Cayman Islands Courts roll out judicial mediation of disputes

In a welcome development, the Courts of the Cayman Islands have introduced new measures concerning the judicial mediation of disputes. By Practice Direction No. 3 of 2022, entitled "Judicial Mediation Guidelines", issued by Chief Justice Sir Anthony Smellie QC on 15 August 2022 (the "**Guidelines**"), the remit of the Cayman Islands judiciary to conduct mediations has been greatly expanded. This continues a trend towards the increasing use of alternative dispute resolution methods in the Cayman Islands, and should be welcomed by litigants and legal practitioners alike.

As the preamble to the Guidelines setting out their purpose explains, Judges and Magistrates are in appropriate cases to encourage parties to engage in mediation. Consistent with the Overriding Objective to deal with cases justly and at proportionate cost, the Court's duty is to manage cases so as to help the parties settle the whole or part of the proceedings. To this end, several members of the judiciary have been trained and certified as mediators.

The Guidelines address the referral of matters to judicial mediation and the procedures for the conduct of judicial mediations in litigation other than cases in the Family Division, which shall continue to operate under their existing mediation procedure. Accordingly, the Guidelines apply to proceedings in the Financial Services, Civil and Admiralty divisions of the Grand Court.

In summary, a case *"may be referred by the Court to mediation at any stage in the proceedings"*. Although it is unclear from the Guidelines whether such a reference may be made unilaterally by the Court, irrespective of the wishes of the parties, it appears that this is the case. The Guidelines provide that a matter will be particularly suitable for judicial mediation where: (i) there has been an earlier unsuccessful private mediation, (ii) one or more of the parties has limited resources, (iii) there is a substantial risk that the costs and time of a trial would be disproportionate to the value or nature of the case, (iv) an estimated trial length would occupy substantial judicial resources, or (v) there are other factors such that the interests of justice require a referral to judicial mediation.

There are also certain cases which, as a matter of policy, may not be suitable for mediation, such as cases involving questions of public importance which, in the public interest, ought to be heard in open Court. Likewise, mediation will not be appropriate in cases where the Court is to review the exercise of a statutory power or discretion, in which the commission of a crime or serious misconduct is alleged in the context of a civil proceeding, or where one of the parties is unrepresented by legal counsel.

As the focus of the Guidelines is on judicial mediation, they do not appear to apply to private mediation (*i.e.* mediation conducted outside the auspices of the Court with a private mediator) and nor do they address whether, for example, it may be left to the parties to choose between a judicial or private mediation.

The Guidelines indicate that directions will be given by the Court regarding preparation for the mediation, and the parties will be informed in advance of any pre-conditions, expectations, or particular requirements. These may include a requirement to provide specified documents or other information, position papers, or confidential offers.

The parties and other participants are required to maintain the confidentiality of the mediation proceedings, and it will be the usual practice of the mediator to destroy all materials provided to or prepared by the mediator, following completion of the mediation (whether successful or not).

The mediator will control the conduct of the mediation proceedings, and mediation styles and practices will vary between different judicial mediators. For example, some mediators may be prepared to meet with each of the parties independently (albeit only ever with the consent of all other parties) whereas others may wish to meet only with all parties present. The mediator will not evaluate issues in dispute or provide legal advice to the parties. Although the mediator will not assist with the preparation of the terms of any settlement, they may give guidance for settling the terms of any settlement agreement that may be reached.

As one would expect, no member of the Court will hear and determine an issue in any proceeding in which that person has acted as a mediator or where they have become acquainted with any confidential information relating to the mediation of the dispute. However, perhaps surprisingly, the Guidelines provide that if the proceedings fail to settle at mediation, the judicial mediator may give directions for the further conduct of the proceedings in their judicial capacity. This blurs the lines between mediation and litigation (and the roles of the judge and judicial mediator), and may therefore prove controversial. It is also difficult to reconcile with the Guideline which provides that no member of the Court will determine an issue in a proceeding in which they acted as mediator.

Finally, a judge acting as a mediator shall have the same immunity from liability as a judge acting judicially in Court proceedings.

The Guidelines are silent, and therefore leave open the question, as to whether mediation will ordinarily be conducted on a 'without prejudice' or 'without prejudice save as to costs' basis. This is an important distinction as the latter would allow the Court, when determining costs at the conclusion of the litigation, to take into account the parties' conduct during the mediation, and any settlement offers they may make during the process, whereas the former would not. It is reasonable to expect that, in the usual course, the parties will agree or the Court will direct that the mediation is to be conducted on a 'without prejudice save as to costs' basis so as to create costs risk for a party that is or would otherwise be minded not to engage in *bona fide* mediation.

The Guidelines are also silent as to the Court's costs, if any, of the judicial mediation process and whether the parties' costs of the mediation will form part of the costs of the Court proceedings to be determined by the Court at the conclusion of the litigation; we expect that they will.

The Guidelines thus provide a welcome expansion of the scope and prominence of mediation in the Cayman Islands, with the aim of promoting settlements, thereby reducing the overall time and cost of litigation and the overall burden on the judicial system.

The promulgation of the Guidelines is consistent with a trend towards increased alternative dispute resolution in

other jurisdictions such as the United Kingdom and Canada. In the UK, there has been a long-standing requirement for early mediation in many civil cases, and a failure to mediate may be reflected in adverse cost orders made by the Courts. As to mandatory mediation, the UK government has recently published consultation proposals for a roll-out of compulsory free mediation for disputes worth less than £10,000 – which could result in some 270,000 more people every year being helped to resolve disputes outside of the Court system.

As the UK Justice Minister Lord Bellamy QC has stated, *"Millions of businesses and individuals go through the civil courts every year and many of them simply do not need to. Mediation is often a quicker and cheaper way of resolving disputes and ... [our proposals] could help free up vital capacity in the civil courts to deal with more complex cases quicker."*

In Canada, automatic or mandatory mediation has been in use in three cities in Ontario for over 20 years, and a recent survey of Ontario Bar Association members showed that 90% of respondents favoured expanding it further.

One distinguishing feature of the new mediation procedures in the Cayman Islands, in contrast to the proposed approach in the UK, is that at least some of the compulsory mediations will be conducted by judges. The Cayman approach will also apply to disputes of all sizes and values.

While compulsory mediation (sometimes regarded as a contradiction in terms) is not without controversy, the Guidelines are a welcome addition to the powers available to the Court to facilitate the resolution of disputes in accordance with the Overriding Objective. This development should therefore serve as a "jump-start" for mediation in the Cayman Islands, which promises to operate in the best interests of litigants as well as the judicial system as a whole.

The authors are the Chairman and Secretary, respectively, of the Cayman Islands Chapter of the Chartered Institute of Arbitrators ("CIArb"), which is the leading professional body for alternative dispute resolution globally.

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