



**EXPERIENCE SHARING BY
EXTERNAL MEDIATION MASTER**

5 November 2020

**MR. BRYAN LUNG,
ADJUDICATOR OF SMALL CLAIMS TRIBUNAL**

**HOW WERE THE HEARINGS
USUALLY CONDUCTED?**

Parties attending the hearings

- Both sides were legally represented
- Both sides were not legally represented
- Only one party was legally represented

Flow of the hearings

- Briefly mentioned the purpose of the hearing.
- To explore the use of mediation in a dispute and to facilitate the parties on settlement, if appropriate.
- Gave case management directions for future conduct on the case.
- Conclusion of settlement if the parties reached settlement during hearings.

Explore the use of mediation

If the parties have NOT attempted mediation

- Explored whether they had intention to settle the case by mediation or direct negotiations.
- If the parties did not have an intention to negotiate or attempt mediation or did not know what mediation is (usually in the situation for the parties who were not legally represented), we would briefly mention what mediation is and direct them to attend an information session of mediation organized by Integrated Mediation Office (“IMO”) of the Judiciary which is located in Room 113, 1/F, Wanchai Tower.

Explore the use of mediation

If the parties have NOT attempted mediation

- Parties may be directed to attend an information session of mediation organized by IMO as well whenever we had doubts that the parties did not fully understand the spirit of mediation,

no matter whether or not they were legally represented, and whether or not they mentioned they would proceed to mediation and have selected a mediator.

Explore the use of mediation

If the parties have NOT attempted mediation

- If the parties indicated intention to attempt mediation, we would then discuss with the parties on whether and how mediation could be conducted on a constructive and meaningful way before giving further case management directions. For example:-
 - (1) Discussed whether parties were ready for conducting a meaningful mediation, i.e. whether an expert report was required, whether a breakdown on assessment of damages were required, whether further documents needed to be disclosed before mediation etc., or whether the parties considered mediation should be conducted as soon as possible before incurring further costs in preparing witness statements and expert report (by referring to the Statement of Costs submitted by the parties).

Explore the use of mediation

If the parties have NOT attempted mediation

(2) Discussed the appropriate criteria for choosing mediators (i.e. costs, qualification, professional background of mediator such as one who knew the area of dispute, or one who could deal with difficult emotions etc.),

but also reminded the parties not to spend too much in arguing over the appointment of the appropriate mediator.

Explore the use of mediation

If the parties have NOT attempted mediation

- (3) Discussed the preparation works that the parties should have done before mediation (i.e. prepared different proposals to resolve the matter, explored own interest of the dispute and tried to understand the other parties' interest of a dispute as well, ensure the party attending the mediation has sufficient authority to deal with the matter etc.).
- (4) Worked out the core issues need to be addressed by the parties for settlement negotiations in mediation (no matter legal issues or other non-legal issues or concerns).

Explore the use of mediation

If the parties have NOT attempted mediation

- (5) Reminded the parties a meaningful mediation usually took at least some time and for some cases joint sessions were necessary for the parties to have a constructive discussion.
- (6) Set down a realistic case management timetable for the parties in view of the discussion of the above issues (including
 - (1) a short adjournment of the case for the parties to come back for a meaningful settlement discussion; OR
 - (2) gave directions to commence mediation first within 30 or 60 days from the hearing; OR
 - (3) gave directions to the parties to exchange expert reports or witness statements first before pursuing mediation).

Explore the use of mediation

If the parties have attempted mediation but UNSUCCESSFUL

- (1) Discussed with the parties in what aspect the mediation or settlement negotiations failed and found out what were the impasse/hurdles of the parties for settlement during mediation (the process of the mediation would be explored as well to assist the parties to understand in what ways they could do to improve the effectiveness of the mediation in the future (if any)).
- (2) Evaluated with the parties if further mediation would help and when would be the best time to re-commence mediation/settlement negotiations (e.g. by highlighting the costs incurred, explored the concerns of the parties and to evaluate whether the relief sought at Court would solve the concern of the parties etc.).

Explore the use of mediation

If the parties have attempted mediation but UNSUCCESSFUL

- (3) Asked the parties relevant questions for them to consider and evaluate the likely consequences that the parties may face in litigation if they win and if they lose. In very obvious case, or where it is a question of law, the Court may, if it is helpful, point out the issues by raising questions, directing the parties to consider the problem, and inviting them to further consider and evaluate the case.
- (4) If the parties would like to attempt further without prejudice discussion during the hearing, facilitated without prejudice discussion with the parties, then gave parties a chance to meet and discuss outside the courtroom to explore settlement.

Explore the use of mediation

If the parties have attempted mediation but UNSUCCESSFUL

- (5) Gave appropriate directions if the case was appropriate and ready to set down for trial after issues for settlement and mediation were fully explored with the parties and the parties were yet to find a mutual acceptable solution to resolve the matter.

Without Prejudice Discussion During Hearings

- Discussion was not only limited to legal issues and proposals. We would also try to explore parties' interest behind their proposals.
- We would also try to narrow down the issues and focus on the core issues that affect parties' settlement of a dispute.
- We were fully aware that not all the evidence was before the Court at this stage. However, for obvious case, or where it was a question of law, the Court may point out the issues by raising questions, directing the parties to consider the problem, inviting them to further consider and evaluate their case and to come up with a more realistic and revised proposal to resolve the problem.

Without Prejudice Discussion During Hearings

- If appropriate, name viable options for parties to consider.
- Facilitated and concluded settlement when time allowed and the parties seemed interested in reaching a settlement in the hearing.
- If necessary, reiterated lawyers' duty to assist the court in achieve the underlying objectives.

Few observations on Statement of Costs and Personal Attendance at the hearings

- Statement of Costs provided very useful and important information that encourage parties to engage in alternative dispute resolution.

Although the parties were required to provide a rough estimation only, we would clarify with the legal representatives when the estimates were exceptionally “low” or “high” compared with other usual cases and asked relevant questions on how the estimates were arrived at to ensure the estimates were an accurate estimation for the parties to consider and evaluate their positions.¹⁶

Few observations on Statement of Costs and Personal Attendance at the hearings

- Attendance of the parties was a key element to achieve an effective facilitation for settlement or preparation for meaningful mediation/settlement.

For corporate parties, it would be useful if the authorized person who attended the hearing has the authority to decide on how to proceed with the matter.

EXPERIENCE SHARING BY EXTERNAL MEDIATION MASTER

-END-