



**CONFIDENTIALITY AND PRIVILEGE IN
COURT-ANNEXED AND
COURT-BASED MEDIATIONS**

9 November 2022

**THE HON MR JUSTICE JOHNSON LAM
PERMANENT JUDGE OF THE COURT OF FINAL APPEAL**

Court-annexed mediation

- **Various schemes since establishment of Working Party on Mediation**
- **Pilot court-annexed mediation scheme at West Kowloon Mediation Centre (from 2018 to June 2022)**
 - Next to West Kowloon Law Courts
 - Targeted at litigants at Small Claims Tribunal

Court-annexed mediation

- **Proposed court-annexed mediation in simple family disputes:**
 - A duty-mediator pilot scheme at fixed fees for the Family Court
 - Mediation to be conducted at premises inside the court building

Issues of privilege and confidentiality at various levels

- **Pre-mediation consultation**
- **Communication between court staff and mediator**
- **Joint sessions – communication between mediators and parties**
- **Separate sessions – communication between mediator and each party**

Court-based mediation

- **Dispute resolution procedures in the Family Court**
 - Financial Dispute Resolution (FDR)
 - Children Dispute Resolution (CDR)

Court-based mediation

- **Mediator-assisted FDR (M-FDR)**
 - Approved *LLC v LMWA* [2019] 2 HKLRD 529
 - Steps: (1) Private mediation → (2) M-FDR inside court building (if not settled)
- **Case Settlement Conference (CSC) and Mediator-assisted CSC**

Confidentiality and privilege at common law

- **Confidentiality**
 - Sources:
 - ✓ Contract (mediation agreement)
 - ✓ Equitable obligations
 - ✓ Hong Kong Mediation Code

Confidentiality and privilege at common law

- **Exception:**
 - Disclosure necessary for the fair disposal of the case
 - ✓ *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102
 - ✓ *Chu Chung Ming v Lam Wai Dan* [2012] 4 HKLRD 897

Without prejudice privilege

- Admissibility of communications during negotiation/mediation in subsequent legal proceedings
- Justifications:
 - ✓ Public policy of encouraging settlement
 - ✓ Parties' agreement

Without prejudice privilege

- **Scope:**
 - Not limited to admissions
 - ✓ *Ofulue v Bossert* [2009] 1 AC 990
 - ✓ *Oceanbulk Shipping SA v TMT Ltd* [2011] 1 AC 662

Exceptions to without prejudice privilege

- *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436
 - ✓ Proof of concluded compromise agreement
 - ✓ Proof of vitiating factors (misrepresentation, fraud or undue influence)
 - ✓ Estoppel

Exceptions to without prejudice privilege

- *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436
 - ✓ Exclusion of evidence as cloak for perjury, blackmail or other unambiguous impropriety
 - ✓ *Calderbank* correspondence in arguments on costs
 - ✓ Conciliation privilege in family proceedings

Exceptions to without prejudice privilege

- *Oceanbulk Shipping SA v TMT Ltd* [2011] 1AC 662
 - ✓ Rectification/ construction of settlement agreement

Does the common law provide adequate protection?

- **“Mediator secrets” between mediator and a party in separate session**
 - See Briggs (2009) 159 NLJ 506; 550

Does the common law provide adequate protection?

- Ramsay J's refusal to recognize "mediation privilege" in *Farm Assist*
- Courts unlikely to accede to applications for disclosure of mediator secrets

Statutory confidentiality and privilege under the Mediation Ordinance (Cap. 620)

- **s.8: prohibition against disclosure of mediation communication, with exceptions under ss.8(2) and (3)**

Statutory confidentiality and privilege under the Mediation Ordinance (Cap. 620)

- **s.8(2): disclosure without the leave of the court**
 - ✓ Consent of parties and mediator
 - ✓ Information lawfully in public domain
 - ✓ Required by law
 - ✓ Disclosure for research, evaluation or educational purposes
 - ✓ Prevention or minimization of danger of injury to person or of serious harm to the well-being of a child

Statutory confidentiality and privilege under the Mediation Ordinance (Cap. 620)

- **s.8(3): disclosure with leave of the court**
- **ss.9 and 10: admissibility of mediation communications in evidence**

Application of the Mediation Ordinance

- **Statutory definition of mediation in s.4(1)**
 - ✓ structured non-adjudicative process
 - ✓ presided by a neutral assisting the parties
 - ✓ To achieve any one of the four objectives in s.4(1)

Application of the Mediation Ordinance

- **s.2 defines “mediation communications”**
 - ✓ Anything said or done; any document prepared or any information provided for the purpose of or in the course of mediation

Application of the Mediation Ordinance

- **s.5(2): disapplication of the Ordinance to processes set out in Schedule 1**
- **Concerns over ss.7 and 7A**

Does the Mediation Ordinance govern court-annexed or court-based mediations to the exclusion of common law?

- Legislative intent
- Protection afforded by ss.8-10 vs common law

Does the Mediation Ordinance govern court-annexed or court-based mediations to the exclusion of common law?

- ss.8(3), 10(2)(b) and (c) gives the courts open-ended powers
- Continued relevance of public policy underpinning the without prejudice privilege

Uniform approach at different stages

- **Court-annexed mediations**
 - ✓ Communications between mediators and parties in mediations (joint and separate sessions)
 - ✓ Communications between litigants and court staff at the IMOs
 - ✓ Communications between IMO staff and mediator

Uniform approach at different stages

- **Court-based mediations**
 - ✓ Communication between mediators and parties
 - ✓ Communication between parties and the court
 - ✓ Communication between mediators and judicial officers
- **Alternative common law analysis**
 - ✓ Dominant purpose test

Concluding remarks

- **The laws provide robust support for the safeguard of confidentiality and privilege in mediations in Hong Kong**
- **Privacy of communication under BL 30**
- **Joint efforts in making better use of mediations**
- **Special tribute to pro-bono mediators participating in court-annexed and court-based mediations**