The Hong Kong Courts' Role in Encouraging and Facilitating the Use of Mediation in the Settlement of Litigations

By The Hon Madam Justice Lisa Wong

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It can be said that mediation entered a new era in Hong Kong with the coming into force of the Civil Justice Reform ("CJR") on 2 April 2009[1]. The revised civil procedure rules under the CJR expressly identify the facilitation of settlement of disputes as an objective underlying the rules of the courts. The courts are required to help parties settle; to encourage them to resort to alternative dispute resolution mechanism ("ADR") to try to settle and to facilitate the use of such alternative procedure. [2]

And the primary form of ADR promoted under the CJR is mediation. The Hong Kong Judiciary has since sought to incorporate mediation in its process. To this end, Practice Direction 31 entitled "Mediation" ("PD31") provides for a mediation protocol for civil proceedings begun by writ[3] in the Court of First Instance ("CFI") and the District Court ("DC").

Under this mediation protocol, where all parties are represented, each party has to file a Mediation Certificate signed by both the party and his solicitor at a fairly early stage in the proceedings. This document serves 2 purposes:

(1) First, it informs the court whether the parties are willing to attempt mediation and, if not, why not.

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[1] However, the beginning of the promotion by the Hong Kong Judiciary of the use of mediation in civil dispute settlement can be dated back to October 1997 when the former Chief Justice appointed a working group to consider a pilot scheme for the introduction of mediation into family law litigations in Hong Kong.

[2] See Order 1A, rules 1(e) and 4(e) and (f) of the Rules of the High Court (Cap 4A) ("RHC") and Order 1A, rules 1(e) and 4(e) and (f) of the Rules of the District Court (Cap 336H) ("RDC").

[3] Including proceedings begun by originating summons that have been directed to continue as if it had been begun by writ.

(2) Second, it assures the court that each party's solicitor has explained to his client and that each party understands: (a) PD31; (b) the availability of mediation to resolve the dispute instead of litigation; and (c) the costs of mediation as compared with the costs of the litigation.

Where either or both of the parties indicate a wish to mediate, they will then exchange a Mediation Notice and a Mediation Response to make proposals and counter-proposals on how, when, where and by whom the mediation should be conducted; the extent to which they are obliged to participate in the mediation and how they would share the costs of the mediation, whether the legal action should be put on hold while they mediate, etc. Where the parties agree on the proposals for mediation, the agreement is reduced into a Mediation Minute to be filed with the court.

Where the parties cannot reach agreement, either or both of them can apply for directions. In a joint application, the court can resolve any differences including the mediator to be engaged. Where the application is made by just one party but the parties have otherwise agreed to go for mediation, the court can resolve differences concerning the details or mechanics of the mediation process but it cannot compel a party to mediate or to appoint a particular mediator against his wish.

Where one or more parties are acting in person, the court may at a suitable stage consider whether mediation is appropriate[4]. If so, it may direct the parties to follow the mediation protocol under PD31 with necessary modifications.

With an increasing number of litigants in person, the Judiciary seeks to steer them towards mediation and guide them through the process through the Integrated

[4] On application or on its own motion.

Mediation Office ("IMO") at the Wanchai Law Courts Building[5]. The IMO[6] is the focal point by which the courts distribute information on mediation by (1) answering individual enquiries; (2) conducting regular information sessions and educational talks[7]; (3) providing leaflets and other written materials on mediation at a resource corner; and (4) permitting use of computers at the premises on which mediation information can be accessed. Further, for family and building management cases[8], the IMO can even help parties identify and appoint a mutually agreed mediator.

Also, the Judiciary website contains a webpage on mediation[9] which has attracted close to 2 million hits in the past 9 years.

Coming back to the practice direction, if I can highlight just one essential aspect, I would emphasise that the filing and service of the various mediation documents are not mere formalities to be undertaken mechanically just to satisfy the courts. Mediation is now a substantive stage in civil litigation. Both parties and lawyers are charged with a positive duty to assist the courts in facilitating settlements.[10] An unreasonable refusal or failure by a party to engage in mediation[11] may result in that party being ordered to pay wasted costs. More importantly, by refusing or failing to participate in mediation or by doing so half-heartedly, a party may miss out on an opportunity to obtain a timely and less costly resolution of its dispute.

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[5] Room 113, 1st floor, 12 Harbour Road.

[6] The IMO commenced operation on 2 May 2018 but it is not exactly new but is the merger of the Mediation Information Office set up in 2010 at the High Court Building and the Family Mediation Co-ordinator's Office set up in 2000 at The Family Court.

[7] Which are open to litigants, professional bodies, education institutions, government departments, court users as well as the public.

[8] With regard to building management disputes, in addition to the IMO, since January 2008, litigants involved in building management disputes at the Lands Tribunal are also served by the Building Management Mediation Co-ordinator's Office. Parties seeking mediation would be provided with a list of mediators, many of whom are willing to act free of charge, though the actual mediation would be conducted outside of the Judiciary.

[9] Website: http://mediation.judiciary.hk.

[10] See Order 1A, rule 3 of the RHC and Order 1A, rule 3 of the RDC.

[11] It is, however, important to note that the refusal or failure must be one provable by admissible evidence. Privilege remains at all times protected. In exercising its discretion on costs, the court cannot admit any materials protected by privilege in accordance with legal principles, including legal professional privilege and the privilege protecting without prejudice communications (which include what happened during the mediation process).

Mediation protocols along the line under PD31 have been applied across a wide spectrum of case types of different nature under various other practice directions[12], with modifications where necessary.

Beginning from November 2018, the Judiciary has further proactively supported the Pilot Mediation Scheme steered by the Department of Justice at the West Kowloon Mediation Centre ("WKMC") next to the West Kowloon Law Courts Building where the Small Claims Tribunal ("SCT") is located. Small claims litigants identified as suitable for mediation will be referred to the WKMC where they can receive mediation service upon paying a nominal all-inclusive application fee of $200 each. An independent co-ordinator, the Joint Mediation Helpline Office, will match cases with suitable mediators on the WKMC panel and provide all necessary administrative, logistical and other support to the parties.

Pausing here, I do not want to give the wrong impression that Hong Kong courts' involvement in mediation has been limited to one of promotion and facilitation only. In family cases where there is a dispute over ancillary relief or children, the court would hold what is called a FDR (Financial Dispute Resolution) hearing[13] or a CDR (Children Dispute Resolution) hearing[14], as the case may be. Parties are required to personally attend such hearings and to try their best to settle, with the presiding judge acting as a conciliator[15]. In this connection, since

[12] For example, family proceedings (Practice Direction 15.10, the current version of which came into effect on 2 May 2012); personal injuries claims (Part D of Practice Direction 18.1, which came into effect on 2 April 2009); employees' compensation claims (Part B of Practice Direction 18.2, which came into effect on 2 April 2009); contentious probate and administration of estates proceedings (Part V of Practice Direction 20.2, the current version of which came into effect on 1 August 2012); construction disputes (Part F of Practice Direction 6.1, which came into effect on 2 April 2009); building management disputes (Direction issued by the President of the Lands Tribunal [LTPD:BM 1/2009] on 21 May 2009, effective on 1 July 2009); cases under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545) (Direction issued by the President of the Lands Tribunal [LTPD:CS 1/2011] on 28 January 2011, effective on 15 February 2011); and shareholders' "unfair prejudice" petitions and companies winding-up petitions on the "just and equitable" grounds (Practice Direction 3.3, which came into effect on 13 February 2017).

[13] See Practice Direction 15.11 which became effective on 3 October 2012.

[14] See Practice Direction 15.13 which became effective on 1 April 2016.

[15] If the FDR or CDR hearing does not result in a settlement, the judge before whom it is held will have no further substantive involvement with the case.

2007, a total of 54 Hong Kong judges have been arranged by the Judiciary to undergo mediation skills training[16]. As of today, 39 of these judges trained in mediation are still serving.

Mediation has now become an integral part of the civil justice system in Hong Kong. The number of cases that have gone through mediation has steadily increased over the years. The settlement rates are encouraging. For 2018, the mediation settlement rates for CFI cases, DC cases, Family Court cases and Lands Tribunal building management cases are 65%, 60%, 61% and 50%[17] respectively. Statistics also proves mediation to be cost and time effective. For 2018, for CFI and DC cases that were settled through mediation, it took an average of 4 to 5 hours in mediation to reach agreement at an average expenditure of HK$14,000-HK$17,000 shared between the parties.

The Judiciary will continue its efforts to integrate mediation into court procedures. In this regard, the Judiciary's Working Party on Mediation[18], chaired by Mr Justice Johnson Lam[19] with cross-sectional membership[20], continues to serve as a forum to identify and explore new measures to promote and facilitate the use of mediation to help litigants settle disputes.

To conclude, I would like to leave these 3 messages for this audience:

(1) Litigation is not an end but only a means for resolving disputes.

(2) There is another more time and cost effective dispute settlement option.

[16] By attending and completing, e.g. the Mediation Skills Training Course provided by the Centre for Effective Dispute Resolution (CEDR).
[17] Including cases where mediation did not produce immediate agreement but were disposed of within 6 months after mediation.
[18] First established in January 2007 to consider, at a policy level, how the settlement of civil disputes through mediation may be facilitated in Hong Kong courts and tribunals.
[19] Vice President of the Court of Appeal.
[20] Judges from different levels of court, representatives of the Department of Justice, Legal Aid Department and the legal profession plus practising mediators.

(3) The Hong Kong courts are committed to facilitate the amicable consensual settlement of disputes.

Thank you.