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CAN MEDIATION HELP SOLVE PROBLEMS OF AGING BUILDINGS IN HONG KONG

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Abstract
This article outlines the effect of using mediation as an alternative to conventional dispute resolution processes, namely negotiation and litigation, in resolving building management disputes, especially in aging buildings. The Author illustrates how mediation resolved the problems during the high-profile public dispute – The Albert House Case, in an attempt to give readers further insight on using mediation to build consensus among owners in managing daily issues outside the scope of litigation.
Keywords : Mediation, Albert House, Aging Buildings

1. Introduction

Recently, Hong Kong has experienced a number of fallen window accidents from private buildings causing bodily injury to 3rd parties. These incidents along with the resulting media coverage of conflicts amongst owners on renovation have aroused public concern over problems with aged buildings. Improper building management of old buildings not only jeopardizes the safety and welfare of the public, but also degrades property values and negatively impacts the overall city image.

These circumstances have necessitated an examination into the everyday problems facing old buildings in our city. After experiencing a real case study, I would like to share with you my views on the loopholes of current legislation with the aim of resolving building management disputes as well as providing insight into how Mediation can complement conventional dispute resolution processes, namely, negotiation and litigation.

Mediation is a constructive and amicable dispute resolution process to settle disputes among owners and/or members of Owner's Corporations. To provide a recent and welldocumented illustration of the value of Mediation, I put Mediation into practice and applied its principles to resolve the contentious Albert House case.

2. The Albert House Case

Albert House, built in 1973, is a composite building comprising 88 residential flats and 10 commercial units in Aberdeen. The second and third floors were designed for commercial purposes, i.e. in this case a restaurant. From the fourth floor upwards are the residential units. Most of the residents are low-income, elderly, retired fishermen. Albert House is divided into a total of 137 "undivided" shares, of which a major owner, the Aberdeen Winner Investment Limited (AWI), owns 36 shares and the balance 101 shares are owned by 88 individual residential unit owners as well as a few corporate owners.

A tragedy, unfortunately, took place in August 1994. A fish tank and a 15-tonne canopy on the second floor collapsed during a demolition project. The accident resulted in 1 fatality and injuries sustained by 13 others. The victims and family of the deceased filed a lawsuit seeking compensation. In 1999, the High Court ordered the six responsible parties, jointly and severally, to pay HK$33 million to the victims in the contribution as shown in Table 1:

Table 1: Contribution made by each responsible party in the Albert House Case

Party	*%*	*Damage*
(1) Restaurant owner &	*50%*	*HK$*
(2) License holder		*16,500,000*
(3) Rest. Landlord (AWI)	*15%*	*4,950,000*
(4) Incorporated Owners Association(IO)	*15%*	*4,950,000*
(5) Management Company	*15%*	*4,950,000*
(6) Construction Contractor	*5%*	*1,650,000*
	Total	*HK$ 33,000,000*

After AWI and IO had paid their respective shares of the compensation (~HK$5 million) to the victims, the other responsible parties claimed bankruptcy. Since there were joint and several liabilities, AWI and IO became liable for the remaining balance to the victims.

Appeals were filed by AWI and IO to object to the assumption of the bankrupt parties'liabilities. Their efforts were in vain and AWI paid ~HK$50 million in compensation and costs but later sued against the IO for HK$25 million for its share of the liability.

IO refused to pay and a series of lawsuits commenced between AWI and IO. Lawsuits were no longer limited to the outstanding sum, but had extended to the submission of IO's accounting book records and numerous management issues. More than 10 court actions were taken between these two parties. These proceedings lasted until 8 November 2004, when the Court ordered the IO to wind up.

What are the consequences of winding up an Incorporated Owners? Will the IO's liabilities vanish with the winding up order? The outcome was just the opposite.

CAP 344 Building Management Ordinance Section 33 Part VI (1), provides as follows:
"A corporation may be wound up under the provisions of Part X of the Companies Ordinance (Cap 32) as if it were an unregistered company within the meaning of that Ordinance and the provisions of that Ordinance relating to the winding up of an unregistered company shall, in so far as they are applicable, apply to the winding up of a corporation."

And according to Part X of Cap 32, all members of the "unregistered company" are responsible for its liability. Section 34 of the Building Management Ordinance also provides that,
"In the winding up of a corporation under section 33, the owners shall be liable, both jointly and severally, to contribute, according to their respective shares, to the assets of the corporation to an amount sufficient to discharge its debts and liabilities"

Simply speaking, individual owners and their properties were at stake. In addition to liquidating the IO's assets for repayment, the creditor maintained the right to seek repayment from individual owner(s). Flat owners faced the risk of being evicted from their unit if they could not satisfy the creditor's claim.

What compounded the problem was that even if individual owners agreed to pay, risks still remained as it is provided in Cap. 377 Civil Liability (Contribution) Ordinance, Section 3(1), that "*... any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).*"

In other words, any owner that paid its share to the creditor could seek contribution from other owners through legal actions. A resulting chain of legal actions would occur with more than 80 owners in the building. It is inconceivable to imagine the scope of the litigation that would have commenced.

Moreover, if individual flats were to be auctioned, the fairness of the Court's selection criteria would be questioned. If the whole block was to be auctioned, court order to evict the owners would be viewed as a harsh and unfair outcome.

The owners of the Albert House were stunned that the public liability of a multi-storey building, in fact, was an individual obligation. About 80 angry flat owners marched to the Legco and called for public support. Those owners had paid in full their appropriate share of the damages. They could not find reason to, in addition, pay for those insolvent parties. They even refused to borrow any loan for an unreasonable burden imposed on them by law.

Though public opinion was very sympathetic to the owners' predicament, the owners nonetheless had to bear their legal liabilities. The Government faced a hard decision whether to intervene in this civil dispute. If the case could not be resolved, hundreds of low-income, poorly educated people could very well become homeless. Owing to the contentiousness of this case, Hong Kong would surely face a degree of social instability.

Whilst all the stakeholders of the dispute at that time felt desperate, anxious, helpless and confused by various issues ahead of them, Mediators stepped in to help restructure the entire dispute resolution process.

With the assistance of the HAD, Mediators intervened to research pertinent information to help bring the case to closure. Interviews were arranged and the mediators' neutral and independent roles were explained to the parties. The Mediators took care to consider the human factor, helped to clarify the issues in the disputes and uncovered the needs underlying the owners' oppositions.

What are the issues in dispute? It seemed a simple question, but, at that moment, even the stakeholders were confused by the chaotic situation. The issues were too complex and the stakeholders were overcome with emotion.

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Firstly, some residents were both willing to meet the court order and had no financial difficulties but still were skeptical to pay due to the "Cap 377" obligations explained earlier. Secondly, even though some residents were willing to repay the creditor, they lacked the cash on hand to make prompt payment.

Thirdly, a number of owners were retirees, even though they managed to secure a loan to meet their liability, they lacked the income to repay the loan. Finally, the ambiguity of the Ordinance as well as the undue burden it placed on the individual owner required amendment. However, the Albert House owners were not in a financial position to appeal the issue in court after years of payments to cover the lawsuit's costs.

Clarification of these issues was critical to moving the case forward. Mediation allowed the owner's a voice and offered a means to resolve this challenging case. One of the key reasons for the success of Mediation to resolve the dispute was that it facilitated problem solving through options-generation.

Upon the offer by the Hong Kong Housing Society, every individual owner of residential unit of Albert House was able to borrow funds. Loans were divided into 4 categories, (a) One year interest free loan (b) Five year loan (c) Special loan and (d) Three year loan. Special terms, in each category, were designed according to the specific needs of different owner groups. The lengthy legal proceeding was thus avoided and the case finally came to an end.

Despite the previous court actions spanning over a decade in duration and the strong emotions involved, the owners and AWI started to work together on building management issues of the Albert House. As a conciliatory gesture, AWI also agreed that each owner would only need to pay HK$3,888 for the costs not covered by the loan of HKHS. The amicable outcome of this case demonstrates the beauty of mediation whereby the parties' relationship can be restored.

3. Mediation as an Alternative to Resolve Problems of Aging Buildings

The Albert House Case is a precedent case in Hong Kong. Cases of similar nature can be reasonably anticipated due to aging buildings. To name a few, the Yuet Wah Mansion of Kwun Tong, No. 6-8 Lime Street and No. 56-62 Larch Street of Tai Kok Tsui, Church Lane Cluster of Shau Kei Wan.

In these buildings, unauthorized structures, falling windows, obstruction to repairs, reluctant owners to form OC, problematic DMCs, owners' ignorance to monitor renovation projects, potential corruption, owner's incompetence to supervise their management companies, conflicts among owner groups and differing opinions as to redevelopment all contribute to building management disputes, criminal offences, bodily injuries and even fatal accidents.

We must understand that these things occur regularly in the context of building management. As legislation is a time-consuming process, an alternative must be considered. It is impossible for the law to cover every single aspect of daily life. People cannot rely on the law alone to solve every single problem. They need to be more cooperative and competent and have more empathy for others.

In situations that call for cooperation amongst owners, Mediation should be considered as a viable option for consensus-building. As we have seen with Albert House, Mediation helps to diagnose problems, manage differences between groups, and can help foster good working relationships among parties.

Furthermore, it is advantageous to develop mediation as an alternative method of dispute resolution. Successful and effective mediation not only results in the saving of expensive legal costs, but provides considerable social utility in creating a more harmonious community.

In fact, the role of mediator in building management disputes is not that of a judge. The mediator is neutral and independent. He/she does not represent any party. He/she is there to facilitate the parties to reach a voluntary settlement. A party will not accept a solution if it hurts his interests. Thus, a Mediated Settlement is said to be a "mutual gain".

4. Conclusion

With Hong Kong's demographic changes and the ageing of its buildings, the government must be pro-active. Standards and guidance as well as consultations on a proposed mandatory building inspection scheme should be put in place. Additionally, amendments on legislation should be considered as a long-term strategy to promote the improvement of building management and maintenance. It is in fact a task which requires the continuous and combined efforts from all concerned parties. Moreover, the Judiciary should encourage parties to building management disputes to make attempts to resolve their differences through an alternative dispute mechanism, particularly, mediation. Last but not the least, strengthening the awareness and the mediation techniques of frontline housing practitioners will definitely help support both the physical and psychological well-being of the owners.

「專業調解」在建築物管理上的應用

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「衣、食、住、行」乃生活基本需要。在香港，因「住」而引發的糾紛尤其繁多。住戶、業主、法團、管業公司之間的矛盾衝突若處理不善，會招致金錢上的重大損失，1994年「添喜大廈塌簷蓬」事件便是一例。這些年來，筆者積極推動以調解解決物業管理糾紛，雖然土地審裁處的調解計劃已落實成為永久計劃，但筆者認為調解始終未獲業界及業主的廣泛接受。原因有二：

概念混淆　協商調停誤作調解

筆者多個月前聽另一位調解員說起他的經歷。該調解員在報章看到平等機會委員會(平機會)代表一位傷殘業主向某大廈提出訴訟後，便連同另外兩位調解員一同約見該大廈的法團委員，希望藉由會面解釋調解程序。豈料見面之初，法團主席即表明已知調解是什麼。調解員不疑有他，便向各委員了解案情，可是見面的氣氛很不友善。調解員以為這是因雙方初次見面的原故，但其後越說越覺出奇，法團主席竟謂調解員是「平機會的人」。至此調解員終於明白，原來對方一直認為調解員是平機會派來的。理由是平機會曾向法團表示，會代表業主和法團「調解」，引起這場誤會。

很多物業經理告訴筆者：「我經常都在調解。」我回答說：「是嗎？你是那一間機構認可的？用什麼調解規則？爭議者都簽署同意調解協議書保障保密權嗎？」那些物業經理一臉茫然，不知如何回答，因為他們並不了解調解程序，把調解與一般「排解糾紛」或「商討和解」混淆一起。還有一次一名法團委員告訴我調解沒有用處。我問他為何這樣說，他告訴我他曾向消費者權益機構投訴管業公司，經「調解」後被指理據不足，管理公司拒絕和解，與原先的期望背道而馳。其實該機構採用的是「調停」程序 (conciliation)，有法定的權力和方式處理消費者投訴，亦有是不能和調解混為一談。

對調解缺乏認知並沒有什麼可責怪的，畢竟在民事司法改革實行以前，認真對待調解的人寥寥無幾。但對調解一知半解卻自以為無所不知，繼而混淆概念，任由被扭曲的觀念以訛傳訛，不但剝削用家了解和使用調解的機會，更阻礙他們為調解會議作適切的準備，影響成功率。長遠而言，讓不良的印象累積，對整體調解的發展構成威脅。因此筆者認為有必要從基本開始，讓業界重新認識調解的工作定義，釐清調解與「調停」的分別，和在建築物管理糾紛中使用調解的困難。

為了避免語文運用上的混淆，筆者選用「專業調解」一詞，與中文「排解紛爭」等義的「調解」區別開

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來。「專業調解」的概念源自西方，是由中立及獨立第三者(專業調解員)主持的保密會議。專業調解員在過程中協助參與者界定要處理的事項，制定議題，促進參與者互相了解對方的需要，協助他們跨過原有的既定立場，構思不同方案，最後以客觀標準選擇方案，再與最佳替代方案 (BATNA，即專業調解之外的最佳「後著」)比較，讓雙方達至「知情協議」(Informed Consent)，並由專業調解員把協議記錄、各方簽署作實。

專業調解員不會代表任何一方作出決定、裁決對錯或提供專家意見。相反，他們透過「主動聆聽」和「發問」，了解參與者需要，釐定清晰目標。若會議中參與者的情緒高漲，專業調解員會以專門的技巧疏導情緒，先對人、後對事，兩者兼而顧之。若有需要，專業調解員會分開面見參與者，在保密的情況下進一步探討雙方的困難和解決方法。由於調解會議的內容和所披露的文件不能呈堂，因此在調解會議開始前，調解各方必須簽署同意調解協議書以保障雙方。此外，專業調解員還需要確定參與者的權限，確保一旦達成協議，雙方均有權簽署協議書，落實協議的法律效力。

一些機構如申訴專員公署、消費者委員會、平機會和勞工處均會由機構職員為合適個案進行「調停」(conciliation)。用者需要注意的是這些部門同時需要執行法律賦予的職責，並需按法例提供意見或和解建議，就故此並非完全中立和獨立，與專業調解在性質上有明顯分別。專業調解不但適用於解決糾紛，也可用於交易買賣、地方規劃、制定政策和管理屋苑事務。

調解員會協助：

訂立公平及客觀的程序；

商討及確定受爭議的事項；

探索各方實際需要和權益所在；

擴大和解方案的選擇範圍，並評估各方案的可行性；

發掘各方共同關注的利益方案；

共建客觀的標準，實行方案；

議訂詳細的和解協議，就每項爭議列出各方所同意的解決方案。

意識薄弱 解決糾紛欠缺策略

除了對專業調解認知不足外，調解未被業界廣泛接受的另一原因，與香港密集式多層建築建築物息息相關。在這種高密度居住環境下發生的糾紛，涉及眾多爭議者，意見難以統一。每一宗很少的問題，如漏水、冷氣機滴水、噪音等，都能成為關係不和的源頭。當人際關係不和，再遇到大廈管理上的意見分歧，如大廈管理費及維修費用的攤分、管理委員會的委任等事情，業主之間會變針鋒相對。物業管理公司在處理這些情況，有時一下子便處理糾紛的實際內容，忽略了潛藏的人際衝突，便會不得要領。

筆者在《調解》一書中看到一則故事[1]。該書作者在一次研討會後，被管業公司的高層問及一個棘手問題：兩名業主，A君住樓上，B君住樓下。某天A君投訴B君的一部分體式冷氣機的散熱器發出很大的噪音，對他構成滋擾，要求物業管理公司執行職務，拆除該發熱器。管理公司經查察後，證實B君沒有違反大廈公契，管理公司無權清拆。可是A君並不罷休，令管理公司陷於兩難境況。作者聽了個案後，沒有追問案件的細節和爭拗內容，反而問管理公司高層A君和B君之間有沒有什麼過節。這才發現雙方的積怨，是由A君作為前任法團主席開始。他們的過節在此不贅，筆者只希望帶出一點，就是處理糾紛時若對制定全盤策略的意識薄弱，只著眼於表面情況和爭拗內容，沒有嘗試了解根源，即使能解決當下問題，但人事關係未能化解，之後又會冒出其他紛爭，沒完沒了。

當衝突持續升級，到了訴訟的地步，人際關係已難以復和，爭議者參加調解的機會便大為降低。即使參與調解，亦難以要求雙方以合作的態度解決問題。訴訟產生的另一問題，便是律師往往把問題化作法律上的爭議，在狹窄的法律定義中爭拗，對解決人際衝突毫無幫助。訴訟者只能從「贏得官司，讓對方得到教訓」來洩心頭之氣。業主、法團甚至管業公司在這種訴訟文化熏陶下，在分析問題時的第一個反應，往往是分析「誰對誰錯」。當認為錯不在己，便單純地固守立場。專業調解員的核心訓練和日常工作，就是要擺脫這種思考模式。要了解人及其背後的真正需要，從而制定對事亦對人的協調程序，儘量擴大可商討和達成協議的範圍，此為之「關注式協商」的精神，專業調解的基石，是需要長期歷練才能握其精要。

慎密的爭議解決策略並非單靠專業調解解決所有問題。事實上世界各地的經驗顯示，若任何一方不願參與調解，便需要訴訟機制互補使用，才能雙得益彰。另外，一些涉及工程或技術上的問題，像樓上樓下的漏水問題，爭議各方亦可共同聘請一名專家提供「專家裁斷」服務，找出問題的根源及建議解決的方法；若爭議者希望同時獲得具有約束力的裁決和將事件保密的優點，可透過「仲裁」方式，將案件交由仲裁員而非法庭審理並作出裁決。仲裁裁決書的地位類似法庭的判決並可強制執行，並在極例外的情況下方可提出反對。若爭議涉及一些合約與公契的釋義，爭議各方可在調解開始後協商共同聘請一名訟務律師提供「中立評核」服務，就個案的法律觀點作出非約束性的裁斷，給爭議者作為調解談判的參考[2]。

解決糾紛的機制是多樣化的。爭議各方可按建築物管理的爭議情況和需要選用不同的服務組合，即「專業調解」與「中立評核」、「專家裁斷」及「仲裁」混合使用。這樣，既享有自主決定和解方案(專業調解)的優點，又有由法庭執行裁決(仲裁)的保障，將會是處理建築物管理爭議的理想方向。管業經理在遇到複雜的個案時，在得到上級的許可下，亦可與專業調解員商討應付策略，免得錯過了調解的時機和徹底解決問題的機會。

[1]資料來源：《調解：談判突破困局》 鄭會圻著
[2]資料來源：《調解手冊》 陳慶生編