



Role of legal and other advisors and Commitment of participants to the mediation session

Mr Registrar Lung
12 May 2012

1

Item One: Role of legal and other advisers

- 1. You have been seeing the attitude of lawyers towards mediation when CJR was implemented in April 2009. How would you describe their attitude at that time? Now three years have elapsed, any, and if so, what changes do you observe?*

2

Item One: Role of legal and other advisers

- Practice Direction 31 for mediation was operative on 1 January 2010.
- This is purely a personal impression as I see from my work at court. The initial reaction of the legal profession seemed to look upon mediation as an infringement of their professional business.

3

Item One: Role of legal and other advisers

- Many of the lawyers were not accredited mediators themselves. They also saw mediation as a way whereby the Court would shift the workload to mediation. As such, they would take it as an erosion of the litigants' right of access to court.

4

Item One: Role of legal and other advisers

- We had seen resistance from the legal profession on mediation, which was one of the reasons mediation was postponed for its operation until 1 January 2010.
- Now the legal profession seems to have accepted the reality of mediation as one of the objectives of the CJR.

5

Item One: Role of legal and other advisers

- Many of the members have also acquired accreditation of mediators. They have more understanding of how mediation can assist the parties to resolve their disputes. This is a global trend. Of course, we can still see resistance from members of the legal profession against mediation.

6

Item One: Role of legal and other advisers

- It will take time for them to see the effects of mediation. It will also take time to change their mindset.

7

Item One: Role of legal and other advisers

- 2. What were the expectations of the Court towards lawyers when they then had additional role to play as a mediation advocate?*

8

Item One: Role of legal and other advisers

- The Court expects them to give proper advice to their clients as a mediation advocate.
- Proper advice is the proper legal advice on the legal issues and the fact, always bearing in mind the objectives of mediation and let clients be the ultimate decision makers for themselves.

9

Item One: Role of legal and other advisers

3. *It is understood that lawyers behave differently in mediation. Here are some examples gathered from mediators:*

- They “ring-fenced” their clients so that mediator did not have a chance to talk to the party, leading to the failure of the session;

10

Item One: Role of legal and other advisers

- They kept on making unrealistic proposals; when they were asked to give some justification, they failed to do so;
- Some lawyers were still arguing the clause on mediation fees when they came on the date of mediation.

11

Item One: Role of legal and other advisers

- How much does the court know about the lawyers' behaviour/practices in mediation? Some of them indeed tried to prevent settlement. From a forward looking perspective, how to ensure the lawyers come with an appropriate attitude to the mediation?

12

Item One: Role of legal and other advisers

- The court does not know what happened in mediation, which is confidential information kept from court. Of course, when there is dispute as to the conduct in mediation, the parties will, upon legal advice, disclose such information to the court for determination of their disputes.

13

Item One: Role of legal and other advisers

- The first example amounts to interference with the duties of the mediator, whose main duty will be to explore the parties' interest.
- The second example demonstrates what a legal advisor should not do for client in mediation – a contravention of the court's expectation as I explain in question 2.

14

Item One: Role of legal and other advisers

- This is the so-called “*unrealistic rosy picture for client*” situation, which Lam J. in his judgment in *Chevalier (Construction) Company Limited v. Tak Cheong Engineering Development Limited HCA153/2008* had advised against.
- The 3rd example is simply a non-preparation for mediation.

15

Item One: Role of legal and other advisers

- This will waste time and costs for their clients.
- The appropriate attitude to mediation comes from the proper mindset of the legal advisers. The proper mindset stems from understanding of mediation, through practice in mediation and awareness of clients’ interest vis-à-vis their own personal interest.

16

Item One: Role of legal and other advisers

- Their professional ethnos require them to give priority to clients' interest.

17

Item Two: Commitment of participants to the mediation session

1. *Pursuant to Practice direction 31, the concepts of minimum level of participation and costs sanctions have been introduced for the purposes of, inter alia, supporting the use of mediation.*

18

Item Two: Commitment of participants to the mediation session

- *Can you share with us the Judiciary's observations on the effectiveness of PD 31 in (a) getting the disputing parties to come to the table and mediate and (b) on the whole, fulfilling the underlying objectives of the CJR?*

19

Item Two: Commitment of participants to the mediation session

- Practice Direction 31 has provided a set of comprehensive directions for mediation. In part A, it sets out the importance of mediation, being one of the objectives of the CJR (paragraph 1 and paragraph 3); its application in District Court and the High Court (paragraph 2);

20

Item Two: Commitment of participants to the mediation session

- the costs implication for unreasonable refusal of considering mediation for settlement and the legal advisors' duties of advising clients (paragraphs 4 and 5);
- and the protection of privilege for parties in civil litigation (paragraph 6).

21

Item Two: Commitment of participants to the mediation session

- Part B provides for the procedures for starting mediation, with the special provisions under paragraph 13 for the court's jurisdiction to resolve parties' disputes over the choice of mediator, the minimum level of participation and the proportion of costs each party should bear, which are the most frequent disputes between the parties.

22

Item Two: Commitment of participants to the mediation session

- Paragraph 14 imposes upon the parties the duty of implementing their agreement on mediation.
- In my experience, there is nothing that has fallen outside the provisions under this Practice Direction.

23

Item Two: Commitment of participants to the mediation session

- To answer your question briefly, the form has been set for mediation. Whether or not the underlying objectives of the CJR have been fulfilled depends on the proper mindset of the parties, their advisors and the mediators' skill and experience in mediation.

24

Item Two: Commitment of participants to the mediation session

- 2. We have read a number of judgments from you regarding the choice of mediator. In practice, lawyers often spend a lot of time and costs on this first step of the mediation process, in order to agree on the choice of mediator which is often disproportionate to the mediation process.*

Looking forward, will there be any measures/mechanisms to limit the costs incurred on this aspect?

25

Item Two: Commitment of participants to the mediation session

- The main objective of mediation is to save costs and time for the parties. It is contrary to this main objective if parties spend a lot of time and costs on the preparation for mediation, in particular the choice of mediator, which is invariably the first hurdle.

26

Item Two: Commitment of participants to the mediation session

- Other disputes that we had come across were the minimum level of participation, the proportion of costs to be shared by each party and whether there should be a stay of the proceedings for mediation.

27

Item Two: Commitment of participants to the mediation session

There are the following judgments for reference:

- (a) *Resource Development Limited v. Swanbridge Limited HCA1873/2009* on the question of minimum level of participation in accordance with that proposed in the Practice Direction and whether there should be a stay;

28

Item Two: Commitment of participants to the mediation session

(b) *Hak Tung Alfred Tang v. Bloomberg L.P. (a firm) HCA198/2010* on the proper approach of parties towards mediator;

29

Item Two: Commitment of participants to the mediation session

(c) *Upplan Company Limited v. Li Ho Ming & Others HCA1915/2009* has set out the ways for parties to determine the choice of mediator. Since this Decision delivered on 5 August 2010, similar disputes had been resolved by reference to it without court's invention, as far as my court is concerned.

30

Item Two: Commitment of participants to the mediation session

- (d) *C.Y. Foundation Group Limited v. Leonora Yung and Others HCA933/2011* on the issue of sharing of mediator's fees and costs between the plaintiff and the defendants where there is only one plaintiff but there are 12 defendants.

31

Item Two: Commitment of participants to the mediation session

- Parties should make reference to those cases for guidance on those issues. For most cases, the cases have provided useful guide to resolve their disputes without court's assistance.

32

Item Two: Commitment of participants to the mediation session

- If they are unable to do so, they can refer the matter to the court, identifying the issues in dispute, their reference to the relevant judgments and state the reasons why the cases cannot assist them to solve their disputes.

33

Item Two: Commitment of participants to the mediation session

- The court may, for appropriate cases, decide the issues for them on the paper without a hearing, thus saving costs. I can tell you that I have seldom come across disputes that required my determination.

34

Item Two: Commitment of participants to the mediation session

- The last case on the sharing of mediator's fees and costs, which is a new issue that finds no guide from the previous decision, is the only one in the past 18 months.

35