

PRACTICE DIRECTION 6.3

CONSTRUCTION AND ARBITRATION LIST PILOT SCHEME FOR VOLUNTARY MEDIATION

A. General

1. This Practice Direction provides for a pilot scheme to operate from 1 September 2006 to 31 August 2008 in relation to construction cases in the Construction and Arbitration List.
2. The purpose of the scheme is to encourage parties in construction cases in the Construction and Arbitration List to consider the use of mediation as a possible cost-effective means of resolving disputes.

B. Initiation of Mediation under the Pilot Scheme

3. A party (the Applicant) to a construction action may serve a Mediation Notice upon any other party (the Respondent) in the dispute.
4. The Mediation Notice should state that the Applicant wishes to attempt mediation to resolve all or a specified part of its dispute with the Respondent.
5. The Mediation Notice should identify the rules under which the proposed mediation is to take place, including the manner in which a mediator is to be appointed. The Mediation Notice should as much

as possible also give some idea of the estimated costs to a party of engaging the services of a mediator.

6. The Mediation Notice should specify a timetable for the proposed mediation, stating what minimum amount of participation would qualify (as far as the Applicant was concerned) as a sufficient attempt at mediation.

7. Upon receiving the Mediation Notice, the Respondent should respond to the Applicant in writing within 14 days (or such other time as the parties may agree), stating:-
 - (1) whether the Respondent agrees to mediation of all or only a specified part of the relevant dispute;
 - (2) whether the Respondent agrees to mediation in accordance with the rules identified by the Applicant or proposes that mediation proceed by some other set of rules;
 - (3) whether the Respondent agrees with all or part of the timetable proposed by the Applicant and whether the Respondent suggests any modifications to the timetable;
 - (4) the minimum amount of participation which (as far as the Respondent is concerned) would qualify as a sufficient attempt at mediation.

8. Where the Respondent does not wish to mediate the relevant dispute or part of the dispute, the Respondent should state why it does not believe that mediation is appropriate.
9. Where the Respondent agrees to mediation, the parties should proceed in accordance with the stipulated rules and timetable.
10. Where the parties agree on some (but not all) proposals in the Mediation Notice, the parties should meet as soon as possible to see whether agreement can be reached on those proposals over which they differ. Any agreement consequent upon such meeting should be reduced into a written minute signed by the Applicant and Respondent. Where appropriate, the parties may apply to the Construction Judge for assistance in resolving points of difference between them in relation to the mechanics of the proposed mediation.
11. The Applicant or Respondent may apply to the Construction Judge to stay the relevant action pending the progress of an agreement to mediate reached in accordance with this Practice Direction. The stay application should specify the anticipated duration of the mediation. The stay application should be supported by a brief affidavit exhibiting the Mediation Notice, the Respondent's written reply and any subsequent minute of agreement.
12. Where the Applicant and Respondent differ on the minimum participation which should qualify as a sufficient attempt at mediation, the Construction Judge may (either when hearing a stay

application or at any other time) specify the applicable minimum level of expected participation.

13. It is recommended that any stay application be heard after the close of pleadings in the underlying action at the time of the Summons for Directions.
14. Attention is drawn to Question 12 of Appendix A (“Construction and Arbitration Judge: Information for the Summons for Directions”) to Practice Direction 6.1. At the Summons for Directions, the Construction Judge may ask the parties whether they have attempted mediation and (if not) the reasons for not so doing. The Construction Judge may also express a view as to whether mediation might help in resolving all or some of the disputes in an action.

C. Voluntary Nature of Mediation under Pilot Scheme

15. No party to an action shall be compelled to go to mediation under this pilot scheme. The Court will treat an agreement to mediate reached pursuant to Section B above (a Mediation Agreement) as having been arrived at on a voluntary basis without prejudice to the parties’ contentions in the underlying action.
16. A Mediation Agreement will not be actionable as a contract. The Applicant and Respondent will be free to withdraw from such agreement at any time and proceed with the underlying action.

17. No settlement reached in the course of mediation under a Mediation Agreement will become binding on the Applicant or Respondent until the settlement is reduced into writing and signed by both parties.
18. The conduct of the mediation shall remain confidential to the parties and will proceed wholly on a without prejudice basis.

D. Cost Sanctions

19. Where a Mediation Notice has been served, an unreasonable refusal or failure to attempt mediation may expose a party to an adverse costs order.
20. Where a party:-
 - (1) has engaged in mediation up to the minimum level of expected participation agreed by the parties beforehand or as determined by the Court; or,
 - (2) has a reasonable explanation for non-participation,he shall not suffer any adverse costs order.
21. What constitutes an adverse costs order will be a matter in the Court's discretion after taking into account all relevant circumstances.

22. In determining whether a party has acted unreasonably in refusing to proceed with mediation, the Court will not take account of or inquire into:-
- (1) what happened during the mediation;
 - (2) why the mediation failed; or,
 - (3) whether any failure in the mediation may be ascribed to unreasonable conduct by any party.

E. Administration of Pilot Scheme

23. A booklet will be available from the Judiciary for those wishing information on mediation generally and on the resources available for mediation in Hong Kong.
24. For the purposes of evaluating the effectiveness of the pilot scheme, the parties or their legal representatives are requested to report the following to the clerk to the Construction and Arbitration List:-
- (1) the action number of any case in which mediation pursuant to a Mediation Agreement has been attempted;
 - (2) the amount claimed in the action;
 - (3) whether mediation has led to settlement of the dispute or some part of it;
 - (4) the number of hours spent by the mediator (including preparation) on mediation (whether or not ultimately successful);

- (5) whether (in the opinion of the reporting party) the mediation has led to a significant saving in litigation costs; and,
- (6) any observations on how the pilot scheme may be improved.

25. This practice direction comes into effect on 1 September 2006.

Dated this 4th day of July 2006.

(Andrew Li)
Chief Justice