

- (b) Upon the written advice of the mediator after consultation with the parties that in his opinion further attempts at mediation are no longer justified or;
- (c) Upon written notification by any party at any time to the mediator and the other parties that the mediation is terminated.<sup>38</sup>

4.96 This part of the LSHK Mediation Rules replicates of its counterpart in the HKIAC Mediation Rules.

4.97 The DoJ's Proposed Agreement reads:

#### **'TERMINATION OF THE MEDIATION**

A Party may terminate the mediation at any time after consultation with the Mediator.

The Mediator may terminate the mediation if, after consultation with the Parties, the Mediator feels unable to assist the Parties to achieve resolution of the Dispute.<sup>39</sup>

38. Law Society of Hong Kong Mediation Rules, clause 11.

39. Department of Justice's Proposed Agreement to Mediate, clauses 15 and 16.

## **Chapter 5**

### **MEDIATION CODES AND PROCEDURES (II) ISSUES ARISING FROM MEDIATION**

#### **(I) Introduction**

- 5.1 In the previous chapter, we looked at how the mediation process is carried out from initiation to termination under various mediation codes and procedures.
- 5.2 In this chapter, we will continue to examine the mediation codes and procedures while we focus on several important issues arising from mediation.
- 5.3 In particular, the following aspects of these mediation codes and procedures will be looked at:
  - (1) confidentiality;
  - (2) without prejudice and privileged communication;
  - (3) costs;
  - (4) exclusion of mediator's liabilities; and
  - (5) the mediator's role in subsequent proceedings.

#### **(II) Confidentiality**

- 5.4 In relation to the issue of confidentiality of documents provided for mediation, CEDR Mediation Procedure reads:

##### **'5 Documentation**

Documentation intended to be treated as confidential by the mediator or CEDR Solve (such as a counsel's opinion, an undisclosed expert report, a draft proof of evidence or a confidential briefing for the mediator) must be clearly marked as such, and will not be circulated further without express authority.

One of the advantages of mediation is that its success is not dependent on exhaustive disclosure of documents. Bundles

can usually be relatively limited in size, containing only key documents, and case summaries can be quite brief, and can to advantage be prepared jointly by the parties. The parties can ask CEDR Solve to effect simultaneous exchange of case summaries if required.<sup>1</sup>

5.5 The CEDR Mediation Procedure requires suppliers of documents to mark the documents intended to be confidential as confidential, and such marked documents will not be circulated by the mediator to the parties without express authority.

5.6 In relation to confidentiality of the mediation itself, the CEDR Mediation Procedure reads:

**'8 Confidentiality in relation to mediation**

The CEDR Solve standard agreement provides that what happens at the mediation is to be treated as confidential by the parties, the mediator and CEDR Solve, including the fact and terms of settlement. However, the fact that the mediation is to take place or has taken place is not normally made confidential, as either or both of the parties may wish to claim credit for agreeing to engage in the process. If it is desired to make the fact that the mediation is taking place confidential also, the agreement can be amended.

Apart from where the parties agree in writing to consent to disclosure of what would normally be confidential, there may be rare circumstances in which the confidentiality of the mediation process cannot be preserved, such as where:

- the mediator or any party or their representative is required by law to make disclosure;
- the mediator reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or

- the mediator reasonably considers that there is a serious risk of being personally subject to criminal proceedings unless the information in question is disclosed.<sup>2</sup>

The CEDR Mediation Procedure treats the followings as confidential:

- (1) the content of the mediation; and
- (2) the terms of settlement.

Unless parties to mediation agree in writing to disclose what would usually be treated as confidential, the mediation itself and the settlement agreement are confidential. Such default position for confidentiality is subject to a list of exceptions as provided for under the CEDR Mediation Rules, which includes requirement under the law, disclosure relating to personal safety reasons, and disclosure relating to criminal proceedings against the mediator.

The CEDR Mediation Procedure is further supplemented by the CEDR Mediation Agreement, which reads:

**'Confidentiality and without prejudice status**

5 Every person involved in the Mediation:

- 5.1 will keep confidential all information arising out of or in connection with the Mediation, including the fact and terms of any settlement, but not including the fact that the Mediation is to take place or has taken place or where disclosure is required by law to implement or to enforce terms of settlement; and

6 Where a Party privately discloses to the Mediator any information in confidence before, during or after the Mediation, the Mediator will not disclose that information to any other Party or person without the consent of the Party disclosing it, unless required by law to make disclosure.

1. CEDR Model Mediation Procedure 11th Edition (2010), clause 5.

2. CEDR Model Mediation Procedure 11th Edition (2010), clause 8.