

General Guide to Practice Direction 31 — Mediation

I. Introduction

1.1 This pamphlet is designed to provide you with a brief outline of the Practice Direction 31 (“PD”) - Mediation - and how it applies to all civil proceedings in the Court of First Instance and the District Court which have been begun by writ*, except the proceedings set out in Appendix A.

1.2 The Civil Justice Reform (“CJR”) has come into effect since 2 April 2009 and the commencement date of the PD is 1 January 2010. An underlying objective of the Rules of the High Court and the District Court introduced by the CJR is to facilitate the settlement of disputes, before or after the commencement of a court action. If settled, the dispute will come to an end without going through a trial process. It will save time and costs.

1.3 The Court has the duty as part of active case management to further the above objective by encouraging the parties to use an alternative dispute resolution (“ADR”) procedure if the Court considers that appropriate and facilitating its use. Mediation is one of the common modes of ADR and a cost-effective means of resolving disputes.

* The proceedings include those which were begun by originating summons but were ordered to be continued as if the cause or matter had been begun by writ. See Order 28, rule 8.

You should read Rules of the High Court (or Rules of the District Court, as the case may be) and Practice Direction 31 for full details.

II. Mediation

2.1 What is Mediation?

- Mediation is a voluntary process in which a trained and impartial third person, the mediator, helps the parties in dispute to reach an amicable settlement that is responsive to their needs and acceptable to all sides.
- During the process, each party to the dispute has a chance to put forward his case and to listen to what the other side has to say. The mediator's job is not to make a decision for the parties, but to assist the parties to explore the strengths and weaknesses of their own cases and to identify possible solutions, so as to facilitate them to reach a settlement agreement. The mediator is skilled in unlocking negotiations that have become deadlocked and in keeping everyone focused on finding a solution.

2.2 When to seek mediation?

- In general, mediation can start before any litigation begins or at any stage during the process of litigation.
- This pamphlet would provide the procedure to be followed by the parties to engage in mediation after commencement of a court action.

2.3 The application of the PD

A) All parties are legally represented cases

- If you are legally represented, your solicitors shall file in Court a Mediation Certificate at the same time when the Timetabling Questionnaire is filed under Order 25, rule 1 indicating whether a party is willing to attempt mediation or not. A sample of such Mediation Certificate is in Appendix B.
- If a party ("the Applicant") wishes to attempt mediation, he should, as soon as practicable after filing a Mediation Certificate, serve a Mediation Notice on the other party or parties ("the Respondent(s)") in the dispute and file a copy with the Court. A sample of such Mediation Notice is in Appendix C.
- Upon receiving the Mediation Notice, the Respondent should respond to the Applicant by way of a Mediation Response within 14 days (or such other time as the parties may agree or as the Court may direct) and file a copy with the Court. A sample of such Mediation Response is in Appendix D.
- Parties should attempt to reach agreement on the proposals they put forward in the Mediation Notice and Mediation Response as soon as practicable. Any agreement consequent upon such discussion should be reduced into writing in a minute called Mediation Minute to be signed by the Applicant and the Respondent or their solicitors and filed with the Court.
- Where the parties are unable to reach agreement on certain terms of the proposal in the Mediation Notice and the Mediation Response, the parties may make a joint application, (or any party may apply where there is no agreement on a joint application), to the Court for directions to resolve the differences regarding the proposal.

- The Mediation Notice and Mediation Response shall be filed in Court at the time of the service of the same on the other party. The Mediation Minute shall also be filed in Court within 3 days after it has been signed by or on behalf of both parties. These documents may be taken into account by the Court on questions of costs.

B) One or more of the parties acting in person

- Where one or more parties are not legally represented, on the application of a party or on its own motion, the Court may, at a suitable stage, give directions that the parties should attempt mediation by following the procedures similar to section 2.3A) above.
- Parties may also, by consent, approach the professional bodies or an appointed mediator to seek mediation at any stage.

C) Stay of proceedings pending mediation

- The Court may, on the application of one or more of the parties or of its own motion, stay the proceedings or any part thereof for the purpose of mediation for such period and on such terms as it thinks fit, bearing in mind the importance of avoiding, so far as possible, disruption to the milestone dates* and of avoiding, save in exceptional circumstances, any postponement of the trial dates.
- Where the Court stays the proceedings, the plaintiff must promptly inform the Court if a settlement is reached and the parties should take the necessary steps to conclude the legal proceedings formally.

* Milestone dates include Case Management Conference, Pre-trial Review and Trial Date/Period. See Order 25, rule 1B(8) of the Rules of High Court or Order 25, rule 3(8) of the Rules of District Court.

2.4 Does this procedure apply to all civil proceedings?

- It applies to all civil proceedings in the Court of First Instance and the District Court which have been begun by writ, including those which were begun by originating summons but were ordered to be continued as if begun by writ, with some exceptions as mentioned in Appendix A. Where parties are engaged in arbitration proceedings, the court proceedings would be stayed and the PD would not be applicable.

2.5 What are the consequences of failure to engage in mediation?

- In exercising its discretion on costs, the Court takes into account all relevant circumstances, including any unreasonable failure of a party to engage in mediation.
- However the Court will not make any adverse costs order against a party on such ground where
 - a) the party has engaged in mediation to the minimum level of participation agreed to by the parties or as directed by the Court;
 - b) A party has a reasonable explanation for not engaging in mediation, e.g. active without prejudice settlement negotiations between the parties are progressing.
- Please note a party's application for attending mediation information session or mediation will not lead to an automatic stay of the legal proceedings.

III. Assistance you can get from Mediation Information Office of the Judiciary

3.1 The Mediation Information Office is set up to serve the parties/litigants in court and facilitate them to seek mediation from the professional bodies.

3.2 The Office holds information sessions on mediation and assists parties to approach the professional bodies for seeking mediators.

3.3 You may approach the Mediation Information Office at Room LG104, LG1 High Court, 38 Queensway, Hong Kong for further information. However, you should note that the assistance provided at the Office is confined to court-related mediation matters only and the staff there will not give legal advice or make any comments on the merits of your case.

3.4 This publication is for general reference only and should not be treated as a complete or authoritative statement of law or court practice. Whilst every effort has been made to ensure that the information provided in this pamphlet is accurate, it does not constitute legal or other professional advice. The Judiciary cannot be held responsible for the content of this publication.

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Appendix A - Proceedings to which PD 31 does not apply

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Appendix A

Proceedings to which PD 31 does not apply

- 1 Court of First Instance:
 - (a) Proceedings in the Construction and Arbitration List (See PD 6.1 Part F¹)
 - (b) Proceedings in the Personal Injuries List (See PD 18.1 paragraphs 14 and 25 to 49²)
- 2 District Court:
 - (a) Proceedings in the Personal Injuries List (See PD 18.1 paragraphs 14 and 25 to 49³)
 - (b) Proceedings in the Equal Opportunities List under the Sex Discrimination Ordinance (Cap.480), Disability Discrimination Ordinance (Cap.487) and Family Status Discrimination Ordinance (Cap.527)
 - (c) Proceedings to recover tax under the Inland Revenue Ordinance (Cap.112)

¹ The relevant part of the PD in question contains relevant provisions dealing with the encouragement and facilitation of mediation.

² As above.

³ As above.

Appendix B

Sample Mediation Certificate

[Title as per proceedings]

Part I

1. Is the Plaintiff / Defendant willing to attempt mediation with a view to settling these proceedings?¹
2. If the Plaintiff / Defendant is not willing to attempt mediation, please state the reasons in this Certificate or, if thought desirable, such reasons or additional reasons should be set out in a statement signed by the party concerned or his solicitor and attached to this Certificate in a sealed envelope².

¹ If a party is willing to attempt mediation, he should issue a Mediation Notice in accordance with Practice Direction 31.

² Such a sealed statement should be marked and takes effect as a statement without prejudice save as to costs and will be inspected by the Court only if an issue arises in relation to costs. The use of such a sealed statement may be thought desirable if privileged information may be involved. The statement (so marked) should however be sent to the other parties.

Part II

I, [name], solicitor of [firm name] having conduct of the proceedings on behalf of [plaintiff / defendant] confirm as follows:

- (a) I have explained to our client the availability of mediation with a view to settling the dispute or part(s) of the dispute, and the respective costs positions of mediation as compared with the costs of the litigation.
- (b) I have explained to our client the Mediation Practice Direction.
- (c) The information set out under Part I is to the best of my knowledge and belief true and correct.

[signed by the solicitor]

Part III

I, [name], the plaintiff / defendant [if the party is a corporation or an association, describe the position of the person signing this certificate, and state the authority of the person to represent the party] in these proceedings, acknowledge that I understand the Practice Direction on Mediation and the availability of mediation to resolve the dispute instead of litigation. I further confirm the information set out under Part I is true and correct.

[signed by the party]³

³ Where the party does not understand English, the party should sign a Chinese version or there should be a signed interpretation clause.

Appendix C

Sample Mediation Notice

[Title as per proceedings]

Applicant:

Respondent:

Solicitors for the
Applicant:

Solicitors for the
Respondent:

1. The Applicant wishes to attempt mediation to resolve all [or a specified part] of its disputes with the Respondent and makes the following proposals¹.
2. If the Applicant wishes to propose the adoption of the rules of a particular body² for the proposed mediation, specify them³.
3. The Applicant proposes to appoint [name of mediator] as the mediator. The CV of [name of mediator] is attached. The estimated costs for engaging [name of mediator] are [costs in figures].
4. The Applicant proposes [name of venue] as the venue for the mediation. The estimated costs of renting the venue for the mediation are [costs in figures].

¹ An Applicant wishing to attempt mediation should make as many of the proposals referred to in paragraphs 2 to 7 as possible. If he is not in a position to make some of those proposals, he should nevertheless file the notice and then make proposals to the other party.

² For example the Mediation Rules published by the Hong Kong International Arbitration Centre in consultation with the Hong Kong Mediation Council or the Mediator's Rules and Code of Ethics of the Hong Kong Mediation Centre.

³ A mediation may be undertaken without the adoption of the rules of a particular body. If the Applicant does not wish to propose the adoption of such rules, this paragraph will not be applicable.

5. [The Applicant makes the following proposals as to payment of fees and costs for the mediation and whether the same could be recoverable as costs of the proceedings if the mediation fails.]
6. The Applicant proposes that [a specified minimum level of participation⁴] should qualify as a sufficient attempt at the mediation.
7. The Applicant proposes that the mediation should commence within [state period of time].
8. The Applicant requests / opposes an interim stay of the legal proceedings for [] days pending the mediation process.
9. The Applicant's willingness to pursue mediation is / is not conditional upon an interim stay of the legal proceedings being granted.

Dated this (day and month) of (year)

[signed by the Applicant
or his solicitor]⁵

⁴ An example of a specified minimum level of participation may be as follows: "Agreement between the parties as to the identity of the mediator and the terms of his or her appointment, agreement as to the rules applicable to the mediation (if any) and participation by the parties in the mediation up to and including at least one substantive mediation session (of a duration determined by the mediator) with the mediator".

⁵ Where the Notice is signed by a party who does not understand English, the party should sign a Chinese version or there should be a signed interpretation clause.

Appendix D

Sample Mediation Response

[Title as per proceedings]

Applicant:

Respondent:

Solicitors for the
Applicant:

Solicitors for the
Respondent:

1. The Respondent agrees / does not agree to use mediation to attempt to resolve all [or specified part] of the relevant disputes¹. [If disagrees or agrees only as to specified part of the disputes, please state the reasons in this Response or, if thought desirable, such reasons or additional reasons should be set out in a statement signed by the party concerned or his solicitor and attached to this Response in a sealed envelope².]
2. The Respondent agrees to attempt mediation in accordance with [the rules identified by the Applicant]. If the Respondent proposes the adoption of the rules of some other body, specify them³.
3. The Respondent agrees / does not agree to appoint [name of mediator] to conduct the mediation. [If he disagrees, the Respondent should identify the mediator he proposes and supply his or her CV together with an estimate of the costs of engaging [name of mediator].]

¹ A Respondent agreeing to use mediation should respond to the various proposals made by the Applicant. Further, where the Applicant who wishes to attempt mediation has not made proposals in respect of any of the matters in paragraphs 2 to 7 in the Mediation Notice, the Respondent should make as many proposals as possible in relation to these matters.

² Such a sealed statement should be marked and takes effect as a statement without prejudice save as to costs and will be inspected by the Court only if an issue arises in relation to costs. The use of such a sealed statement may be thought desirable if privileged information may be involved. The statement (so marked) should however be sent to the other parties.

³ See footnotes 2 and 3 to the Sample Mediation Notice.

4. The Respondent agrees / does not agree that the mediation should be conducted at the venue proposed by the Applicant. [If he disagrees, the Respondent should identify the alternative venue he proposes, together with an estimate of the costs of renting such venue.]
5. The Respondent agrees / does not agree on the arrangement for payment of fees and costs of the mediation as proposed by the Applicant. [If he disagrees, the Respondent should specify his position on fees and costs.]
6. The Respondent agrees / does not agree to the minimum level of participation which would qualify as a sufficient attempt at this mediation specified by the Applicant⁴. [If he disagrees, the Respondent should specify his position on minimum level of participation.]
7. The Respondent agrees / does not agree on the time for commencing the mediation proposed by the Applicant. [If he disagrees, the Respondent should state his position as to the time within which the mediation should commence.]
8. The Respondent agrees / requests / does not agree to an interim stay of the legal proceedings for [] days pending the mediation process. [Specify the Respondent's position on interim stay.]
9. The Respondent's willingness to pursue mediation is / is not conditional upon the grant of an interim stay.

Dated this (day and month) of (year)

[signed by the Respondent
or his solicitor]⁵

⁴ See footnote 4 to the Sample Mediation Notice.

⁵ See footnote 5 to the Sample Mediation Notice.