

What and Why Housing Managers Should Know About Mediation

For The Hong Kong Association of Property Management Companies

香港物業管理公司協會

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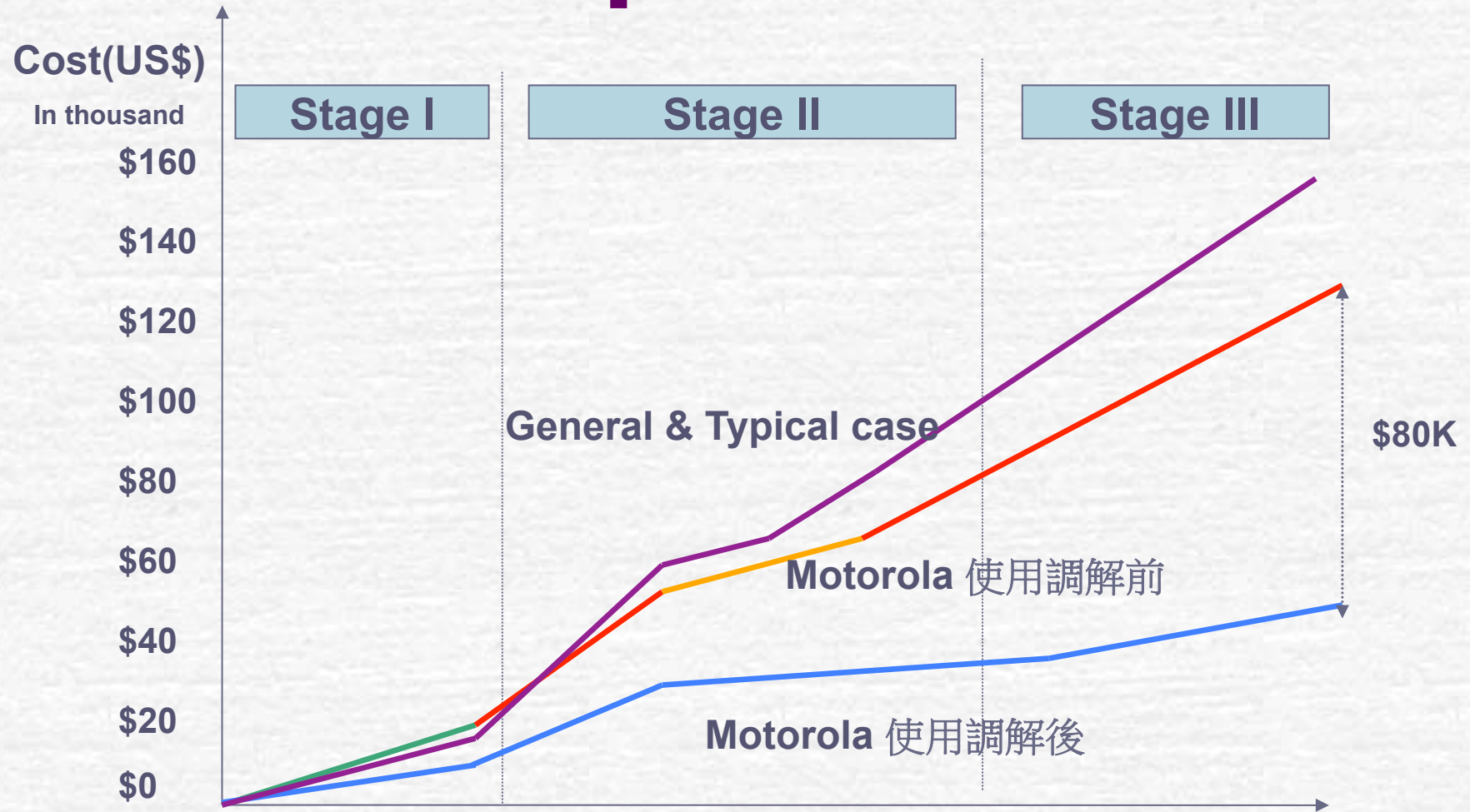
Private / Public interests in Mediation

- Mediation in the Commercial World
- Mediation as Public Policy

Mediation in the Commercial World

- ✓ **Transactional – Quality, Breach of Terms, Title**
- ✓ **Tortious – IP, Occupier's Liability, PI**
- ✓ **Shareholders' Disputes – Corporate Finance, Winding Up, Boardroom Disputes**
- ✓ **Employment – Compensation, Working Hours, Restructuring**
- ✓ **Workplace – Inter-personal Disputes**

Cost of Dispute Resolution



[REF: Slaikeu, K.A. & others (1998), Controlling The Costs of Conflict, Jossey Bass Inc. Quoted from Motorola]

How Mediation affects Bottom Line

- **Motorola**
 - 75% reduction in litigation costs
- **Brown and Root (Fortune 500)**
 - 80% reduction in litigation costs.
- **NCR Inc. (NYSE:NCR)**
 - lawsuits drop from 263 to 28 (1984-1993)
- **US Air Force**
 - 50% Reduction of Costs in relation to Equal Opportunity Disputes

[Src: Slaikeu, K.A. & others (1998), Controlling The Costs of Conflict, Jossey Bass Inc.]

Mediation as Public Policy

Report of Secretary for Justice's Working Group on Mediation

- Introduction to Mediation in HK
- The Working Group on Mediation
- Mediation
- Overview of Current Development of Mediation
- Public Education and Publicity
- Accreditation and Training
- Regulatory Framework
- Summary of Recommendations

Mediation as Public Policy

The Trend in Hong Kong



“The promotion of mediation is now a matter of Government policy.”

**- The Hon Chief Justice Andrew Li
Ceremonial Opening of the
Legal Year 2008**

Mediation as Public Policy

The Trend in Hong Kong

- 1985 – Hong Kong International Arbitration Centre (HKIAC) Formed
- 1992 – ACP Project Commenced
- 1994 – Hong Kong Mediation Council (HKMC) formed
- 2000 – Family Court Pilot Scheme
- 2006 – Construction and Arbitration List Pilot Scheme
- 2007 - CJ's working party on mediation
- 2008 – The Lands Tribunal Pilot Scheme
- 2008 – The DOJ Cross Sector Working Group formed
- 2010 – Practice Direction 31



Implications:
The Need for Mediation Advocacy
Ethical Issues

Mediation as Public Policy

The Trend in Hong Kong

The Consultation Report of the Working Group on Mediation

Background

- **Set up in early 2008 with the support of the Chief Executive and chaired by Secretary of Justice, Mr. Wong Yan Lung, SC**
- **Consider important issues that are fundamental to the greater use of mediation**
- **Focus on Issues:**
 - **Public education**
 - **Promotion**
 - **Accreditation**
 - **Training**
 - **Regulatory framework**



Mediation as Public Policy

The Trend in Hong Kong

The Consultation Report of the Working Group on Mediation

Public education and promotion

- ***Mediation information and training for frontline dispute resolvers***
- ***Such as building managers, lawyers etc***
- ***Training will assist them in day-to-day work***
- ***Having a good understanding of mediation will assist them to be effective dispute resolvers or mediation referrers.***

Mediation as Public Policy

The Trend in Hong Kong

The Consultation Report of the Working Group on Mediation

Promotion of Mediation

- *Further promotion of the 'Mediation First' Pledge*
- *Encouraged within the business and commercial sectors given its initial success.*
- *Promoted to different sectors of the community*
- *Its website (www.mediatefirst.hk) be maintained, updated and made interactive in order to provide support to those who subscribe to the Pledge and interested members of the public.*



Mediation as Public Policy

The Trend in Hong Kong

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Accreditation

- *A standardized system of accrediting mediators*
- *Common benchmark*

Training and regulatory framework

- *Enact a Mediation Ordinance*
- *Confidentiality and Privilege*
- *Immunity of Mediators*
- *Limitation*
- *Enforcement of mediated settlements*
- *Mediation Agreement*
- *Model Rules for Mediation*
- *An Apology Ordinance*
- *Contents of a Mediation Agreement*

Mediation vs Supported Negotiation vs Conciliation

“I have been mediating disputes everyday in my practice/job”

- Confused Mediation with Supported Negotiation: Police Officers, Loss Adjusters, Lawyers, etc.
- Confused Mediation with Conciliation: Consumer Council, Labour Department, Equal Opportunity Commission, etc.
- Confused Settlement Mediation with Facilitative Mediation

Mediation vs Supported Negotiation vs Conciliation

- Supported Negotiation & Conciliation
 - Assist in Formulating Arguments
 - Forming Opinions of Oneself
 - Evaluate Merits of the Case
 - Persuade the Other Side
 - Advising Parties
 - Compromise

Adjudication

Fair Process

Lawyer

Lawyer

Plaintiff

Disputants Hand Off

Defendant



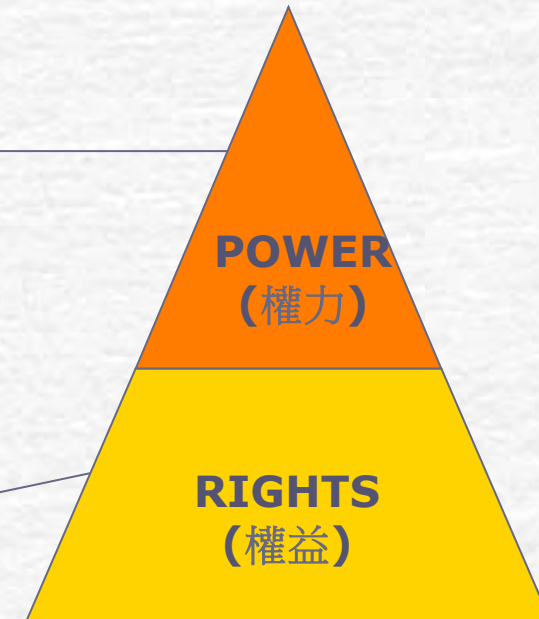
If I cannot persuade the other party that my client's case has greater merits, we turn to adjudication

Client knows little about the litigation process and procedures, lawyers assume greater influence.

Adversarial Mindset

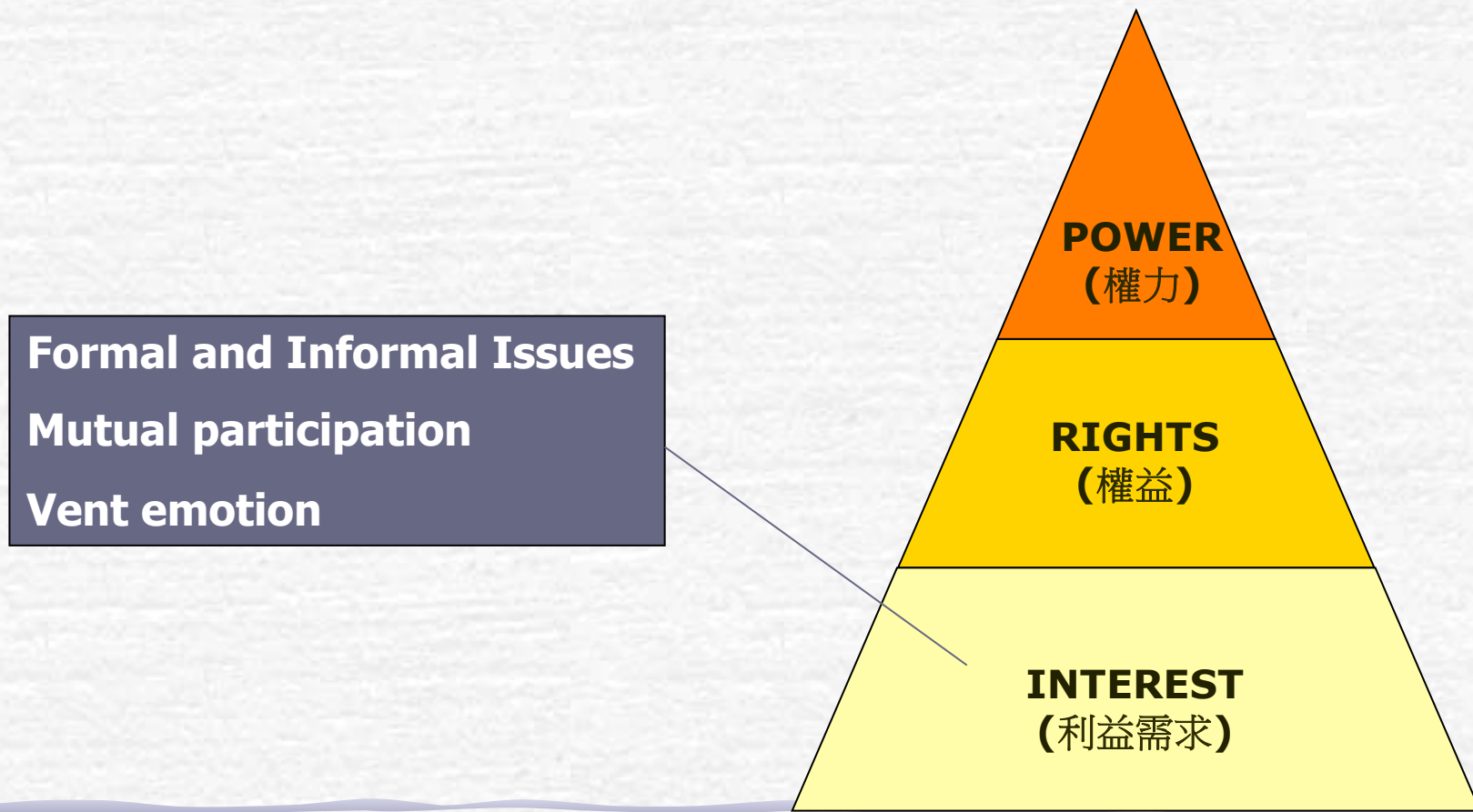
Formal and Informal Issues
Unilateral participation
Vent emotion
Strive for rights

Formal Issues
Little Participation
Definite Judgment Imposed



Adversarial Mindset

Shift of Paradigm



Civil Justice Reform

The Court Connected Mediation

- ✔ **Petition for Voluntary Winding Up**
- ✔ **Lands Tribunal Building Management**
- ✔ **Construction and Arbitration List**
- ✔ **Personal Injury PD 18.1 & 18.2**
- ✔ **Practice Direction 31**



Implications:
The Need for Mediation Advocacy

Civil Justice Reform

Case Laws in Hong Kong

Implications

- Explore settlement and mediation
- Advise clients about mediation
- Advise clients as to the cost sanctions



Housing Managers as Mediation Advocate

- ◆ **To Advise**
- ◆ **To Prepare**
- ◆ **To Negotiate**
- ◆ **To Guide**



- ☞ Keep clients' awareness of his prospects if the case goes to court
- ☞ Assisting clients to make informed decision during negotiation
- ☞ Being a mediation advocate in case of mediation
- ☞ Assist clients to negotiate in an interest-based manner

Housing Managers as Mediation Advocate

- ☞ Let the other side see the consequences of confrontation
- ☞ Make the other side willing to resolve problem
- ☞ Make the other side willing to talk and negotiate
- ☞ Invite the parties to meet
- ☞ Let the parties share, listen and explore the possibility and feasibility of solving problem
- ☞ Prepared to explore interests on both sides to generate various options to “make the pie larger”

Engage a Mediator
You can borrow the power of a Mediator
to achieve these objectives too

What is Mediation?

- ☞ Mediation is a **non-adversarial, co-cooperative,**
- ☞ **Confidential and without prejudice** decision-making process
- ☞ in which a **qualified** and **impartial** third party, “the mediator”
- ☞ **facilitates** parties resolve their disputes.
- ☞ The mediator has **no advisory or determinative role** in regard to the content of the dispute or the outcome of its resolution,
- ☞ but may **advise on the process of mediation.**
- ☞ The parties to a dispute, with the facilitation of the mediator,
- ☞ identify the disputed **issues,**
- ☞ develop **options,**
- ☞ consider **alternatives** and
- ☞ endeavour to reach a **voluntary** settlement
- ☞ based upon sufficient information and **legal advice** for each party

Mediation Process

Pre-Mediation:

- Understanding the case
- Define issues
- explaining features and process
- Encourage communication
- Informed consent to mediate
- Signing the Agreement to Mediate
- Logistics



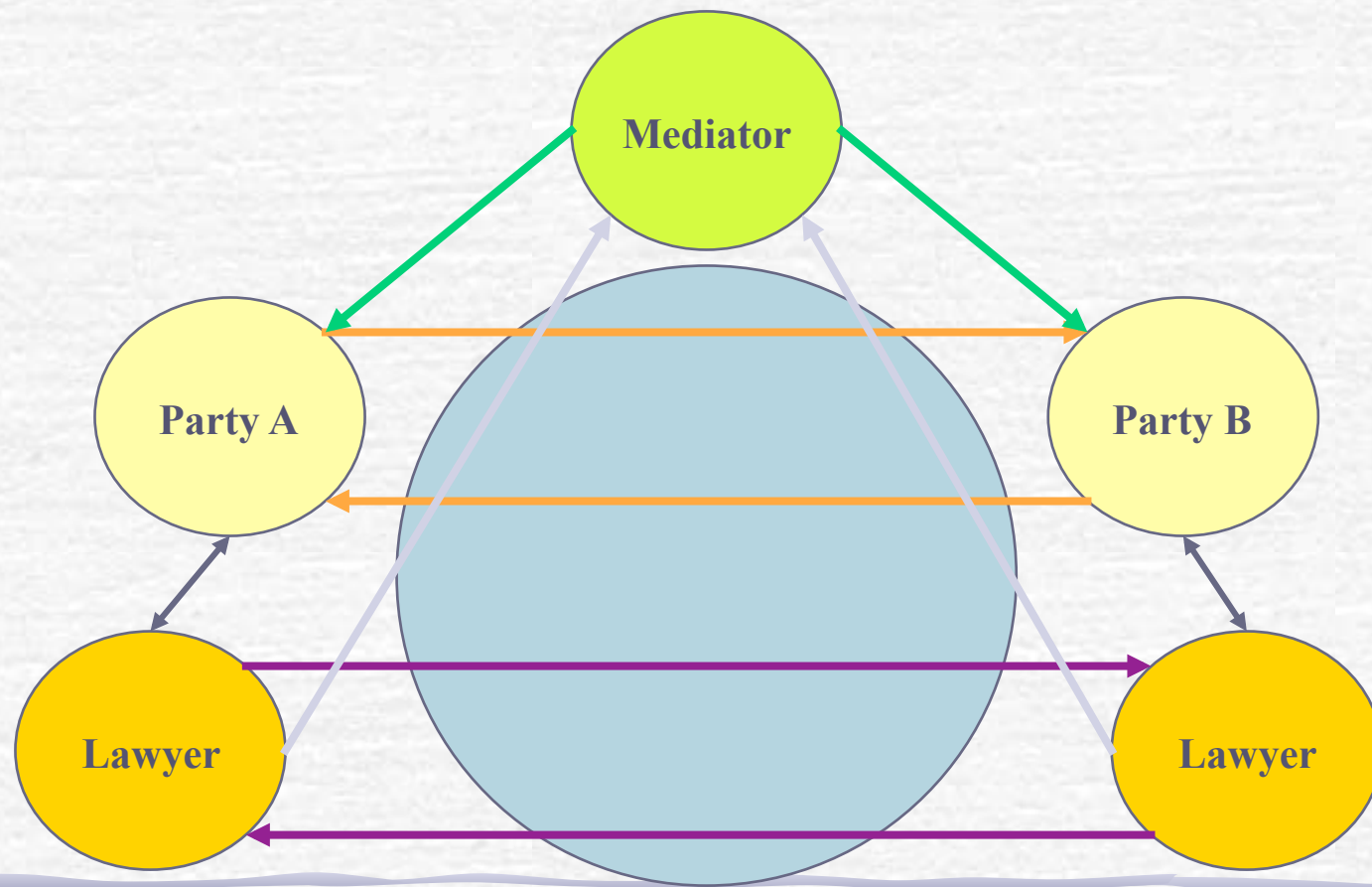
Mediation Process



Opening/ 1st Joint Session

- Mediator's Opening Statement
- Parties' Opening Statements
- Clarification
- Agenda Setting
- Prioritizing
- Discuss Concerns
- Ease Emotions
- Facilitate Direct Dialogue

Communication in Mediation



Mediation Process



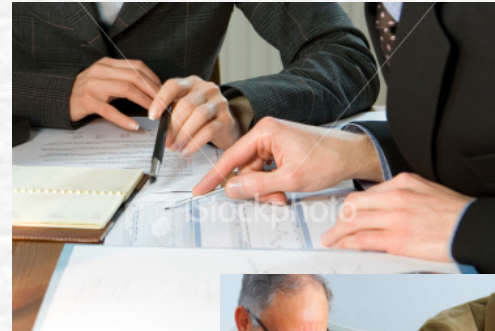
☞ Negotiation Phase

- Bargaining
- Caucusing
- Uncover Underlying Concerns
- Brainstorm Options
- Compare Alternatives

Mediation Process

• Closure

- Termination by Mediator / Parties
- Reach Settlement
 - Binding contract
 - med-arb
 - Consent order
 - About 80% settlement rate



Attendance of Mediation

Mediator, Decision Makers, Lawyers, Experts

Mediator

- framework
- mindset
- skills

Authorized Decision Makers

- negotiate
- generate options
- make decisions

Advocates

- report
- advice
- support

預防(Prevent), 解決(Resolve), 協助(Assist)

Future of Mediation in Hong Kong

- Financial Dispute Resolution Centre (“FDRC”)
 - Process Quality
 - Lehman Brothers-related Investment Products Mediation and Arbitration Scheme
 - Power imbalance between the parties
 - Confidentiality
 - Confidentiality is an overriding principle of mediation
 - Quality of Mediators and Arbitrators
 - Build public confidence and maintain credibility in FDRC



- End -

Question and Answer

