

Issue 20

Mediation in Hong Kong (香港调解须知)

Introduction(简介)

One of the changes in the 2009 Civil Justice Reforms (香港司法改革) is the need for all parties to consider alternative dispute resolution procedures as a means of settling their disputes rather than merely proceeding to litigation which will be a lengthy and expensive process.

“Alternative dispute resolution” (“ADR”) (争议其他解决方法) is a process whereby the parties agree to appoint a third party to assist them to resolve their dispute. One may be arbitration (仲裁). A common mode of ADR is “mediation”(调解).

To a layman, the word “mediation” is an uncommon concept. Accordingly, this newsletter aims to give a brief overview of the meaning of mediation, its advantages and disadvantages, different stage of mediation process, and where one can find a mediator.

What is mediation (调解的性质)

Mediation is a non-adversarial but structured negotiating process (非争议但有系统的谈判过程) in which a professionally trained and impartial third party, the mediator, assists parties in resolving their dispute and reaching a settlement. It is neither fault-finding (怪责性质) nor adjudicative (裁判性质). The process emphasizes problem solving, and is interest-oriented (利益为本). The mediator does not play legal issues and tries to find practical and feasible ways to compromise the needs and interests of both parties in order to reach a mutually acceptable settlement.

Mediation is also a confidential process (保密程序) and any information exchanged by the parties during the mediation process cannot be disclosed in any court proceedings. Mediation fundamentally differs from the litigation process. The mediation process does not follow a rigid formal framework and is not governed by the rule of evidence. The mediator does not impose a binding and enforceable decision on the parties. The negotiation terms are always controlled and agreed by the parties.

Though mediation is not a mandatory process, refusing to mediate after court litigation has commenced can be regarded by the court as an unreasonable refusal to engage in mediation. It may lead to an adverse costs order to be made by the court against any un-cooperative party.

Advantages of mediation (调解的优点)

1. **Mediation is suitable and good for many cases (适合性).** Most commercial, family and business disputes are suitable for mediation. Mediation shall produce good settlement results. However, some special disputes may not be suitable for mediation because of their particular features (for example where a party is not mentally fit for mediation).
2. **The process can start at any stage (even after commencement of court litigation) and either party has the right to terminate the mediation process at any time (时间弹性).** Where mediation takes place after litigation commences, the court may adjourn the hearing until after completion of the mediation. The length of the mediation depends on the complexity and number of issues in disputes, and level of co-operation from the parties.
3. **Everything discussed or disclosed in mediation is without prejudice (不影响法律权利) and confidential (保密).** Parties will usually enter into a mediation agreement containing a clause requiring each party to keep confidential everything discussed during the mediation.
4. **The process creates a supportive and constructive environment to promote communication between the parties and increase the chance of a later settlement (加深了解).** Mediation provides a friendly and facilitative environment for parties to understand each other better and negotiate a settlement. There will be no legal binding agreement on either party until a settlement is signed by both parties.
5. **Mediation allows the parties to be creative and flexible with the terms of settlement (弹性解决).** The parties can agree on arrangements beyond the realm of what a court can order (e.g. apology in the media, or one party agreeing to, for example, attend a behavior rehabilitation course). Remedies available in court proceedings normally include the narrow orders of damages (赔偿), injunctive orders (禁制令), orders for specific performance (执行令), and declarations (声明令).
6. **The parties avoid the stress and risk of litigation (减低风险).** In mediation, parties control the result. In court litigation, the judge controls the fate of the parties.
7. **Mediation is timely, effective, and inexpensive in case of an early settlement (费廉).** Court litigation is long and expensive but effective mediation may just take a few days and several thousand dollars.
8. **Legal representation is not essential although lawyers can have a legitimate and constructive role to play (省法律代表).** Lawyers can help clients by (a) assisting their clients in presenting their case and materials, and (b) evaluating and giving advice on the risks and opportunities presented by the options suggested for a settlement.

Disadvantages of mediation (调解的可能缺点)

The mediation process may not produce fair and win-win negotiation results in some rare cases. For example, in a case where a bad party may use the mediation as a “fact finding exercise”, “bottom line assessing exercise” or “bullying exercise” (where the bargaining powers of the parties are not equal). However, such instances are not supposed to take place if the parties can have an able mediator who shall deal with such undesirable situations and introduce measures to discourage such conduct.

Costs of mediation (调解费用)

The costs of the mediation (e.g. the mediator's fees and the mediator venue charges etc) are usually borne equally between the parties. In the event of a co-mediation (e.g. each party appoints his own mediator when the parties cannot agree to the appointment of a single mediator), each party will pay the fees of their own mediator, but share equally the other incidental expenses.

Stages of mediation (调解阶段)

The mediation process is a highly flexible and self-empowering experience. The mediator and the parties (and their legal representatives) can agree on how to conduct the mediation.

The mediation process is generally distinguished by 5 phases:

Phase 1 – Introduction (简介): The mediation process is explained by the mediator to the parties, and the tone and ground rules of the mediation process are set jointly.

Phase 2 – Initial Joint Session (合议): The mediator is briefed on the general facts and issues of the disputes of each party. Both parties will express their stands and views.

Phase 3 – Initial Private Session (单议): The mediator will see and talk to each party in private and by this way, honesty of the parties can be encouraged.

Phase 4 – Other Session (其他安排): The mediator may request to meet the parties' lawyers without their clients or meet the parties without their lawyers.

Phase 5 – Final Joint Session (结议): The mediator clarifies and sums up, and states the agreement reached by the parties, or where there is no agreement reached, acknowledge that there is no agreement reached. Where there is a partial agreement reached, the mediator may clarify what has been agreed but the remaining issues in dispute. Any agreement reached may be drafted by the mediator in writing or the lawyers of the parties.

Where to find a mediator (何处找调解员)

The Law Society's website at www.hklawsoc.org.hk provides a list of qualified mediators on the Law Society's Panel of Mediators. Alternatively, you may consult your lawyer to seek other recommendation.

Conclusion (总结)

In 2009, Sir Laurence Street QC said that:

“Part of the magic of mediation is that the parties themselves have to own the resolution. In a Court case where one party wins and one losses, the one that's lost is often rigorously critical of the process – the judge didn't understand the issue or the lawyers made a mess of it – and the other side isn't

necessarily delighted with it either. Contrast that with mediation, where both parties go back with a degree of disappointment but never loss. They've negotiated with their counterpart, they've got a deal they can live with, and they can get on with their business and their life. The win-win is in the fact of the settlement, not the terms of the settlement."

Accordingly, before proceeding to litigation to seek justice from the court, parties should consider engaging the prior mediation. You may be surprised with the mediation result!

Recently, it was complained that few mediators conducted mediation in bad faith. They did not help the parties diligently or responsibly. They roughly finished the mediation case so that the parties could simply be given an excuse to report to Court that they did go through mediation. Such unprofessional mediators should be condemned.

Nothing shall constitute legal advice to any person by Messrs. Maurice WM Lee Solicitors (Tel: (852) 2537 5833) (Website: www.wmleehk.com)

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