

PRACTICE DIRECTION 3.3

VOLUNTARY MEDIATION IN PETITIONS PRESENTED UNDER SECTIONS 168A AND 177(1)(f) OF THE COMPANIES ORDINANCE, CAP. 32

A. General

1. This Practice Direction sets out the provision for voluntary mediation in respect of petitions presented under section 168A and petitions for winding up on the just and equitable ground under section 177(1)(f) of the Companies Ordinance, Cap. 32, where there is no allegation of insolvency concerning the subject company and no allegation that the affairs of the company would require full investigation in the public interest.
2. Where the petitions are purely disputes between shareholders, not involving the interest of the general body of creditors of the subject company or affecting the public interest, the court wishes to encourage the parties to consider the use of mediation as a possible additional means of resolving their disputes in a cost-effective and more expeditious manner.

B. Initiation of Mediation

3. At any stage of the petition, if a party (“the Applicant”) wishes to attempt mediation, this may be initiated by serving a notice (“a Mediation Notice”) on the other party or parties (“the Respondent”), inviting them to agree to mediation. The Mediation Notice, which is to be filed in court, should specify the following matters:
 - (1) whether it is proposed to resolve by mediation the entire dispute or a part of the dispute, and if the latter, specify which part of the dispute;
 - (2) the rules or procedures under which the proposed mediation is to take place, including the manner in which a mediator is to be appointed;

- (3) the estimated costs of engaging a mediator;
 - (4) a timetable for the proposed mediation; and
 - (5) what minimum amount of participation would qualify as a sufficient attempt at the proposed mediation, as far as the Applicant is concerned.
4. Upon receiving a Mediation Notice, the Respondent should respond to the Applicant in writing within 14 days, or within such further time as the parties may agree, stating:
 - (1) whether the Respondent agrees to mediation of the entire dispute or a part of the dispute as specified by the Applicant or by the Respondent;
 - (2) whether the Respondent agrees to the proposed mediation in accordance with the rules or procedures as identified by the Applicant, or proposes some other rules or procedures by which mediation is to proceed;
 - (3) whether the Respondent agrees with the timetable proposed by the Applicant or proposes modification to the timetable; and
 - (4) what minimum amount of participation would qualify as a sufficient attempt at the proposed mediation, as far as the Respondent is concerned.
5. Where the Respondent counter-proposes to mediate a different part of the dispute, the Applicant should reply to the Respondent in writing within 7 days of receipt of the Respondent's response, or within such further time as the parties may agree.
6. Where the Respondent (or the Applicant where the Respondent counter-proposes to mediate a different part of the dispute) does not agree to the proposed mediation to resolve the whole or part of the dispute, he should state in the response why he does not believe such proposed mediation to be appropriate, and be prepared to justify his refusal to attempt mediation at the conclusion of the trial.

7. Where the Applicant and the Respondent agree on the proposals in the Mediation Notice, or on such modifications to the proposals, the agreement should be reduced into a written minute signed by the Applicant and the Respondent and the proposed mediation should proceed accordingly.
8. The Applicant and the Respondent may apply to a Companies Judge for a ruling where,
 - (1) they are unable to resolve their difference on a point of procedure or mechanics concerning the proposed mediation;
 - (2) they are unable to agree on the minimum level to qualify as sufficient participation in the proposed mediation.
9. Where the Respondent (or the Applicant where the Respondent counter-proposes to mediate a different part of the dispute) has given an affirmative response to mediation, the Applicant and the Respondent may apply to a Companies Judge to stay the petition, pending the progress of an agreement to proceed to mediation reached in accordance with this Practice Direction, with liberty to apply to extend the stay to enable the proposed mediation to be completed. The supporting affidavit should exhibit the Respondent's response, the Applicant's reply, the minute of agreement (if any), evidence of solvency of the company, and specify the expected duration of the proposed mediation.
10. If the Applicant and the Respondent are unable to resolve their differences by mediation within the specified period for which the petition is stayed, they are to apply to restore the petition within 7 days of the expiry of the stay, for the purposes of reporting back to the court what progress have been made by way of mediation and seeking further directions as follows:
 - (1) the report is to cover only the process adopted for mediation (such as the number of sessions held and the participants) and the outcome, and shall not cover the content of the contact between the parties, their legal advisers and the mediator;

- (2) where further time is required to enable the mediation to be completed, what further period should the petition be stayed with evidence of solvency of the company;
 - (3) where efforts towards settlement by means of mediation have proved fruitless, what directions are to be obtained from the court to proceed with the petition.
11. A party is at liberty to apply to a Companies Judge at any time to lift the stay imposed on account of mediation in appropriate circumstances.
 12. At any hearing for directions of the petition, the Judge may ask the parties if they have attempted mediation and, if not, why not. The Judge may express a view as to whether mediation might assist in resolving all or some of the disputes in the petition. Legal representatives have a duty to advise clients at an early stage of resolving their dispute through mediation.

C. Voluntary Nature of Mediation

13. Parties reach an agreement to mediate on a voluntary basis. Such an agreement is not actionable as a contract, and is without prejudice to the parties' contentions in the petition. A party to an agreement to mediate is free to withdraw from mediation at any time and to proceed with the petition.
14. No settlement reached in the course of mediation will become binding on the Applicant and the Respondent until the settlement is reduced into writing and signed by both parties.
15. The conduct of the mediation shall remain confidential to the parties and will proceed wholly on a without prejudice basis.

D. Costs Sanction

16. Where a Mediation Notice has been served, an unreasonable refusal or failure to attempt mediation may expose a party to an adverse costs order. Whether a party has acted unreasonably would

be determined having regard to all the circumstances of the particular case. In general, a party shall not suffer any adverse costs order where,

- (1) he 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) he has a reasonable explanation for non-participation.
17. In determining whether a party has acted unreasonably in refusing or failing to proceed with mediation, the court will not usually take account of or inquire into:
- (1) what happened during the process of mediation;
 - (2) why the process failed; or
 - (3) whether any failure in the process may be ascribed to unreasonable conduct by any party.

E. Administration

18. For the purpose of compiling data on the effectiveness of mediation, the parties or their legal representatives are requested to report to the Clerk to the Judge in charge of the Companies and Bankruptcy List the following matters within 28 days of the conclusion of the court proceedings:
- (1) the action number of any petition in which mediation has been attempted pursuant to an agreement to mediate reached in accordance with this Practice Direction;
 - (2) whether mediation has led to settlement of the dispute or some part of it;
 - (3) the number of hours spent by the mediator (including preparation) on mediation, whether or not ultimately successful; and

- (4) whether, in the opinion of the reporting party, the process of mediation has led to saving in litigation costs.
19. A booklet is available from the Judiciary for those wishing information on mediation generally and on the resources available for mediation in Hong Kong.

F. Commencement Date

20. This Practice Direction supersedes the previous Practice Direction 3.3 on Pilot Scheme for Voluntary Mediation in Petitions Presented under Sections 168(A) and 177(1)(f) of the Companies Ordinance, Cap. 32 dated 4 September 2008, and Practice Direction 3.3A on Extension of Pilot Scheme for Voluntary Mediation in Petitions Presented under Sections 168(A) and 177(1)(f) of the Companies Ordinance, Cap. 32 dated 23 September 2009.
21. This Practice Direction comes into effect on 1 January 2010.

Dated this 2nd day of December 2009.

(Andrew Li)
Chief Justice