DOI: 10.52028/rbadr.v5i9.ART02

# How Court or Legislation Mandated Mediations are Conducted in Hong Kong

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**Abstract:** The Judiciary of Hong Kong has long been a supporter of mediation. To facilitate the use of mediation by disputants, it has implemented various practice directions and pilot schemes. This article discusses the practice of mediation within civil cases and makes references to Case Settlement Conference, Financial Dispute Resolution, Children's Dispute Resolution, the proposed duty mediator scheme for family cases, and the recent development of mediator-assisted proceedings.



## I Introduction

*1.* Mediation is an attractive option for parties to consider in resolving their disputes. It is an efficient, effective and consensus-oriented dispute resolution method where parties can explore solutions beyond remedies that can be granted by the court.[1] By resolving disputes through mediations, parties can reduce the time and costs involved in litigations, ensure confidentiality, avoid publicity, maintain

[1] Department of Justice of the Government of the Hong Kong Special Administrative Region, *Report of the Working Group on Mediation* (2010) at §§1.1, 3.2 and 3.12.

good relationship between themselves, and make effort to build a harmonious community.[2]

*2.* The Judiciary of Hong Kong has always been a supporter of mediation. Former Chief Justice of Hong Kong Andrew Li in his Opening Address at the 'Mediation in Hong Kong: The Way Forward' Conference in 2007 and Permanent Judge Johnson Lam in his speech for The Hong Kong Legal Week 2022 on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" in 2022 stressed the commitment and support of the Judiciary to the development of mediation in Hong Kong.[3]

*3.* Mediation in Hong Kong has resulted in satisfactory results. In 2021, based on the mediation reports filed, taking into account the mediated cases which resulted in full agreement and cases without agreement but eventually disposed of within 6 weeks, the settlement rate at the Court of First Instance was 54%, while that at the District Court was 66%.[4]

*4.* In support of mediation, the Judiciary has implemented various practice directions and pilot schemes. For example, under the court-annexed mediation schemes, staff in the Integrated Mediation Office and the Building Management Mediation Co-ordinator's Office introduce litigants to mediation and provide pre-mediation sessions to them, but do not conduct the actual mediation.[5] In July 2022, the Integrated Mediation Office (West Kowloon) commenced operation, to which the adjudicators of the Small Claims Tribunal refer suitable cases for mediation.[6] The mediations would be conducted by private mediators on a *pro bono* basis.[7]

*5.* This article provides the reader with a perspective of how court mandated mediations are conducted in Hong Kong.

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2 Department of Justice of the Government of the Hong Kong Special Administrative Region, *Report of the Working Group on Mediation* (2010) at Foreword, §§1.4, 3.16 and 7.96.

3 Andrew Li CJ, Opening Address at the 'Mediation in Hong Kong: The Way Forward' Conference on 30 November 2007, retrieved from https://www.info.gov.hk/gia/general/200711/30/ P200711300131.htm; Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 2.

4 Summary of Mediation Reports filed in the Court of First Instance in 2021, retrieved from https://mediation.Judiciary.hk/en/doc/2021_CFI_EN.pdf and Summary of Mediation Reports filed in the District Court in 2021, retrieved from https://mediation.Judiciary.hk/en/doc/2021_DC_EN.pdf.

5 Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 3.

6 "Integrated Mediation Office (West Kowloon)", retrieved from https://mediation.Judiciary.hk/en/imo_wk.html; Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 4.

7 Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 4.

## II Mediation in General Civil Cases

*6.* Practice Direction 31, which provides guidance on mediations, came into effect on 1 January 2010 and was superseded by a newer version subsequently on 1 November 2014. [8] It applies to the majority of civil proceedings in the Court of First Instance and the District Court, with a few exceptions such as personal injury cases, equal opportunity cases and proceedings in the Construction and Arbitration List.[9] Family mediations are specifically regulated by Practice Direction 15.10.

*7.* Practice Direction 31 first requires that "where all the parties are legally represented, solicitors acting respectively for the parties shall file in Court a Mediation Certificate at the same time as the time tabling questionnaire filed under Order 25, rule 1".[10]

*8.* On the Mediation Certificate, parties have to state whether they are willing to attempt mediation and their reason(s) for refusing to attempt mediation, while the solicitor has to confirm that he or she has explained this option to the client.[11] The Mediation Certificate focuses the minds of the parties on attempting mediation, facilitates lawyers in advising clients on mediation and provides information to the Court for assessing whether a party's refusal to mediate is reasonable.[12]

*9.* A party wishing to attempt mediation should serve a Mediation Notice on the other parties in the dispute, then the other parties should respond by way of a Mediation Response within 14 days.[13] Where there are differing proposals in the Mediation Notice and the Mediation Response, parties should attempt to reach agreement on the proposals and reduce the discussion into the Mediation Minute.[14]

*10.* The Mediation Notice sets out the scope of mediation, the rules for mediation, choice of mediator, time and venue of mediation, costs and the minimum level of participation which should qualify as a sufficient attempt at the mediation; whereas the Mediation Response sets out any agreements and disagreements to the proposals and proposes alternatives.[15] The Mediation Notice and Response

8 Practice Direction 31 (superseded version) dated 12 February 2009; Practice Direction 31 dated 14 August 2014.

9 Practice Direction 31 at §2 and Appendix A. On multiparty mediation cases in Brazil see FERREIRA; SEVERO, 2021, p. 5.

10 Practice Direction 31 at §9.

11 See Practice Direction 31 at Appendix B.

12 Department of Justice of the Government of the Hong Kong Special Administrative Region, *Report of the Working Group on Mediation* (2010) at §1.8.

13 Practice Direction 31 at §§10 and 11.

14 Practice Direction 31 at §12.

15 See Practice Direction 31 at Appendices C and D.

facilitate dialogue on mediation, identify areas of agreement and disagreement, and assist the court to decide on directions to be made.[16]

*11.* To prevent sham mediations and facilitate the Court's exercise of case management responsibilities, the Court may also direct parties to report the results of mediation, including the time and costs spent on mediation, progress of mediation and the date of completion of mediation.[17]

*12.* The codes of conduct of the Law Society of Hong Kong and the Hong Kong Bar Association put a duty on solicitors and barristers respectively to advise the client on mediation if settlement may be in the client's interests.[18]

*13.* The above procedures are crucial for litigants as the Court will consider parties' conduct in making a cost order. Paragraph 4 of Practice Direction 31 provides that "in exercising its discretion on costs, the Court takes into account all relevant circumstances. These would include any unreasonable failure of a party to engage in mediation where this can be established by admissible materials. Legal representatives should advise their clients of the possibility of the Court making an adverse costs order where a party unreasonably fails to engage in mediation".

*14.* Cost sanctions are supported by Order 62 Rule 5(1)(aa) and (e) of the Rules of the High Court Cap.4A - the Court would consider the underlying objectives set out in Order 1A Rule 1, which includes increasing cost-effectiveness and ensuring that the case is dealt expeditiously, and the conduct of all parties, which includes reasonableness in refusing to mediate.[19] To avoid an adverse costs order, parties are expected to engage in mediation unless there is a valid and reasonable explanation not to do so.[20]

*15.* Where one or more parties are not legally represented, on the application of a party or on the Court's own motion, the Court may direct parties to follow the procedures specified under Practice Direction 31 with modifications.[21]

*16.* In effect, the mediation regime stipulated in Practice Direction 31 is mandatory for most civil cases in Hong Kong. One may argue that parties may choose not to engage in mediations so long as they are willing to bear the costs consequences, but it is unlikely that parties would want to bear the costs of the opposing party, no matter how much financial resources one may have.

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[16] Department of Justice of the Government of the Hong Kong Special Administrative Region, *Report of the Working Group on Mediation* (2010) at §1.8.

[17] "Report on Mediation" of "Working Party on Mediation", retrieved from https://mediation.Judiciary.hk/en/workingparty.html#rom.

[18] The Law Society of Hong Kong, *The Hong Kong Solicitor's Guide to Professional Conduct* at §10.17 Commentary 3; Hong Kong Bar Association, *the Code of Conduct of the Bar of the Hong Kong Special Administrative Region* at §10.27.

[19] Department of Justice of the Government of the Hong Kong Special Administrative Region, *Report of the Working Group on Mediation* (2010) at §§1.8 and 1.9.

[20] Allan Leung and Douglas Clark, *Civil Litigation in Hong Kong* (5th ed., Sweet & Maxwell 2017) at §9.075.

[21] Practice Direction 31 at §§18 to 20.

*17.* There are two exceptions to the mediation requirement. The first one is where one or more parties are unrepresented, the parties are not put under pressure to mediate unless the Court directs. The second one is where parties have a reasonable explanation for refusing to engage in mediation.

*18.* Some solicitors consider mediation "as a process that needs to be gone through as part of getting a case to trial".[22] Parties might engage in mediations unwillingly for the purpose of avoiding adverse cost consequences, hence they only aim at showing a minimum level of participation to the Court. Such attitude shows a complete lack of commitment towards resolving their respective disputes through mediation. The Code of Conduct of the Hong Kong Bar Association states that "... if mediation is inappropriate in any given case, Counsel should not advise the client "to go through the motion" without making a genuine attempt to settle the dispute. It is unethical and unprofessional knowingly to participate in a mediation for the purpose of going through the motions, or so as to enable a representation to be made to the Court that mediation has been attempted".[23]

*19.* This is an inevitable flaw in the mediation regime under Practice Direction 31. Afterall, the success of mediation depends on the parties' willingness and commitment to settle their disputes amicably and not through the court mandated procedures. The regime can be improved, if judges start to probe the reasons behind why mediation was not successful and if the reasons given are inadequate to justify a departure from using mediation to resolve one's dispute, the judge may compel one to attempt mediation again. This will send a strong signal to disputants that they will have to go that extra mile to resolve their respective disputes and not simply pay lip service to the process.

## III Case Settlement Conference

*20.* In line with the objective of facilitating the settlement of disputes under Order 1A Rule 1 of the Rules of the District Court Cap.336H, the District Court commenced a pilot scheme in 2018 to "introduce the idea of assisted settlement into the case management process to further promote the use of alternative dispute resolution ("ADR") in civil litigation and to instill among litigants as well as their legal representatives a culture of exploring settlement".[24] As the settlement

[22] Allan Leung and Douglas Clark, *Civil Litigation in Hong Kong* (5th ed., Sweet & Maxwell 2017) at §9.084.
[23] Hong Kong Bar Association, *the Code of Conduct of the Bar of the Hong Kong Special Administrative Region* at §10.27 Footnote 28.
[24] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §§1 and 2.

rate was high, the pilot scheme has been extended and is now called the Case Settlement Conference (hereinafter known as "*CSC*").[25]

*21.* The Court may fix a CSC at any stage of the proceedings, but parties should seek directions at the stage of Case Management Summons or consent summons.[26] The Court will take into account all relevant circumstances in deciding whether a CSC should be held, such as the information provided in the Timetabling Questionnaire in accordance with Practice Direction 5.2, which includes parties' attempt in mediation.[27] The Court may consider a case not suitable for CSC where parties produce a mediation report showing that they have attended a mediation previously which lasted a reasonable duration, and solicitors confirm that the parties are "*entrenched in their positions with no reasonable prospect to settle*".[28]

*22.* Not later than 7 days before the CSC, one of the parties have to lodge and serve a paginated CSC bundle, providing (i) a one-page summary of each party's case; (ii) a list of issues; (iii) copies of key documents; (iv) a statement of the parties' latest offer and counter-offer; and (v) a copy of the mediation report (if any).[29] At the same time, parties should lodge and exchange a statement of costs in the format in Appendix A of Practice Direction 14.3 to provide information on their costs incurred up to the CSC and their estimated costs up to and including the trial.[30]

*23.* The typical directions of the Court would direct the following persons to attend the CSC: (i) every party who is a natural person, or where a party is a corporation, a representative authorized to settle the case; and (ii) the legal representatives of the parties.[31]

*24.* A master sitting in chambers (not open to the public) will conduct the CSC on a without prejudice basis by reviewing and evaluating the process of any without prejudice negotiation and mediation between the parties, addressing parties directly, narrowing down the issues, conducting cost-benefit analysis and

[25] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §§3 and 4; Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 7.

[26] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §6.

[27] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §7 and Appendix 3 §5; see Practice Direction 5.2 at Appendix A.

[28] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §7.

[29] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §§20 and 21 and Appendix 2.

[30] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §24 and Appendix 2; see Practice Direction 14.3 at Appendix A.

[31] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §25 and Appendix 2.

exploring settlement options with the parties.[32] The CSC master will not deal with contested case management issues nor interlocutory applications, and will not have any further involvement in the case if the case is not settled after the CSC. [33] The CSC master will not hold private sessions to discuss the case with a party in the absence of the other party.[34]

*25.* CSCs provide an opportunity for the parties to have a "*face-to-face dialogue to discuss their case*".[35] Legal representatives are expected to support and advise the parties with a collaborative mindset, but not to advocate and argue their case at a CSC, as the master will not adjudicate on the dispute.[36] Non-compliance with the directions for preparation of CSC and unreasonable conduct at the CSC may have cost consequences. [37]

*26.* In 2023, the CSC pilot scheme added the option of having a mediator participate in a CSC, which is known as Mediator-assisted Case Settlement Conference (hereinafter known as "*MCSC*").[38] A MCSC should only be held after the parties have undergone a mediation session.[39]

*27.* In addition to the previously stated procedures, the preamble of the consent summons for a MCSC should include the identity of the mediator, the details of the previous mediation and the parties' agreement that the Court may discuss with the mediator in the absence of the parties prior to and during the MCSC.[40] The consent summons should also provide for the lodgement of a mediator's note, which should contain (i) the common grounds agreed by the parties; (ii) the remaining issues in dispute; and (iii) the concerns and latest proposal of each party in relation to the disputed issues.[41]

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[32] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §§9, 27 and 28 and Appendix 3 §§7 and 8; Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 7.

[33] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §§28 and 29.

[34] Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 7.

[35] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at Appendix 3 §4.

[36] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §26 and Appendix 3 §11.

[37] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §31.

[38] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §4; Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 7.

[39] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §14.

[40] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §15.

[41] Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §16.

*28.* The MCSC hearing will be listed before a judge sitting in chambers (not open to the public) instead of a master.[42] The judge may adjourn the hearing at any stage to allow the parties to continue with the mediation at the facilities inside the court building, and the parties can go back to the judge with the mediator to seek the assistance of the Court.[43]

*29.* In my view, CSC and MCSC are hybrid procedures of litigation and mediation. On one hand, like a mediator, the CSC master or the MCSC judge facilitates settlement by without prejudice discussions with the parties. Parties may voice out their stance more freely than in trial. On the other hand, the master or judge only conducts the CSC or MCSC hearing in the presence of both parties and does not participate in the private sessions with the parties separately. CSC is directed by the Court in an order, hence attendance is compulsory, no matter whether the parties are willing to discuss further. Mediators normally would persuade parties to take a middle ground without commenting on the law, but masters or judges might comment on the weaknesses of all parties' cases.

*30.* The new MCSC scheme combines the advantages of conventional mediation and CSC. Parties can now share confidential matters/information with the mediator in individual sessions without fear of the information being disclosed to the other party, while at the same time, the MCSC judge can make authoritative comments to encourage parties to settle.

## IV Financial Dispute Resolution

*31.* The Financial Dispute Resolution (hereinafter known as "*FDR*") Pilot Scheme provided in Practice Direction 15.11 applies to most ancillary relief applications in family cases, except where parties apply for nominal maintenance or have reached an agreement on ancillary relief.[44] The FDR procedure consist of three phases - the First Appointment, the FDR hearing and trial.[45] It aims to provide the parties with an opportunity to explore all possibilities to settle their disputes in relation to ancillary relief and to avoid greater expense and the uncertainty of what a trial may endure.[46]

*32.* Not later than 7 days before the FDR hearing, the applicant for ancillary relief, who is usually the Petitioner, should deliver to the Court a paginated FDR

42 Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §17.

43 Justin Ko CDJ, *Guidance Note for Case Settlement Conference in Civil Cases in the District Court* dated 16 December 2022 at §19; Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at pages 6 and 7.

44 Practice Direction 15.11 at §1.

45 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §§7.027 to 7.030.

46 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §§7.072 and 7.080.

bundle containing relevant documents and all offers, proposals and responses made by a party, whether they are made orally, in open correspondence or correspondence without prejudice save as to costs.[47] On the last working day before the FDR hearing, parties exchange with each other and deliver to court a written estimate of costs incurred up to the hearing.[48]

*33.* Although not specified in the Practice Direction, it is good practice for parties to arrive at court at least 30 minutes early to conduct settlement negotiations in order to narrow down the issues before the FDR hearing.[49]

*34.* Paragraph 9 of Practice Direction 15.11 stipulates that "*Both parties shall personally attend every hearing unless the court otherwise orders.*" Where legal representatives attend the FDR hearing, they are required to have full knowledge of the case.[50]

*35.* During the FDR hearing, parties should be prepared to address the Court the key elements of their case and their reasons for the proposed settlement terms, then the judge acts as a facilitator to point out matters of concern, remind parties of the risks and costs of litigation if the case goes to trial, and encourage parties to make compromises.[51] The judge will not deliver a ruling on any of the disputed issues, but he or she may express the Court's concern to a party's position on a particular issue especially when the stance is unreasonable, so as to facilitate settlement negotiations.[52]

*36.* The nature of FDR hearings is less adversarial.[53] There are usually short adjournments to allow parties to continue with their negotiations outside the courtroom, when an impasse arises, parties may return to the courtroom and invite the FDR judge to give indications as to how a trial judge may rule on the specific issue.[54]

*37.* FDR hearings are without prejudice, and evidence of anything said during the FDR hearing is not admissible in evidence in any subsequent hearings if the FDR is unsuccessful. [55] The FDR judge will have no further involvement in the case.[56]

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47 Practice Direction 15.11 at §8(d) and (e); Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.068.
48 Practice Direction 15.11 at §10.
49 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.071.
50 Practice Direction 15.11 at Explanatory Note §4.
51 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.073.
52 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.073.
53 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.076.
54 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.078.
55 Practice Direction 15.11 at §8(c); Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.086.
56 Practice Direction 15.11 at §8(b); Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §7.086.

*38.* In *LLC v LMWA*,[57] the Court of Appeal made the following observations in paragraph 68 of the judgment:

> 68. The husband and the wife had previously attempted mediation without success. At the hearing, this Court suggested that the effectiveness of the process could be enhanced if a FDR can be held with the assistance of a mediator. There can be matters on which a FDR Judge can give useful views and steer the parties to explore at greater length with a mediator. With such steering, a mediator can work more effectively with the parties separately in a way which a FDR Judge cannot. The mediator can also refer some issues which divided the parties to the FDR Judge for an authoritative opinion. With synergy between the FDR Judge and the mediator, it is also more likely in cases where parties reach agreement on some but not all the issues, a more cost-effective way to resolve the outstanding issues could be worked out.

*39. LLC v LMWA* gave rise to the mediator-assisted Financial Dispute Resolution (hereinafter known as "*MFDR*"), the first MFDR took place in October 2019 which resulted in full settlement agreement. [58] Up to October 2022, 22 MFDRs had taken place with a settlement rate of 89%. [59]

## V Children's Dispute Resolution

*40.* The Children's Dispute Resolution (hereinafter known as "*CDR*") Pilot Scheme was introduced in 2012, and was later adopted as the standard practice, with the intention to "ensure that whilst the best interests of children remains the court's paramount concern, that lasting agreements concerning children are obtained quickly and in a less adversarial atmosphere"[60] Similar to the FDR procedure, the CDR procedure aims to narrow down issues, save costs and encourage parties to consider alternative dispute resolution.[61] The CDR procedure also consists of 3 phases - the Children's Appointment, the CDR hearing and trial.[62]

*41.* The CDR hearing is similar to the FDR hearing in a number of ways. Parties should prepare a CDR hearing bundle consisting of all relevant documents

[57] [2019] 2 HKLRD 529.
[58] Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 6.
[59] Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 6.
[60] Practice Direction 15.13 at §§1 to 3. On mediation in the Brazilian schools see: FARIAS, Bianca O. Mediação de conflitos em ambientes educacionais: um horizonte com novas perspectivas. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 2, nº 3, 2020, pp. 157-194.
[61] Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §11.014.
[62] See Practice Direction 15.13 at §§6 to 25.

relating to the children's issues, and should exchange with each other and deliver to the court a cost estimate. [63] The judge will act as a conciliator and all parties should attend the CDR hearing, so that the judge can speak to the parties directly in a less formal setting than in a conventional hearing, in the hope of promoting free and spontaneous discussions.[64] The judge may give indications on his or her possible ruling on issues in dispute if he or she were the trial judge, but will not make any determination of disputes.[65]

*42.* The same judge will conduct both the CDR hearing and the FDR hearing, but at separate occasions. [66] In practice, the CDR hearing will usually be heard before the FDR hearing, because the Court can only ascertain the appropriate financial settlement for the parties after determining the children's living and care arrangements, which will have a financial impact on the parties' needs and expenses.[67]

*43.* In addition to the bundle, parties are required to file and exchange their detailed Statement of Proposal about the future arrangements for the children.[68] If directed by the Court previously at the Children's Appointment hearing, third parties such as the Social Welfare Officer and child experts will also be required to attend the CDR hearing.[69]

*44.* However, there is a key difference between the CDR hearing and the FDR hearing. A CDR hearing is not privileged but on an open basis, hence anything said and any admission made orally or in writing in the CDR hearing is admissible as evidence in trial.[70] If the CDR hearing is unsuccessful, the same judge may hear the child related matter in trial.[71]

*45.* As CDR hearings are not conducted on a without prejudice basis, there are concerns whether a mediator-assisted Children's Dispute Resolution (hereinafter known as "*MCDR*") is possible.[72] Permanent Judge Johnson Lam opined that MCDR "would only be viable if the relevant practice direction is amended to provide for

63 Practice Direction 15.13 at §20; Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §11.045.
64 Practice Direction 15.13 at §15; Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §§11.022 and 11.023.
65 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §11.022.
66 Practice Direction 15.13 at §16.
67 Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §11.044.
68 Practice Direction 15.13 at §13.
69 Practice Direction 15.13 at §15; Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §11.023.
70 Practice Direction 15.13 at §§16 and 17; Philippa Hewitt, *Family Law and Practice in Hong Kong* (3rd ed., Sweet & Maxwell) at §11.021.
71 Practice Direction 15.13 at §16.
72 Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 6.

the parties consenting to such process being conducted on a without prejudice basis".[73]

*46.* I understand that there are debates on whether CDR hearings should be held on without prejudice basis.[74] In my view, the reason why CDR hearings are not privileged is that the Court regards the best interests of children as the paramount consideration. The judge will have continuous supervision over the children's disputes and parents cannot change their stance in relation to the children in the CDR hearing and trial. If MCDR hearings are without prejudice, they may pose a challenge on how the Court can evaluate the best interests of children continuously. The practice of MCDR requires more discussions and remains to be explored.

## VI Proposed Duty Mediator Scheme

*47.* The Judiciary is considering the expansion of court-annexed mediation service by setting up a pilot scheme of duty mediator for simple family disputes in the Family Court.[75] The Court will refer suitable cases to mediation conducted inside the court building by a duty mediator who will be remunerated at a fixed hourly fee.[76]

*48.* Based on the name of the scheme, I anticipate that junior members of the legal profession would be given more opportunities to act as a mediator, just as they represent parties in criminal cases under the Duty Lawyer Scheme. More experience in mediation would foster a stronger body of mediators in Hong Kong and facilitate the development of mediation, which is beneficial to the public as a whole.

## VII Conclusion

*49.* The Judiciary of Hong Kong has made great strides in promoting alternative dispute resolution. It has set up various offices to facilitate the use of mediation, implemented schemes to encourage parties to engage in mediations to settle their disputes, and published guidance notes and practice directions to maintain

[73] Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 6.

[74] Johnson Lam PJ, Speech on "Mediator-assisted Financial Dispute Resolution/ Child Dispute Resolution ("M-FDR/CDR") - Concerns, Feasibility and Benefits" on 27 July 2022 at pages 8 and 9.

[75] Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 4. On mediation in family law in Brazil see: BRAGANÇA, Fernanda; Netto, Fernando G. M. O protocolo familiar e a mediação: instrumentos de prevenção de conflitos nas empresas familiares. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 2, nº 3, 2020, pp. 217-230.

[76] Johnson Lam PJ, Speech on "Confidentiality and Privilege in Court-annexed and Court-based Mediations" on 9 November 2022 at page 5.

consistency. The Judiciary has been keen to explore creative ways to facilitate settlement of disputes in a fair, expeditious and cost-effective manner.

*50.* While this article covered general mediation in civil cases, CSC and MCSC, FDR and MFDR, CDR and CFDR, and the proposed duty mediator scheme for family cases, it has not covered every single scheme proposed and implemented by the Judiciary.

*51.* As discussed above, each scheme has its unique features, ranging from conventional mediation to court procedure with mediation elements. General civil mediations, family mediations and the proposed duty mediator schemes are essentially private mediations encouraged by the Court, as parties unreasonably refusing to engage in mediations may face cost sanctions.

*52.* CSC and FDR are similar to conventional mediations, but parties are compelled to participate. The master or judge is more authoritative on the merits of legal issues than a mediator, but it is less able to give suggestions on negotiation strategies and address parties' non-legal concerns.[77] CSC and FDR are without prejudice in nature.

*53.* CDR is the least akin to conventional mediations, as there are no individual sessions, and the discussions are not privileged. The judge conducts CDR in a less adversarial manner and communicates with the parties directly, to achieve a consensus.

*54.* MCSC and MFDR are innovative procedures combining mediation and court proceedings. Parties benefit from the advantages of having a mediator, such as being able to have individual sessions to preserve confidential information from the other party and being able to obtain advice on negotiation strategies. At the same time, the master or judge can steer parties back on track when parties insist on meritless arguments. It remains to be seen how MCDR will be developed and whether CDR will be conducted in a without prejudice basis in the future.

*55.* With the continuous support from the Judiciary, the legal profession and the general public, I am confident that the diversified usage of mediation will continue to benefit all stakeholders going forward thus creating a harmonious society that we can all be proud of.

[77] Johnson Lam PJ, Speech on "Mediator-assisted Financial Dispute Resolution/ Child Dispute Resolution ("M-FDR/CDR") - Concerns, Feasibility and Benefits" on 27 July 2022 at page 2.

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Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

TO, Christopher. How Court or Legislation Mandated Mediations are Conducted in Hong Kong. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 05, n. 09, p. 37-51, jan./jun. 2023. DOI: 10.52028/rbadr.v5i9.ART02.