Kong, with its robust legal system and locale as a gateway to China, as a centre for arbitration in Asia.

“We hope that Hong Kong and China will move even closer in this area of cooperation. Hong Kong itself will serve as a stepping stone between overseas and China,” says Yeung, an accredited arbitrator who worked at several oil and gas companies before starting his own company, CFO Solutions.

Yeung says there is a good opportunity for disputes regarding oil contracts to be handled in Hong Kong. Many oil contracts are drawn up in Hong Kong, but disputes are generally handled in London or Singapore, where arbitration is more common and there is a precedent set in the industry.

A typical case might be a dispute between an overseas investor entering into a joint venture with a domestic Chinese entity. “Transactions with mainland China are becoming more frequent, so Hong Kong should be advancing as a mediation and arbitration centre,” says Yeung.

Mediation has become more common in Hong Kong after the city’s civil justice reform in 2009, which sought to reduce costs and improve the efficiency of civil proceedings in the High Court and the District Court.

For instance, lawyers are now required to advise clients in dispute resolution to try mediation before proceeding with litigation. In order to get a hearing date at a Hong Kong court, litigants in civil cases must declare whether they have tried or declined mediation.

The anticipated need for more dispute resolution professionals has brought about a boom in the number of people seeking to train as arbitrators and mediators over the last two years.

The Hong Kong International Arbitration Centre assists parties with arbitrations and mediations, and also accredits arbitrators and mediators. Its council members include Hong Kong Exchanges and Clearing Ltd. Chairman Ronald Arculli and former Equal Opportunities Commission Chairwoman Anna Wu.

The centre added 66 arbitrators last year to its roster of more than 300 arbitrators, up from 44 in 2009. The number of people seeking accreditation as mediators also went up to 136 last year, from 87 in 2009.

Dispute resolution

The HKIAC has accredited about 600 mediators since its establishment in 1985.

“For the past decade, the HKIAC only accredited one or two mediators a month, or about 30 mediators a year. Now we see this sort of accreditation every month,” says Chan Bing-woon, chairman of the Hong Kong Mediation Council, a division of the HKIAC. “Everybody is joining the bandwagon.”

Those seeking both training and accreditation as mediators, however, will need to go to the Hong Kong Mediation Centre because the HKIAC does not organize courses.

Role for accountants

Most professionals getting mediation or arbitration credentials in Hong Kong are lawyers, but a variety of other professionals such as surveyors, engineers, architects and accountants, particularly those involved in insolvency and audit, are also seeking to qualify.

Trevor Dick, a partner in the fraud investigation and dispute services unit at Ernst & Young Advisory Services Ltd., says accountants are helpful in any situation where two parties in a financial contract end up in dispute.

“If the dispute involves a complicated financial matter, it makes sense for one of the arbitrators to be an accountant,” he says.

Accountants need to figure out when it is advisable to pursue mediation and when arbitration or litigation is better, according to Yeung of CFO Solutions.

Sometimes mediation is the better choice for disputes within a joint venture, when litigation could harm a relationship. Mediation is also useful in cases in which legal issues are not at the centre of the dispute, Yeung says.

Yeung recalls a merger in which the party being acquired felt it had not been paid enough. The case was not about what was stated in the contract, but more about one party feeling that it was unfairly treated. He says a CPA's accounting knowledge would come in handy in such cases by helping to explain how the sale price was calculated and the accounting environment at the time.

But at other times, arbitration is better. Yeung cites another case in which a Hong Kong company acquired a mainland company. The dispute arose when executives from the Hong Kong company went to Shanghai to take over the management and noticed that the Chinese company had declared a dividend and paid





out all the company's cash to shareholders. The Hong Kong company said the purchase price should include working capital, including cash, but it was not stated explicitly in the contract.

This sort of dispute, if sent to court, would draw on expert witnesses, such as accountants, to explain how a fair price for a company in the industry is generally calculated, whether by price-earnings ratio, industrial benchmark or some other measures, and whether agreements include or exclude cash, Yeung says.

Mediation skills help

Mediation or arbitration training can also help accountants in everyday situations.

Annie Chan, a managing director at accounting firm Mazars in Hong Kong, believes her mediation training made her a better accountant.

As an accountant focusing on corporate recovery and forensic services, Chan is often involved in talks between former employees and companies in liquidation and knows first-hand how difficult the process can be.

She says her training has made her sensitive to how she presents the facts. In one case, a director owed a company in liquidation a sum of money, but refused to pay up. Before her training, Chan, as the liquidator, might have forced the director to pay through various punitive means. But as a mediator, Chan says she learned how to ease the blow by walking him through a reality check and weighing the pros and cons of different alternatives.

"I told him to consider all the possible consequences including possible legal actions against him, the costs and psychological stress to him and his family," Chan says. The director eventually came up with a proposal and repaid the debt in instalments.

Chan says her mediation skills have also smoothed her negotiations with clients.

"I was more geared towards financial solutions before," she says. "My mediation coach told me money is not the only, or the most powerful, solution."

Chan recalls one dispute that she mediated, where one of the parties accused the other of spreading market rumours. Before she became a mediator, Chan says she would have focused on finding a financial settlement – making one party pay the other for damage done. But through mediation, the companies came to a completely different solution: The party accused of spreading rumours agreed to publish an apology in a local newspaper.

“As an auditor that needs to commit a client to making changes, it became important for us to learn how to negotiate and persuade.”

Chan says one of her CPA colleagues at Mazars is now following her footsteps to become an accredited mediator.

Dispute resolution skills have become more important for accountants in recent years, says Peter Nixon, a former PwC accountant who left to start his own consulting firm, Potential Dialogue, which trains employees at the Big Four and other firms across the Asia-Pacific region.

“As an auditor who needs to commit a client to making changes, it became important for us to learn how to negotiate and persuade,” he says.

Nixon says the shakeup in the accounting profession over the last 15 years, whittling down the Big Eight to the Big Four, has made such skills particularly relevant because of more fee pressure and complex disclosure and listing requirements.

“Conflict doesn’t really come down to the numbers, it’s more of an emotional situation where numbers are secondary,” he says.

A shift towards mediation?

Although mediation has become more common over the past two years, there is still more focus on arbitration. For the most part, local companies still tend to head for the courts during conflicts.

In 2009, the HKIAC handled 649 dispute cases of which 429 were arbitration cases. There were only 159 mediation cases, although there are bodies other

than the HKIAC that handle mediations.

“Clients that retain me are more interested in winning than in getting over it... Parties are still happy to litigate,” says Nixon, adding that accountants are still often used as expert witnesses in such cases.

Mediation is often absent from contracts as a possible dispute resolution method, he says.

Industry watchers are hopeful that mediation, which has become better known since the high-profile Lehman Brothers minibond case, will pick up in popularity.

The HKIAC has been involved in mediating more than 100 cases between investors and banks, with amounts ranging from HK\$40,000 to HK\$5 million in each case. It had a 90 percent success rate in these cases as of the end of last year.

The HKIAC has also set up a joint mediation helpline with eight professional bodies including lawyers, arbitrators, architects and surveyors to help connect parties in dispute with appropriate mediators. The centre also rents out rooms in its Central office for both mediation and arbitration proceedings.

Learning about dispute resolution can be rewarding and useful in all parts of life.

The HKIAC’s Chan, who started his career as a litigation lawyer, finds arbitration “more laid back” and mediation fulfilling. He now spends about 80 percent of his time as a mediator and plans to go full-time.

“I do love peace and harmony,” he says. **A**

GETTING YOUR CREDENTIALS

To get accredited as a mediator by the Hong Kong International Arbitration Centre, students must take 40 hours of classes and mediate at least two simulated cases. Applying to the HKIAC Mediator Accreditation Committee generally incurs a HK\$600 application fee and HK\$800 annual panel fees.

The HKIAC does not provide courses but it recognizes certain mediation training courses provided by other institutions, including The Chinese University of Hong Kong, The City University of Hong Kong, Conflict Resolution Centre, Global Mediation Services Ltd., Hong Kong Academy of Law,

The University of Hong Kong, HKU Space and Hong Kong Catholic Marriage Advisory Council.

The Hong Kong Mediation Centre, established in 1999, has a similar accreditation process, requiring 40 hours of coursework followed by a written exam and mediation simulation.

Deciding where to seek training and accreditation depends on your professional focus. Solicitors, accountants and other business professionals are more likely to seek accreditation at the HKIAC, which tends to focus more on commercial disputes. The Hong Kong Mediation Centre deals with more general

cases and sees more social workers and psychologists.

Becoming an accredited arbitrator is more involved. The HKIAC requires applicants who apply for inclusion on the list of arbitrators to have “sufficient experience in arbitration whether as an arbitrator, counsel, expert witness, instructing solicitor or otherwise.”

There is no application fee but applicants need to have some real-life experiences and formal training, such as a master’s degree in arbitration. The Chinese University of Hong Kong and The City University of Hong Kong both offer such programmes.