

[LTPD: CS No. 1/2011]

**Direction Issued by the President of the Lands Tribunal
Pursuant to Section 10(5)(a) of the
Lands Tribunal Ordinance (Cap. 17)**

**Mediation for Compulsory Sale Cases
Under the Land (Compulsory Sale for Redevelopment)
Ordinance (Cap. 545)**

Part A

1. This Direction is issued pursuant to section 10(5)(a) of the Lands Tribunal Ordinance, Cap. 17 and applies to all cases (“Compulsory Sale Cases”) under the Land (Compulsory Sale for Redevelopment) Ordinance, Cap. 545 (“the Compulsory Sale Ordinance”).
2. As stipulated in the Direction on Application of the Civil Justice Reform to the Lands Tribunal issued on 12 February 2009 (LTPD: CJR No. 1/2009), Order 1A of the Rules of the High Court is of general applicability in the context of cases in the Lands Tribunal (“the Tribunal”). Order 1A sets out the underlying objectives of the Rules of the High Court, and can be applied to the Tribunal by virtue of section 10(1) of the Lands Tribunal Ordinance.
3. An underlying objective of the Rules of the High Court is to facilitate the settlement of disputes. The Court has the duty as part of active case management to further that objective by encouraging the parties to use an alternative dispute resolution procedure (“ADR”) if the Court considers that appropriate (“the duty in question”). The Court also has the duty of helping the parties to settle their case. The parties and their legal representatives have the duty of assisting the Court to discharge the duty in question¹.

¹ See Order 1A, rule 1(e), rule 3 and rule 4(2)(e) and (f).

4. Thus, by applying Order 1A to the Tribunal, the Tribunal has the same duties as in the High Court to facilitate the settlement of disputes. The parties and their legal representatives involved in cases before the Tribunal also have the duty to assist the Tribunal to discharge the duty in question.

5. The aim of this Direction is to ask the parties to assist the Tribunal to discharge the duty in question in Compulsory Sale Cases. ADR means a process whereby the parties agree to appoint a third party to assist them to settle or resolve their dispute and a common mode of ADR is mediation. Settlement negotiations between the parties do not amount to ADR. This Direction, however, applies to mediation only.

6. The Tribunal is entitled to and may take into account of any unreasonable failure of a party to engage in mediation in its consideration of (a) whether to grant an order under a compulsory sale application, and (b) in exercising its discretion on costs. These will be addressed in greater detail in Part C below.

7. Legal representatives should advise their clients of the possibility of the Tribunal in refusing to make an order under a compulsory sale application and/or in making an adverse costs order as set out in Part C below.

Part B

B1. Where all the parties are legally represented

8. With effect from the effective date stated below, the following procedure shall be applied automatically to Compulsory Sale Cases where all the parties are legally represented, and the parties must comply with the procedure as if they were specifically directed by the Tribunal:-

- (1) An applicant shall file with the Tribunal a **Mediation Certificate** at the same time when the Notice of Application is filed. The Mediation Certificate shall contain the information required and be in the form as per **Appendix A**, with modifications if necessary, and signed by the solicitors and the party they represent.
- (2) A respondent shall file with the Tribunal a **Mediation Certificate** at the same time when the Notice of Opposition is

filed. The Mediation Certificate shall contain the information required and be in the form as per **Appendix A**, with modifications if necessary, and signed by the solicitors and the party they represent.

- (3) If a party (either the applicant or the respondent) wishes to attempt mediation, he should as soon as practicable after filing the Mediation Certificate serve a **Mediation Notice** on the other party or parties in the dispute in the form and containing the information as per **Appendix B**, with modifications if necessary, and signed by the party or his solicitor.
- (4) Upon receiving the Mediation Notice, the other party or parties shall respond to the party serving the Mediation Notice by way of a **Mediation Response** within 14 days (or such other time as the parties may agree or as the Tribunal may direct) in the form and containing the information as per **Appendix C**, with modifications if necessary, and signed by the responding party or his solicitor.
- (5) Where the parties put forward different proposals in the Mediation Notice and Mediation Response, the parties shall attempt to reach agreement on the proposals as soon as practicable. Any agreement reached upon such discussion shall be reduced into writing and be referred to as the **Mediation Minutes**, which shall be signed by all the parties or their solicitors.
- (6) Where the parties are unable to reach agreement on certain proposals in the Mediation Notice and Mediation Response,
 - (a) but the parties are willing to have their differences resolved by directions of the Tribunal, they may make a joint application to the Tribunal for directions resolving the points of difference between them; and
 - (b) in the absence of such willingness, any party may apply to the Tribunal for directions and the Tribunal may give such directions as are appropriate.
- (7) Where the parties reach agreement on mediation in accordance with the Mediation Notice, Mediation Response and any Mediation Minutes, the parties shall proceed in accordance

with the agreement and, if appropriate, may apply to the Tribunal for an interim stay of the proceedings.

- (8) The Mediation Notice and Mediation Response shall be filed with the Tribunal at the time of the service of the same on the other party. The Mediation Minute shall also be filed with the Tribunal within 3 days after it has been signed by or on behalf of both parties. These documents may be taken into account by the Tribunal in considering whether to grant an order under a compulsory sale application and in exercising its discretion on costs as stipulated in Part C below.
- (9) The Tribunal may, on the application of one or more of the parties or of its own motion, stay the proceedings or any part thereof for the purpose of mediation for such period and on such terms as it thinks fit, bearing in mind the importance of avoiding so far as possible, disruption to the progress of the case, and of avoiding, save in exceptional circumstances, any postponement of the trial dates.
- (10) Where the Tribunal stays the proceedings, the applicant must promptly inform the Tribunal if a settlement is reached and the parties should take the necessary steps to conclude the legal proceedings formally.

B2. Where not all the parties are legally represented

9. When one or more parties in Compulsory Sale Cases are not legally represented, the Tribunal may at a suitable stage, either on the application of a party or on its own motion, consider whether mediation is appropriate, taking into account of all the circumstances. The Tribunal may seek information from the parties for this purpose, always respecting privilege.

10. Where the Tribunal considers that mediation is appropriate, the Tribunal may at call-over hearings or in chambers give directions that the parties shall follow the procedure set out in paragraph 8 above, or any part thereof, with any necessary modifications.

Part C

C1. Reasonable steps to acquire under section 4(2) of the Compulsory Sale Ordinance and costs sanction for unreasonably failing to engage in mediation

11. Section 4(2) of the Compulsory Sale Ordinance stipulates that the Tribunal shall not make an order for sale unless it is satisfied that, amongst other things, the majority owner has taken reasonable steps to acquire all the undivided shares in the lot (including, in the case of a minority owner whose whereabouts are known, negotiating for the purchase of such of those shares as are owned by that minority owner on terms that are fair and reasonable).

12. With the implementation of the Civil Justice Reform and the availability of mediation as a mode of ADR in settling or resolving disputes, parties in Compulsory Sale Cases should also attempt mediation to settle the dispute including the purchase of the shares that are owned by the minority owner.

13. The majority owner in Compulsory Sale Cases may not be considered by the Tribunal as having taken all the reasonable steps under section 4(2) of the Compulsory Sale Ordinance to acquire the minority owner's undivided share of the lot, if he unreasonably fails or refuses to attempt mediation with the minority owner. The Tribunal is entitled to take into account such failure or refusal in determining whether an order for sale should be granted.

14. Further, in exercising its discretion on costs, the Tribunal shall take into account of all the relevant circumstances, including any unreasonable failure of a party to engage in mediation, where it can be established by admissible materials.

15. Legal representatives should advise their clients of the possibility of the Tribunal refusing to make an order for sale and/or making an adverse costs order when a party unreasonably fails to engage in mediation.

16. However, the Tribunal shall not refuse to grant an order for sale or make any adverse costs order against a party on the ground of unreasonable failure to engage in mediation when:

- (1) The party has engaged in mediation to the minimum level of participation agreed to by the parties or as directed by the Tribunal prior to the mediation in accordance with paragraph 8(6) of this Direction.
- (2) A party has a reasonable explanation for not engaging in mediation.

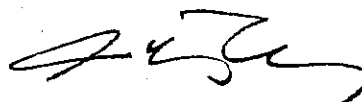
C2. Protection afforded by privilege

17. In all contexts, including dealing with matters arising under this Direction, in exercising its discretion on costs and considering whether an order for sale should be granted, the Tribunal will not compel the disclosure of or admit materials that are protected by privilege, other than under the circumstances that are allowed in accordance with legal principles.

Effective date

18. This Direction shall come into effect on 15 February 2011.

Dated this 28th day of January 2011.



(Thomas Au)
President, Lands Tribunal

Specimen Mediation Certificate

[Title as per proceedings]

Part I

1. Is the Applicant / Respondent willing to attempt mediation with a view to settling these proceedings?¹
2. If the Applicant / Respondent is not willing to attempt mediation, please state the reasons in this Certificate or, if thought desirable, such reasons or additional reasons should be set out in a statement signed by the party concerned or his solicitor and attached to this Certificate in a sealed envelope².

¹ If a party is willing to attempt mediation, he should issue a Mediation Notice in accordance with this Direction.

² Such a sealed statement should be marked and takes effect as a statement without prejudice save as to costs and will be inspected by the Tribunal only if an issue arises in relation to costs. The use of such a sealed statement may be thought desirable if privileged information may be involved. The statement (so marked) should however be sent to the other parties.

Part II

I, [name], solicitor of [firm name] having conduct of the proceedings on behalf of the Applicant / Respondent confirm as follows:

- (a) I have explained to our client the availability of mediation with a view to settling the dispute or part(s) of the dispute, and the respective costs positions of mediation as compared with the costs of the litigation.
- (b) I have explained to our client the Direction on Mediation for Compulsory Sale Cases (LTPD: CS No. 1/2011).
- (c) The information set out under Part I is to the best of my knowledge and belief true and correct.

[signed by the solicitor]

Part III

I, [name], the Applicant / Respondent [if the party is a corporation or an association, describe the position of the person signing this certificate, and state the authority of the person to represent the party] in these proceedings, acknowledge that I understand the Direction on Mediation for Compulsory Sale Cases (LTPD: CS No. 1/2011) and the availability of mediation to resolve the dispute instead of litigation. I further confirm that the information set out under Part I is true and correct.

[signed by the party]³

³ Where the party does not understand English, the party should sign a Chinese version or there should be a signed interpretation clause.

Specimen Mediation Notice

[Title as per proceedings]

To: the Respondent / Applicant and his solicitors

1. The Applicant / Respondent wishes to attempt mediation to resolve all [or a specified part] of its disputes with the Respondent / Applicant and makes the following proposals¹.
2. The Applicant / Respondent wishes to propose the adoption of the rules of [specify a particular body²] for the proposed mediation³.
3. The Applicant / Respondent proposes to appoint [name of mediator] as the mediator. The CV of [name of mediator] is attached. The estimated costs for engaging [name of mediator] are [costs in figures].
4. The Applicant / Respondent proposes [name of venue] as the venue for the mediation. The estimated costs of renting the venue for the mediation are [costs in figures].
5. The Applicant / Respondent makes the following proposals as to payment of fees and costs for the mediation and whether the same could be recoverable as costs of the proceedings if the mediation fails.
6. The Applicant / Respondent proposes that [a specified minimum level of participation⁴] should qualify as a sufficient attempt at the mediation.

¹ A party wishing to attempt mediation should make as many of the proposals referred to in paragraphs 2 to 7 as possible. If he is not in a position to make some of those proposals, he should nevertheless file the notice and then make proposals to the other party.

² For example the Mediation Rules published by the Hong Kong International Arbitration Centre in consultation with the Hong Kong Mediation Council or the Mediator's Rules and Code of Ethics of the Hong Kong Mediation Centre.

³ Mediation may be undertaken without the adoption of the rules of a particular body. If the Applicant / Respondent does not wish to propose the adoption of such rules, this paragraph will not be applicable.

⁴ An example of a specified minimum level of participation may be as follows: "Agreement between the parties as to the identity of the mediator and the terms of his or her appointment, agreement as to the rules applicable to the mediation (if any) and participation by the parties in the mediation up to and including at least one substantive mediation session (of a duration determined by the mediator) with the mediator".

7. The Applicant / Respondent proposes that the mediation should commence within [state period of time].
8. The Applicant / Respondent requests / opposes an interim stay of the legal proceedings for [] days pending the mediation process.
9. The Applicant's / Respondent's willingness to pursue mediation is / is not conditional upon an interim stay of the legal proceedings being granted.

Dated this day of

[signed by the Applicant /
Respondent or his solicitor]⁵

⁵ Where the Notice is signed by a party who does not understand English, the party should sign a Chinese version or there should be a signed interpretation clause.

Specimen Mediation Response

[Title as per proceedings]

To: the Applicant / Respondent and his solicitors

1. The Respondent / Applicant agrees / does not agree to use mediation to attempt to resolve all [or specified part] of the relevant disputes¹. [If disagrees or agrees only as to specified part of the disputes, please state the reasons in this Response or, if thought desirable, such reasons or additional reasons should be set out in a statement signed by the party concerned or his solicitor and attached to this Response in a sealed envelope².]
2. The Respondent / Applicant agrees to attempt mediation in accordance with [the rules identified by the Applicant / Respondent]. [If the Respondent / Applicant proposes the adoption of the rules of some other body, specify them³].
3. The Respondent / Applicant agrees / does not agree to appoint [name of mediator] to conduct the mediation. [If he disagrees, the Respondent / Applicant should identify the mediator he proposes and supply his or her CV together with an estimate of the costs of engaging [name of mediator].]
4. The Respondent / Applicant agrees / does not agree that the mediation should be conducted at the venue proposed by the Applicant / Respondent. [If he disagrees, the Respondent / Applicant should identify the alternative venue he proposes, together with an estimate of the costs of renting such venue.]

¹ A Respondent / an Applicant agreeing to use mediation should respond to the various proposals made by the Applicant / Respondent. Further, where the Applicant / Respondent who wishes to attempt mediation has not made proposals in respect of any of the matters in paragraphs 2 to 7 in the Mediation Notice, the Respondent / Applicant should make as many proposals as possible in relation to these matters.

² Such a sealed statement should be marked and takes effect as a statement without prejudice save as to costs and will be inspected by the Tribunal only if an issue arises in relation to costs. The use of such a sealed statement may be thought desirable if privileged information may be involved. The statement (so marked) should however be sent to the other parties.

³ See footnotes 2 and 3 to the Specimen Mediation Notice.

5. The Respondent / Applicant agrees / does not agree on the arrangement for payment of fees and costs of the mediation as proposed by the Applicant / Respondent. [If he disagrees, the Respondent / Applicant should specify his position on fees and costs.]
6. The Respondent / Applicant agrees / does not agree to the minimum level of participation which would qualify as a sufficient attempt at this mediation specified by the Applicant / Respondent⁴. [If he disagrees, the Respondent / Applicant should specify his position on minimum level of participation.]
7. The Respondent / Applicant agrees / does not agree on the time for commencing the mediation proposed by the Applicant / Respondent. [If he disagrees, the Respondent / Applicant should state his position as to the time within which the mediation should commence.]
8. The Respondent / Applicant agrees / requests / does not agree to an interim stay of the legal proceedings for [] days pending the mediation process. [Specify the Respondent's / Applicant's position on interim stay.]
9. The Respondent's / Applicant's willingness to pursue mediation is / is not conditional upon the grant of an interim stay.

Dated this day of .

[signed by the Respondent /
Applicant or his solicitor]⁵

⁴ See footnote 4 to the Specimen Mediation Notice.

⁵ See footnote 5 to the Specimen Mediation Notice.