Speech for the Seminar on "Mediator-assisted Financial Dispute Resolution/ Child Dispute Resolution (" M-FDR/CDR") - Concerns, Feasibility and Benefits"

By The Hon Mr Justice Lam, PJ

27 July 2022

The 2018 vision

At the 2018 annual general meeting of the Family Law Association, I gave a speech sharing my visions on the future of our family justice system. Some measures in the roadmap I shared are being implemented: PDSL 10.4 on Case Management and Timetabling was issued in August 2021; good progress having been made in setting up a master system in the Family Court.

Another vision that I had talked about in 2018 is the better synergy between Financial Dispute Resolution/Child Dispute Resolution ("FDRs/CDRs") and family mediation. At present, FDR, CDR and family mediation are governed by different practice directions. However, these are all alternative dispute resolution procedures providing options to litigants to resolve their differences. In the past, the potential synergy between these processes have not been adequately explored. People tends to treat them as discrete processes without regard to each other. It has led to the unfortunate misconception that FDRs or CDRs could take the place of family mediations and some regarded it as unnecessary duplications to undergo both mediation and FDR or CDR.

Such misconception was based on inadequate understanding of the differences in the role of a mediator and the role of a judicial officer hearing FDR and CDR. In a mediation, the mediator acts as a neutral facilitator assisting the parties to understand their respective needs and explore available options to settle their

disputes. Given the importance of rapport and trust that a mediator has to maintain with the parties, he could not go too far in the expression of subjective view on the merits of the case though he may put forward suggested options for the parties to consider. The assistance to each party could be offered in the secured environment of caucus sessions. The relationship between a mediator and the parties is more personal and very often he needs to explore a wider range of issues beyond the legal issues arising from the dispute. Emotional issues and needs, which are of great importance in family cases and must be tackled with great patience and empathy, are better handled in mediations than FDRs or CDRs.

On the other hand, a judicial officer hearing FDR and CDR is the court in action. The process is compulsory. Whilst the objective is to facilitate and encourage settlement, a judicial officer cannot and does not establish as much personal touch with the parties as a family mediator does. A judge is more authoritative and it is likely that the parties could benefit from his view on the merit of the legal issues and other practical incidence of litigations (like time and costs to be incurred in the litigation). But it would be less likely for more mundane individual needs to be canvassed at length before a FDR/CDR judge. The judicial officer cannot hold any caucus session with a litigant. Whilst the court is in a stronger position to steer the parties to focus on the real issues in the litigation, it is less able to give specific suggestions to the parties on their negotiation strategy and to address their extraneous non-legal concerns.

In short, there are things that a mediator can achieve in a mediation which is beyond the power of a judicial officer in a FDR or CDR and vice versa.

In my view, these processes should be complimentary to each other. In order to enhance the effectiveness of FDR and CDR, I put forward the idea of mediator-assisted FDR or CDR in my speech of 2018. The suggested model was that of a

continuum: parties go through mediation first; if the case is not settled, parties participate in a mediator-assisted FDR/CDR at which there would be facilities at the court for mediation to be continued after seeing the FDR/CDR judge; parties can also come back to the FDR/CDR judge with the mediator.

Developments of M-FDR/CDR since 2018

Since then, the courts have provided encouragements to litigants in family cases to explore such option. In *LLC v LMWA* [2019] 2 HKLRD 529, the Court of Appeal gave its blessing to mediator-assisted FDR. The first mediator-assisted FDR took place in October 2019. It resulted in a full settlement agreement. The Court of Appeal further endorsed this new mode of FDR in *WW v LLN* [2020] 2 HKLRD 487 and *Chan Man Ki v Yau Chun For* [2021] HKCA 393.

Facilities for mediation to be conducted in the same building as the Family Court as a continuum of the court hearing were set up and managed by the Integrated Mediation Office.

The Family Court had adopted this mode not only in FDR but also occasionally in CDR. By July 2022, there have been 19 cases (including 2 cases in the High Court) in which mediator-assisted FDR or CDR were conducted. 7 judges and 7 mediators have participated in such procedure. So far, the success rate is very encouraging: out of the 16 cases which have been completed, full agreements were reached in 12 cases; partial agreements were reached in 2 other cases.

Later, Judge Chan, Ms Remedios and Mr Iu will share with you their first-hand experience in such process and provide us with valuable insights and tips as to how to make good use of it. I will focus more on some general issues emerging from our experience with this mode of FDR or CDR.

Awareness, acceptance and guidance on the use of M-FDR

There has been some initial scepticism on how a family mediator could work effectively side by side with a judge in a FDR or CDR. In order to achieve synergy in the process, the judicial officer involved in the case must establish a good rapport with the mediator engaged. There has to be mutual trust and good communication between the two.

At the same time, as a mediator is bound by confidentiality towards the parties, the court should recognize and respect the mediator over his decision on the extent to which information obtained from a party can be passed on to the judge. That said, in order to be useful, the parties should be prepared to give consent to the mediator to disclose some essential information to the judge. I shall have more to say about the issue of confidentiality later. But before we come to that issue, I wish to emphasize that a good understanding as to the respective role of the mediator and the judicial officer in the process and the establishment of a good working relationship between them is essential for its success.

To facilitate that, the Mediation Section of the Judiciary had organized a briefing on 15 March 2021 for the judges in the Family Court and some senior family mediators about this mode of FDR/CDR. 2 judges and a mediator who had been involved in the process shared their experience with those attending the briefing.

With the wider use of M-FDR/CDRs, it is recognized that there should be similar briefings for others in the professions. I am grateful for the Family Law Association, the Bar Association and the Law Society for organizing tonight's Special Seminar. The Seminar would help to disseminate amongst members of the legal and mediation professions useful information on how M-FDRs or CDRs work in practice and how to advise and prepare their clients on making effective use of the process. I think it is very important that lawyers and

mediators should understand the concepts behind the process and the benefits that could be derived from it so that lawyers can properly advise their clients and mediators can suggest to the parties in appropriate cases to adopt the process accordingly.

In addition to seminars and briefings, upon the consolidation of experience over the conduct of M-FDR/CDRs, the Judiciary will incorporate some practical guidance in a Guidance Note or a Practice Direction. Workshops or other training sessions should be organized amongst lawyers and mediators to promote the use of this process.

The initiation of the use of M-FDR/CDRs

At present, I understand that most if not all M-FDR/CDRs were proposed by the FDR/CDR Judges. This is understandable since this a new mode of FDR/CDR and Family judges have been taking the lead in promoting its use in appropriate cases. Further, in view of the fact that M-FDR/CDRs are procedures in a set of Family Proceedings, it is right that the presiding judge should have the overall control and management of the process. In particular, a presiding judge should have the ultimate say on whether the case is suitable for this mode of FDR/CDR and whether he or she is comfortable with working in collaboration with a particular mediator.

Having said so, I reiterate my vision that the M-FDR/CDR should be the second stage with the first stage being a private mediation. As with other alternative dispute resolution procedure, the model I have in mind is “parties-driven” as opposed to “court-driven”. I believe that the parties would be better equipped and more ready to participate meaningfully in a process if it is voluntarily adopted by them on account of they seeing the merits of such process as opposed to it being imposed upon them by a judge.

"Parties-driven" means that the initiation of the process should come from the parties upon the advice of their lawyers or by way of adopting a suggestion by a mediator. If the lawyers advising the parties are able to see the benefits of a mode of dispute resolution mechanism and provide advice to the parties on the proper use of that mechanism, the prospect of maximizing the utility of such process is much higher. Likewise, if a mediator sees the possibility of an impasse in a mediation being overcome by a M-FDR/CDR, he or she could explain that option to the parties. The mediator can also explain to them the benefit that they may derive from such process and to allay whatever concerns they may have on confidentiality. Hence, it is of great importance that family lawyers and mediators should learn more about M-FDR/CDR so that they could guide the parties on considering its use.

Whilst there shall continue to have M-FDR/CDRs initiated by presiding judges, I would like to see more cases initiated by the parties under the guidance of their lawyers or mediators. To facilitate that, there should be specimen application documents setting out the requisite information (including the identity and experience of the proposed mediator) in the Guidance Note or Practice Direction to be promulgated. In any event, a presiding judge retains the ultimate power to decide if and how a M-FDR/CDR should proceed as a matter of case management in the Family Proceedings.

Communications between judge and mediator

As mentioned earlier, for the purposes of a M-FDR/CDR there should be good communications between the presiding judge and the mediator. At the same time, the confidentiality of communications between the mediator and the parties in private sessions must be respected.

The mediator should not disclose information provided by a party in a caucus session without consent. At the same time, whilst the contents of the Mediator's Note discussed below should be cleared with the parties, the communications between the presiding judge and the mediator should be treated as internal discussions which should not be disclosed to the parties without the consent of the judge.

Prior to the M-FDR/CDR, the mediator should prepare a Mediator's Note for the judge, identifying the outstanding issues between the parties and highlighting other information which the mediator considers useful to bring to the attention of the judge for the purposes of the M-FDR/CDR. If mediation has not previously been conducted by the mediator between these parties, the mediator should hold intake sessions with the parties before the preparation of the Note. A copy of the Mediator's Note should be furnished to the parties. Consent for the disclosure of the information contained in the Mediator's Note should be given in the agreement to appoint the mediator for the M-FDR/CDR by way of an annex to that agreement.

Since the mediator is part of the team conducting the M-FDR/CDR, there could be face to face or virtual meetings between the judge and the mediator either before or during the course of the M-FDR/CDR to discuss how the process should be managed. Whilst the judge presides over the hearing, the mediator may provide inputs in private to the judge. After the judge has heard the parties and spoken to them, the M-FDR/CDR may be adjourned and the mediator may continue to mediate with the parties in the facilities available in the court building. Depending on the progress of that mediation, the mediator may invite the parties to go back into the courtroom to report the progress to the judge and to seek further views from the judge in order to narrow down issues or explore the viability of some options. Alternatively, if it is considered helpful to have a more in-depth mediation which may take a longer time, the judge could adjourn

the M-FDR/CDR to another date to facilitate the mediation to take place in the meantime. Since it is a without-prejudice and non-adjudicative process, there is much room for flexibility to cater for the particular needs in each case.

Confidentiality and the without prejudice nature of M-FDR/CDR

Because of the element of mediation and involvement of mediator in the process, M-FDR/CDR should be protected by the without prejudice privilege and communications between mediator and the parties are protected by mediation confidentiality under the Mediation Ordinance.

It is well established that what happened in FDRs are protected by privilege[1], M-FDR is similarly protected.

As for CDRs, Practice Direction 15.13 para 14 presently provides that such hearings are not privileged. We understand the difficulty this would present for mediators. As a matter of common law, mediation in respect of children matters are protected by without prejudice privilege[2]. Likewise, there is no special exception for such mediation in respect of confidentiality under the Mediation Ordinance. The only exception is where there are reasonable grounds to believe that disclosure is necessary to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a child under Section 8(2)(d) of the Ordinance.

Whilst there are debates on whether CDRs should generally be held in non-privileged setting, there is a need for an option to be given to the parties to have CDRs being conducted on a without prejudice basis. The Practice Direction

[1] *AB v MAW* [2017] HKLRD 385 and *CSFK v HWH* [2020] 2 HKLRD 586

[2] See *Re E (A Child) (Mediation Privilege)* [2020] EWHC 3379 (Fam); *Re D (A Child) (Hague Convention Mediation)* [2017] EWHC 3363 (Fam), [2018] 4 WLR 45; *In re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231..

would be amended to cater for that. The M-CDR judge would not be further involved in the case if it is not settled. For those who wish to pursue M-CDR, there would be an avenue for doing so without causing difficulties for the mediators and with adequate protection to the parties on confidentiality.

In short, the parties will not be prejudiced by anything said during the course of a M-FDR/CDR. They can be assured that their position will not be compromised at the trial if they give consent to the mediator to disclose information to the judge presiding over M-FDR/CDR.

The role of the lawyers

In the draft Guide to Good Practice on Family Law prepared by the profession, there are provisions requiring practitioners to advise their clients on the options of alternative resolution of family disputes[3]. Obviously, solicitors play an important role in advising their clients in conducting family litigation sensibly and proportionately. In the modern concept of case management, this would include the giving of proper advice on the use of alternative dispute resolution process including M-FDR/CDRs.

It is perhaps useful to remind ourselves that the purpose of FDR and CDR hearings (including M-FDR/CDRs) is to achieve settlement of disputes instead of the adjudication of the same. Whilst it may still be necessary for lawyers to address the FDR/CDR judge on some salient points regarding the merits so that some rough and ready evaluation could be proffered by the judge for the parties, in a M-FDR/CDR parties may benefit more from the mediation part of the hearing after the views of the judge have been provided. Hence, lawyers should make good use of the time available at a M-FDR/CDR and it would be

[3] Paras 2.1.1 (e), (g), 2.2.1(f) and (h), 6.3.1, 7.1.2, 10.1.1, 10.2.7, 11.1.4.

disproportionate and misguided to deploy legal arguments on the merits before the FDR/CDR judge as if it is a dry-run for the substantive trial. In general, unless the judge otherwise directs, in a M-FDR/CDR appointment of one day the time taken up for legal arguments should not be longer than half an hour for each party.

A lawyer will serve a party's interest better at a M-FDR/CDR by adopting a collaborative mindset. This can be achieved by assisting the judge and the mediator to identify the stumbling blocks to settlement and explore potential options for solving impasses. They should also help their respective clients to take ownership and responsibility for the disputes in order to motivate them to find an acceptable solution. The beauty of mediation is that the resolution of a dispute is parties-driven and the solution that can be achieved is as flexible as the parties could be. The more creative and flexible they are, the more likely that they would find an option which is acceptable to all. The job of a good collaborative lawyer is to instill a sense of practical proportionality upon the parties and assist them to be creative and flexible in finding solutions. Sometimes it is difficult to persuade a client to accept the unpalatable limits in the solution offered by the law in family disputes. In a M-FDR/CDR, the judge and the mediator works hand-in-hand with the parties and their lawyers to search for an alternative and more satisfactory solution outside the bounds of those limits.

M-FDR/CDR provides a more flexible framework for family disputes to be resolved amicably and economically. I sincerely hope that there will be greater use of this process for the overall benefit of those litigating in the Family Court.