

# Mediation Confidentiality - Evolving from Case Law to Ordinance

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## Introduction

The new Mediation Ordinance (Cap. 620) was enacted on 22 June 2012 and came into force on 1 January 2013. It represents a new era for Hong Kong mediation. In view of its object setup, it is clearly aimed at promoting, encouraging, and facilitating the resolution of disputes through mediation (Section 3a). In addition, one of the fundamental characteristics of mediation – confidentiality – was established in the statutory tool to protect the secret nature of “mediation communication” (Section 3b). This paper describes the difference between case law and the new ordinance with respect to confidentiality.

## The Old Days of Confidentiality

In the **S v T [2011]** case, the applicant asked to admit further evidence comprising “a without prejudice document” designed to achieve a certain settlement of the matter along with other documents of what was said or not said during the mediation process. The court regarded this as fundamentally important. Every mediation case starts with an agreement (Agreement to Mediate) between the parties and communication must be kept confidential. That discretion must extend to the process of the mediation and the decision to embark on it. It is wholly wrong to refer to what was said, not said, or arose out of the mediation unless and until a concluded agreement has been achieved that encompasses what may or may not be disclosed in the settlement agreement.

In **Wu Wei v Liu Yi Ping (2004)**, the court accepted that genuine negotiations with a view to settlement are protected from disclosure whether or not the “without prejudice” stamp was applied expressly to the negotiations. This case involved a couple that divorced, with the husband suing the wife for the asset distribution from their joint bank account after a PRC mediation meeting was held.

But the court held that justice was required so the defendant should be allowed to explain her action (which allegedly amounted to a breach thereof) by relying on the communications made during mediation conducted in the PRC.

In **Chu Chung Ming v Lam Wai Dan [2012]**, a party sought to adduce part of a letter read out during mediation of another case as evidence. The court considered if the “exceptions” to the general principles governing the communication of “confidentiality” or “without prejudice” applied here. It held that there was no greater public interest involved in this case to override the confidentiality principle, so there was no exception to apply. The two passages in the letter were also unnecessary for fair disposal and their contracts could be proved by alternative means.

Based on the case laws, the ordinance set up the principle of confidentiality and its obligation throughout the mediation process.

## New Ordinance

Section 8(1) stated that subject to the exceptions provided in the ordinance, “...a person must not disclose a mediation communication...” Section 8(2) lists the “Exceptions” to the general confidentiality rule in 8(1). Hence, a person may disclose a mediation communication under restricted situations that include:

- *the consent of the parties and mediator [s.8(2)(a)(i) to (iii)];*
- *consent that has already been made available to the public [s.8(2)(b)];*
- *consent that is subject to discovery in civil proceedings [s.8(2)(c)];*
- *any reasonable grounds to believe that disclosure is necessary to prevent or reduce the danger of injury to a person or is of serious harm to the well-being of a child [s.8(2)(d)];*
- *research, evaluation, or educational purposes without revealing the identities of the parties involved [s.8(2)(e)];*
- *an attempt to seek legal advice [s.8(2)(f)]; and*
- *anything required by law [s.8(2)(g)]*

Section 8(3) also allows disclosure, with the court's or tribunal's permission, to enforce a settlement agreement, a complaint against a mediator's misconduct, or whatever the court thinks is justified. Sections 9 and 10 further set the considerations of disclosure taken from a court or tribunal.

A case that came out after the ordinance was enacted was **Lincoln Air-conditioning & Another v Chan Ping Fai & Others, HCA 527/ 2010 (21/1/2013)**. In it, the defendants' amended plea and witness statements relied on mediation communication during the wind-up proceedings that are now used to support a defendant's assertion that a petitioner's claim at issue was settled by way of an agreement reached after the mediation. The court held that mediation communication is not required for the fair disposal of the dispute because the petitioner is not even a party to the mediation agreement. Moreover, the mediation communication was without prejudice and inadmissible. No admission of mediation communication was held to permit.

**Conclusion**

Generally, the ordinance has provided a good regulatory framework for safeguarding mediation communication with

the doctrine of confidentiality. Confidentiality in mediation is fundamentally important for the evaluation of the mediation process success (or lack thereof). Maintaining a statute could inform the public of it and give disputants the confidence to use it.

**Bibliography:**

- 1) Vod K.S. Chan, Seminar topic - Mediation Ordinance – debut of the regulatory framework on 11 July 2013.
- 2) Elaine Liu, Seminar topic - Mediation Ordinance – Areas to watch out for on 10 April 2013.
- 3) Gary Soo, Building Journal – Mediation Ordinance – A new Landscape for Hong Kong on January 2013.
- 4) ONC Lawyers Newsletter – The Enactment and Implementation of the Mediation Ordinance : Its Impacts and Implications, July 2012. 

**C**ALENDAR OF EVENTS 活動日誌

Date	Event	Organiser	Location	
<b>2013</b>				
<b>Sep</b>	14	HKIS Annual Conference 2013	HKIS	Conrad Hong Kong
	25	HKIS General Council Meeting	HKIS	Board Room, HKIS
	25	HKIS Executive Council Meeting	HKIS	Board Room, HKIS
<b>Oct</b>	24	HKIS Executive Council Meeting	HKIS	Board Room, HKIS
<b>Nov</b>	4	HKIS Annual Dinner 2013	HKIS	Grand Hyatt Hong Kong
	28	HKIS General Council Meeting	HKIS	Board Room, HKIS
	28	HKIS Executive Council Meeting	HKIS	Board Room, HKIS
<b>Dec</b>	13	HKIS Annual General Meeting	HKIS	SLC, HKIS

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