Speech for The Hong Kong Legal Week 2022 on "Confidentiality and Privilege in Court-annexed and Court-based Mediations"

By The Hon Mr Justice Johnson Lam, PJ

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On 30 November 2007, a conference "Mediation in Hong Kong: The Way Forward", co-organized by some major stakeholders, was held at the Hong Kong International Arbitration Centre. Since then, with the impetus provided by the conference and the works of the Mediation Team in the Department of Justice as co-ordinated by the Working Group on Mediation (which subsequently became the Steering Committee on Mediation) under the leadership of successive Secretaries for Justice, substantial progress has been made in the accreditation of mediators and the regulation, promotion and use of mediation in Hong Kong.

In its Report published in 2010, the Working Group on Mediation identified confidentiality and privilege as two fundamental features of mediation. Three justifications for confidentiality were identified:

(1) It makes mediation an attractive option to those who would wish to avoid publicity and increases parties' willingness to mediate since they know any disclosures made during mediation cannot be used against them subsequently;

(2) Confidentiality enhances the effectiveness of mediation by encouraging frank and open discussion between the parties of their real needs and interests which in turn promote the prospect of settlement;

(3) Confidentiality safeguards the integrity of the mediation process by excluding mediator from the pressure to make disclosures during or after the mediation process.

The Mediation Ordinance (Cap 620) was enacted in 2013 pursuant to the recommendation of the Working Group.

In today's lecture, we would examine how the common law and the Mediation Ordinance safeguard these fundamental features in court-annexed and court-based mediation schemes.

I shall begin with a brief survey of our court-annexed and court-based mediation schemes. Then I shall examine the common law on confidentiality and privilege before I turn to the statutory protections under the Mediation Ordinance. Finally, I shall offer my views on the how the law is applied to the court-annexed and court-based mediation schemes and make some suggestions as to how the common law may develop in the future.

I. Court-annexed and court-based mediation schemes in Hong Kong

Whilst previously mediations had already been used widely in family and construction disputes, after 2008 it has been adopted by parties in other types of disputes at all level of courts. The Judiciary has always been a firm supporter in the promotion of mediation. The Chief Justice's Working Party on Mediation has introduced many mediation-related initiatives since its establishment in 2006. Over the years, we have also set up a number of court-annexed mediation schemes at various levels of courts to facilitate the use of mediation by litigants-

(a) The Family Mediation Co-ordinator's Office provided services to litigants in the Family Court by assisting them to understand the nature of mediation and providing them with information on family mediators. Pre-mediation consultations with the parties were conducted and assistance was given to set up appointments with private mediators;
(b) The Building Management Mediation Co-ordinator's Office ("BMMCO") at the Lands Tribunal provided similar services to litigants in building management disputes;
(c) The Mediation Information Office at the High Court Building provided similar services to litigants in other civil cases;
(d) Since April 2018, the Family Mediation Co-ordinator's Office was merged with the Mediation Information Office to become the Integrated Mediation Office ("IMO") at Wanchai Tower where the District Court is situated.

Under these court-annexed mediation schemes, the staff in the IMO or BMMCO introduces litigants to mediation services and provides pre-mediation consultations to them. But they do not conduct mediations. Information about mediators specialised in the types of disputes is available and some of them offer pro bono services. Litigants who are willing to undergo mediations after pre-mediation consultations could engage independent mediators for mediations. The mediations will be conducted by such mediators outside court premises. The IMO or BMMCO has no involvement in the actual mediations.

In 2018, another court-annexed mediation scheme commenced operation at the West Kowloon Mediation Centre which is situated on a piece of land adjoining the West Kowloon Law Courts. The scheme targeted at serving litigants at the Small Claims Tribunal which is part of the West Kowloon Law Courts. It was a pilot scheme administered by the Department of Justice and its operation was undertaken by the Joint Mediation Helpline Office as an independent body.

Though the pilot-scheme was not run by the Judiciary, it could still be regarded as a "court-annexed" scheme because there was co-ordination between the Tribunal and the Centre in terms of referral of cases by the adjudicators of the Tribunal. The mediation services under the scheme were provided by mediators appointed by the Centre which also offered venues for mediations to take place. The Centre provided supporting services including pre-mediation consultations. Based on statistics kept by the Department of Justice, 1306 cases were referred by the Tribunal to the Centre and the overall success rate was 55%.

The experience with the scheme shows that there is considerable demand for mediation services in Small Claims Tribunal cases. With the referrals by the adjudicators and the vicinity of the West Kowloon Mediation Centre, litigants in the Tribunal (in which there is no legal representation) are willing to undergo mediations to resolve their disputes. The success rate also indicates that even though the impact of costs on Small Claims dispute may not be as significant as that in other level of courts, there is still a substantial room for mediation to provide a satisfactory alternative to litigation.

The pilot scheme ended in June 2022. In light of the positive outcomes in the scheme, the Judiciary decided to set up the Integrated Mediation Office (West Kowloon) ("IMO(WK)") which offers similar services at the same location. The adjudicators of the Small Claims Tribunal refer suitable cases to the IMO(WK). Whilst pre-mediation services would be provided by the staff of the IMO(WK), mediation would be conducted by private mediators who would provide their services on a pro bono basis. If the parties are willing to mediate, mediation would take place at the IMO(WK).

Looking ahead, the Judiciary is considering expansion of the existing court-annexed mediation service in the Family Court by setting up a pilot scheme of duty mediator for simple family disputes in the Family Court. Whilst supporting

services would continue to be provided by the staff of IMO, the actual mediation in suitable cases referred by the court would be conducted at premises inside the court building by a duty mediator who will be remunerated at a fixed hourly fee. If implemented, it would be another form of court-annexed mediation.

In the context of these court-annexed mediation schemes, issues on privilege and confidentiality may arise in respect of communications at different levels,

(a) Communications between litigants and court staff at the IMOs for the purpose of considering the use of mediations, particularly information gathered at pre-mediation consultations;
(b) Communications between court staff and mediator;
(c) Communications between mediator and the parties during mediation at joint session;
(d) Communications between mediator and each party during mediation at separate sessions.

Apart from court-annexed mediations, the Judiciary has also introduced other mechanisms in court proceedings for alternative dispute resolution. Some procedures involved the participation of mediators with an element of mediation built into them. I shall refer to these mediations as "court-based mediations" as distinguished from court-annexed mediations discussed above.

In family proceedings, Financial Dispute Resolution ("FDR") and Children Dispute Resolution ("CDR") are procedures introduced since 2003 and 2012 respectively. They are presided by family judges. In FDR, the process is evaluative and it is without-prejudice in nature and if the case is not settled, the judge would not be further involved. On the other hand, a CDR judge acts as a

conciliator and he or she can continue to preside at the trial of a child-related matter if settlement is not achieved.

In *LLC v LMWA*[1], the Court of Appeal gave its blessing to a process called mediator-assisted FDR ("M-FDR"). The court saw the potential for synergy by having a mediator within FDR. Instead of mediation and FDR as discreet processes, M-FDR is a model of a continuous alternative dispute resolution process running in parallel with litigation: the parties should go through private mediation first; if the case is not settled at the mediation, they would take part at a M-FDR with facilities inside the court building for mediation to be continued after seeing the FDR judge; they can also go back to the FDR judge with the mediator repeatedly to seek the views of the judge in order to resolve some outstanding issues between them.

The first M-FDR took place in October 2019. It resulted in a full settlement agreement. Since then, twenty-two M-FDRs had taken place and the results had been very encouraging. Up to Oct 2022, the settlement rate is 89%. The success of this model depends on the synergy stemming from different roles played by the FDR judge and the mediator. Communication between the judge and the mediator is necessary to enable the judge to give useful indications on various matters which a mediator could subsequently follow-up with the parties.

There had been attempts to adopt a similar model for CDR. There was one case in which a M-CDR resulted in a settlement. However, as CDR is not presently conducted on a without prejudice basis, it justifiably gives rise to some concerns. In my view, M-CDR would only be viable if the relevant practice direction is amended to provide for the parties consenting to such process being conducted on a without prejudice basis.

[1] [2019] 2 HKLRD 529

For general civil litigation in the District Court, there is a court-based alternative dispute resolution process in the form of Case Settlement Conference ("CSC"). In 2018, the District Court launched a pilot scheme engaging some lawyers with mediation experience to sit as masters presiding in case management hearings. Such hearings were devoted partly to without prejudice settlement discussions in which the master explored cost-benefit analysis and settlement options with the parties. The pilot scheme was refined and evolved in 2021 into CSC conducted by a master. In a CSC, the entire hearing is conducted on without prejudice basis and the presiding master would not be further involved in the case if it is not settled. At the CSC, the master does not conduct mediation with the parties. There is no separate session and the master cannot discuss the case with a party in the absence of the other party.

The CSC pilot scheme will be extended in 2023 with a further enhancement by adding the option of having a mediator participating in a CSC in similar fashion as in M-FDR. The option would only be adopted with the consent of the parties. The Mediator-assisted Case Settlement Conference ("M-CSC") would take place in a without-prejudice setting using the facilities in the court building. The mediation conducted in the context of a M-CSC would be another form of court-based mediation.

In the context of court-based mediation schemes, issues on privilege and confidentiality may arise in respect of,

(a) Communications between the parties and the court prior to the M-FDR or M-CSC;

(b) Communications between the parties and mediator prior to the M-FDR or M-CSC;

(c) Communications between mediator and judicial officer prior to the M-FDR or M-CSC;

(d) Communications between the parties and the court in the presence of the mediator during the M-FDR or M-CSC;

(e) Communications between the parties and the mediator during mediation at joint session;

(f) Communications between a party and the mediator during mediation at separate sessions.

Before we address these issues, it is useful to have an overview of the law on privilege and confidentiality relating to mediation.

II. Confidentiality and privilege at common law

Confidentiality and privilege are often discussed together to underscore their importance to the integrity of mediation. Nevertheless, whilst there are overlaps in applications, they are different concepts. Mediation as it is practised in Hong Kong engages both of them.

Confidentiality arises from the relationship between the parties as contractual or equitable obligations. Such an obligation is usually provided for in the mediation agreement entered into by the mediating parties and the mediator before mediation begins. Even in the unlikely event of a mediation conducted without any written mediation agreement, equity imposes obligations of confidence when the information is received in circumstances in which a reasonable person would regard as confidential. Mediation has always been promoted and practised in Hong Kong as a confidential process. Under the Hong Kong Mediation Code[2], mediators are required to observe the duty of

[2] The Hong Kong Mediation Code was promulgated by the Secretary for Justice's Working Group on Mediation in 2010 to provide a common standard among mediators and to serve a quality assurance function. It has been adopted by the major mediation bodies in Hong Kong including the Hong Kong Mediation Accreditation Association Limited.

confidentiality as a matter of professional conduct[3]. It also provides that any information disclosed in confidence to the mediator by one party should not be disclosed to the counterparty without permission[4]. Mediation is invariably held in confidential setting with the mediator starts off by reiterating its confidential nature. Thus, all participants and mediators undergo the process of mediation on the basis that they are bound by obligations of confidence. Even before the enactment of the Mediation Ordinance, Hong Kong courts had repeatedly emphasized the fundamental importance of confidentiality in mediation[5].

In a mediation, confidentiality works at various levels. It operates as between the parties themselves. At the same time, it operates between the mediator vis-à-vis the mediating parties. It also operates between the mediator vis-à-vis each party in respect of communications in separate sessions. As such, the parties are prohibited from disclosing to any other person the communications in the course of the mediation. Likewise, mediators should not reveal anything discussed in the mediation unless permitted by all parties or compelled by law to do so. Further, they should not disclose communications made in separate meetings except with the consent of the party concerned. Such obligations can be enforced by injunctive relief.

But the duty of confidence is not absolute. The court may order disclosure of confidential information if such disclosure is necessary for the fair disposal of a case. In *Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 2)*[6], Justice Ramsay refused a mediator's application to set aside a witness summons as it was in the interests of the administration of

[3] The Hong Kong Mediation Code, para.4(a).

[4] The Hong Kong Mediation Code, para.4(b).

[5] *Champion Concord Ltd v Lau Koon Foo (No 1)* (2011) 14 HKCFAR 534, *S v T* [2011] 1 HKLRD 534.

[6] [2009] EWHC 1102.

justice for her testimonial evidence to be obtained for determining whether the mediated settlement agreement should be set aside due to economic duress.

In Hong Kong, Madam Justice Au-yeung in *Chu Chung Ming v Lam Wai Dan*[7] upheld the confidentiality of the communication between the parties by a letter in the course of a mediation and struck out a party's evidence exhibiting the letter in another set of proceedings. Her Ladyship adopted the approach in *Farm Assist* and held that the letter was not necessary for the fair disposal of the later proceedings.

Privilege is a separate concept from confidentiality. There are mediations in which parties attend with lawyers and the communications between a party and his lawyer in private are protected by legal professional privilege. However, in today's lecture, I would focus on without prejudice privilege which is relevant to the communications amongst the parties and the mediator.

The rules of without prejudice privilege are primarily about admissibility of evidence in legal proceedings based on public policy. Litigants are encouraged to settle their differences through negotiations and they should be able to put their cards on the table without worrying that anything that is said in the course of such negotiations may be used to their prejudice in the course of the proceedings. A further justification for the privilege is based on the expressed or implied agreement of the parties that communications in the course of their negotiations should not be admissible in evidence in subsequent proceedings[8]. Mediation as practised in Hong Kong is a without prejudice process and such communications are protected by without prejudice privilege under common law.

[7] [2012] 4 HKLRD 897.

[8] *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436 at 2448. See also *Ofulue v Bossert* [2009] 1 AC 990 at [85] and [95]; *Oceanbulk Shipping SA v TMT Ltd* [2011] 1 AC 662 at [24].

In *Ofulue v Bossert*[9], Lord Hope explained the essence of the privilege as follows,

"The essence of it lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie. Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement ..."

Previously, there had been debate as to whether the privilege was limited to prevent the use of anything said in negotiations as evidence of expressed or implied admissions against the interest of the party making the statement[10]. The difficulty with such restrictive approach was highlighted by Lord Justice Robert Walker in *Unilever Plc v Procter & Gamble Co* [11],

"… to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the *Rush & Tompkins* case [1989] AC 1280, 1300: 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts.' Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders."

The House of Lords in *Ofulue v Bossert*[12] by majority[13] rejected the restrictive approach and endorsed the observations in *Unilever*[14]. The approach of the

[9] [2009] 1 AC 990 at [12].

[10] See *Muller v Linsley & Mortimer* [1996] PNLR 74 and *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 at [16] per Lord Hoffmann.

[11] [2000] 1 WLR 2436 at 2448.

[12] [2009] 1 AC 990.

majority in *Ofulue v Bossert* was subsequently followed by a seven-member Supreme Court in *Oceanbulk Shipping SA v TMT Ltd* [15].

In *Chu Chung Ming v Lam Wai Dan*[16], Madam Justice Au-yeung followed *Ofulue* and held that without prejudice privilege extends not only to admissions but also to communications during the whole course of negotiations.

Over the years, the courts had developed several exceptions to the inadmissibility of without prejudice communications. In *Unilever Plc v Procter & Gamble Co*[17], Lord Justice Robert Walker set out eight exceptions. Constraint of time does not permit me to go through every exception. I would only highlight several more commonly encountered exceptions.

Without prejudice communications are admissible to prove whether the negotiations have resulted in a concluded compromise agreement. Such exception is obviously consistent with the public policy underlying the without prejudice privilege. In *Brown v Rice & Patel*[18] the court admitted into evidence a mediator's manuscript, his correspondence to the parties, and testimonial evidence of what the parties had said and done in mediation for the purpose of determining whether the parties had settled in a mediation.

In *Yan How Yee v Yu Kin Sang Paul*[19], the plaintiff sought to enforce a mediated settlement agreement. The court admitted evidence as to what had happened at the mediation in order to refute the defence that no agreement had been reached.

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[13] Lord Hope, Lord Rodger, Lord Walker and Lord Neuberger.

[14] Lord Hope at [7]; Lord Rodger at [43]; Lord Neuberger at [89].

[15] [2011] 1 AC 662 at [25]. The main judgment was delivered by Lord Clarke. The other judges were Lord Phillips, Lord Rodger, Lord Walker, Lord Brown, Lord Mance and Dyson JSC.

[16] [2012] 4 HKLRD 897 at [28].

[17] [2000] 1 WLR 2436 at 2444C-2445E.

[18] [2007] EWHC 625 Ch; [2008] FSR 3.

[19] [2018] HKCFI 2511.

Without prejudice negotiations are also admissible as proof of vitiating factors when a party seeks to set aside a settlement agreement on the grounds of misrepresentation, fraud or undue influence. In the *Farm Assist* case, each claimant sought to set aside a mediated settlement agreement based on economic duress. Justice Ramsay declined to set aside a witness summons served on the mediator.

In *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd*[20], the claimants sought to set aside a mediated settlement agreement on the ground that their agents did not have authority to enter into the agreement on their behalf. The defence relied on certain statements made in the mediation to refute such claims. The claimants sought to strike out that part of the defence as breach of without prejudice privilege. The English Court of Appeal held that the case fell within an exception to the privilege. Lord Justice David Richard rejected the argument that such exception only applied to evidence supporting the grounds of challenge. His Lordship held that the exception extends to evidence admitted for the purpose of showing that the settlement agreement should not be set aside.

Even if there is no concluded agreement, if one party in a mediation made a clear statement to the other party which the latter was intended to act and did in fact act upon, evidence could be admissible to support a case of estoppel. Justice Neuberger in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd (No. 2)*[21] held that in such circumstances it would be unconscionable for the party to hide behind the cloak of without prejudice.

Evidence of without prejudice negotiations is also admissible if its exclusion would act as a cloak for perjury, blackmail or other unambiguous impropriety.

[20] [2021] 1 WLR 4877.

[21] [1997] FSR 178 at 190-1 (reversed on appeal but not on this point).

As explained in *Unilever*, the veil of the privilege would be pulled aside when it has been unequivocally abused[22]. This exception is only applicable in obvious cases of abuse of the privileged occasion. Lord Justice Rix in *Savings & Investment Bank Ltd (In Liquidation) v Fincken* emphasized the narrow scope of this exception[23].

Such exception was held to be applicable in *Crane World Asia Pte Ltd v Hontrade Engineering Ltd*[24]. A Hong Kong company sued a former director for breach of fiduciary duties and subsequently made an offer of settlement to him with a condition that he would not prepare any witness statement for a Singaporean company which had been suing the HK company in another action. The director rejected the offer and referred to it in a witness statement filed on behalf of the Singaporean company in that other action. The Court of Appeal held that the unambiguous impropriety exception was engaged because a deliberate attempt to prevent the opposing party from having full and unimpeded access to a potential witness, even with a benign intent, is improper conduct and the Hong Kong company had no legitimate interest in imposing such restriction on the director. The court held that it did not matter that the offer was rejected.

Another commonly encountered exception is the use of *Calderbank* correspondence in arguments on costs. It is actually not a true exception since by labelling the correspondence "without prejudice save as to costs", the parties had only agreed to a limited cloak of privilege.

In family proceedings, a conciliation privilege akin to the without prejudice privilege has been developed. Sir Thomas Bingham MR in *In re D (Minors)*

[22] [2000] 1 WLR 2436 at p.2449C.

[23] [2004] 1 WLR 667 at [57].

[24] [2016] 3 HKLRD 640.

(Conciliation: Disclosure of Information) [25] alluded to the strong public interest in excluding statements made in conciliation from evidence. The exclusionary rule is subject to a narrow exception where a statement clearly indicated that the maker has in the past caused serious harm to the well-being of a child or is likely to cause such harm in the future. Even then, the court should only admit the evidence if the public interest in protecting the interests of the child outweighs the public interest in preserving the confidentiality of attempted conciliation. A similar approach was adopted in respect of family mediations, see *Re D (A Child) (Hague Convention: Mediation)*[26] and *Re E (A Child) (Mediation Privilege)*[27].

Other exceptions were discussed in later cases. In *Chu Chung Ming v Lam Wai Dan*[28], Madam Justice Au-yeung added three additional exceptions to the list of Lord Justice Robert Walker. In *Oceanbulk Shipping SA v TMT Ltd* [29], Lord Clarke acknowledged another exception for the use of such communications for seeking rectification of settlement agreement. The court further held that such communications could also be admissible to explain the factual matrix or the surrounding circumstances in aid of the construction of a settlement agreement.

Whilst the vitality of the common law could provide further refinements of the rule and new exceptions may have to be coined to meet new challenges, the salutary observations of Lord Rodger in *Ofulue v Bossert*[30] should always be borne in mind:

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[25] [1993] Fam 231

[26] [2018] 4 WLR 45.

[27] [2020] EWHC 3379 (Fam).

[28] [2012] 4 HKLRD 897.

[29] [2011] 1 AC 662 at [33] and [46].

[30] [2009] 1 AC 990 at [39] (emphasis added)

"The question is whether creating such an exception would be consistent with the *overall policy* behind the rule".

III. Does the common law provide adequate protection?

In a two-part article written by Justice Briggs in the New Law Journal in April 2009 [31] , His Lordship suggested that the common law protections were inadequate to fulfil the requirement of the EU Directive on Mediation which provided that mediators must not be compellable to give evidence regarding information arising out of or in connection with a mediation except where overriding considerations of public policy otherwise require, or where disclosure is necessary in order to implement or enforce a mediation settlement agreement.

In particular, His Lordship highlighted the importance of confidential communications, which he called mediator secrets, between a mediator and a party in the separate session.

"The ability of a mediator to receive mediation secrets from the opposing parties without communicating them across the divide, and to use the knowledge thereby gained in assisting the parties towards a settlement, is unique to mediation as a dispute resolution process and an important part of its success to date …"

His Lordship suggested that the public policy underlying legal professional privilege is similarly engaged in respect of such communications and the common law could develop a mediator secrets privilege.

However, such development appears to have been foreclosed by Justice Ramsay in *Farm Assist*[32] in May 2009. Having considered the submission that the court

[31] (2009) 159 NLJ 506 and 550.

[32] [2009] EWHC 1102 at [30] to [43].

should recognize a mediation privilege, the learned judge reached this conclusion,

"However, in mediation where existing concepts of legal advice privilege, litigation privilege and without prejudice privilege can be applied, I consider that those principles provide sufficient guidance but there is also the need for a further 'privilege' which arises other than the Mediator's right to confidentiality in relation to the mediation proceedings."[33]

The further privilege that Justice Ramsay had in mind was not Justice Briggs' 'mediator secrets privilege'. Instead, Justice Ramsay confined himself to the preservation of other existing privileges notwithstanding disclosure to a mediator[34]. Since then, judges generally analysed privilege in the mediation context by reference to the without prejudice privilege.

For my part, whilst I can see the distinction made by Justice Briggs regarding mediator secrets in separate sessions and the communications in the presence of all the participants in joint sessions, it would be difficult to envisage the court ordering the disclosure of mediator secrets on existing common law principles. Though there were instances where mediators failed in their attempts to set aside witness summonses because of the exceptions to the without prejudice rule, they were called to give evidence about what happened at the joint sessions. I am not aware of any authority holding that a mediator could be questioned in the witness box about what had happened in a separate session. It is difficult to demonstrate that on top of disclosure of communications at the joint sessions, disclosure of the mediator secrets is necessary for the fair disposal of a claim, particularly when the applicant for disclosure was not privy to what had happened at the separate session between the mediator and the other party. It is

[33] Ibid, at [43].

[34] Ibid at [44(3)], "If another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege."

unlikely that the court would override the confidentiality and privilege attaching to mediator secrets based on the speculation of the applicant that it may contain some evidence helpful to his case.

In Hong Kong, as I shall discuss below, the matter should be governed by the Mediation Ordinance (Cap 620) which, as I shall demonstrate, provides sufficient safeguards.

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

As set out in its preamble, the Mediation Ordinance aims at providing a regulatory framework governing the conduct of mediation in Hong Kong. As stipulated in section 3(b), an object of the Ordinance is to "protect the confidential nature of mediation communications".

Section 8 prohibits a person from disclosing mediation communication with exceptions specified under Section 8(2) and (3). Section 8(2) set out situations where disclosure can be made without the leave of the court, including those made with consent of the parties and mediator; disclosure of information lawfully in the public domain; disclosure under a discovery obligation in civil proceedings; disclosure for research, evaluation or educational purposes; disclosure for seeking legal advice; disclosure in accordance with a legal requirement. Notably, Section 8(2)(d) permits disclosure when there are reasonable grounds to believe that the 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. This exception was developed from *In re D (Minors) (Conciliation: Disclosure of Information)* but it is wider in scope as it covers danger of injury to an adult as well as danger of serious harm to a child.

Section 8(3) provides for disclosure with leave of the court for the purpose of enforcing or challenging a mediated settlement agreement and for the purpose of complaint of professional misconduct against a mediator. There is also a residual open-ended power for leave to be granted for other justifiable purpose in the circumstances of the case.

Without using the terminology of privilege, the admissibility of mediation communications in evidence is governed by Sections 9 and 10. In determining whether to admit the evidence on without prejudice negotiations, the court should have regard to the possibility of disclosure under Section 8(2) and the public interest and the interests of the administration of justice and other circumstances that the court considers relevant.

Other than a case where Section 8(2)(d) is engaged, it is unlikely that a mediator would unilaterally agree to disclose mediator's secrets. For the reasons canvassed earlier, it is unlikely that a party who was not privy to the communication in a separate session could successfully apply for leave for such communication to be disclosed or be admitted as evidence.

V. Application of the Mediation Ordinance to court-annexed or court-based mediations

It is plain from the contents of the Ordinance that its provisions are of general application in respect of all mediations conducted in Hong Kong. Mediation is defined in Section 4(1) as,

"a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following:

(a) identify the issues in dispute;
(b) explore and generate options;
(c) communicate with one another;

(d) reach an agreement regarding the resolution of the whole, or part, of the dispute."

This is a very wide definition and potentially it encompasses any structured non-adjudicative process presided by a neutral assisting the parties to achieve any one of the four objectives. The neutral needs not be a person practised privately as a mediator. It could be a staff of the IMO or a judicial officer who, as an impartial person, takes part in the structured process, see the definition of "mediator" in Section 2(1).

Mediation communication is also defined widely in Section 2(1) as "(a) anything said or done; (b) any document prepared; or (c) any information provided, for the purpose of or in the course of mediation".

Adopting a purposive interpretation, a case management hearing before a master (in which issues would be identified) should be excluded from the definition of mediation on the ground that such case management hearing served the ultimate purpose of an adjudicative process and is therefore an integral part of it.

However, given that courts are now more proactive in facilitating settlement of disputes with hearings like FDR, CDR and CSC specifically designed for non-adjudicative purposes, such hearings are arguably within the scope of that definition.

In this connection, Section 5(2) provides for the disapplication of the Ordinance to various processes set out in Schedule 1. The processes specified in Schedule 1 include conciliations conducted by public officers or mediations conducted by mediators appointed by public officers. The statutory arrangement indicates that such processes are within the meaning of "mediation" in Section 4 and thus, but

for the disapplication under Schedule 1, the provisions of the Mediation Ordinance are applicable to them.

Given that FDR, CDR and CSC (together with M-FDR, M-CDR and M-CSC) are not included in Schedule 1, it is arguable that they are governed by the provisions in the Mediation Ordinance.

Should the court-annexed or court-based mediation schemes be added to Schedule 1?

In my view, it is desirable that the conduct of mediations, including the pre-mediation consultations at the IMO, BMMCO and IMO(WK), under the court-annexed and court-based mediation schemes be governed by the Mediation Ordinance. Mediators, lawyers and parties need certainty as to confidentiality and privilege protecting the integrity of the mediation process. The legislative intent behind the enactment of the Mediation Ordinance as set out in the 2010 Report of the Working Group on Mediation[35] was to avoid the need to refer to the case law to determine the limits of confidentiality and privilege. Instead, it was intended that the Ordinance would provide a general statutory mediation privilege subject to specified exceptions. I cannot see any justification for excluding mediations conducted under court-annexed or court-based schemes from such rationale. Thus, a mediation conducted by a mediator in a M-FDR, M-CDR or M-CSC should be governed by the Mediation Ordinance. Likewise, mediations conducted under referrals from IMO, BMMCO and IMO(WK) should be governed by the Ordinance.

I mention pre-mediation consultations conducted by the staff of the IMO, BMMCO and IMO(WK) because Section 4(2)(a) of the Ordinance defines a mediation "session" to include not only the actual mediation attended by all the parties and the mediator, but also any activity undertaken in respect of arranging

[35] Paras 7.128 to 7.140.

or preparing for mediation, whether the mediation takes place or not. Such extensive coverage is necessary because communications between litigants and the staff of IMOs and BMMCO should also be protected by confidentiality and privilege in order to safeguard the integrity of the whole process.

The same analysis could be applied to the hearings presided by judicial officers assisted by mediators in M-FDR and M-CSC. It would be confusing to the parties and mediators if such hearings and the private communications between mediator and judicial officers were to be governed by the common law whilst the mediation component of that process is governed by the Mediation Ordinance[36].

On the other hand, I think the conventional form of FDR, CDR or CSC should be excluded from the application of the Mediation Ordinance. This can be achieved by amending Schedule 1. I hold such view not because of any reservation on the confidentiality and privilege for these processes. The practice directions and guidance note on FDR and CSC have already provided explicitly that these processes are confidential and without prejudice in nature. In *AB v MAW*[37] the Court of Appeal reiterated the importance of upholding such confidentiality.

My reason for excluding them from the Mediation Ordinance stems from Sections 7 and 7A of the Mediation Ordinance. Section 7 enables assistance and support to a party in the course of a mediation to be provided by non-lawyers. Section 7A permits third party funding in mediation for disputes undergoing arbitration. Such exemptions are not appropriate for FDR or CSC.

In its current form CDR is not a without prejudice process. According to my understanding, as the judge hearing a CDR may subsequently preside at the trial,

[36] The only caveat is that, as explained below, Sections 7 and 7A of the Mediation Ordinance should not be applicable for such hearings.

[37] [2017] 1 HKLRD 385.

they would not go very far in expressing their views on merits in CDR. As such, CDR could be regarded as a preliminary hearing to the trial and falling outside the meaning of "mediation" in the Ordinance. However, to avoid any uncertainty, it is better to add CDR to Schedule 1.

However, if without prejudice M-CDR were to be introduced, it should be governed by the Mediation Ordinance subject to the disapplication of Sections 7 and 7A.

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

As discussed earlier, the text of the Mediation Ordinance as well as the legislative intent show that the Ordinance is meant to be ***the*** law regulating the conduct of mediations in Hong Kong. The only exception are the processes excluded under Schedule 1. It would frustrate the legislative intent if one still needs to resort to common law for protection in the context of mediation. It is also clear from the above survey of the position under the common law and that under the Ordinance that the protection provided under Sections 8 to 10 is no less than those offered by the common law. Under these circumstances, I do not see any need for the common law in Hong Kong to develop a new mediation privilege.

Having said so, the common law shall continue to govern other negotiation processes which are outside the scope of the Mediation Ordinance. Moreover, such developments would remain relevant in the actual application of the statutory regime. Sections 8(3)(c) and 10(2)(b) and (c) give the courts open-ended powers in granting leave for disclosure and admission of evidence to achieve a just result. As observed in *Crane World Asia Pte Ltd v Hontrade*

Engineering Ltd [38] , the public interest and the interests of the administration of justice underpinning common law without prejudice privilege also underpinned the statutory mediation privilege. Hence, the courts should pay regard to the public policy considerations discussed in the context of the common law in an application under Section 10(1). In short, the law must be administered coherently.

VII. Uniformity of approach to confidentiality and privilege at different stages of the process

Coming back to the different levels at which issues of confidentiality and privilege may arise in court-annexed and court-based mediations, they should all be subject to the rules set out in Sections 8 to 10 of the Mediation Ordinance.

Thus, in court-annexed mediations, communications between mediators and the parties at the mediations (in joint and separate sessions) are confidential and privileged. Likewise, communications between litigants and court staff at the IMOs or similar offices for the purpose of considering the use of mediation are also protected as they come within the definition of mediation communications under the Ordinance. Communications between IMO staff and mediator are also information provided for the purpose of mediation and thus falling within such definition. They are protected accordingly.

By the same token, in the context of court-based mediations, communications between mediators and the parties prior to and in the mediations under a M-FDR or M-CSC are obviously protected as mediation communications. Since the M-FDR or M-CSC falls within the meaning of "mediation" under Section 4(1) with the judicial officer and the mediator playing the role of neutrals as "impartial individuals without adjudicating a dispute", all communications

[38] [2016] 3 HKLRD 640 at [21].

between the parties and the court, prior to and during the M-FDR or M-CSC, insofar as they are made for the purpose of or in the course of the M-FDR or M-CSC, are mediation communications and are protected under Sections 8 to 10 accordingly. Communications between mediator and judicial officer prior to the M-FDR or M-CSC are akin to communications between co-mediators and should also be similarly protected as they are made for the purpose of the M-FDR or M-CSC.

For the sake of completeness, I would offer an alternative analysis on the assumption that, contrary to my primary view, our court-annexed or court-based mediation schemes are governed by common law instead of the Mediation Ordinance. The different stages in these processes should be considered as one single continuous without prejudice process within which the staff at the IMOs and mediators (and the judicial officers presiding in a M-FDR or M-CSC) performing their respective roles and functions to assist the parties to reach a settlement. Viewed in this light, consultations at the IMOs, mediation sessions and M-FDR or M-CSC hearings should be regarded as different parts of a single process in the application of the common law principles of confidentiality and privilege. They should therefore be subject to a uniform cloak of privilege.

The pre-mediation consultations in the IMOs and the M-FDR and M-CSC hearings are conducted in confidential settings with a view to facilitating mediations. The dominant (if not the sole) purpose[39] of these communications is to prepare for mediation. They should be regarded as part of the process of mediation. The rationale behind the public policy granting a cloak of privilege in respect of mediation is equally applicable and these communications should be protected.

[39] The dominant purpose test applied in the context of legal professional privilege can provide useful guidance on the development of the common law in the context of mediation privilege.

If necessary, the common law in Hong Kong should develop in a manner consonant with the policy underlying the extensive coverage for protection of mediation communications under Sections 2 and 4 of the Mediation Ordinance as discussed above.

VIII. Concluding remarks

The laws in Hong Kong provide robust support for the safeguard of confidentiality and privilege in mediation. Whilst it is beyond the scope of today's lecture to examine how Article 30 of the Basic Law can be relied upon to safeguard the privacy of communication, it should be noted that such right is engaged in respect of the confidentiality and privilege in mediation communications. At the same time, the exceptions provided for in the Mediation Ordinance and the common law strike a necessary as well as fair and proportionate balance between such right and other legitimate competing interests.

With an adequate legal framework in place, the Judiciary has been working in concerted efforts with those in the legal and mediation communities under our court-annexed and court-based mediation schemes to cater for the needs of litigants. There are new initiatives for greater and better use of mediations in the pipeline. I trust the Judiciary can count on the continued supports from the Secretary for Justice, the legal profession, the mediation community and other stakeholders in the society in our efforts to further the development of mediations in Hong Kong as part of the continuing enhancement of Hong Kong as an international dispute resolution hub.