Globalization and Financial Dispute Resolution: A View from Hong Kong

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Recent financial dislocation indicates that in many respects the world’s financial markets are increasingly operating as a single integrated whole. Both the economic fallout of the financial crisis as well as the global response reflects the significant degree of interchange characterizing cross-border exchange. Hong Kong like many global financial centers was directly impacted by the financial crisis, and responded with its own unique regulatory mix that drew on global experience. Part one of this paper examines the theoretical perspectives on the impact of globalization on international legal practice. Part Two provides a global review of financial dispute resolution programs. Part Three examines Hong Kong’s response to the financial crisis and how it has demonstrated the patterns of both convergence and informed divergence in its selected financial reforms.

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Introduction: A Financial Crisis with Global Proportions

Beginning in early 2007, the indicators of what would soon become the most severe financial crisis since the Great Depression in the 1930’s, became increasingly evident. In the summer of 2007, investment banks such as Bear Stearns and BNP Paribas warned investors that they would be unable to retrieve money invested in sub-prime mortgages hedge funds. Later in September, there was a bank run on Northern Rock - the biggest run on a British bank for more than a century. By 2008, Northern Rock was nationalized. Banks such as the Union Bank of Switzerland (“UBS”), Merrill Lynch and Citigroup also started announcing losses due to heavy investments in sub-prime mortgages. In response to the growing crisis, central banks in Europe, Canada, the United Kingdom, the United States and Japan intervened to boost liquidity in the financial markets by reducing interest rates as well as increasing monetary supply.¹

In 2008, Bear Stearns was acquired by JP Morgan Chase for less than 10% of its market value². Other banks such as UBS, the Royal Bank of Scotland (“RBS”) and Barclays also announced the issuance of shares in an attempt to raise capital. To prevent a collapse of the United States housing market, financial authorities in the United States stepped in with one of the largest bailouts in history of Fannie Mae and Freddie Mac. On 15 September, Lehman Brothers filed for bankruptcy. Immediately ripple effects were felt throughout the world. Countries successively announced details of rescue packages

for individual banks as well as the banking system as a whole and emergency interest
rates were further cut. The United States initiated a US$700 billion dollar Troubled Asset
Relief Programme to rescue the financial sector and the Fed also injected a further
US$800 billion dollars into the economy to stabilize the system and encourage lending. It
also extended insurance to money market accounts via a temporary guarantee.³ By early
2009, the United Kingdom, the European Union and the United States officially slipped
into recession.

Governments across the world implemented economic stimulus packages and
promised to guarantee loans. For example, in the United States, a $787 billion dollar
economic stimulus plan was passed. The International Monetary Fund (“IMF”) estimated
that banks in total lost $2.8 trillion from toxic assets and bad loans between 2007-2010.⁴
There was also a severe decline in assets as stock indices worldwide fell along with
housing prices in the United States and the United Kingdom⁵.

The global reach of the financial crisis calls for renewed investigation on the
impact of globalization on international legal practice. Part one of this paper examines
the theoretical perspectives on the impact of globalization on international legal practice.
Part Two provides a global review of financial dispute resolution programs. Part Three

<http://online.wsj.com/article/SB122186683086958875.html?mod=article-outset-box>
⁴ Cutler, David, Steve Slater, and Elinor Comlay. “U.S., European Bank Writedowns, Credit
examines Hong Kong’s response to the financial crisis and how it has demonstrated the patterns of both convergence and informed divergence in its selected financial reforms.
Part 1: Theoretical Perspectives on the Impact of Globalization on International Legal Practice

Rapid transformations at the global level in the last two decades have challenged the nature of international legal practice. In exploring the impact of globalization on international legal practice, two forces – principally those of “harmonization” and “legal diversity” provide a helpful lens to observe the dynamic nature of financial governance in the context of diverse societies. Anne Marie Slaughter, in her book A New World Order, describes how legal networks such as those associated with international legal practice have proliferated in recent years. She describes how these networks offer “a flexible and relatively fast way to conduct the business of global governance, coordinating and even harmonizing national government action while initiating and monitoring different solutions to global problems.” On the one hand, these networks promote “convergence,” while on the other hand they also allow for “informed divergence.” Such interactions are founded on the basis of what she calls the foundational norm of “global deliberative equality.” She cites Michael Ignatieff, who derives this concept from the basic moral precept that “our species is one, and each of the individuals who compose it is entitled to equal moral consideration.”

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6 See generally, Ali, Shahla, Resolving Disputes in the Asia Pacific Region: International Arbitration and Mediation in East Asia and the West, October 2010 (Routledge).
7 See generally: Ali, Shahla, “Approaching the Global Arbitration Table: Comparing Advantages of Arbitration as Seen by Practitioners in East Asia and the West” (Review of Litigation, 2009)
10 Ibid.
11 Ibid.
12 Ibid, p. 245
In promoting convergence, such legal networks “bring together regulators, judges, or legislators to exchange information and to collect and distill best practices.”  
Specifically, international legal practitioners around the world are “coming together in various ways that are achieving many of the goals of a formal global legal system: the cross-fertilization of legal cultures in general and solutions to specific legal problems in particular; the strengthening of a set of universal norms regarding judicial independence and the rule of law (however broadly defined).” Such “harmonization networks” Slaughter argues, “exist primarily to create compliance.” Interestingly, “however, those who would export—not only regulators, but also judges—may also find themselves importing regulatory styles and techniques, as they learn from those they train. Those who are purportedly on the receiving end may also choose to continue to diverge from the model being purveyed, but do so self-consciously, with an appreciation of their own reasons.”

This leads to the second process at work which is “legitimate difference.” This principle allows for diversity within certain boundaries. In describing this principle, Slaughter cites Justice Cardozo:

We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. The courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate

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13 Ibid, p. 19
14 Ibid, p. 102
15 Ibid, p. 172
some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.\textsuperscript{16}

This principle of legitimate difference is limited when such solutions or approaches come in conflict with fundamental principles or values. In the case of the United States, this is true when a law violates the Constitution itself.\textsuperscript{17}

With the increasing integration of global markets, countries can increasingly look to one another for experience, and learning regarding the application of diverse financial regulatory interventions and policies. With developments in information technology and regional and global integration of trade, the parameters of business activity are becoming more global.

Building on the overarching framework of “harmonization” and legal diversity, existing themes within scholarship on legal pluralism and legal transplant and the internationalization of law shed further light on the interrelation of these two forces. These schools of thought are examined in order to understand their contributions as well as gaps, suggesting areas for further research.

\textsuperscript{16} Ibid, p. 247
\textsuperscript{17} Ibid, p. 248
Legal Pluralism and Internationalization of Legal Practice Literature

Addressing the conceptual challenges brought about by globalization, legal pluralism scholars beginning in the 20th century embarked on an effort to describe the diverse contexts “in which two or more legal systems coexist in the same social field.” Research focused largely on the interaction between European forms of law and indigenous legal systems of Africa, Asia, and the Pacific. Legal pluralism advanced the idea of the “semi-autonomous social field” which captures the porosity of the social and normative contexts of legal orders. These are fields that are not confined to national boundaries, but rather recognize that local, national, transnational, regional, and global orders can all overlap and apply to the same condition or situation.

Legal pluralism has contributed to a greater understanding of both the normative and descriptive complexities of multiple legal systems interacting in a global environment. Its descriptive contribution calls attention to the “coexistence and interaction of different forms and sources of law within a more or less unified legal order” and draws focus to the notion that legislatures and courts are only two among the

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18 See generally, Ali, Shahla, Resolving Disputes in the Asia Pacific Region: International Arbitration and Mediation in East Asia and the West, October 2010 (Routledge).
diverse forms of legal order that regulate people’s lives. It’s normative import lies in the importance it places on institutions that are close to the people. These institutions are said to have a prima facie claim to respect, forbearance, and support because “they are valued as extensions of personhood, as settings within which social participation is most direct and most effective.”

While important insights have been drawn from the legal pluralism literature, the difficulties scholars have recognized regarding legal pluralism include conceptual as well as theoretical problems. Among these challenges, Twining observes, are conceptual problems associated with drawing distinctions between legal and non-legal phenomena and between legal orders, systems, traditions, and cultures. In addition, many normative orders do not have discrete boundaries and tend to be dynamic rather than static. Many scholars within the field have observed that, as yet, legal pluralism has failed to move beyond a descriptive model to a dynamic theory. Important questions such as what accounts for change within a legal system, how the direction of change can be examined, or the principles by which norm identification and selection occurs remain largely unanswered. This is true both at the domestic and international levels as multiple domestic legal systems increasingly operate within global legal institutions. Twining notes that the main difficulties of legal pluralism are likely not conceptual or semantic,

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24 Id.
26 Id.
but rather lie in the “sheer complexity and elusiveness of the phenomena themselves.”

These are inherent challenges that researches examining the impact of globalization on law will have to deal with.

Following efforts made by scholars of legal pluralism, individuals within an emerging field examining the internationalization of the practice of law have begun to explore questions such as the impact of globalization on the legal profession, the changing landscape of the international practice of law in various countries, and the impact of globalization on international dispute-resolution mechanisms. This literature provides a helpful grounding in emerging questions of global dispute-resolution procedure, the dynamics of global enforcement of international agreements, and the mechanisms that are best suited to resolving particular types of business disputes. For example, John Braithwaite and Peter Drahos, in their book *Global Business Regulation*, investigate global business regulation through examining underlying principles that constitute the global context. Such principles are not exclusively legal principles, but rather emerge from the values and practices of a given community of actors. Through this lens, Drahos and Braithwaite examine how the regulation of business has shifted from national to global institutions in the areas of contract, intellectual property, and corporations law and the role played by global institutions as well as various NGOs and significant individuals. Braithwaite and Drahos’ contribution to the study of private

27 Id.
30 Id.
global business regulation offers a helpful framework for examining the development of private international regulation and corresponding implementation at the local level.

As yet, however, both the legal pluralism literature as well as the internationalization of law literature have failed to address the nature of the interaction between globalization on the one hand and diversity of normative systems regarding the purpose and methods of dispute resolution on the other, and how such differing norms are reconciled in the international context.

Recent socio-legal work by Terrence Halliday and Bruce Carruthers (2007) regarding the recursivity of law in global norm making and national lawmaking has made an important contribution to examining the dynamic mechanisms by which global norms interact with national law making processes in the corporate insolvency regime.\textsuperscript{31}

The importance of a theoretical approach that can both extend its analysis globally while focusing on the diversity of norms that underlie transnational interaction has been identified by scholars such as William Twining and Philip Selznick. Twining, in his article “Have Concepts, will travel: analytical jurisprudence in a global context,” argues that analytical jurisprudence should “broaden its focus not only geographically, but also in respect of the range of concepts, conceptual frameworks, and discourses it

He notes that as the discipline of law becomes more cosmopolitan, it needs to be underpinned by theorizing that treats generalizations across legal families, traditions, cultures, and orders as problematic. In addition to a broadening outward, an examination inward of those underlying norms that guide dispute-resolution processes has been called for by scholars such as Philip Selznick. In his book *The Moral Commonwealth*, he notes that the reconciliation of notions of particularity with universal values is the primary challenge of theoretical scholarship and policy. He observes that the capacity of law to deliver justice depends on the range of interests it recognizes and protects. The challenge at present, therefore, is to examine how emerging global legal norms respond to national diversity while crossing international borders.

**Legal Transplant Literature**

The question of transporting legal and regulatory systems in multiple cultural and political contexts raises a number of questions addressed in the legal transplant literature. Scholars in anthropology, sociology, political science, and law have all contributed to this area of inquiry.

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Within the field of anthropology, Richard Abel and Laura Nader have examined how differing societies may have affinities toward different processes of dispute-resolution.\textsuperscript{35} This literature highlights the extent to which litigation is employed in Western cultures, in contrast to the emphasis in traditional Latin American, Asian, and African societies on conciliation, mediation, and customary arbitration.\textsuperscript{36}

From a sociological perspective, Lawrence Friedman traces the impact of legal culture, defined as “the ideas values, knowledge, behavior and attitudes and opinions people in each society hold with regard to their laws and legal systems,” on the development of law. He argues that legal development failures can be attributed to the wholesale export of Western laws and traditions without consideration of the context into which these laws are being introduced.\textsuperscript{37}

The legal transplant and globalization literature has contributed to a fuller awareness of the dynamics involved in the exchange of legal systems from one region to another. However, as yet, the examination of how multiple legal cultures simultaneously

\textsuperscript{35} Customary arbitration is a process of dispute-resolution in which parties agree to submit their dispute to a family head or elder in the community and agree to be bound by that decision.


\textsuperscript{37} Friedman, Lawrence M. (1969) "Legal Culture and Social Development," 4 Law and Society Rev. 29. A number of scholars have examined the reception of foreign laws at the domestic level in multiple-country contexts. Masaji Chiba examines how six Asian cultures interact with the introduction of Western laws. (See: Chiba, Masaji Ed., (1986) Asian Indigenous Law: An Interaction with Received Law, London: Kegan Paul). He notes that the reception of such laws first occurs at the highest levels of government where official laws are sanctioned by the government. This sanctioning in turn gradually influences those unofficial laws sanctioned in practice by the general population, and finally legal postulates or systems connected with the official and unofficial laws.
interact, or the substantive norms according to which they interact, particularly in East Asia, has received little attention.

**ASSESSMENT OF LITERATURE IN LIGHT OF METHODS USED**

The bodies of literature described above provide some useful insights into the nature of regulatory practices in a transnational context. In particular, Slaughter's findings regarding the dynamic interaction of processes of “convergence” and “informed divergence” in the global legal sphere, Selznick’s description of the need for consideration of the dynamics of reconciliation of particularity with universal values, and the insight that legal structures themselves are a reflection of the underlying values and attitudes of members of a society are particularly helpful in framing the question of how regional diversity interacts with global values in the realm of financial regulation.

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Part Two: The Global Reach of ADR to Resolve Financial Disputes

In response to recent financial turmoil worldwide, governments have increasingly employed alternative dispute resolution mechanisms to address citizen complaints resulting from financial dislocation. The United Nations Institute for Training and Research has made special efforts to conduct research and offer training in arbitration and alternative dispute resolution, negotiation for conflict and global financial governance. In developing its own financial dispute resolution mechanisms, Hong Kong examined lessons learned from a number of countries including the United States, the United Kingdom, Australia and Singapore. What follows is an examination of financial ADR efforts in these regions.

In the United States, the use of alternative dispute resolution in the financial arena has largely been in the area of securities as well as refinancing negotiations. The Financial Industry Regulatory Authority (“FINRA”) offers investors the option to resolve disputes via mediation or arbitration of which arbitration is the more popular option. Through August 2010, 3778 arbitration cases were filed and 562 parties agreed to go to mediation. 41 FINRA deals with a variety of cases such as unauthorized trading, failure to supervise, negligence, breach of contract, misrepresentation and breach of fiduciary duty. The three most popular claims made by investors in FINRA arbitrations in 2009 were: Breach of Fiduciary Duty (2,836), Misrepresentation (2,005), Breach of Contract (1,658), Negligence (1,602) and Failure to Supervise (1,029). 42

In addition, many states have increased their focus on mediation and arbitration in foreclosure filings to cope with a growing caseload. In Florida, foreclosure filings increased 400% over 3 years thus placing an increasing burden on the limited resources of the courts. Consequently, the Florida Supreme Court created a Task Force on Residential Mortgage Foreclosures which is currently developing a proposed statewide process (particularly mediation and other forms of ADR for foreclosure cases). In February, the court also established a foreclosure mediation program. Other states such as New Mexico, Connecticut, Oregon, Rhode Island and Missouri are also considering similar legislation that will give homeowners facing foreclosure access to alternative dispute resolution options.

In Singapore, the Monetary Authority of Singapore (MAS) established a Financial Industry Dispute Resolution Centre (FIDReC). By October 2008, FIDReC reported that it had received 530 complaints regarding failed investment products linked to the United States financial crisis with 422 regarding the Lehman Brothers Minibond Program. By April 2009, the number of claims relating to Lehman Brothers had
increased to 581 with 34 claims resolved at the mediation stage, 485 pending mediation, and 42 undergoing adjudication\textsuperscript{49}.

In the United Kingdom, the Financial Ombudsman Service (FOS) which was established by Parliament as an independent public body in 2006 has also received an increase in complaints due to the recent financial turmoil.\textsuperscript{50} The FOS provides free and independent advice to consumers regarding the resolution of disputes with financial companies.\textsuperscript{51} If it decides the case has merit, it will attempt to resolve the complaint via mediation. Where informal settlements fail, the FOS may set up more detailed investigations including an ‘appeal’ to one of their panel of ombudsmen for a final decision.\textsuperscript{52} In 2008/2009 financial year, 51\% of complaints were resolved via mediation, 41\% via adjudication and only 8\% by a formal review carried out by an ombudsman.

Complaints regarding investment disputes increased by 30\% in 2008 from the previous year while disputes in unsecured loans and mortgages increased by 44\% and 11\% respectively.\textsuperscript{53}

The Australian Financial Ombudsman Service recorded a 52\% increase in disputes between January 2008 and April 2009.\textsuperscript{54} In light of the recent financial crisis, the Australian Securities and Investment Commission (“ASIC”) has revised its early dispute resolution scheme (“EDR”) and increased the upper limit of compensation to AUS$500

\textsuperscript{51} "In a Crisis." BBC. <http://www.bbc.co.uk/raw/money/in_a_crisis/noflash>
\textsuperscript{53} Ibid
000.\textsuperscript{55} It has also implemented other changes to improve consumer access such as giving EDR schemes the power to award interest in addition to compensation awards where appropriate.\textsuperscript{56}

The next section examines Hong Kong’s response to the financial crisis, drawing on global experience.

\textsuperscript{55} Ibid
\textsuperscript{56} Ibid
Part III: Hong Kong’s Response to the Financial Crisis: Demonstrating the Operations of Convergence and Informed Divergence

Shortly after the fall of Lehman Brothers, financial institutions in Hong Kong began to explore possible regulatory responses to addressing citizen complaints. The experiences of a number of overseas jurisdictions, including the United Kingdom, the United States, Australia, Singapore, the Netherlands and Germany were examined for models and ideas. Among the existing ADR models and procedures examined were disclosure requirements, supervisory measures, cooling off periods (allowing customers a right to return financial products within a certain timeframe), and dispute resolution mechanisms (including mediation, arbitration and ombuds services). Demonstrating the application of both convergence in global approach to financial disputes as well as informed divergence, a number of global models were integrated into Hong Kong’s response to the financial crisis with some distinct modifications as will be explored below.

Regulatory Convergence: Exploring the Development of a Financial Ombuds and Direct Settlement Negotiation in Hong Kong

Similar to practices developed in many regions, Hong Kong employed the use of direct settlement negotiations, mediation and arbitration to resolve commercial and financial disputes. Also, drawing on lessons learned from diverse regions, it is actively investigating the development of a financial ombuds office.

Direct Settlement Negotiation

Hong Kong investors, like many investors world wide, have largely attempted to directly approach banks for settlement negotiations. In Hong Kong, aggrieved investors of the failed Lehman “mini-bonds” for example, have the option of pursuing mediation or arbitration through the Hong Kong International Arbitration Centre (HKIAC) or direct settlement negotiations. Such alternatives to suing respective banks for misrepresentation are attractive given that in most cases, claims that exceed the $50,000 limit set by the Small Claims Tribunal are required to use lengthy and costly court proceedings. Furthermore, aggrieved investors who take their claims to court face even higher costs given the lack of class action rights or contingency fees in Hong Kong’s legal system.

Hong Kong banks have proactively identified and settled some individual cases to reduce the likelihood of successful suits against them. Unfortunately, for aggrieved investors who lack the resources to litigate or who have weaker claims, banks have generally refused negotiation. In other words, while direct settlement negotiation may be the most “cost-effective” way to seek compensation, retail banks, without external pressure and influence, are seldom willing to negotiate with investors seeking settlement.

Financial Ombudsman Service in Hong Kong

Following a review of the United Kingdom Financial Ombudsman service, Hong Kong is exploring the development of a financial ombudsman service similar to the one

60 The Standard, supra n.3
62 Ibid
Based on experience gained in other countries, regulators in Hong Kong have observed that such dispute resolution mechanisms provide low cost and useful investigatory and resolution services to customers and market participants in the financial sector.

The United Kingdom’s Financial Ombudsman Service handles disputes in the financial sector and provides free and independent dispute resolution services to consumers. Under the rules of the UK Ombuds Service, consumers retain their right to go to Court if they are not satisfied with the Ombudsman’s decision. However, if the decision is accepted, then it is binding on both the consumer and the financial institution. The Ombudsman does not have the power to punish or fine financial institutions for non-compliance with decisions. Therefore it remains the role of the Court to impose legal sanctions for any subsequent misconduct following the settlement decision. This practice is similar to the approach used in mediation. Once a mediator assists parties to formulate a legally-binding agreement, it lies with the Court to sanction parties for failure to honor the agreement.

Policy makers in Hong Kong are currently considering the creation of a similar independent financial ombuds body in Hong Kong. The aim of such an institution would

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64 See: http://www.financial-ombudsman.org.uk/
65 Ibid
66 Ibid
be to adjudicate or settle disputes related to financial matters. The recent proposal to develop a Financial Ombudsman service in Hong Kong reflects a growing need to enhance financial-system management and provide greater avenues for the use of appropriate methods of dispute resolution in Hong Kong’s dynamic financial sector. A proposal has been put forward to expand the Securities and Futures Commission (“SFC”) and the Hong Kong Monetary Authority (“HKMA”)’s scope of power in order to allow these institutions to provide compensation to aggrieved investors similar to remedies provided by an Ombuds office. The benefits of this proposal are three-fold. While it would offer an additional route of redress for future investors, it would also provide greater financial and compensatory incentives for investors to assist with SFC and HKMA investigations. Finally, this proposal would draw on the already robust investigatory and regulatory framework of the SFC and HKMA.

Informed Divergence: Unique Development of a Financial Sector Dispute Resolution Scheme in Hong Kong

While convergence in global financial ADR approaches can be seen in the increased use of direct settlement negotiations, mediation and arbitration to resolve disputes and the development of proposals for the creation of a financial ombuds office, unique developments in Hong Kong include the establishment of a dedicated financial-

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69 Ibid
70 Ibid
sector dispute resolution scheme to address consumer complaints following the collapse of Lehman Brothers.

Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme

On 31 October 2008, the Hong Kong International Arbitration Centre (HKIAC) was appointed by the HKMA to be the service provider for the Lehman Brothers-related Investment Products Disputes Mediation and Arbitration Scheme (“IPDMAS”). Under this scheme mediation and arbitration services are provided to aggrieved investors seeking financial redress from banks. With strong support and oversight by the HKMA, the SFC and the Legislative Council, the Scheme was successfully launched in October 2008. On the basis of lessons learned from this scheme, a dedicated Financial Dispute Resolution Center will be established in Hong Kong in 2012.

According to the requirements of the program, only a specified group of investors are eligible for the mediation and arbitration scheme. According to the HKMA, a qualified candidate is one that has:

1. Made a complaint to the HKMA against a bank that has sold him/her a Lehman-Brothers-related product (not exclusive of minibonds), and

2. The HKMA has completed its review of the complaint, and

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71 See: http://www.hkiac.org/documents/Mediation/News/081031_Lehman_E.pdf
72 Ibid.
3. **Either**, the HKMA has referred the complaint to the SFC for it to decide whether to take any further action, **or** a finding (of fault) against a relevant individual or executive officer has been confirmed by either the HKMA or the SFC.

   Only individuals meeting the above requirements are eligible for the HKMA sponsored mediation arrangements. For eligible disputants, the HKMA pays the relevant mediation fees and banks are required to support the Scheme.\(^{74}\) Whether a bank ultimately agrees to mediate depends on the circumstances of the case. The principle of voluntariness applies in all cases. If both parties agrees to settle, they then have the option of signing a legally-binding agreement enforceable by the Court.\(^{75}\)

   According to information provided by the HKIAC,\(^{76}\) the HKMA-sponsored mediation settlement amounts have ranged from between HK$40,000 to over HK$5 million (US$5,000 to $650,000). The parties have included 11 licensed banks in Hong Kong and individual investors. All of the mediation sessions, which have taken place within one week of the appointment of the mediators, were concluded within the time-limit provided under the rules which is not to exceed five hours. While some have questioned the short mediation duration, post-mediation interviews indicate that the parties have largely been satisfied with the usefulness of the mediation process and the professional performance of the mediators.\(^{77}\)

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\(^{74}\) Ibid

\(^{75}\) Tan, Oscar, “There’s more to mediation than talking”, *The Standard*, 22 October, 2008.


\(^{77}\) Ibid
For unsuccessful mediations, parties have the option of proceeding to binding arbitration conducted by the HKIAC. Therefore, if a bank is willing to arbitrate the matter with an investor after a failed mediation attempt, then the subsequent arbitration decision will be legally binding on both parties. However, because the arbitration process is optional, and because the sales and purchase agreements concluded between the banks and Lehman Brothers minibond holders often do not include relevant arbitration clauses, only a few banks have been willing to proceed with this option.

Several key features of the mediation scheme reflect the operation of “informed divergence” and represent a unique approach to the resolution of financial disputes. These features include the active use of a mediation “hotline,” pre-mediation briefings, and a mediation scheme office. A special hotline was set up to handle all enquiries in relation to the Scheme. The hotline was considered a vital channel for banks and investors to initiate mediation. Hotline staff members were trained in basic mediation skills and provided with adequate knowledge to discern whether mediation should be made available to the parties concerned. The success of the hotline indicates that

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79 In November 2009, more than a year since the launch of the Lehman Mediation Scheme, an interim report was conducted which indicated that a total of 334 cases were referred to the SFC by the HKMA, and around 243 cases were handled by the Scheme Mediation Office. Of the 243 cases, 85 mediations were conducted successfully while the remaining cases were settled prior to the mediation sessions. For those who actually engaged in the Mediation Scheme, the settlement rate was 85%. The Lehman Mediation Scheme was successful because of its careful consideration of the unique characteristics and needs of aggrieved investors and the incorporation of such considerations into the mediation procedures. Pre-mediation meetings were held to familiarize investors with mediation procedures. In addition, the HKMA and SFC provided strong support in gathering background information and the HKIAC provided the dispute resolution platform, all of which were critical to the success of the Scheme. (Hong Kong International Arbitration Centre. “Mediation 100% Success for Lehman Brothers-Related Investment Product Cases.” Press release. 19 Feb. 2009.)

80 Ibid
mediation schemes must not only be concerned with mediator abilities, but with pre-mediation educational processes as well.

Pre-mediation briefings were conducted with individual banks and investors during which a practicing mediator discussed the suitability of mediation with respect to a given case. Since only a maximum of five hours were allocated for each mediation, the HKIAC made use of pre-mediation sessions to allow disputants to make informed decisions about their participation in the mediation session. Since most of the investors did not have prior experience in mediation or formal negotiation, preparation meetings were conducted to familiarize them with the mediation process.

Last but not least, the HKIAC also set up a Scheme Office to collect background information from disputants regarding their goals and objectives. Banks often had concerns regarding risk management, minimizing negative publicity and strengthening client relationships, while investors often had concerns beyond immediate financial losses. With background information collected by the Scheme Office, designated mediators were equipped with a greater understanding of the underlying needs and interests of the parties involved.

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84 Ibid
Discussion

Financial institutions in Hong Kong, following the collapse of Lehman Brothers, examined the experiences of a number of overseas jurisdictions, including the United Kingdom, the United States, Australia, Singapore, the Netherlands and Germany for financial ADR models and ideas. From a review of Hong Kong’s programmatic experience, areas of convergence in global financial dispute resolution approach include the growing use of mediation and arbitration to resolve a significant number of disputes. Hong Kong, like many overseas jurisdictions, also explored the use of an ombuds service to investigate and hear complaints regarding mismanagement of financial products and services. At the same time, Hong Kong developed its own unique process of financial dispute handling through the development of a dispute resolution schemed dedicated to hearing complaints from Lehman Brothers “mini-bond” investors, a mediation hotline, formal pre-mediation briefings and a mediation information office. From an initial review, these unique developments appear to be successful and demonstrate the application of both convergence as well as informed divergence in the creation of domestic mechanisms dedicated to the resolution of financial disputes.