The following scenario with a number of variations is offered as an illustration of how the MO is intended to operate.[210]

An agreement to mediate in the form of mediation clause in a commercial contract was entered into on the 29 July 2011 and a mediation was conducted on 30 September 2012 in accordance with the clause. The mediation resulted in a mediated settlement agreement, which was written up and signed by both parties on 27 October 2012. Subsequently, one of the parties seeks to have the mediated settlement agreement set aside on the basis of misrepresentation by the other party during the mediation. An application is made to the appropriate court for leave to admit evidence of certain mediation communications in order to prove the misrepresentation.

Question: Does the MO apply here?

Answer: Yes, the MO applies to the application for leave to the court to admit evidence of mediation communications. The fact that the agreement to mediate, the mediation and the related mediation communications are concluded before the MO came into force is not relevant to the applicability of the MO in this regard.

Question: Would it make a difference to the scenario if the agreement to mediate was dated 29 July 1999 but all other dates in the scenario remained the same?

Answer: No, it makes no difference to the application of the MO. Insofar as the Limitations Ordinance may be relevant, the litigation limitation period will begin to run when the cause of action arises, not when the agreement to mediate is signed.

Question: Would it make a difference to the scenario if the agreement to mediate was dated 29 July 1999 and the mediation took place in 2003?

Answer: Yes, it may make a difference. Assuming the cause of action arose during the course of the mediation – for example, a claim of professional negligence against one of the legal representatives in the mediation, or an allegation of misrepresentation, undue influence or unconscionability by one party against the other – then the Limitations Ordinance may operate to extinguish that cause of action should the applicable limitation period have expired.

In terms of geography, s 5(4)(a) makes clear that it is no obstacle to the application of the MO that the agreement to mediate was entered into outside of Hong Kong. This point is examined in relation to s 5(1) above.[211]

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[210] See also the scenarios outlined in LC Paper No. CB(2)955/11-12(01) at para 11.

[211] See ¶5-001.

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Section 6. Application to the Government

This Ordinance applies to the Government.

¶6-001 General Note

The MO applies to the Government of the HKSAR. Unlike s 6 of the AO, this provision does not expressly apply to the offices set up by the Central People's Government ("CPG") in HKSAR.

The absence of a reference to the CPG may be due to a number of factors. The background to legislating arbitration and mediation, while containing similarities, is quite different, especially in relation to its relevance for the CPG. Institutional arbitration has a significantly greater history and practice in mainland China compared with institutional mediation,[212] with many arbitration institutions offering arbitration services for domestic and cross-border disputes. Accordingly, the Hong Kong AO was always going to have a much greater impact in mainland China than the MO, and the absence of an express reference to the CPG in s 6 is not likely to have any significant practical effect.

As indicated previously, the MO was conceived, drafted, presented to the Legislative Council, debated and passed within a remarkably short period of time. Thus one may speculate that there may have been insufficient time for the necessary consultations with CPG delegations in relation to the Mediation Bill.[213] However, looking to the future, the Administration continues to explore the applicability of the MO and other Hong Kong ordinances to the CPG offices in Hong Kong.[214]

[212] Note that court-related mediation has an extensive history in mainland China, however the practice of mediation as an independent dispute resolution process in the private sector and in arbitration institutions is in its nascent stage.

[213] See comments on clause 6 in LC Paper No. CD(2)/09/11-12(01).

[214] See LC Paper No. CB(2)1943/11-12, paras 32 & 33 and LC Paper No. CB(4)225/12-13(01), para 15.

Section 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.).

¶7-001 Non-lawyers and Foreign Lawyers may offer Assistance and Support in Mediation

Section 7 provides that the provision of "assistance" or "support" to a party to mediation in the course of mediation does not constitute infringement of ss 44, 45 or 47 of the Legal Practitioners Ordinance[215] ("LPO"). The purpose of s 7 is to minimise concern in relation to the risks of contravening the relevant provisions of the LPO.

The LPO deals with the admission and registration of legal practitioners and the appointment and registration of notaries public in Hong Kong. Choong and Weeramantry[216] explain that, subject to limited exceptions, only solicitors of the High Court and barristers called to the Bar with their respective practising certificates can act as solicitors and barristers respectively, representing parties before Hong Kong courts. The authors point out that it is an offence to act as a solicitor or barrister without the requisite qualifications. Section 44(1) of the LPO makes it an offence for a person who is not a qualified barrister (s 44(1)(a)) or notary (s 44(1)(b)) to act as a barrister or a notary respectively. Similarly, s 45 of the LPO makes it an offence for a person who is not a qualified solicitor to act as a solicitor and such a person may be:

- liable for contempt of court (s 45(2)(a) of the LPO);
- prevented from recovering fees in relation to work done when so acting (s 45(2)(b) of the LPO); and/or
- guilty of an offence and fined (s 45(2)(c) of the LPO).

Section 47 of the LPO makes it an offence for unqualified persons to prepare certain instruments related to any legal proceedings, or for the purposes of Ordinances listed in the section, in return for remuneration.

[215] Legal Practitioners Ordinance (Cap 159).

[216] Choong and Weeramantry (2011) at para 63.04.

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The effect of s 7 is that non-lawyers and foreign lawyers can participate in mediation conducted in Hong Kong to assist and support parties. The use of the terms "assistance" and "support" in s 7 confirms the variety of roles that non-party participants can play in mediation. Moreover, s 7 reflects:

- the practice of non-lawyer advocates, such as family, friends or others, who play a supportive role for the benefit of parties in mediation;
- the practice of non-legal professionals such as financial advisers or counsellors assisting parties during the course of mediation;
- the practice of foreign lawyers assisting parties in cross-border mediation, especially where foreign law may be relevant; and
- the general understanding and practice worldwide that one does not need to be a lawyer or locally qualified to represent a party in an international mediation or arbitration.

Section 7 is drawn from s 63 of the Hong Kong AO and is consistent with the notion of mediation as an interdisciplinary, interest-based process. In relation to cross-border mediations, it may be the case that non-Hong Kong law is applicable and here, the need for foreign lawyers with expertise in the applicable law is apparent.

The operation of s 7 is limited to the mediation process ("in the course of the mediation"). In line with s 5(3), this includes "a mediation communication relating to any mediation to which this Ordinance applies." "Mediation communication" is defined broadly and has been considered previously in ¶2-021. However, if any aspect of the mediation requires court intervention or review, the non- or foreign lawyer cannot represent the party in court. For example, s 7 would not permit a foreign lawyer to represent a client in litigation about the enforcement of a mediated settlement agreement, even if the same foreign lawyer assisted the client during mediation.

The absence of the words, "unless the parties otherwise agree" or similar indicates that the section is mandatory; in other words, the parties cannot contract out of it.

¶7-002 Background to Section 7

The Working Group on Mediation took the view that it would be desirable to insert a similar provision in the proposed MO as that which is already found in the AO. According to Recommendation 37 of the Hong Kong Mediation Report, the proposed Ordinance should include a provision similar to what is now s 63 of the AO.[217]

Section 63 of the AO, "Representation and preparation work", provides as follows,

> "[s]ection 44 (Penalty for unlawfully practising as a barrister or notary public), section 45 (Unqualified person not to act as solicitor) and section 47 (Unqualified person not to prepare certain instruments, etc.) of the Legal Practitioners Ordinance (Cap 159) do not apply to–

[217] The Hong Mediation Report (2010) refers to s 2F of the AO at para 7.89. The AO was amended in 2010 and the relevant section is now s 63.

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(a) arbitral proceedings;

(b) the giving of advice and the preparation of documents for the purposes of arbitral proceedings; or

(c) any other thing done in relation to arbitral proceedings, except where it is done in connection with court proceedings–

(i) arising out of an arbitration agreement; or

(ii) arising in the course of, or resulting from, arbitral proceedings."

Section 63 of the AO was first introduced as s 2F in 1989 and retained as s 63 in the revisions to the AO introduced in 2010.[218] Its effect in practice has been to enable non-lawyers or foreign lawyers to participate in arbitration proceedings conducted in Hong Kong. This practice has generally been considered advantageous as it:[219]

- promotes Hong Kong as an international hub for dispute resolution;
- attracts disputes which have little connection with Hong Kong as it offers a truly international legal space for lawyers from civil law as well as common law jurisdictions;[220]
- helps develop an internationally reputable arbitration jurisprudence out of Hong Kong based on international legal and other expert argumentation;[221] and
- offers parties a choice of the type of (legal) representation they desire and so maximises party autonomy in the private dispute resolution forum of arbitration.[222]

The Working Group on Mediation explained their recommendation for a similar provision in the MO as follows:[223]

- first, the Working Group considered that, given the AO policy to allow non-lawyers and foreign lawyers to represent parties in formal and legalistic arbitration proceedings, there was no reason to prevent non-lawyers and foreign lawyers from representing or supporting parties in the less formal process of mediation;
- secondly, mediation does not involve a determination of parties' rights and liabilities by a third party and legal submissions are not required. Rather, the aim of mediation is to assist parties to resolve their disputes in a way that suits their particular interests and needs (as distinct from legal positions). Therefore

[218] *Report of the Committee on Hong Kong Arbitration Law* (HKIAC, Hong Kong 2003) at para 8.20 – 8.21; see also *Consultation Paper: Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* (Hong Kong, Department of Justice 2007) at para 7.36.

[219] Choong and Weeramantry (eds) (2011) at para 63.08.

[220] Report of the Committee on Hong Kong Arbitration Law (Hong Kong, HKIAC 2003), para.5.6

[221] Choong and Weeramantry (eds) (2011), above note 51, para 63.08.

[222] Choong and Weeramantry (eds) (2011), above note 51, para 63.08.

[223] The reasoning is drawn from the Hong Kong Mediation Report (2010) at para 7. 90.

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there is no need to restrict party representation to lawyers; indeed, parties may choose to appear in mediation without any representation;

- thirdly, mediation is employed to resolve a diverse range of disputes – including family, community, neighbourhood, commercial, inter-government, town planning, intellectual property and so on. As such, mediation caters to a greater variety of disputes than arbitration, many of which might not typically involve lawyers. Therefore, to change mediation practice by requiring the presence of lawyers in situations where lawyers were previously not engaged would not seem to serve the broader development of mediation practice in Hong Kong; and
- finally, the inclusion in the MO of an equivalent to s 63 of the AO would enshrine the principle of self-determination – a central tenet of mediation. It would confirm the principle and practice that parties are free to make their own choices about whether or not to engage Hong Kong qualified lawyers to support and assist them in mediation. The inclusion of such a provision would not affect the parties' right to legal advice or legal representation as parties are still free to engage Hong Kong qualified lawyers if they wish.

Further, in moving the second reading of the Mediation Bill in the Legislative Council, the former Secretary for Justice, Mr Wong Yan Lung SC, highlighted the "international" benefits of s 7 of the MO, stating,

> "[t]he Bill makes it clear that the assistance or support provided to a party in mediation does not constitute an infringement of certain provisions in the Legal Practitioners Ordinance (Cap 159). This is in line with the Arbitration Ordinance and will serve to attract more parties to choose Hong Kong as the place to conduct mediation and promote Hong Kong as an international centre for dispute resolution."[224]

During the discussions and debates on the draft Mediation Bill, the Law Society of Hong Kong ("Law Society") objected to the clause, now s 7 of the MO, arguing that its provisions were unnecessary. The Law Society responded with the argument that there was no law prohibiting non-lawyers and foreign lawyers to assist parties in mediation provided they complied with the LPO. Reference was made to the Foreign Lawyers Practice Rules (Cap 159R) and it was pointed out that foreign lawyers were free to assist parties in mediation provided they complied with the RHC. It was submitted that the restrictions imposed on unqualified persons should always apply. However, the Law Society failed to explain its reasons for making a distinction between arbitration and mediation in order to justify the inclusion of s 63 in the AO and the exclusion of its equivalent in the draft Mediation Bill.[225]

[224] Speech by the Secretary for Justice in moving the Second Reading of the Mediation Bill, 30 November 2012.

[225] LC Paper No. CB(2)819/11-12(03). The Law Society of Hong Kong Mediation Committee, *Draft Mediation Bill: Submission of the Law Society*, 4 July 2011, D, referring to clause 8, which corresponds to s 7 of the MO.

In summary, courts will be able to exercise their discretion in applying this exception. In doing so they must consider all the surrounding facts and circumstances of the case and the wider interests of justice, including the desire to secure a just resolution of the dispute.[387] At the same time, courts will be informed by the policy and legislative goal to promote settlement of disputes as part of the case management function of the courts[388] and the need to safeguard confidentiality as a fundamental feature of mediation[389] in all but the most exceptional of circumstances.

[387] See, for example, the case of *Farm Assist Ltd. (in liq.) v The Secretary of State for the Environment, Food and Rural Affairs (No. 2)* [2009] WEHC 1102 (TCC) in which the Court compelled mediator testimony of mediation communications as it considered it necessary for the fair disposal of the case and in the interests of justice. This case is also discussed at ¶8-004 and ¶9-005.

[388] See, for example, the RHC O 1A, r 1(e).

[389] See, for example, s 3(b) of the MO.

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Section 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.

¶9-001 General Note

Section 9 deals with insider-court confidentiality, ie the rights and obligations associated with protecting mediation communications from being admitted in evidence in court, tribunal or other proceedings.[390] Section 9 restricts the admissibility of mediation communications in evidence in any proceedings by requiring the leave of a specified court or tribunal. Section 10 identifies the relevant courts and tribunals to which applications for leave should be made and sets out guidelines for the exercise of the court's discretion in deciding whether or not to grant such leave.[391]

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As indicated previously, the requirement of leave of the court or tribunal reflects the seriousness with which the MO treats the issues of mediation confidentiality and admissibility of evidence of mediation communications. The requirement of leave of the court or tribunal seeks to prevent frivolous, vexatious or otherwise unjustified claims connected with mediation. The mandatory nature of s 9 means that parties cannot contract out of it and this offers a degree of certainty in relation to how questions of admissibility of evidence of mediation communications will be addressed by the courts.

¶9-002 Application of Section 9

Section 9 covers some of the same terrain as without prejudice privilege and legal professional privilege in so far as these privileges apply to mediation.[392] However, the section is not framed as a privilege, ie it does not attach to a person or particular group of people and give them rights in relation to the question of admissibility of certain mediation communications in evidence. Section 9 is written in the passive voice and does not have a direct addressee. Accordingly, it is a provision of general application that applies to any person seeking to admit evidence of a mediation communication. This gives it a broader application than the common law privileges as these attach to specific persons, primarily the parties.[393] Section 9 also has a broader application than contractual

[390] Insider – court confidentiality and its relationship to insider – outsider and insider – insider confidentiality have been examined previously at ¶8-003.

[391] See the annotation to s 10 at ¶10-004.

[392] See the discussion at ¶8-004.

[393] On the holders of without prejudice privilege and legal professional privilege, see ¶8-004 at (b)(i), (ii) and (iii).

privilege or non-admissibility provisions, which can only bind the signatories to those agreements.

¶9-003 Mediation Communications

As with the duty of confidentiality (non-disclosure) in s 8(1), s 9 applies to all mediation communications. The term "mediation communication" is defined in s 2(1) and has been examined in detail in the commentary to that provision.[394] Essentially, mediation communications extend to all spoken, written and potentially non-verbal information provided for the purpose of, or in the course of, mediation. The explanation of mediation in s 4 of the MO[395] is helpful in understanding the scope of mediation communications. The definition of mediation includes preliminary mediation meetings (whether or not the mediation takes place), substantive mediation meetings as well as follow-up mediation meetings, and activities done in connection with any of the aforementioned mediation meetings, such as telephone calls to arrange or discuss aspects of the mediation. Agreements to mediate and mediated settlement agreements are not included in the definition of mediation communication in s 2(1); therefore, in terms of s 9, it is not necessary to obtain leave from the court or tribunal in order to admit these documents in evidence.[396] However, agreements to mediate and mediated settlement agreements may themselves contain confidentiality clauses, which aim to prevent admission of some or all of their provisions as evidence in a court, tribunal or other proceedings.

Section 5(3) of the MO makes it clear that the substantive sections of the MO, including s 9, apply to mediation communications arising from a mediation process to which the MO is applicable according to s 5(1) and (2).[397] Section 5(3) also clarifies the operation of s 5(4) (c), which provides that the application of the MO – and therefore of s 9 – extends to mediation communications made before, on or after the commencement date of the MO, 1 January 2013. The retrospective aspect of s 9 of the MO is illustrated in the case of *Lincoln Air Conditioning & Engineering Co Ltd v Chan Ping Fai Ricky* discussed elsewhere in this work.[398]

¶9-004 Requirement to Seek Leave and Consequences of Failure to Do So

As indicated previously, s 9 places the onus on all persons who seek to admit evidence of a mediation communication in any proceedings to apply to the relevant court or tribunal for leave to do so. At the same time, the section places responsibility on the relevant court or tribunal to act as a gatekeeper in balancing the need to keep mediation

[394] See ¶2-021.

[395] See the annotation to s 4 at ¶4-001.

[396] See ¶2-025 and ¶9-001.

[397] For a fuller explanation, see the annotation to s 5 at ¶5-007.

[398] *Lincoln Air Conditioning & Engineering Co Ltd v Chan Ping Fai Ricky* [2013] HKEC 93. The retrospective aspect of the operation of the MO is examined in the annotation to s 5 at ¶5-008.

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communications confidential against the need for disclosure in the circumstances of the individual case.[399]

Where an attempt is made to admit evidence without the required leave, it may be struck out by the court or tribunal as demonstrated by the first case to invoke the MO, *Lincoln Air Conditioning & Engineering Co Ltd v Chan Ping Fai Ricky*.[400] In this case the plaintiff had raised objections – in October 2012, before the MO was operative – about certain paragraphs in the defence and witness statements referring to mediation communications. Subsequently, in a matter of days after the MO came into effect on 1 January 2013, the plaintiff made an application to expunge the material under s 9. The application was allowed and the Court struck out the affidavit evidence of witness statements and relevant defence paragraphs relating to mediation communications, even though:

- the mediation communication occurred before the coming into force of the MO; and
- the defence and affidavit evidence witness statements containing the mediation communications had been filed with the Court before the coming into force of the MO.

The Court reasoned that the materials referred to or contained mediation communications and were therefore subject to s 9 of the MO. Poon J explained at para 3 of the judgment,

> "[i]t is common ground that the defendants must first obtain leave from the court under section 9 of the Mediation Ordinance, Cap 620, before they can deploy the mediation communication at trial. Failing which, the paragraphs in the pleadings and the witness statements complained of are liable to be expunged."

Further, the defendant's argument that the mediation communication was required for the fair disposal of the dispute was rejected by the Court.

¶9-005 Mediators and Others Giving Evidence

Evidence of a mediation communication may take various forms, including documents or photographs prepared for the purpose of, or in the course of, mediation, regardless of who made or created the documents. Evidence may also take the form of testimony by the mediator, a party or other mediation participants.

When parties enter a mediation process, they are anticipating a private and confidential forum in which they can negotiate to resolve the dispute between them. The possibility of the mediator or any other mediation participant, including the parties themselves, being required to testify in court or other proceedings in relation to the mediation is the furthest thing from the parties' minds.

[399] LC Paper No. CB(2)1943/11-12 at para 62.

[400] *Lincoln Air Conditioning & Engineering Co Ltd v Chan Ping Fai Ricky* [2013] HKEC 93.

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In an attempt to remove or minimise the risk of mediators being required to, or consenting to, provide evidence of mediation communications, many standard agreements to mediate contain clauses prohibiting mediators from acting as witnesses and producing evidence of notes relating to the mediation. Clause 13 of the Hong Kong Mediation Code's Sample Agreement to Mediate offers an example of such a clause. It reads as follows:

> "[t]he Parties will not call the Mediator as a witness, nor require him to produce in evidence any records or notes relating to the mediation, in any litigation, arbitration or other formal process arising from or in connection with the Dispute and the mediation; nor will the Mediator act or agree to act as a witness, expert, arbitrator or consultant in any such process."

At first glance, such clauses may appear to offer mediators and mediation participants a reassurance that nothing said or done in mediation will end up as evidence in other proceedings. However, the courts and tribunals are not bound by such agreements and have overridden such clauses where the interests of justice have so required. The case of *Farm Assist Ltd. (in liq.) v The Secretary of State for the Environment, Food and Rural Affairs (No. 2)*,[401] discussed below, provides an illustration of a situation in which the court dismissed a mediator's application to set aside a witness summons.[402]

While clauses aimed at keeping evidence of mediation communications out of court do not always succeed in relation to their primary aim, they may still influence the practice of mediators, for example in relation to notetaking. The MO does not contain any provision prescribing the extent to which mediators or other mediation participants are required to make or keep notes of the mediation. Notetaking is generally considered to be an aspect of the conduct of the mediation process and therefore a matter for the mediator and the parties.[403]

In Hong Kong, the dominant practice seems to be that mediators do not keep their notes related to the mediation. This practice is arguably influenced by provisions such as clause 13 of the Hong Kong Mediation Code's Sample Agreement to Mediate, reproduced above, which states that a mediator's records and notes are not to be produced in evidence. Most mediators will retain a copy of the agreement to mediate to which they are a signatory and some mediators also keep a copy of the mediated settlement agreement. The MO does not consider these contractual documents to be mediation communications (s 2(1)) and therefore they are not *prima facie* confidential. As noted previously[404] however, the signatories to agreements to mediate and mediated settlement agreements may agree to subject certain or all provisions of such contracts to confidentiality or non-disclosure obligations.

[401] *Farm Assist Ltd. (in liq.) v The Secretary of State for the Environment, Food and Rural Affairs (No. 2)* [2009] WEHC 1102 (TCC). See also ¶2-008 where this case is discussed.

[402] See LC Paper No. CB(2)1499/11-12(02) at No. 32.

[403] See LC Paper No. CB(2)1499/11-12(02) at No. 31.

[404] See ¶8-013.

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¶9-006 "Any Proceedings"

Section 9 applies to "any proceedings." The term "any proceedings" expressly includes, but is not limited to, "judicial, arbitral, administrative or disciplinary proceedings." It is suggested that a wide interpretation of "any proceedings" is in line with the intention of s 9 and with the overall objective of the MO to "protect the confidential nature of mediation communications" (s 3(b)).

The term "any proceedings" would appear to apply to proceedings irrespective of whether or not those proceedings are dealing with the dispute that is or was the subject-matter of mediation. This approach is consistent with leading judicial and academic opinion which suggests that the application of insider-court confidentiality should not be limited to proceedings concerning the mediated dispute but should extend to other proceedings involving different, although often related, legal disputes.[405] Such an interpretation of the term "any proceedings" prevents parties circumventing mediation confidentiality by arguing that the dispute which is the subject of other proceedings involves primary legal issues different from those dealt with in the mediation.[406]

Finally, the term "any proceedings" seems to apply to concurrent and subsequent proceedings. Accordingly, if mediation has been suspended rather than terminated, or if mediation is running parallel to another process such as arbitration,[407] the requirements of s 9 still apply.

¶9-007 With Leave of the Court or Tribunal

Section 10 deals with the exercise of discretion by the court or tribunal to grant leave to disclose, or admit evidence of, a mediation communication.

[405] See, for example, L Boulle, *Mediation: Principles, Process, Practice* (Sydney: Lexis Nexis 2005) at 543.

[406] See the annotation to a similar issue in relation to mediation clauses at ¶2-008 and the decision of *Farm Assist (N° 2)* [2009] WEHC 1102 (TCC) in which the language of the mediation agreement was to the effect that the parties could not call the mediator as witness in any litigation or arbitration "in relation to the dispute." Here the judge held that this wording "in relation to the dispute" referred to the original dispute and was not wide enough to cover a different dispute on the question as to whether duress had been deployed by one of the parties during the mediation.

[407] For example, in the French process *med – arb simultanés*, mediation and arbitration are conducted simultaneously, ie as parallel processes.

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