

Mediation in the context of CJR: the role of the Judiciary

The Honorable Mr Justice Lam

The theme of this conference being a review of the implementation of the CJR, when I was invited to give a presentation it was suggested that I should speak about how effective ADR and Mediation have been in the context of CJR. Even though the CJR came into force in April 2009, our Practice Direction on Mediation¹ only came into effect on 1 January 2010. The implication of the recent commencement of operation is that this Practice Direction has only been effective for about three odd months. It is therefore premature to assess the extent to which the new practice brings about successful resolution of disputes by mediation.

But why should the number of cases settled by mediation be the only benchmark for assessing the effectiveness of the Practice Direction or other mediation related initiatives under the CJR? One can understand from the point of view of the parties to a dispute, if mediation brings about settlement it is successful, if not it is a failure. But I believe when we examine the effectiveness of CJR from a macro point of view this is only one of the relevant dimensions and this cannot be the conclusive factor.

Resolving dispute by mediation as opposed to litigation involves a totally different kind of mindsets on the part of the stakeholders. Traditionally, litigation lawyers in our system have been trained to adopt an adversarial approach in their practice. Whilst adversarial approach has its merits, there is always a risk of excess. There are lawyers who believe they are under a duty to present their clients' case in the best possible light. They believe it is in the interest of their clients to pitch their claims as high as possible. They believe in taking every possible forensic advantage which the substantive law or the procedural rules allow them to take, exploiting every mistake made by the other side (including very often the mistakes of the lawyers on other side), appealing on every arguable points of law (or sometime even unarguable ones). As a judge, I have seen too many cases where the issues fought in court can hardly have any direct bearing on the real substantive merits between the parties. The excess of interlocutory applications and appeals is regrettably too familiar. I would not blame the lawyers because if they do not do so they may be perceived

¹ Practice Direction 31 which was promulgated on 12 Feb 2009, at the same time as the other CJR related Practice Directions.

as “weak” or at least “not aggressive enough” in the eyes of their clients. Worse still, they may even be regarded as not doing their best for their clients.

However, one must not forget the adversarial process is costly. Costs are incurred for the drafting of every summons and affidavit, the perusal and settlement of the same by counsel or senior partner. When these documents are served, the other side incurred costs when their team of lawyers perusing the same, taking instructions and drafting the affidavit in response. The same applies to writs and pleadings as well as witness statements. You may say this is every day occurrence and every litigation lawyer does it on daily basis. But I doubt how many lawyers have ever reflected on the monetary implications of what they are doing. In particular, I doubt how many lawyers have considered with their clients how much cost they will be incurring by going through this process before advising them to issue a writ or embark on a particular application. And how many lawyers have advised their clients about the risk of such costs being unrecoverable due to potential enforcement difficulties or insolvency and the time required before a judgment (assuming the court rules in favour of his client) can actually result in money in the hands of the client. I wonder how many clients have an idea as to how much money, time and energy they may have to spend on a case before they instructed their lawyers to issue a writ. Yet, once the process has been started, it cannot be stopped unilaterally (unless you are willing to surrender and pay the other side’s costs). Thus, litigation has been described as “a runaway train”.

Mediation is an altogether different process. It is voluntary: each party is free to stop the process at any time. It is consensual: the mediator does not adjudicate issues for the parties, he assists the parties to work out a solution acceptable to all. It is collaborative as opposed to adversarial: the co-operation of the parties is essential in resolving the dispute. Thus, it is important that those participate in the process and those who advises the parties in the process have to put aside the traditional adversarial mindset when they approach the mediation table. Instead of focusing on rights and wrongs in the past, they have to proceed with a sincere willingness to find a solution to the problems caused by the dispute according to the present needs and concerns of all the parties. The change of mindset will not come about unless and until the parties appreciate it is in fact in their interest to adopt such an approach to try to resolve their disputes instead of the traditional adversarial litigious approach. And the parties will not adopt such a mindset unless their lawyers explain to them the pros and

cons of the different approaches. Hence, the mindsets of both the parties and the lawyers have to be revolutionized: instead of regarding the adversarial litigation as the prime mode of resolving dispute, all stakeholders have to be educated to see things more broadly and to embrace mediation as a viable option (or in many cases a better option).

Judges also need to be educated. Proactive case management by judges is a key element in the CJR. The new Order 1A Rule 4(2) sets out the case management duty of the court. It includes the encouragement of the parties to use an ADR procedure if the court considers that to be appropriate and the facilitation of the use of such a procedure. Instead of a judge staying aloof from the prospect of settlement, the rule also prescribes that the case management duty of the court includes helping the parties to settle the whole or part of the case. This does not mean that judges would be involved in the process of settlement negotiations. As recognized in our Practice Direction on Mediation, without prejudice communications are still privileged and trial judges should not pry into what happened during the mediation sessions without the consent of all the parties. However, judges can help the parties to explore an appropriate ADR process that may lead to settlement. In the discharge of our case management duty, judges can take steps to ensure that the parties shall make an informed choice as regards the option they choose to resolve their disputes.

It is my firm belief that judges do have roles to play in helping the parties to understand why it is in their interests to explore mediation. In my experience there are far too many cases where litigants (and sometimes even their lawyers) have failed to exercise any sense of proportionality in litigating. There are litigants who have no idea on how much costs they have to incur in the process of litigations. Even though they may have some rough idea as to the costs they have to pay to their solicitors as costs on account, it is unlikely that the solicitors can give them fair estimate of their overall costs exposure when they start the litigation process.

Though a solicitor is obliged to keep his client informed about the level of costs incurred, it is the nature of the litigation process that unexpected steps may have to be taken involving unforeseen costs to be spent. There are always uncertainties as to what steps might be taken by your opponents and these may necessitate unforeseen interlocutory applications in response. Another uncertainty is the costs incurred by the other side which may add to the overall costs exposure of the losing party.

Hence, even the best solicitor in the world will not be able to give an accurate estimate of the costs exposure to his client. Further, there are always hidden intangible human costs which clients rarely take adequate account and lawyers could not measure. A lawyer cannot tell his client how much time and energy that his client may have to invest in the litigation process (such time and energy can otherwise be spent on other more worthwhile causes), not to mention the emotional strain, relationship damage and other intangible price one may have to pay during the course of litigation. Though a judge may not be able to do that either, our Mediation Information Officer could alert the parties to these intangible costs in the mediation information sessions.

At pre-trial hearings, a judge can direct parties to file and serve their costs estimates and explain to the court their attitudes towards mediation. Based on the information supplied by the parties, a judge can form his independent view on the appropriateness of mediation and make such view known. And the view so expressed and recorded may be taken into account eventually when the question of costs is argued.

The proper discharge of the case management duty of the court requires judges exercising their case management powers with a proper perspective to litigation. Litigation is not the ends by itself. Most of the time, in civil disputes, the end is the resolution of a dispute. Litigation is only a means and it is not the only means. This is echoed in Order 1A Rule 2(2) where it is stated that the primary aim in exercising powers of the Court is to secure the just resolution of disputes and at the same time, the facilitation of settlement of disputes is recognized as one of the underlying objectives in Order 1A Rule 1.

Therefore, changing the mindsets of those involved in the litigation process is important. Rather than focusing on settlement rates achieved by the mediation process, I think it is more important to consider how effective we have been in achieving a change in the mindsets of the stakeholders. In this respect, whilst I appreciate that there is also a need to change the mindsets of those not presently engaged in litigation (like our Government officials, leaders in our communities like the Legislative Councillors, our business communities and the general public), looking the matter from the perspective of the Judiciary in the present context I shall confine to examining the mindsets of the judges, the lawyers and the litigants.

What have we done in the past few years towards the change of mindsets of these stakeholders?

Pilot scheme on mediation was first introduced in our Family Court in 2000 and it has proved to be successful. In the CJR consultation process, the Working Party on CJR referred to the development of mediations in other jurisdictions. In its final report published in 2004, after carefully examining the argument that mediation could impinge upon the constitutional right of access to court, the Working Party reached this conclusion,

“It is plainly **legitimate** for the civil justice system to seek the benefits of mediation ... The constraints range from the imposition of a temporary incapacity to proceed with an action to a threat of an adverse costs order for rejecting mediation, these being means which are plainly **proportionate** ... and which **cannot possibly be said to impair** the very essence of the access right.” (CJR Final Report Para.804)

The Working Party further observed,

“Parties in litigation come to the court to seek **a fair and satisfactory resolution of their dispute**. The introduction of court-annexed mediation enables the civil justice system, in suitable cases, to channel a case to a mediation process **as a potentially cost-effective means of achieving that outcome** at an early stage of the proceedings. ... It makes little sense to deprive the civil justice system of [the option of mediation] simply on the basis of a categorical assertion in favour of an undiluted adversarial approach.” (CJR Final Report Para.806)

More mediation pilot schemes were launched by the Judiciary in the following years: for construction cases; building management cases; shareholders disputes. Mediation Co-ordinator’s Offices were set up in the Family Court and the Lands Tribunal to provide information to litigants regarding family and building management cases. All these pilot schemes, like the pilot scheme for family cases, brought about favourable results and enhanced the awareness of all stakeholders regarding the use of mediation as a means to resolve disputes. They have all become regular features in our civil justice system. In the field of personal injuries litigation, though the Judiciary did not set up a pilot scheme as such, there is a pilot scheme run by the Hong Kong Mediation Council and judges have encouraged litigants to utilize the service offered under that scheme when appropriate. The current Personal Injuries Practice Direction has specific provisions dealing with mediation.

In 2006, the Chief Justice set up a Working Party in the Judiciary to consider how consensual mediation of civil disputes in the Court of First Instance, the District Court and the Lands Tribunal may be facilitated, having regard to its economic and social benefits and taking into account developments in mediation in other common law jurisdiction. Apart from judges, members of the Working Party include nominees from the Bar, the Law Society, the Department of Justice, the Legal Aid Department, Hong Kong Mediation Council and Hong Kong Mediation Centre. It was resolved at the first meeting of this Working Party that our works would focus on measures that could be implemented by the Judiciary to facilitate consensual mediation. In so doing, the works of this Working Party did not overlap with the Secretary for Justice's Working Group on Mediation which had a broader remit.

The Chief Justice's Working Party provided a good platform for the major stakeholders to exchange views about the promotion of mediation within the civil justice framework. Through the discussions in the Working Party, apart from the monitoring of the progress of various pilot schemes, the works of the mediation co-ordinator's office, the training of judicial officers in respect of mediation, views were exchanged on mediation pledges, provision of legal aid for mediation, the setting up of a joint office of mediation service providers.

In this manner, the Judiciary was able to muster the support of the various stakeholders in the encouragement of the use of mediation in civil disputes. After due deliberation, the Law Society resolved in 2008 to add a provision in their Guide to Professional Conduct setting out a positive duty on the part of litigation solicitors to advise their clients to consider ADR procedures including mediation in appropriate cases. The Bar adopted a similar provision regarding the use of mediation to resolve dispute in their Code of Conduct.

The Legal Aid Department responded positively to the need for legal aid coverage for the mediation process. It was readily accepted by the Director of Legal Aid that there should be legal aid coverage for mediation as costs incidental to a piece of litigation where legal aid has been granted.

The discussion in the Working Party also led to the co-operation between 8 professional bodies in a concerted effort, with the support of the Judiciary, to set up the Joint Mediation Helpline Office at the High Court

Building to provide a one-stop avenue to those who wish to engage the service of mediators.

The Mediation Practice Direction was drafted in 2008 and before it was finalized there had been extensive consultation. Taking into account of the feedbacks during the consultation, the draft was revised to address some of the concerns raised by the professions. Further, in order to give sufficient time for the lawyers to have training in respect of mediation, the Chief Justice postponed the implementation of the Practice Direction to January 2010.

Throughout 2008 and 2009, many training courses were organized by various professional bodies. Some of these courses were for mediator training and some were for mediation advocacy training. In addition, there were courses specifically focusing on the Mediation Practice Direction. The promulgation of the Practice Direction provided a strong impetus to the litigation lawyers' acquisition of at least some basic knowledge regarding mediation. Together with the implementation of the Practice Direction, the Judiciary launched a Mediation webpage in the Judiciary website. In the webpage, information was provided about the mediation process, the Practice Direction, the service of a Mediation Information Office (at the High Court Building). There is a database of Hong Kong case law on mediation and speeches by judicial officers on the topic. There are also three videos (which can be downloaded from the webpage) explaining the advantages of mediation. This webpage can facilitate a lawyer in advising his client about mediation. Gradually, the momentum is being gathered and more and more lawyers find mediation to be a viable and commendable option. Though this may not convert every lawyer to subscribe to mediation as the prime option for resolving dispute, a litigation lawyer in Hong Kong has no excuse for being ignorant.

Prior to the implementation of the Mediation Practice Direction, in line with the case management duty of the court, the masters in the High Court adopted a practice of inviting the litigants to attend a case-specific mediation briefing before their case is set down for trial. Lawyers can attend together with the litigants. Through that process, the lawyers and the litigants learn about using mediation as an option. Based on what I have been told, a high percentage of attendants to such briefing subsequently agreed to try mediation.

Some lawyers gained experience through such briefing and the subsequent mediations. I have seen a letter from a solicitor informing a master how he had changed his attitude towards mediation after having a first hand experience in the process. His client's case (scheduled for a 16 days' trial) was settled after one day's mediation. Though he had therefore lost the profit he could have earned from the trial, the solicitor gracefully accepted that a formal trial may not always advance the client's interest as compared with litigation. And he believed that a satisfied client through settlement would bring him new business as a lawyer who solves the client's problems in a cost-effective manner.

For Family cases and Building Management cases, the two co-ordinators offices at the Family Court and the Lands Tribunal regularly hold mediation information sessions for litigants in those courts. There are many litigants acting in person in those courts and they were made aware of the option of mediation and its advantages and costs through explanation by our Mediation Co-ordinators. Litigants with legal representation can also use the services of these offices.

With the implementation of the Practice Direction, the duty of a lawyer to consider the option of mediation with his client (already acknowledged by the professions in their respective codes of conduct) is materialized as a procedural requirement in the course of the litigation process. Order 1A Rule 3 requires the party and their legal representatives to assist the court in furtherance of the underlying objectives of the rules. Under the Practice Direction, a Mediation Certificate has to be filed after the close of pleadings. The certificate has to be signed by the solicitor as well as the client. The requirement focuses their minds on exploration of the option of mediation. Part I of the Certificate states whether the party is willing to attempt mediation and if not, he is required to give reasons. Part II of the Certificate is a confirmation by the solicitor that he has explained to the client about mediation and the Practice Direction. Part III of the Certificate is a confirmation by the client that he had been so advised. Lawyers no longer have any worry that the exploration of mediation would be interpreted as a sign of weakness on his part since this is a standard procedural requirement. The Certificate also provided information to the court for its independent assessment whether the case is appropriate for mediation.

The preparation of a Mediation Certificate necessitates the use by a lawyer of his knowledge about mediation. In order to properly discharge his duty to his client and the court, a solicitor has to consider whether mediation would be a viable option in the circumstances of his client and his case. He would then have to explain to his client the pros and cons and the costs implications. This would be an educational process for the client. After such advice, the client would need to make an informed decision. By the time when a Mediation Certificate is filed, the solicitor and the client would have actively considered mediation as an option. If they have fulfilled their duties conscientiously, they should have addressed their minds to the potential costs exposure in litigation, the management time and costs required for litigation and assess whether it is proportionate or worthwhile. The process should have broadened their perspective in handling the dispute. Instead of focusing on the forensic preparation of the litigation, they would be considering what is the more satisfactory means to resolve the dispute. This by itself is a change of the mindset.

After the filing of the Mediation Certificates by all the parties, the court will consider whether mediation is appropriate option and, if appropriate, what steps are necessary to facilitate such a process. This can be done at the hearing of the Case Management Summons or the Case Management Conference or the Pre-Trial Review. The independent assessment by the judge or master may cause the parties to re-consider their attitudes towards mediation. If necessary, the court can direct that the litigants shall attend such hearings personally. If there is reason to believe that the litigant may benefit from a mediation briefing, the court can refer a client to attend an information session at the Mediation Information Office or the Mediation Co-ordinators' Offices. The objective is to assist the litigant in understanding what are the options available and in assessing the pros and cons of litigation vis-à-vis mediation.

From the above, it can be seen that the Judiciary understood the importance of collaboration in the effective resolution of dispute by mediation. In encouraging the parties to explore mediation, we adopted a facilitative approach. Whilst we have provided for costs sanction in the Mediation Practice Direction, the aim of the Practice Direction is not to empower judges to coerce the parties to mediate. The measures adopted by the Judiciary are carefully designed to achieve a change of the mindset of the stakeholders: a shift from the traditional litigious mode to a broadened horizon of weighing the options in resolving a dispute

satisfactorily and effectively. We try to facilitate such change by raising awareness and providing facilities to educate our litigants about mediation. Once the litigants and their lawyers realize that it is indeed in their interests to explore mediation, there will be no need for the court to exercise any costs sanction.

Based on the developments in the past couple of years, the legal professions in Hong Kong have been receptive to this new culture. I am hopeful that with the implementation of the Mediation Practice Direction, the new culture will take root in our system.