Introduction

Personal Injuries claims are civil claims. Given limited judicial resources, parties to civil claims have long been encouraged to settle their disputes or switch to ways of dispute resolutions other than going to court for trial. Examples are settlement negotiations and mediation. After the Civil Justice Reform (“CJR”) in 2009, rules of civil procedures have been amended to create incentives for parties to resolve civil disputes by reaching settlement before trial, mainly by imposing adverse costs order against those who fail to consider settlement sufficiently and seriously.

Mediation

As discussed in our previous article “Mediation for Personal Injuries Cases in Hong Kong”, mediation provides a forum in which parties can resolve their disputes with the help of a trained and impartial third party, the mediator. As a part of the procedures of conducting civil claims, parties are required to report to the court whether they are willing to attempt mediation and whether they have attempted mediation, and have to explain to the court if they are not willing to make such an attempt.

It is noteworthy that adverse costs order may be made by the court against parties who unreasonably fail to engage in mediation. In other words, if a person unreasonably refuses to take part in mediation, the court may order him to pay legal costs of the other party which he would not otherwise have been required to pay.

Without prejudice negotiations

Both before and after a claim is brought, parties may negotiate with each other for settlement of their dispute. It is not unusual for legally represented parties to have their solicitors writing “without prejudice” letters to the other side, making offers for settlement. There may also be without prejudice meetings between the parties to discuss terms of settlement. These communications between parties are without prejudice in a sense that information provided under the communications by a party cannot be used as evidence by another party against him.
For personal injuries claims, paragraph 14 of Practice Direction 18.1 provides that:

“Prior to the commencement of proceedings, parties should explore settlement by making bona fide attempts to engage in settlement negotiations by without prejudice correspondence, by structured without prejudice face-to-face meeting, or by any other manner agreed by the parties.”

It is important for persons who intend to bring a personal injuries claim to take this requirement of pre-action attempt of negotiation in mind. If the other side offers to settle (usually by way of without prejudice communications), the offer should also be considered seriously. A party to a claim who has unreasonably failed to settle may be punished by the court by adverse costs order.

Sanctioned offer and sanctioned payment

After the legal proceedings have been commenced, sanctioned offer and sanctioned payment may be made with a view to settling the dispute. Sanctioned offer is an offer made by one party to the other party to settle the whole or part of the claim with specified consequences in accordance with Order 22 of the Rules of the High Court, Cap 4A (“RHC”). Sanctioned payment is an offer made by way of a payment into court by the Defendant to settle the whole or part of the Plaintiff’s claim in accordance with Order 22 of RHC. Where an offer by a Defendant involves a payment of money to the Plaintiff, the offer must be made by way of a sanctioned payment.

If a sanctioned offer or payment is not accepted by the other party, and the party who made the sanctioned offer or payment eventually obtain a better result after trial than what was offered under the sanctioned offer or payment, the Court may impose the consequences specified in Order 22 of RHC including an adverse costs order against the party who fails to accept the sanctioned offer or payment.

For example, the Plaintiff claims against the Defendant for HK$500,000, and makes a sanctioned offer of HK$350,000 to the Defendant for settlement; if the Defendant refuses to accept the sanctioned offer but the Court awarded HK$400,000 to the Plaintiff after trial, the Court may order the Defendant to bear more legal costs of the Plaintiff and pay enhanced interest on the Plaintiff’s costs. On the other hand, if it is the Defendant who makes a sanctioned payment of HK$450,000 into court but the Plaintiff refuses to accept it, then even if the Court awards HK$400,000 to the Plaintiff after trial, the Court may order the Plaintiff to pay the Defendant’s costs after the latest date on which the sanctioned payment could have been accepted.
Conclusion

In view of limited judicial resources, the Hong Kong court encourages parties of civil claims to use alternative dispute resolutions and to settle their disputes without court trial. A party to a civil claim who has acted unreasonably in refusing alternative dispute resolutions and settlement will be punished by the court by, among other things, adverse costs order. The implications of alternative dispute resolutions and settlement on legal costs are particularly significant to personal injuries cases, as the parties in these cases are mostly suing or sued for monetary compensation; an adverse costs order may therefore frustrate the whole purpose of bringing or resisting a claim. As such, both before and after a legal action is commenced, parties to a dispute should consider the possibility of alternative dispute resolutions and settlement, and should not dismiss the possibility too easily.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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