

**Editor's Note**

ESSAR Insurance Services Limited, Managers of the Professional Indemnity Scheme in collaboration with Panel Solicitors **Clyde & Co**, issue this quarterly bulletin to highlight risk management issues learned from their handling of claims.

**ADR AND SETTLEMENT:****SOLICITORS' DUTIES AND RESPONSIBILITIES**

In court proceedings, parties are actively encouraged to explore alternative dispute resolution (“**ADR**”) with the aim of achieving an early resolution. ADR can take many different forms, where the ultimate objective is to resolve a dispute without recourse to litigation. Most commonly, it refers to a form of facilitated settlement process such as mediation. ADR can also include binding or non-binding processes where a third party, such as an Arbitrator, expert, or lawyer, is asked to give some form of determination based upon the submissions presented to him.

The parties' underlying contract (if such exists) could include some form of mandatory ADR process. Otherwise, ADR procedures such as mediation are a voluntary process requiring the mutual agreement of both parties to progress. There are no mandatory legislative provisions for mediation / ADR in Hong Kong. However, unreasonable refusal to attempt ADR could lead to adverse costs consequences. Over the years, the Hong Kong courts have shown their commitment to facilitate the consensual settlement of disputes among court users. Litigation solicitors play an integral part in this process and practitioners should be mindful of the duties and responsibilities they owe when advising their clients on ADR.

**Overview**

Facilitating the settlement of disputes is one of the underlying objectives of the civil procedure rules of the court following the Civil Justice Reform (“**CJR**”) in 2009.

Following the CJR, the court has a duty, as part of active case management, to encourage the use of an ADR procedure if it considers that to be appropriate and to facilitate the use of such a procedure. Mediation is the primary form of ADR promoted by the courts.

- ***Solicitors' responsibilities to advise their clients on ADR such as mediation***

Solicitors, as officers of the court, are under a positive duty to assist the courts in facilitating the settlement of disputes. The duties and obligations are manifested in the civil procedural rules<sup>1</sup>, the Hong Kong Solicitors' Guide to Professional Conduct (the “**Guide**”) and various Practice Directions.

- ***Principle 10.17 of the Guide***

The Guide sets out a *positive* duty on the part of litigation solicitors to advise their clients to consider ADR procedures including mediation in appropriate cases.

---

<sup>1</sup> Order 1A, rule 3 of the RHC and Order 1A, rule 3 of the RDC

Specifically, principle 10.17 “Encouraging Settlements” of the Guide states that: “*A litigation solicitor needs to keep in mind that a settlement may be in his client’s interest and to advise and act accordingly*”.

In doing so, it is important to consider with the client at the commencement of - and throughout the retainer - whether the likely outcome of the litigation justifies the expense and risks involved and to always keep in mind and advise the client of the possibility of a settlement through ADR.

- ***Solicitors’ duty in respect of Practice Direction 31 (“PD 31”)***

The duty of a solicitor to consider the option of mediation with his client is a procedural requirement pursuant to PD 31 “Mediation”, which applies to all civil proceedings begun by writ in the Court of First Instance and the District Court in which all parties are legally represented. Paragraph 4 thereof expressly provides that legal representatives should advise their clients of the possibility of the Court making an adverse order where a party unreasonably fails to engage in mediation.

PD 31 sets out the relevant protocol for mediation: in proceedings where all parties are legally represented, solicitors acting respectively for the parties shall file a Mediation Certificate after the close of pleadings confirming the client’s willingness (or otherwise) to mediate, and that the client has been advised of the nature of the process. The Mediation Certificate is required to be signed by the solicitors *and* the party they represent. To comply with the obligations under PD 31, solicitors must have explained to the client the availability of mediation to resolve the dispute or part(s) of the dispute instead of litigation, and the respective costs positions of mediation as compared with the cost of the litigation, and the requirements under PD 31.

Similar mediation protocols for other case types also exist under various other Practice Directions (e.g. Practice Direction 6.1 of the Construction and Arbitration List and Practice Direction 18.1 of the Personal Injuries List).

### **Relevant considerations in undertaking an ADR process**

It is therefore essential for litigation solicitors to explain to, and advise their clients in respect of engaging in ADR. Whilst every case will differ, the advice given (ideally in written form) should consider issues such as the following:

- Whether the parties’ underlying contract contains any requirement for ADR;
- The purpose and nature of the ADR process;
- Where applicable, the provisions and requirements under PD 31 on mediation (or equivalent provisions in other Practice Directions);
- The risks of an adverse costs order where a party unreasonably fails to engage in mediation;
- Whether prior failed mediations or other forms of settlement negotiations are sufficient basis to rebut the above premise, and to counter the risk of an adverse costs order in the circumstances of that case;

- Analysis of the merits of the case and the risks of litigation and the potential benefits (or otherwise) of engaging in ADR;
- Alternative methods of resolution, such as Sanctioned Payment and Sanctioned Offers, without prejudice negotiations, and the pros and cons of the different approaches;
- The likely costs of the litigation process as compared to the costs of engaging in ADR;
- The potential consequences of pursuing litigation through to the conclusion of a trial, including the financial and costs consequences if the party loses, the irrecoverable costs that may be incurred even if a party wins, and the professional or reputational impact that an adverse judgment may have; and
- The prospects of being able to enforce any successful Judgment or costs award against the losing party, subject to their financial resources.

After consideration of the above and any other matters relevant to the case, solicitors should ensure that advice is provided to the clients on the merits of the case and the relevant considerations in engaging ADR before the clients elect/agree to participate in a mediation/ADR process.

### **Before attending a mediation / ADR**

Careful preparation in advance of an ADR process such as mediation increases the prospects of it being successful. There are a number of key steps a solicitor should consider undertaking in advance:-

- Preparing a detailed analysis of the merits of the case, as discussed above, including the recommended strategy, and the potential settlement parameters;
- The logistics of the process, including the appointment of the mediator (if applicable), the venue, timings, format and attendees;
- Ensuring that the client understands the terms of the mediation agreement (if applicable), including the confidential and without prejudice nature of any mediation process;
- The preparation of Position Papers (or similar submissions) that may need to be exchanged ahead of the day;
- The core bundle of documents that will be mutually relied upon and provided to the mediator (if applicable);
- Ensuring that the client's representative who attends the mediation or without prejudice meeting has the necessary authority to reach a binding settlement on the client's behalf.
- If solicitors hold themselves out as having the necessary authority to act on the client's behalf, the solicitors need to ensure that they have such authority from the client. Otherwise they risk being found to be in breach of warranty of authority.
- If client's insurance is involved, invariably the relevant Policy will require that Insurers' consent be obtained in advance of any settlement. Accordingly, Insurers will need to be advised in advance of the process and their consent obtained to any settlement;
- Obtain clear and documented settlement authority / instructions from the client; and
- Consider preparing a draft settlement agreement in advance, to both save time on the day, as well as ensuring that key settlement terms are considered well in advance.

As to the last point, if a settlement can be reached during an ADR process, proper consideration should be given to the appropriate settlement terms, and what the client's objectives comprise. A comprehensive settlement agreement will usually include clauses covering a range of issues such as:

- The settlement sum to be paid;
- Payment terms and dates;
- The resolution of any counter-claim or fee claims;
- The scope of the dispute that is being settled and applicable releases from known and/or unknown claims;
- Whether the settlement is on a non-admission of liability basis;
- The payment or bearing of legal costs, expenses and disbursements;
- The responsibility for paying accrued court fees, or pre-existing cost orders;
- The payment of Mediator's fees or of the ADR process;
- The obligations (if any) of any party to undertake any future services for the other party or continue to perform the contract;
- Warranties and indemnities;
- Confidentiality provisions; and
- Governing law and jurisdiction.

It is important for solicitors to ensure that the client has been properly advised on the settlement terms / their implications and that the client fully understands and agrees with those terms. It is also important to ensure that the agreed settlement terms are clearly and accurately documented and signed by the properly authorised persons on behalf of the relevant parties.

### **Key takeaways**

- As officers of the court, it is important that litigation solicitors are aware of their duties and responsibilities to facilitate the resolution of disputes through ADR.
- Solicitors should ensure that they provide clear and documented advice to a client on:-
  - (a) the availability and the “pros and cons” of ADR;
  - (b) the consequences, including risk of an adverse costs order being given by the Court where a party unreasonably fails to engage in mediation where the relevant Practice Directions applies; and
  - (c) the merits of the case, including the costs and risks of litigation and the potential benefits of settlement.
- Where the parties have agreed to ADR, solicitors need to carry out careful preparation in order to maximise the prospects of it succeeding, and to ensure that the client's representative has the necessary authority to attend the mediation/settlement negotiation.
- In the event of a settlement, solicitors should:-
  - (a) document the settlement terms in a clear and unambiguous manner;

- (b) ensure that the client understands and agrees with the settlement terms reached;
- (c) ensure that the client's representative has the necessary authority to settle and to sign a settlement agreement; and
- (d) ensure that the client's interests are protected properly through a comprehensive settlement agreement.

This bulletin is provided for the recipients' information only and does not constitute legal advice. No representation whatsoever is made by the Hong Kong Solicitors Indemnity Fund Limited (the "**Company**"), Managers or Clyde & Co, to the recipients in relation to such information. The Company and Managers shall not be responsible or liable to any party who relies on the information provided above.