



A new dispute resolution culture in Hong Kong

Johnson Lam
High Court



iRiver HK v Thakral [2008] 4 HKLRD 1000

- Damages awarded \$1 m
- Costs incurred \$4.7m
- Dispute arisen in 2004, appeal concluded in 2008
- Court of Appeal expressed regret that the parties had not explored mediation



- “The new Order 1A sets out the underlying objectives of the rules and Order 1B sets out the power of the court in case management. Parties and their lawyers have a duty to assist the court to further the underlying objectives. They will be well advised to have the above comments on ADR in mind in making attempts to resolve their dispute effectively.”



The new RHC and RDC

- Order 1A : Objectives
- Rule 1: Underlying objectives
 - (a) to increase the cost-effectiveness
 - (c) to promote a sense of reasonable proportion and procedural economy
 - (e) to facilitate the settlement of dispute



Case management duty of the court

- Order 1A Rule 4(2)
- Active case management includes
 - (e) encouraging the parties to use an ADR procedure if the Court considers that appropriate, and facilitating the use of such a procedure
 - (f) helping the parties to settle the whole or part of the case



Duty of the parties and lawyers

- Order 1A Rule 3
- The parties to any proceedings and their legal representatives shall assist the court to further the underlying objectives



How to discharge these duties?

- The court has to be proactive in case management
- Case management includes exploring ADR when appropriate
- Invite parties to address on costs estimates and proportionality to claim
- Parties to attend personally
- Mediation pamphlet and MIO



The role of lawyers

- Lawyers need to explore ADR and settlement with their clients
- New commentary 3 to Principle 10.17 of Guide to Professional Conduct
- Lawyers and parties need to provide relevant information to court for assessing whether ADR is appropriate
- If appropriate, the actual mechanics and timetable for an ADR process



The Mediation Practice Direction

- Scope of application
- all civil proceedings in HC and DC begun by writ except Annex A
- Some specialist lists already have their own ADR regime
- Some will incorporate the ADR PD
- Litigants in person



Main features of the PD

- Mediation Certificate
- Mediation Notice and Response
- court directions on Mediation mechanics
- Interim stay
- Costs sanction



Mediation Certificate

- To be filed together with the time tabling questionnaire under O25 r1, viz within 28 days after close of pleadings
- To focus the minds of the parties on exploration of mediation
- To facilitate lawyers in advising clients on mediation
- To provide information to court for assessing whether mediation is appropriate and whether refusal is reasonable (additional reasons in sealed envelope)



Mediation Notice & Response

- A mechanism to facilitate parties to enter into dialogue on mediation
- Identify areas of agreement and disagreement on mediation
- To assist the court to facilitate mediation in deciding whether and what directions should be made on mediation mechanics and interim stay



Mediation directions and stay

- Court has a duty to facilitate ADR and help the parties to settle dispute
- Directions on mechanics of mediation
 - Appointment of third party neutral
 - Timing of mediation process
 - The scope of the mediation process
 - Minimum level of participation
- Interim stay



Costs sanction

- New Order 62 Rule 5(1)(aa): the underlying objectives in Order 1A will be taken into account on costs
- Rule 5(1)(e) conduct of the parties will be relevant, including the reasonableness in the manner in which an issue is pursued
- Court will not look into privileged materials, mediation is a without prejudice process



Supply Chain & Logistics v NEC, HCA 1939 of 2006,
judgment on costs 29 Jan 2009 Para.11

- “In many instances, adversarial litigation is only one of the modes to resolve a dispute and it may not be the best mode. If there is an alternative by which the dispute may be resolved in a more cost effective, timely and satisfactory manner but a party insists on resorting to litigation despite suggestion from the court to explore that alternative, in effect he is adopting a potentially more expensive and time-consuming mode in dealing with the same subject matter that may cause greater attrition to all parties”



Supporting facilities

- Mediation Information Office
- Mediation webpage
- Mediation videos
- Court encouragement and referrals
- Joint Mediation Helpline Office



A cultural change and ADR strategy

- Dispute resolution mindset
- Litigation or ADR?
- What form of ADR?
- When should we start the ADR process?
- Which neutral is to be engaged?
- Costs of the ADR process
- Other logistical arrangement
- Directions to be sought from court