

Under Section 20 of the Arbitration Ordinance (Cap. 609)<sup>61</sup> to bring a matter to arbitration, the claim must be a claim that is within the jurisdiction of a court. Therefore, a legal dispute must exist for a matter to be arbitrable. Article 68 of the Arbitration Ordinance (Cap. 609)<sup>62</sup> clearly states that law or rules of law must be applied to the substance of the dispute. There are specific categories of disputes, such as criminal charges and divorce that cannot be settled by arbitration. The specific categories are identified in Halisbury's Laws of Hong Kong.<sup>63</sup>

Arbitration has a fundamentally different dimension to mediation, namely the power of the arbitrator to enforce decisions on the parties. There are also public policy issues and limitations as to what can be arbitrated. Public policy issues, which are extremely complex and sometimes crucial, arise during enforcement and setting aside of proceedings that relate to an arbitral award.

For the reasons stated above, the definition of "dispute" in the Mediation Ordinance does not have the same effect as the definition of "dispute" in the Arbitration Ordinance (Cap. 609).

#### Defining what can be considered a "mediated settlement agreement" under the Ordinance

[2.11] This term refers to an agreement that is made at the conclusion of the mediation meeting. All the parties do not need to agree in order to make a mediated settlement agreement. The agreement may be made between all of the parties or some of the parties. The definition of "mediated settlement agreement" also makes it clear that the dispute does not need to be settled in full. A mediated settlement agreement can be concluded to identify issues that have been settled and issues that have not been settled.

In Hong Kong, a mediated settlement agreement is a binding contract. The status of a mediated settlement agreement is equivalent to an agreement reached by parties through means other than mediation. If an obligation under the mediated settlement agreement is not performed by a party, the other party is entitled to commence legal proceedings to enforce the agreement as a contract.

A mediated settlement agreement is not included as a mediation communication. This means that the parties are not obliged to keep mediated settlement agreements confidential. In this provision the autonomy of the parties is respected. If the parties agree that the mediated settlement agreement shall be confidential this can be included as an express term in the mediated settlement agreement. Parties should avoid putting otherwise confidential communications into a non-confidential settlement agreement, unless they intend to waive confidentiality.

<sup>61</sup> Adopts Article 8 UNCITRAL Model Law on Arbitration.

<sup>62</sup> Adopts Article 28 UNCITRAL Model Law on Arbitration.

<sup>63</sup> Halisbury's Laws of Hong Kong, Vol. 1 (2013) Arbitration, para. 25.003.

To ensure the direct enforceability of mediated settlement agreements, some jurisdictions have included statutory enforcement provisions within mediation legislation. The UNCITRAL Model Law on Conciliation recommends this approach.<sup>64</sup> However, research conducted in Australia suggests that statutory enforcement is not desirable or necessary.<sup>65</sup>

During the preparation of the Mediation Ordinance the Administration debated whether a statutory enforcement mechanism should be put in place.<sup>66</sup> This type of mechanism is available under the Arbitration Ordinance (Cap. 609).<sup>67</sup> According to Section 66 of Arbitration Ordinance (Cap. 609), the settlement may be recorded in the form of an award.<sup>68</sup> Provided that the relevant conditions are satisfied, an award will be granted with equivalent status of an award granted by the tribunal.

A statutory enforcement provision has not been included in the Mediation Ordinance. It was not deemed to be necessary to include a statutory mechanism for enforcing mediated settlement agreements. Where necessary, enforcement of mediated settlement agreements shall be enforced by the court, like the enforcement of all other contracts.<sup>69</sup>

The courts in Hong Kong have enforced mediated settlement agreements favourably.<sup>70</sup>

A mediated settlement agreement concluded in Hong Kong is not directly enforceable in another jurisdiction. Cross-border enforcement of mediated settlement agreements is subject to private international law, and rules within the conflict of laws. There is no treaty providing for the enforcement of mediated settlement agreements. The New York Convention does not apply to mediated settlement agreements.

#### Defining "mediation" under the Ordinance

The definition of "mediation" is dealt with in a standalone section. Section 4 of the Mediation Ordinance further elaborates on the definition of "mediation".

[2.12]

<sup>64</sup> UNCITRAL Model Law on Conciliation, 2002. Article 14 states that: "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . . [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement]."

<sup>65</sup> NADRAC "Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters" para.11.29.

<sup>66</sup> Administration's responses to Submissions made by Deputations to the Bills Committee on the Mediation Bill. LC Paper No. CB(2) 894/11-12(01).

<sup>67</sup> Arbitration Ordinance (Cap. 609), s.66, adopting UNCITRAL Model Law on International Commercial Arbitration, Article 30.

<sup>68</sup> Arbitration Ordinance (Cap. 609), s.66(1).

<sup>69</sup> Final Report, p.120: Recommendation 41. For further discussion regarding the enforcement of mediated settlement agreements see Nadja Alexander, *Mediation: Process and Practice Hong Kong*, (LexisNexis, 2010), pp. 319-322.

<sup>70</sup> See *Wang Tat Metal Mfy v Garwin Enterprises Ltd* [2009] HKEC 285; *Steen Skyum Heilesen v Incorporated Owners of Costa Bello* [2010] HKEC 352; *Nu-West Natural Products Corp Ltd* [2010] 4 HKLRD 208; *Lam Chi Ming v Lemng Hop Fook* [2012] HKEC 1231; *Champion Concord Ltd v Lan Koon Foo (No 1)* (2011) 14 HKCFAR 534; and *Champion Concord Ltd v Lan Koon Foo* [2011] HKEC 1535 (Final Appeal, 11 November 2011).

### Defining what can be considered a form of “mediation communication” under the Ordinance

[2.13] The definition of a “mediation communication” was formulated after thorough discussion by the Mediation Task Force chaired by the Secretary for Justice and in the Mediation Ordinance Group.<sup>71</sup>

The definition of a “mediation communication” is important. It is essential to ascertain what information will be treated as a “mediation communication” since a mediation communication can be protected as confidential information under Section 8 of the Mediation Ordinance.

The all encompassing definition of a “mediation communication” is a wide one. A mediation communication includes anything that is orally expressed or anything that is done, either during the course of the mediation or for the purpose of the mediation. Any documents that are prepared or any information that is prepared for the purpose of the mediation or during the course of the mediation will also be treated as a mediation communication. Documents that are used in an attempt to negotiate settlement which are for the purpose of or during the course of the mediation are included.<sup>72</sup> The wide scope of a mediation communication will ensure that confidential mediation communications are protected in the entire mediation process.<sup>73</sup>

It is possible for the parties to narrow the scope of this definition by inserting a clause within the agreement to mediate to prescribe what information should not be treated as a “mediation communication”. Alternatively, a mediation communication may be disclosed with the consent of all persons concerned under Section 8(2)(a).<sup>74</sup>

A mediation communication may also be disclosed if it falls within one of the exceptions prescribed in Section 8(2) and (3).

The agreement to mediate and mediated settlement agreement are not treated as a “mediation communication” under the Mediation Ordinance. The reason for this is that both the agreement to mediate and mediated settlement agreement are contractual documents. Practically, the parties may not require these documents to be confidential.<sup>75</sup> The parties have the autonomy to decide whether an agreement to mediate and the mediated settlement should be treated as a “mediation communication”. A clause may be inserted into the agreement to mediate or mediated settlement agreement to protect the confidentiality of these documents if the parties agree.<sup>76</sup>

<sup>71</sup> Administration's Responses to the Suggestions made by the Hong Kong Association of Banks (“HKAB”) in its letter to the Bills Committee dated 20 April 2012. LC Paper No. CB(2)1812/11-12(01).

<sup>72</sup> Administration's responses to Submissions made by Deputations to the Bills Committee on the Mediation Bill. LC Paper No. CB(2) 894/11-12(01).

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> Administration's Responses to the Suggestions made by the Hong Kong Association of Banks (“HKAB”) in its letter to the Bills Committee dated 20 April 2012. LC Paper No. CB(2)1812/11-12(01).

<sup>76</sup> *Ibid.*

### Defining the role of a “mediator” under the Ordinance

[2.14] A “mediator” is defined as an impartial individual.

The definition of “mediator” is similar to other jurisdictions which define a mediator as an independent, neutral person. The term “impartial” is significant in that it places a strong emphasis of an unbiased role that a mediator must assume. The term “impartial” is also adopted in the Mediation Code.<sup>77</sup>

In the Mediation Ordinance the definition of “mediator” must be read in conjunction with Section 4(1). Accordingly the Ordinance prescribes that the mediator should assist the parties to come to agreement through a collaborative process. It is envisaged that the mediator's role is non-judgmental and non-directive. Under the Ordinance, the mediator should not judge, arbitrate, adjudicate, or make decisions or opinions on the rights or wrongs of the actions of the parties.

There are no further provisions that deal with the appointment, duties, function or role of the mediator.<sup>78</sup> To maintain the flexibility of the mediation process, informal rules are preferred to legal provisions. The Hong Kong Mediation Code currently regulates the professional conduct of mediators.<sup>79</sup>

The Mediation Ordinance does not deal with who can act as a mediator. Under the Ordinance, it is not required that a mediator must be qualified, trained or experienced. The Mediation Ordinance does not prescribe for the accreditation of mediators. A mediator can be any person.<sup>80</sup>

In practice, parties will appoint a mediator from a listed panel of mediators.<sup>81</sup>

### Single accreditation body and the accreditation of mediators

[2.15] The matter of whether or not to include a statutory provision for the accreditation of mediators was considered by the Administration.<sup>82</sup>

To advise on the matter of the accreditation and training of mediators a separate group, the Accreditation and Training Sub-group (“Sub-group”), was established alongside the Working Group.<sup>83</sup>

<sup>77</sup> See Mediation Code. Para. 2.

<sup>78</sup> For further information regarding the mediators' duties see Nadja Alexander, pp.305-310.

<sup>79</sup> Hong Kong Mediation Code (“the Code”). See Appendix E.

<sup>80</sup> For further discussion regarding the accreditation of mediators see Part I, Chapter 3.

<sup>81</sup> For example, HKIAC has 3 panels of mediators: General Panel, Family Panel and a Panel for Family Supervisors see HKIAC online at <http://www.hkiac.org/index.php/en/appointment-of-mediators/panel>.

<sup>82</sup> Final Report, p.59.

<sup>83</sup> The membership of the Sub-group is as follows: Mr Lester Huang, JP, Chairman (Law Society); Mr Robin Egerton, Vice-Chairman (Bar Association); Mr John Budge, SBS, MBE, JP, Vice-Chairman (HKIAC); The Hon Mr Justice Reyes (Judiciary); Ms Anna Wu Hung Yuk, SBS, JP (Shantou University Law School); Mr Chan Bing Woon, SBS, JP (Mediation Council); Ms Sylvia Siu Wing Yee, JP (Mediation Centre); Mr Benedict Y S Lai, JP (Department of Justice); Mr Michael Beckett (City University of Hong Kong); Mr Leung Hing Fung (The University of Hong Kong); Mrs Ruth Wong Chan Tsz Ying (Hong Kong Family Welfare Society); Mr Yeung Man Sing (The Chartered Institute of Arbitrators (East Asia Branch)). The Sub-group met on 16 occasions on the 12 June 2008, 23 July 2008, 27 August 2008, 18 September 2008, 3 November 2008, 5 December 2008, 14 January 2009, 5 February 2009, 18 March 2009, 23 April 2009, 20 May 2009, 17 June 2009, 24 July 2009, 20 August 2009, 4 September 2009, and 14 September 2009.

#### 4. Meaning of mediation

- (1) For the purposes of this Ordinance, mediation is a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following—
  - (a) identify the issues in dispute;
  - (b) explore and generate options;
  - (c) communicate with one another;
  - (d) reach an agreement regarding the resolution of the whole, or part, of the dispute.
- (2) For the purposes of subsection (1), a session is a meeting between a mediator and one or more of the parties to a dispute, and includes any activity undertaken in respect of—
  - (a) arranging or preparing for such a meeting, whether the meeting takes place or not; and
  - (b) following up any matter or issue raised in such a meeting.
- (3) For the purposes of subsection (2), a meeting includes a meeting conducted by telephone, video conferencing or other electronic means.

#### 5. Mediation and mediation communications to which this Ordinance applies

- (1) Subject to subsection (2), this Ordinance applies to any mediation conducted under an agreement to mediate if either of the following circumstances applies—
  - (a) the mediation is wholly or partly conducted in Hong Kong; or
  - (b) the agreement provides that this Ordinance or the law of Hong Kong is to apply to the mediation.
- (2) This Ordinance does not apply to a process specified in Schedule 1.
- (3) This Ordinance applies to a mediation communication relating to any mediation to which this Ordinance applies.
- (4) For the purposes of this section, it does not matter whether—
  - (a) the agreement to mediate is made before, on or after the commencement date of this Ordinance or entered into in Hong Kong or elsewhere;
  - (b) the mediation is conducted before, on or after the commencement date of this Ordinance or completed before that date; or
  - (c) the mediation communication is made before, on or after the commencement date of this Ordinance.

#### 6. Application to the Government

This Ordinance applies to the Government.

#### 7. Provision of assistance or support in mediation

The following sections of the Legal Practitioners Ordinance (Cap. 159) do not apply to the provision of assistance or support to a party to mediation in the course of the mediation—

- (a) section 44 (penalty for unlawfully practising as a barrister or notary public);
- (b) section 45 (unqualified person not to act as solicitor);
- (c) section 47 (unqualified person not to prepare certain instruments, etc.).

#### 8. Confidentiality of mediation communications

- (1) A person must not disclose a mediation communication except as provided by subsection (2) or (3).
- (2) A person may disclose a mediation communication if—
  - (a) the disclosure is made with the consent of—
    - (i) each of the parties to the mediation;
    - (ii) the mediator for the mediation or, if there is more than one, each of them; and
    - (iii) if the mediation communication is made by a person other than a party to the mediation or a mediator—the person who made the communication;
  - (b) the content of the mediation communication is information that has already been made available to the public, except for information that is only in the public domain due to an unlawful disclosure;
  - (c) the content of the mediation communication is information that is otherwise subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or power;
  - (d) there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a child;
  - (e) the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates; or
  - (f) the disclosure is made in accordance with a requirement imposed by law.
- (3) A person may disclose a mediation communication with leave of the court or tribunal under section 10—
  - (a) for the purpose of enforcing or challenging a mediated settlement agreement;
  - (b) for the purpose of establishing or disputing an allegation or complaint of professional misconduct made against a mediator or any other person who participated in the mediation in a professional capacity; or
  - (c) for any other purpose that the court or tribunal considers justifiable in the circumstances of the case.

- (4) In this section—

*child* (未成年人) means a person under the age of 18 years.

**9. Admissibility of mediation communications in evidence**

A mediation communication may be admitted in evidence in any proceedings (including judicial, arbitral, administrative or disciplinary proceedings) only with leave of the court or tribunal under section 10.

**10. Leave for disclosure or admission in evidence**

- (1) The court or tribunal specified in subsection (3) may, on application by any person, grant leave for a mediation communication to be disclosed under section 8(3) or to be admitted in evidence under section 9.
- (2) For the purposes of subsection (1), the court or tribunal must take into account the following matters in deciding whether to grant leave for a mediation communication to be disclosed or admitted in evidence—
  - (a) whether the mediation communication may be, or has been, disclosed under section 8(2);
  - (b) whether it is in the public interest or the interests of the administration of justice for a mediation communication to be disclosed or admitted in evidence;
  - (c) any other circumstances or matters that the court or tribunal considers relevant.
- (3) The court or tribunal specified for the purposes of subsection (1) is—
  - (a) if the mediation communication is sought to be disclosed or admitted in evidence in proceedings in the Court of Final Appeal—the Court of Final Appeal;
  - (b) if the mediation communication is sought to be disclosed or admitted in evidence in proceedings in the Court of Appeal—the Court of Appeal;
  - (c) if the mediation communication is sought to be disclosed or admitted in evidence in proceedings in the District Court—the District Court;
  - (d) if the mediation communication is sought to be disclosed or admitted in evidence in proceedings in the Lands Tribunal—the Lands Tribunal; or
  - (e) in any other case—the Court of First Instance.

**11. Consequential and related amendments**

The enactments specified in Schedule 2 are amended as set out in that Schedule.

**Schedule 1 [s.5]****Processes to Which this Ordinance Does Not Apply**

1. Conciliation referred to in sections 6, 15 and 25 of the Labour Tribunal Ordinance (Cap. 25).
2. Conciliation referred to in section 39 of the Apprenticeship Ordinance (Cap. 47).
3. Conciliation and special conciliation referred to in Part II of the Labour Relations Ordinance (Cap. 55).
4. Mediation referred to in Part IIA of the Labour Relations Ordinance (Cap. 55).
5. The process described in section 17 of the Marriage Reform Ordinance (Cap. 178).
6. Mediation referred to in section 11B of The Ombudsman Ordinance (Cap. 397).
7. Conciliation referred to in sections 4 and 14 of the Minor Employment Claims Adjudication Board Ordinance (Cap. 453).
8. Conciliation referred to in sections 64 and 84 of the Sex Discrimination Ordinance (Cap. 480) and section 8 of the Sex Discrimination (Investigation and Conciliation) Rules (Cap. 480 sub. leg. B).
9. Conciliation referred to in sections 62 and 80 of the Disability Discrimination Ordinance (Cap. 487) and section 8 of the Disability Discrimination (Investigation and Conciliation) Rules (Cap. 487 sub. leg. B).
10. Conciliation referred to in sections 44 and 62 of the Family Status Discrimination Ordinance (Cap. 527) and section 8 of the Family Status Discrimination (Investigation and Conciliation) Rules (Cap. 527 sub. leg. A).
11. Conciliation referred to in sections 59 and 78 of the Race Discrimination Ordinance (Cap. 602) and section 8 of the Race Discrimination (Investigation and Conciliation) Rules (Cap. 602 sub. leg. B).
12. Mediation proceedings referred to in sections 32(3) and 33 of the Arbitration Ordinance (Cap. 609).

29. In exercising its discretion on costs, the Court takes into account all relevant circumstances. These would include any unreasonable failure of a party to engage in mediation where this can be established by admissible materials. Legal representatives should advise their clients of the possibility of the Court making an adverse costs order where a party unreasonably fails to engage in mediation.
30. The Court will not make any adverse costs order against a party on the ground of unreasonable failure to engage in mediation where:
- (1) The party has engaged in mediation to the minimum level of participation agreed to by the parties or as directed by the Court prior to the mediation in accordance with paragraph 41 hereof.
  - (2) A party has a reasonable explanation for not engaging in mediation. The fact that active without prejudice settlement negotiations between the parties are progressing is likely to provide such a reasonable explanation. However, where such negotiations have broken down, the basis for such explanation will have gone and the parties should then consider the appropriateness of mediation. The fact that the parties are actively engaged in some other form of ADR to settle the dispute may also provide a reasonable explanation for not engaging in mediation in the meantime.
31. In all contexts, including dealing with matters arising under the Directions in Part D hereof and in exercising its discretion on costs, the Court cannot compel the disclosure of or admit materials so long as they are protected by privilege in accordance with legal principles, including legal professional privilege and the privilege protecting without prejudice communications. What happens during the mediation process, being without prejudice communications, is protected by privilege. It must be emphasized that there is no question of the Court undermining the protection afforded by privilege.
32. Subject to paragraphs 34 to 37 hereof, Part II of Part D hereof applies to proceedings in which all parties are legally represented. Part III of Part D hereof applies to proceedings in which one or more of the parties are not legally represented.

## Part II

33. Subject to paragraphs 34 to 37 hereof, this Part applies to proceedings in which all parties are legally represented.
- (a) **Mediation Certificate**
34. Paragraphs 35 and 36 hereof shall apply where all parties are legally represented at the Pre-Action Protocol stage.

35. Solicitors acting for the Plaintiff shall file in Court a Mediation Certificate at the same time of the issuance of the Writ. The Mediation Certificate shall contain the information required and be in the form as per Appendix B of Practice Direction 31 (Practice Direction on Mediation), with modifications if necessary, and signed by the Solicitors and the party they represent.
36. Solicitors acting for the Defendant(s) shall file into Court a Mediation Certificate at the same time with the Acknowledgement of Service.
37. In proceedings where a Mediation Certificate is not filed by any party who is not legally represented initially in the proceedings but subsequently all parties become legally represented by the time of filing the first Questionnaire as required to be filed in paragraph 107 hereof, Solicitors acting for the respective parties who have not filed a Mediation Certificate previously shall file in Court a Mediation Certificate at the time of filing of the first Questionnaire.
- (b) **Mediation Notice and Response**
38. If a party ("the Applicant") wishes to attempt mediation, he should as soon as practicable after filing the Mediation Certificate serve a Mediation Notice on the other party or parties ("the Respondent") in the dispute in the form and containing the information as per Appendix C of Practice Direction 31 (Practice Direction on Mediation), with modifications if necessary, and signed by the Applicant or his Solicitor.
39. Upon receiving the Mediation Notice, the Respondent should respond to the Applicant by way of a Mediation Response within 14 days (or such other time as the parties may agree or as the Court may direct) in the form and containing the information as per Appendix D of Practice Direction 31 (Practice Direction on Mediation), with modifications if necessary, and signed by the Respondent or his Solicitor.
40. Where the parties put forward differing proposals in the Mediation Notice and Mediation Response, the parties should attempt to reach agreement on the proposals on which they differ as soon as practicable. Any agreement consequent upon such discussion should be reduced into writing in a minute called the Mediation Minute signed by the Applicant and the Respondent or their Solicitors.
41. Where the parties are unable to reach agreement on certain proposals in the Mediation Notice and Mediation Response in relation to the mediation:
- (1) if the parties are willing to have their differences resolved by direction of the Court, they may make a joint application to the Court for directions resolving the points of difference between them; and
  - (2) in the absence of such willingness, any party may apply to the Court for directions and the Court may give such directions as are appropriate to

54. Full particulars of the heads of damage claimed shall appear in the Statement of Damages including a summary of the Plaintiff's injuries, the treatment received and, where practicable, the prognosis. The Statement of Damages shall be filed and served contemporaneously with the Statement of Claim, and be physically separated from that and from any other document. If liability has been admitted and no Statement of Claim is filed, then the Statement of Damages shall be filed and served at the time when the Statement of Claim should have been filed had liability not been admitted.
55. The Writ shall be accompanied by a certificate ("the said certificate") in the form as per Appendix D signed by the Plaintiff and his Solicitor stating that the action is not funded by any third party on the basis of a fee arrangement contingent upon the outcome of the litigation. The Solicitor has a duty to explain to the Plaintiff that any fee arrangement contingent upon the outcome of the litigation, champerty and / or maintenance of legal proceedings are unlawful save for agreements entered into with the Legal Aid Department under the Supplementary Legal Aid Scheme established under the Legal Aid Ordinance (Cap. 91).
56. In the event that the Plaintiff is not represented by Solicitors at the time he filed the Writ but is subsequently represented by Solicitors, the Notice to Act filed by the Solicitors shall be accompanied by the said certificate.
57. In the event that there is a change of Solicitors representing the Plaintiff, the Notice of Change of Solicitors filed by the Solicitors shall be accompanied by the said certificate.
58. Any failure to observe strictly the Directions in paragraphs 51 to 57 hereof, may result in the Registry staff refusing to accept such documents until they all, at the same time of submission, comply with the above direction, save that the Registry staff will not check the contents of such documents.
59. Given that the date for the Check List Review Hearing is fixed on issue of the Writ (see paragraph 99 hereof), the Plaintiff or his Solicitors should not withhold service of the Writ and should proceed with the case in consideration of the Check List Review Hearing date. Any application to adjourn the Check List Review Hearing on the ground that the Writ has not been served must be justified and the PI Master may give such directions or make such orders with regard to service of the Writ and costs as he thinks fit (see also paragraph 104 hereof).

#### F. Pleadings

60. All pleadings subsequent to the Statement of Claim, including the Defence and any Request for Further and Better Particulars of a pleading and the Particulars supplied pursuant to any such request, shall be filed at the same time as the service thereof.

61. All pleadings settled or drafted by Counsel shall bear Counsel's name in addition to the full name and address for service of the Solicitors acting for the party concerned. Where the firm of Solicitors concerned settles or drafts the pleading, its name and address for service shall appear in full at the end of the pleading and it shall be signed by the firm. All pleadings shall be dated with the date of filing.
62. The Statement of Claim must state the age and date of birth of the Plaintiff. For claims under the Fatal Accidents Ordinance (Cap. 22), similar particulars of the deceased and the person(s) on whose behalf the action is brought must be given. The Statement of Damages, any Revised Statement of Damages and / or Answer thereto will stand as part of the pleadings and should be pleaded with full particulars to facilitate early resolution of the case.
63. All pleadings including any revision thereof or amendments thereto and Further and Better Particulars of any pleadings should contain a Statement of Truth in compliance with RHC, Order 41A, rules 2 and 5 and also with Practice Direction 19.3 (Practice Direction on Statement of Truth) with suitable adaptations notwithstanding that alternative facts may have been pleaded pursuant to RHC, Order 18, rule 12A.
64. Application for dispensing with the Statement of Truth under RHC, Order 41A, rule 2(3) should be made as soon as it is realized that there exists valid grounds for such application and before the expiry of time for filing of the relevant pleading. The application should be supported by affidavit setting out the grounds for the application and salient facts pertinent thereto.

#### G. Documents to be Served with the Statement of Claim

65. The following documents must be served with the Statement of Claim or Counterclaim (in the case of a Defendant claiming damages arising out of death or personal injury by way of counterclaim) in compliance with RHC, Order 18, rule 12(1A):
- (1) medical report(s) within the meaning of RHC, Order 18, rule 12(1C), including in an action brought on behalf of the estate of a deceased person, a post-mortem report if one exists. At least one medical report must describe the Plaintiff's condition at a time preferably no earlier than 4 months prior to service thereof; and
  - (2) a Statement of Damages claimed, giving the following:
 

"In Personal Injuries Cases" (including Medical Negligence cases)

    - (a) the Plaintiff's date of birth;
    - (b) a summary of the Plaintiff's injuries, the treatment received, the permanent disability, if any, suffered by him / her and, where practicable, the prognosis in respect of such disability;

- (c) any special damages claimed for losses and expenses already incurred, including pre-trial loss of earnings with full particulars of the pre-accident employment income for 12 months preceding the accident;
- (d) an estimate of any future expenses and losses, including loss of earnings, pensions and MPF contributions, and, where practicable, the multiplier or the range of multipliers claimed in respect of such future losses and expenses and such estimate should give full particulars of any credit given for post-accident earnings;
- (e) where practicable, all material facts relied upon in support of a claim for damages for loss of earning capacity;
- (f) where practicable, a statement of the range of damages claimed as general damages for pain, suffering and loss of amenities and damages for loss of earning capacity; and
- (g) the amount claimed as damages for loss of society, where applicable.

“In Fatal Accident Cases” (including Medical Negligence cases)

- (a) the name and date of birth of each dependant and the status thereof e.g. student at university or nature of employment;
- (b) the deceased’s date of birth, occupation and income at the date of the accident;
- (c) any special damages claimed for losses and expenses already incurred (including loss of dependency);
- (d) an estimate of any future expenses and losses, including loss of dependency, and, where practicable, the multiplier or range of multipliers claimed in respect of such future losses and expenses;
- (e) an estimate of the claim for loss of accumulation of wealth, including, where practicable, a statement of all material facts relied upon in support of the claim and a statement of how such claim has been calculated, including, where appropriate, the multiplier or range of multipliers used in the calculations; and
- (f) the amount claimed as damages for bereavement and / or loss of society.

66. In order to avoid unnecessary delay and costs, the Plaintiff should additionally serve together with the Writ and Statement of Claim and documents set out in paragraph 65 hereof copies of the following documents, if they are available and not already served under the Pre-Action Protocol (see paragraphs 14 to 23 hereof) before the commencement of proceedings, and in so far as this is practicable:

- (1) a copy of any Statement of Facts and finding of guilt, or otherwise, arising out of any prosecution of any party in respect of the accident in which the

Plaintiff was injured or the deceased was killed, together with a sketch plan prepared by and photographs taken by and / or on behalf of any investigating or prosecuting authority, and any statements made by any witnesses, including where available a Police Investigation Report or a report by the Occupational Safety Officer;

- (2) in respect of any post-accident earnings,
  - (a) where the Plaintiff has returned to work other than with his pre-accident employer and if such employer(s) is / are not Defendant(s) in the action, a record of earnings and allowances received by the Plaintiff contained reasonably sufficiently either in his pay slips, statement(s) obtained from his employer(s) or his bank account or other records; or
  - (b) where the Plaintiff is self-employed, his profit and loss accounts, together with copies of his tax returns lodged with the Inland Revenue Department by him / her and, where appropriate, by his employer(s), and his ORSO and / or MPF Statements;
- (3) in respect of any pre-accident earnings,
  - (a) where the Plaintiff was employed by employer(s) who is / are not Defendant(s) in the action, a record of earnings and allowances received by the Plaintiff for the 12-month period prior to the accident, contained reasonably sufficiently either in his pay slips, statement(s) obtained from his employer(s) or his bank account or other records; or
  - (b) where the Plaintiff was self-employed, his profit and loss accounts for the 2 years prior to the accident, together with copies of his tax returns lodged with the Inland Revenue Department by him / her and, where appropriate, by his employer(s) and of his ORSO and / or MPF statements for the 2 years prior to the accident;
- (4) copies of any statements by the Plaintiff and any other person who was an eyewitness to the accident in question as to the circumstances of the accident, upon which the Plaintiff relies in support of his pleaded case, to the extent that this has not been fulfilled by (1) above; and
- (5) in all Medical Negligence cases, a copy of any expert medical report relied upon as to liability and causation.

**H. Documents to be Served with the Defence**

- 67. In order to avoid unnecessary delay and costs, the Defendant(s) should serve together with their Defence copies of the following documents, if they are available and not already served under the Pre-Action Protocol (see paragraphs