

What is mediation

Introduction

When a civil dispute is brought before the court to be resolved, the opposing parties will present their positions to the court in a hearing. A judge will decide the case on the evidence before him and by determining how the law is to apply. It can be a lengthy and expensive process to prepare and present a case for hearing and to have it determined by the court.

An alternative to resolving a dispute through the court system is mediation. The Judiciary has encouraged parties to use mediation in various aspects like family disputes, construction disputes, disputes between shareholders in company matters and disputes relating to building management. The procedure to be followed in referring cases in specialist lists to mediation is set out in the relevant Practice Direction.

The benefits of mediation are well recognised. Its use is not confined to specialist lists. This pamphlet helps you to understand what mediation is and how it works to your advantage.

What is Mediation?

Mediation is a voluntary process in which a trained and impartial third person, the mediator, helps the parties in dispute to reach an amicable settlement that is responsive to their needs and acceptable to all sides.

The mediator brings the parties together face-to-face in a private and confidential setting. Each party will have the opportunity of putting

forward his point of view and listening to what the other has to say. The mediator does not impose a decision on the parties.

The mediator will help the parties to:

- Discuss and decide what matters are in dispute;
- Explore each party's real needs and interests;
- Expand settlement options and assess the most suitable solution;
- Draw up the settlement agreement in detail, setting out how the parties have agreed to resolve each matter in dispute.

Other observations about mediation include:

- Mediation is suitable in many cases although it may not be suitable for every case. You may be invited to attend a preliminary meeting in which the mediator will assess whether mediation is suitable for your particular circumstances, or your legal adviser may be able to help you to decide.
- The parties may seek legal advice at any stage of the mediation.
- Both parties have the right to terminate the mediation process at any time.
- Both parties must appreciate that what the other party says in a mediation session is without prejudice and therefore cannot be used in any legal proceedings.
- An agreement drawn up in a mediation session and signed by both parties is legally binding as a matter of contract. The agreement itself is not enforceable as a judgment, an order of the court, or an arbitration award, but an innocent party may sue upon it if the other party is in breach of its terms.

What are the Advantages of Mediation?

Experience worldwide has shown that mediation facilitates a high settlement rate and most people are satisfied with the outcome of mediation.

The advantages of mediation are many and include the following:

- You may avoid the tension, conflict and risk in the adversarial court system.
- You may save some time and money in not having to contest matters in court.
- Mediation can start before any litigation or at any stage during the process of litigation.
- You make your own decisions and reach agreements with which you and the other party may be more willing and ready to comply.
- The settlement terms can be kept private and confidential.
- Mediation can result in terms of settlement of greater flexibility and in more practical ways going beyond the legal remedies that the court is empowered to grant.
- Mediation can help maintain a continuing relationship with the other party or parties involved in the dispute and may improve that relationship.
- The chances of an appeal are greatly reduced, in contrast to litigation.

Who are the Mediators?

There is no strict requirement of who can be a mediator. Mediators usually come from various professional backgrounds and have undergone training in mediation skills and techniques so that they know how to conduct the mediation process in unlocking negotiations that have become deadlocked and in keeping everyone focused on finding a solution.

As a rule of thumb, mediators:

- Do not provide legal advice. You will be encouraged to consult your lawyer for such advice;
- Do not take sides with either party;
- Do not make decisions for you, but help you to assess the feasibility of the decisions you make.

How do I Find a Mediator?

Various organisations in Hong Kong maintain their own list of mediators covering many areas and professional disciplines appropriate to the dispute in question. Some of these organisations are set out at the end of this pamphlet. Each organisation has its own requirements for placing a mediator on its list, such as requirements covering knowledge and skills in negotiation and dispute resolution. The parties can select from the lists and agree on a suitable mediator. In case of difficulty, they can consider contacting a mediation provider organisation for assistance.

Mediators may also be required to abide by an Ethical and Professional Code of Practice of the organisation concerned. Rules are published by some organisations for conducting mediations.

Does Mediation take a Long Time?

It depends on the complexity and number of issues you need to settle. The degree of the parties' cooperation and readiness to participate in the mediation sessions also count. If issues are not complicated and the process goes smoothly, it may only take one mediation session of a day or less for you to reach agreement. All in all, mediation is generally a far more expeditious form of dispute resolution when compared to arbitration and litigation. This is of enormous benefit to all parties especially in relation to costs.

Confidentiality

Mediators are required by their Ethical and Professional Code of Practice to observe confidentiality in respect of all matters disclosed in the mediation session. When the parties agree to take part in mediation, they will usually be required by the mediator to sign a Mediation Agreement (i.e. an agreement to mediate) that all negotiations undertaken pursuant to the mediation are to be privileged and conducted on a without prejudice basis.

Who Pays for the Mediation Service?

Some organisations, such as the Hong Kong Mediation Council and the Hong Kong Mediation Centre, may provide free mediation service in some instances. Otherwise, you will have to pay if you receive the mediation service from a private mediator. You should talk to your legal adviser about the likely costs of mediation, and how this would compare with the cost of litigation. Generally, mediation is cheaper and faster than litigation.

Charges in mediation mainly include the mediator's fees for his time and any room hire costs. It is usual for the parties to agree before the start of the mediation that they will be responsible to pay in equal shares. Of course, if you should decide to instruct lawyers, or other professional persons, to assist you during the mediation, you will be responsible for all of their particular charges.

Sources of Further Information on Mediation

Mediation Information Office of the Judiciary

Room LG104, LG1 High Court Building, 38 Queensway,
Hong Kong

Tel : 2825 0470

Fax : 2537 8156

Email : mediation@judiciary.gov.hk

Website : <http://mediation.judiciary.gov.hk>

Joint Mediation Helpline Office Ltd

Room LG102, LG1 High Court Building, 38 Queensway, Hong Kong

Tel : 2901 1224

Fax : 2899 2984

Email : email@jointmediationhelpline.org.hk

Website : www.jointmediationhelpline.org.hk

Hong Kong International Arbitration Centre

38/F, Two Exchange Square, 8 Connaught Place, Central,
Hong Kong

Tel : 2525 2381

Fax : 2524 2171

Email : adr@hkiac.org

Website : www.hkiac.org

Hong Kong Mediation Council

c/o Hong Kong International Arbitration Centre

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Fax : 2524 2171

Email : adr@hkiac.org

Website : www.hkiac.org

Hong Kong Mediation Centre

15/F, Gold and Silver Commercial Building,
12-18 Mercer Street, Central, Hong Kong.

Tel : 2866 1800

Fax : 2866 1299

Email : admin@mediationcentre.org.hk

Website : www.mediationcentre.org.hk

The Chartered Institute of Arbitrators (East Asia Branch)

c/o Hong Kong International Arbitration Centre

38/F, Two Exchange Square, 8 Connaught Place, Central,
Hong Kong

Tel : 2525 2381

Fax : 2524 2171

Email : ciarb@hkiac.org

Website : www.ciarbasia.org

The Law Society of Hong Kong

3/F, Wing On House, 71 Des Voeux Road Central, Central,
Hong Kong

Tel : 2846 0500

Fax : 2845 0387

Email : mediation@hklawsoc.org.hk

Website : www.hklawsoc.org.hk

Hong Kong Bar Association

LG2, High Court, 38 Queensway, Hong Kong

Tel : 2869 0210

Fax : 2869 0189

Email : info@hkba.org

Website : www.hkba.org

The Hong Kong Institute of Surveyors

Suite 801, 8/F, Jardine House, 1 Connaught Place, Central,
Hong Kong

Tel : 2526 3679

Fax : 2868 4612

Email : info@hkis.org.hk

Website : www.hkis.org.hk

The Hong Kong Institute of Architects

19/F, One Hysan Avenue, Causeway Bay, Hong Kong

Tel : 2511 6323

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