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Judicial Roundtable
Mediation in Hong Kong from the Perspective of the Judiciary
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Development of Mediation in Hong Kong

Mediation as a form of Alternative Dispute Resolution (ADR) has been practiced in Hong Kong for a considerable period of time, and has gained popularity in recent decades in many contexts, such as the construction and commercial sectors as well as the community.

Early endeavours by the Judiciary were in matrimonial and related disputes in the Family Court in 2000. The conduct of mediation has always been voluntary, facilitative, and conducted by private practitioners and not judicial officers. The Mediation Co-ordinator's Office was set up in the Family Court, providing information sessions, pre-mediation consultations as well as mediator referral services. A pilot scheme was also put in place to subsidize the costs of mediation in the initial stages. The success of mediation in family matters was demonstrable and had paved the way for wider use of mediation in other court proceedings.

In January 2007, a Judiciary Working Party was set up to consider how mediation could be implemented in different levels of court and tribunals in Hong Kong as an advent to the introduction of mediation as an integral part of the civil procedure under the Civil Justice Reform. Membership of the Working Party included judges, representatives of the Department of Justice, Legal Aid Department, branches of the legal profession as well as practicing mediators. It was and is still the platform where initiatives and policies are deliberated and steered, where pilot schemes and permanent measures are implemented in the Judiciary.

Under the steer of the Working Party, the Judiciary introduced a pilot scheme of mediation in building management cases in the Lands Tribunal. Multi-storey buildings are the most common form of land use in Hong Kong, with its specific problems of management of the common parts of the lobby, rooftop and corridors as well as water leakage and drainage backflow etc, requiring cooperation and agreement of the different owners and stakeholders. Mediation with its non-contentious nature is best suited to resolve such communal problems. A Building Management Mediation Co-ordinator's Office was set up in 2008, with a panel of *pro bono* mediators. It provided a trial run both for the litigants as well as many mediators in the early phase of wider use of mediation in the community. The permanent scheme is still in place currently.

Civil Justice Reform and Practice Direction 31 on Mediation

The use of mediation has progressed into a new and important phase with the implementation of the Civil Justice Reform (CJR) in April 2009. CJR and the attendant new rules of court formally identified the facilitation of settlement of disputes as one of the underlying objectives of the civil procedure of the Court. The new rules expressly require the Court to give effect to the underlying objective by helping the parties to settle the whole or part of the case, by encouraging and facilitating them to use ADR, mainly by mediation, and the parties and their legal representatives are under the duty to assist the court to further those objectives. The Court would explore and monitor the use of mediation under the enhanced case management power.

The Court has issued various Practice Directions (PDs) in relation to mediation. The main PD on mediation is PD 31 for general civil cases, with also PDs for specialist proceedings such as personal injuries claims, construction cases, building management, probate as well as shareholders' disputes.

Mediation is on an entirely voluntary basis, but the parties are under a positive duty to consider the use of mediation as ADR, and the legal representatives must certify that they have duly explained and advised their clients on the use of mediation, and that failure to mediate upon a request by the opposite party without reasonable explanation may attract adverse costs order, i.e. the winning party not recovering its costs from the losing party.

A special mention must be made to the grant of legal aid to mediation as an integral part of litigation. It had a decidedly positive effect on the promotion of mediation upon the commencement of CJR, especially in personal injuries cases where many of the plaintiffs are on legal aid. As such, the decision of the Director of Legal Aid must be recognized and applauded.

Supportive Measures for Mediation in the Judiciary

In support of the implementation of PD 31, the Mediation Information Office was established in January 2010, assisting litigants to make best use of mediation in resolving their disputes. In order that parties are fully informed of the intrinsic value and benefits of mediation, parties are referred by judges to attend information sessions organized by the Mediation Information Office.

In 2018, a new Integrated Mediation Office was set up to galvanize and streamline the efforts of the various mediation offices for the Family Court, District Court and the High Court.

Statistics on mediation in court cases are collected from the parties by the Judiciary in order to monitor and evaluate the effect of mediation.

The Judiciary has continued to explore and set up various schemes, either on its own initiative or in cooperation with other mediation organizations, in order to further promote mediation in the context of judicial proceedings.

Statistics on Mediation

From mediation statistics filed by the parties in the High Court in 2018, the overall settlement rate (including cases settled at mediation and cases settled within 6 months of the conclusion of mediation) was about 65%, and it took an average of 5 hours to reach settlement at the average costs of HK\$17,600. Similar figures are collected in the District Court.

The statistics show that mediation is definitely more effective in terms of costs and time to resolve legal disputes as an alternative to litigation.

Pilot Scheme of External Mediation Master

The Judiciary implemented a Pilot Scheme of External Mediation Master in the District Court in 2018. Legal practitioners with expertise in mediation are engaged as Temporary Master in the District Court with special duties of explaining and exploring with the parties the use of mediation during the case management hearings.

The Mediation Master would explain the underlying objectives of settlement of disputes by using ADR, and encourage the parties to attempt mediation. The skeleton costs estimates prepared by the lawyers is a useful tool for reality testing. While the design is not for the Mediation Master to conduct the mediation itself but to refer the parties to mediation by private practitioners, many cases (about 40%) are in fact either settled during the case management hearings conducted by the Mediation Masters, or by private mediators after the parties have agreed to attempt mediation.

From experience sharing, the following factors have emerged as contributing to the success of the Scheme:

- (1) The Mediation Masters are experienced and skilled mediators in private practice of mediation;
- (2) The process forms part of the court procedures and the parties are more willing to enter into meaningful settlement discussions; and
- (3) In cases where the lawyers might find it difficult to persuade their clients to address the settlement options, the impartial and more authoritative role of the Mediation Masters could assist the parties to consider the settlement realistically.

Pilot Model of Mediator-Assisted Financial Dispute Resolution

The Financial Dispute Resolution (FDR) Pilot Scheme was introduced in the Family Court in 2003 to reform the ancillary relief procedures on financial and custody matters in matrimonial proceedings. It is in substance akin to a judicial settlement conference. Under the original FDR procedures, the parties will make disclosure of their respective financial affairs before the FDR judge. The judge will evaluate their cases and explore possible grounds for, and where appropriate, making attempts to facilitate early settlement. If the parties cannot reach a settlement at the FDR's hearing(s), the matter will proceed to trial before another judge not privy to the FDR.

There are cases where the parties have made initial breakthrough in negotiations during the FDR hearing(s), but the momentum is lost for one reason or another after the hearing has concluded.

Starting in October 2019, the Pilot Model of Mediator-Assisted FDR (Med-FDR) seeks to enhance the effectiveness of FDR with the assistance of a practising mediator. The impetus of negotiations could be maintained with the mediator following up on the meaningful dialogue with a view to facilitate settlement.

Under the new arrangement, cases will be identified for mediation on a voluntary basis by the judge before the FDR hearing. The timing for mediation will usually be at such a stage where sufficient materials have emerged to enable meaningful discussions.

Under normal circumstances, communications during mediation are confidential and will not be disclosed to any third party. Under Med-FDR, the parties' consent will first be sought for disclosure of the mediation communications to the FDR judge. If no settlement is reached in the initial mediation, the mediator will participate in the FDR hearing where the judge will make such enquiries as usual, and may make evaluation of the case. If there is still no settlement, the FDR judge may direct the parties to explore the matters at greater length with the mediator where the judge may not have enough time to do so during FDR. The mediator may also refer issues for further evaluation by the FDR judge. With the synergy between the FDR Judge and the mediator, chances of reaching settlement will hopefully be enhanced.

As Med-FDR has just begun with a few cases, its development and effectiveness will be further monitored.

Pilot Scheme on Mediation for Litigants in Small Claims Tribunal Cases operated by the Joint Mediation Helpline Office

The Small Claims Tribunal (SCT) has an exclusive jurisdiction on monetary claims not exceeding HK\$75,000. It is a special feature of the SCT that no legal representation is allowed and the parties do act in person. The Presiding Officer, assisting by Tribunal Officers, will conduct preliminary hearings to frame the issues and direct production of evidence. The cases will proceed to adjudication if no settlement is reached.

The Joint Mediation Helpline Office (JMHO) is a non-profit making organization jointly founded in 2010 by the Hong Kong Mediation Council, Hong Kong Mediation Centre, Hong Kong Bar Association, Law Society of Hong Kong, Hong Kong Institute of Architects, Hong Kong Institute of Surveyors, Hong Kong Institute of Arbitrators and Chartered Institute of Arbitrators (East Asia Branch) under the incubation of the Judiciary Working Party.

JMHO provides one-stop mediation referral service for parties when the process was then less well known. JMHO set up their first office in the High Court Building with the support of the Judiciary. Since 2018, JMHO has moved to the Wanchai Law Courts Building.

The Pilot Scheme on mediation in the SCT is operated by JMHO under the steer of the Department of Justice. The West Kowloon Mediation Centre is a purpose built mediation centre with congenial architecture on land adjoining the West Kowloon Law Courts where the SCT is situated. The scheme started operation in November 2018.

Cases identified by the SCT Presiding Officers as suitable for mediation will be referred to the Centre for consideration by the parties for mediation by practicing mediators. There is only a nominal fee of \$200 per party and remuneration for the mediators will be funded from elsewhere. Based on the statistics as at 31 July 2019, 188 cases have been referred by the SCT and the settlement rate is 55%.

There is also a feature of the SCT scheme that, subject to the consent of the parties, a newly accredited mediator will join the mediation sessions as a mentee of the mediator, hence, also providing valuable learning opportunities to the less experienced mediators.

Hong Kong Mediation Accreditation Association Limited

The story will not be complete without mentioning the Hong Kong Mediation Accreditation Association Limited (HKMAAL). HKMAAL was set up in 2012 under the steer of the Department of Justice.

It is a premier mediation accreditation body, with the four founding members of the Hong Kong Bar Association, Law Society of Hong Kong, the Hong Kong International Arbitration Centre, and Hong Kong Mediation Centre. Other corporate members are the Hong Kong Institute of Arbitrators, Hong Kong Institute of Architects, Hong Kong Institution of Engineers, Hong Kong Institution of Surveyors, Hong Kong Institute of Construction Managers, Professional Mediation Consultancy Centre and CEDR Asia Pacific. The Judiciary has supported HKMAAL by nominating a judge to sit on its Council.

The HKMAAL is responsible for accreditation of mediators in Hong Kong, and setting standards for training in accordance with international standards. Each corporate member is required to give up the accreditation function to HKMAAL. HKMAAL has 2,200 accredited members. It also handles complaints and disciplinary proceedings against the members. HKMAAL's mission is to progress towards the single mediation accreditation body in Hong Kong.

WAY FORWARD

From experience, it is seen that settlement of disputes and mediation is the most effective means to reducing costs and shortening the time of litigation, which are the underlying objectives of CJR. As such the Hong Kong Judiciary is committed to further integrate mediation into the court procedures with imagination and flexibility. Stakeholders education, providing information and actively encouraging the parties to attempt mediation has proven to be the steps on the

right track to achieve the underlying objectives. The Judiciary will continue to work closely with the litigants and lawyers, and other mediation organizations in realizing the potentials of mediation as an effective alternative means in resolving disputes with a win-win result without the long drawn out and expensive course of tradition litigation.