Civil Justice Reform in Hong Kong: Challenges and Opportunities for Development of Alternative Dispute Resolution

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Hong Kong has very recently launched the civil justice reform (CJR) to enhance its competiveness with the evolving dispute resolution environment. One of the most notable features of the reform is the courts' encouragement and facilitation of the use of alternative dispute resolution (ADR) methods, in particular mediation, with a view of "filtering" litigation cases and procuring early settlement. The reform has, however, alarmed many legal professionals here whose habitual practice is shaped by an adversarial and confrontational approach to litigation. This article presents arguments that the reforms not only bring challenges but also opportunities to the legal profession. Being the frontier participants of the civil justice system, lawyers must face the reality proactively. Their active response can convert the challenge into opportunities, and they shall be able to play a more versatile role in the dispute resolution business. In the long run, the success of civil justice reform in light of the development of ADR in general and mediation in particular, will rely upon the intelligent and dynamic culture of the legal profession in Hong Kong and active involvement of lawyers.

1. Outline of the Civil Justice Reform (CJR)

There have been complaints and criticisms about the current Hong Kong system for handling civil litigation over the past several decades. The general view is that it has been too costly and time consuming.[1] Economic and social analyses into dispute resolution have often called for more efficient procedures to be put into place, despite the challenge

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[1] Legislative Council Brief on Civil Justice (Miscellaneous Amendments) Bill 2007 – File Ref.: CSO/ADM CR 4/3221/04, available at the Legislative Council website, http://www.legco.gov.hk/yr06-07/english/bills/brief/b25_brf.*pdf* (visited 26 Mar 2010), para 2.

of increasingly complex disputes.[2] The introduction and development of alternative dispute resolution (ADR) procedures have gained success in many parts of the world in meeting this demand for cost-effectiveness and time-efficiency.[3]

To ensure that Hong Kong's civil justice system would be able to keep up with the evolving dispute resolution environment, the Civil Justice Reform (the CJR) began in February 2000 when the Chief Justice appointed a Working Party to review and recommend changes to the Rules of the High Court (the RHC). After almost nine years' drafting, discussion and consultation,[4] many of the existing provisions of the RHC have been rewritten, with the same having come into effect on 2 April 2009. One of the most notable features of the CJR is the courts' encouragement and facilitation of ADR, in particular mediation, to resolve disputes with a view to "filtering" litigation cases and procuring early settlements.[5] The scheme of linking ADR processes to court proceedings by statutory rules is novel and unprecedented for Hong Kong. Unsurprisingly, this aspect of the CJR has alarmed many legal professionals here whose habitual practice is shaped by an adversarial and confrontational approach to litigation. Moreover, the philosophy of compromise and conflict-reduction envisaged by ADR seemingly threatens their economic incentives of litigation business. There have been worries from legal practitioners over the statutory ADR schemes including, for example, that whether they are adaptable to the changing civil litigation culture.[6]

The purpose of this article is to examine the new ADR culture brought about by the CJR and, in particular, to examine its impact on the legal professionals in Hong Kong. In considering these issues, the

2 Richard A. Posner, *Economic Analysis of Law* (6th edn) (NY: Aspen Publishers, 2002), Ch 21: Civil and Criminal Procedure, p 563.

3 For a brief review on that, *see*, Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution in a Nutshell* (2nd edn) (St. Paul, Minn.: West Group, 2001), Ch 1.3: Background of the ADR Movement, p 4.

4 An Interim Report on Civil Justice Reform (the "Interim Report") was prepared by the Working Party in Nov 2001, followed by a Consultation Paper seven months later. In March 2004, the Working Party concluded its findings and recommendations in a Final Report on Civil Justice Reform (the "Final Report"), which was incorporated into a further Consultation Paper in 2006 by a Steering Committee appointed by the Chief Justice for amendment of relevant primary and subsidiary legislation. The next significant step was in spring 2007, when the Civil Justice (Miscellaneous Amendment) Bill (the "Bill") was introduced into the Legislative Council. In Oct 2007, the Steering Committee published another Consultation Paper to take into account the Legislative Council's deliberations on the Bill. The Bill was enacted in Feb 2008 and a new version of the RHC was eventually approved in 2008 following further consultations with the legal profession and other interested parties.

5 Civil Justice Reform: An Overview, para 17, available at the Civil Justice Reform homepage, http://www.civiljustice.gov.hk/eng/publication.html (visited 26 Mar 2010).

6 For example, Albert Wong, "Changes Will Promote Mediation: Lawyers 'Not Ready' For Civil Justice Reform", *South China Morning Post*, 29 Sept 2008, p 12.

article will first look into the legislative intention behind the promotion of ADR and the associated new procedural rules and new practice directions introduced under the CJR. It will then focus on the concerns of the legal profession in light of the requirements under these new rules and procedures. This article concludes by arguing that the reforms not only bring challenges but also opportunities to the legal profession in Hong Kong. As long as barristers and solicitors are willing to embrace the opportunities, they shall be able to play a more versatile role in the dispute resolution business. In the long run, their active involvement will be conducive to the successful development of ADR in Hong Kong.

2. Legislative Intention behind Reforms in ADR

Interim Report

The Working Party noted the general success of court-annexed ADR adopted in various jurisdictions in respect of both cost-saving and case management. The success of this kind of scheme abroad prompted the Working Party to explore the introduction of court-annexed ADR, particularly court-annexed mediation, to the civil justice system in Hong Kong.[7] The underlying intention is also driven by the success in the pilot scheme for family mediation commenced in Hong Kong as early as 1993.[8] While the Working Party was cognizant that ADR might not be appropriate and applicable in all cases, it proposed a series of options for court-annexed ADR for public consultation. Proposals 63 to 68 dealt specifically with various kinds of court-annexed ADR.

Proposal 63 was aimed at making ADR mandatory by statutes or court rules in a defined group of cases. The Working Party considered the possibility of mandatory imposition of ADR in family, construction and small claims cases in a manner similar to that undertaken by the Ontario Mandatory Mediation program, which significantly reduced costs to litigants.[9]

Proposal 64, in a milder tone, would make ADR mandatory at the court's discretion in cases where the court thinks parties will benefit from such a course of action. It was felt that such a practice in many common law jurisdictions such as Canada, Australia and New Zealand, helped to remove the negative connotations associated with a party himself/herself

[7] Interim Report, paras 633–635, available at http://www.civiljustice.gov.hk/ir/paperHTML/toc_ir.html (visited 26 Mar 2010).
[8] Interim Report, para 630.
[9] Interim Report, para 643.

initiating ADR to resolve a dispute, this being perceived a sign of weakness of his/her case.[10]

Proposals 65 and 66 sought to make ADR mandatory upon one party electing for ADR, with the court proceedings being stayed.[11] This procedure, initiated by serving a Notice to Mediate, had apparently proved to be effective in Canada despite the potential problem of making it possible for a "wicked" party to use it as a delaying tactic.[12] It was also suggested in Proposal 66 that ADR may be considered a pre-condition for obtaining legal aid in some types of cases.[13]

Proposal 67 attempted to make ADR voluntary, albeit encouraged by the courts. Additionally, any unreasonable delay or refusal in participating in the ADR process could lead to an adverse costs award. This is modeled on the "Access to Justice" reforms introduced by Lord Woolf in 1996 and reports have shown an increase in the use of ADRs since its launch in England and Wales.[14]

Proposal 68 is the most eye-catching proposal which, in line with the "consensual" nature of ADR procedures, aims to make ADR entirely voluntary, with the court's role limited to that of an ADR promoter and facilitator. This proposal draws on the Singapore experience, where the success of court-encouraged mediation has resulted in substantial savings in court days.[15] The Working Party considered that a voluntary ADR scheme may prove a success, particularly in some specific types of cases such as family disputes.[16]

Final Report

From the comments received on the Interim Report during its consultation period, the Working Party recommended against the adoption of Proposals 63 and 64. Proposals 65, 66 and 67, on the other hand, received mixed responses. It was only Proposal 68 that received support

[10] Interim Report, para 644.

[11] Interim Report, paras 646–651.

[12] An illustration of such an ADR model can be found in British Columbia in Canada. It originates in a scheme established by *Notice to Mediate Regulation* in Apr 1998 for motor vehicle personal injury cases under the *Insurance (Motor Vehicle) Act* in its Supreme Court. This was a scheme which allowed any party involved in a motor vehicle action to compel all of the other parties to participate in a mediation session by serving a "Notice to Mediate" on them. Although one would have thought that such a scheme might be a recipe for enabling a recalcitrant party to force delays, an independent evaluation of the scheme's operation between Apr 1998 and Feb 1999 produced very favourable findings, summarized by the British Columbia Mediator Roster Society (http://www.mediator-roster.bc.ca). This success later led to the scheme being extended to residential construction actions in British Columbia as from May 1999.

[13] Interim Report, paras 652–654.

[14] Interim Report, paras 217–222 and 655–660, and subsequently throughout both the Interim and Final Reports.

[15] Interim Report, para 670.

[16] Interim Report, para 669.

generally.[17] As both Proposals 67 and 68 are largely based on the reforms of English Civil Procedure Rules (the CPR), which in turn provide the basis for the Hong Kong CJR,[18] the feedback on these proposals in the Final Report will be discussed below in detail.

As far as Proposal 67 was concerned, the Working Party gave some suggestions as to how it should be implemented. In light of comments on the relationship between costs orders and the question of whether a party has made sufficient attempt at mediation (so as to justify subsequent cost sanctions), Recommendation 143 in the Final Report was that the court should have power to make adverse cost orders in cases where mediation has been unreasonably rejected upon service of a notice of mediation.[19]

It is the general view that the implementation of Proposal 68 will encourage parties to consider resolving disputes voluntarily by mediation. Thus, it will promote the role of mediation and other forms of ADR in the civil justice system in Hong Kong. The adoption of Proposal 68 is therefore recommended along with other appropriate measures in Recommendation 138.[20]

3. New Rules on ADR Introduced

New RHC and RDC

Among the many amendments to the RHC and RDC that took effect on 2 April 2009,[21] Order 1A ("underlying objectives of the rules") and Order 1B ("active case management of the court") have a direct impact on the use of ADR.

Order 1A, r 1 provides that when the court exercises its powers under the RHC or interprets the same and any practice directions, it is required to give effect to the following six underlying objectives:

> (*a*) *to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;*
> (*b*) *to ensure that a case is dealt with as expeditiously as is reasonably practicable;*

[17] Final Report, para 794.
[18] For the direct correlations between the two sets of rules (England CPR and Hong Kong CJR), *see* generally, Gary Meggit, "Civil Justice Reform in Hong Kong – Its Progress and Its Future", 1 (2008) 38 HKLJ, pp 89–117.
[19] Final Report, para 853.
[20] Final Report, para 861.
[21] For the gazetted RHC Amendment Rules 2008 and RDC Amendment Rules 2008, they are both available on the CJR website, http://www.civiljustice.gov.hk/gaz_sub_leg/index.html (visited 26 Mar 2010).

(c) *to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;*
(d) *to ensure fairness between the parties;*
(e) *to facilitate the settlement of disputes; and*
(f) *to ensure that the resources of the court are distributed fairly.*[22]

By virtue of Order 1A r 4(2)(e), the court now has a duty to actively manage cases. The case management powers, so far as ADR is concerned, include:

> *"encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and should facilitate the use of such procedure."*[23]

Case management powers that may be exercised by the court are further provided for under Order 1B r 1(2)(e):

> *"The court has the power to stay the whole or part of any proceedings either generally or until a specified date or event it thinks appropriate in facilitating the parties to attempt ADR and procure settlement of the disputes between them."*[24]

These powers enable the court to intervene in a case and make orders of ADR on application by a party or of its own motion. Hence, under the new procedural rules, ADR is formally linked to and integrated into the civil justice system of Hong Kong. It is worth noting that the functions and benefits that flow from various commonly used ADR processes, particularly mediation, articulate the same tone with that of the six underlying objectives. Likewise, all the underlying objectives in Order 1A r 1 are also supportive of mediation and the power of the court under Order 1B r 1 will be of great assistance when mediation is anticipated. Lawyers should now always be mindful of these underlying objectives in their litigation practice as they, together with their clients, have the duty to assist the court to further these objectives,[25] particularly when their clients are encouraged by the court to attempt ADR processes.

Several other new and amended Orders may also have an effect on ADR, albeit not as direct an effect as the rules outlined above. These include Orders 22 (offers to settle and payments into court), 25 (case management summons and conference) and 62 (costs).[26] Moreover, pursuant

[22] O 1A r 1(a) – (f).
[23] O 1A, r 4(2)(e).
[24] O 1B, r 1(2)(e).
[25] O 1A, r 3.
[26] O 22, 25(1), and 62.

to Order 25 rule 1, there is now a requirement for parties to complete a timetabling questionnaire providing information to facilitate the management of a case within 28 days of the close of pleadings.[27] The questionnaire means that cases will have to be more closely analysed by lawyers at a much earlier stage than some may have hitherto been used to.[28] As this will more than likely incur greater costs at the start of the proceedings, unmeritorious claims and defences will be removed. In association with active case management by the court through Orders 1A r 4 and Order 1B, there is a sense in the legal community that there will be greater use of ADR.

Party conduct that includes, for example, whether they have genuinely contemplated and acted upon the idea of ADR as a method of resolving their dispute both before and after proceedings have been commenced, can be a factor in the court's determination of costs,[29] with such "conduct" being broadly defined.[30] As such, there is a general thrust towards requiring parties to think more laterally and in advance, and additionally, to be more innovative in considering ways of settling a matter outside of the courtroom. Despite the fact that an ADR "learning curve" for legal practitioners may lead to a rise in litigation costs immediately after the introduction of the new rules,[31] it is anticipated that costs should be eventually flowing down because ADR is an attractive option once the streamlining and efficiency underlying active case management are fully realised.

Experience from England

While the CJR amends existing rules of the civil procedure, the amendments are primarily based upon the framework of the similar reforms carried out in England and Wales after Lord Woolf published his final report on "Access to Justice" in 1996. His Lordship dealt with the perceived defects of the civil justice system in England and Wales, including legal costs that were so high that they are disproportionate to the sums claimed and judicial resources; procedural rules that were too complex and incomprehensible for most litigants; and the "adversarial approach" to practice with control of the proceedings in the hands of the litigants (and their lawyers) which made the civil justice system susceptible to abuse and tactical delay.[32] Lord Woolf's proposed reforms were intended

[27] O 25 r 1(a), (b).
[28] *See* n 26 above.
[29] O 62 r 5(1)(e).
[30] O 63 r 5(2).
[31] Keith Brandt and Sam Morton, "Civil Justice Reform – Implications for the Future of Alternative Dispute Resolution in Hong Kong", (2009) *Asian Dispute Review* 48.
[32] Interim Report, paras 9–25.

to produce a cheaper, simpler, more expeditious, and less adversarial civil justice system. The "Access to Justice" reports ultimately led to the enactment of the CPR which came into effect in April 1999.

A closer look at the amended RHC and the CPR reveals a number of direct correlations between the two sets of rules. The most relevant parts are CPR Part 3 (case management powers) under which the court has power to make an order of its own initiative,[33] and CPR Part 44 (general rules about costs) where the court can consider the conduct of the parties as a factor when deciding what order to make about costs.[34] More specifically, to promote ADR at an early opportunity, excellent reasons have to be shown for a party's refusal to consider ADR at an appropriate point, and the party concerned could well face adverse cost implications.

In 2004, five years after the introduction of the CPR, a pivotal judgment set forth a number of guidelines to be used in assessing the reasonableness of any refusal to mediate.[35]

Meaning of ADR

The new RHC and RDC do not, however, define the term "ADR". In fact, even for scholars, it may be difficult to agree on a universally accepted definition of ADR. The word "alternative" is commonly conceived that ADR means all forms of dispute resolution other than litigation in courts where the parties by agreement may appoint a neutral third party to settle or help settle their dispute.[36] The Interim Report further identified two types of ADR process:

(i) "adjudicative ADR", where a neutral third party has the power to make binding adjudication on the parties' dispute. This group may involve methods such as arbitration and expert determination; and
(ii) "consensual ADR", where the neutral third party can only facilitate and assist the parties in dispute resolution. Parties themselves retain the control over the outcome of the process through a settlement agreement. Mediation is the typical example of this type.[37]

[33] CPR 1.4(2) (e).
[34] CPR 3.3.
[35] *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 2003.
[36] Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (Butterworths, 1992), p 6.
[37] Interim Report, paras 625–627. In some cases, there may also be a combination of the various processes such as Med-Arb where a neutral will act as mediator first, and if parties fail to reach any settlement, he/she will become an arbitrator to make a final and binding award. (Interim Report, para 628).

Although the new procedural rules are presumed to encompass all forms of ADR processes, the Judiciary has indicated that mediation is the preferred court-annexed ADR process for the civil justice system in Hong Kong.[38] Besides, since 2000, the Judiciary has introduced various pilot schemes for voluntary mediation into court proceedings for specific types of cases such as family and construction disputes. It is expected that such pilot schemes will be expanded to other areas as a way of encouraging more widespread use of mediation.[39]

The Judiciary has also introduced a Practice Direction on Mediation (PD 31) to provide guidance to practitioners, which took effect on 1 January 2010.[40] The preference for mediation over court proceedings is mainly attributable to its voluntary and consensual nature.[41] It is further perceived that mediation will be widely used and become a common form of ADR in the civil justice system of Hong Kong.[42] The Practice Direction on Mediation will be vital in assessing how far the Judiciary will go in "encouraging" and "facilitating" mediation under Order 1A r 4(2)(e).[43] In addition, it prescribes that the court may exercise its discretionary power to impose adverse cost sanctions against a party who unreasonably refuses to attempt mediation during the court proceedings, except that the relevant party has engaged in mediation to the minimum level of participation (as learning from the experience in England).[44] To that extent, some useful indications may have already emerged from a recent Court of Appeal case that highlighted the benefits of considering mediation,

> *"I can see that the costs of the trial will be substantial. It also seems [sic] to me that it would probably be in the common interest of all parties to come to a solution that*

[38] Final Report, para 797 and footnote 640.

[39] *Ibid.*

[40] The Practice Direction on Mediation (effective in Jan 2010), is available on the CJR website, http://www.civiljustice.gov.hk/eng/pd.html (visited 26 Mar 2010).

[41] The Hon Wong Yan Lung, SC, "The Benefits of Mediation", (2006) *Asian Dispute Review* 10.

[42] Chief Justice's Speech at Ceremonial Opening of the Legal Year 2008, Department of Justice Press Release, 14 Jan 2008.

[43] *See* n 22 above.

[44] According to Practice Direction on Mediation, paras 4 and 5, the adverse costs will be imposed unless agreed to by the parties or as directed by the court, prior to the mediation or that the relevant party has a reasonable explanation for not engaging mediation, for instance active without settlement negotiations between the parties are progressing (*see* the counterpart English experience at *above n* 40). The existing O 62, r 5 of the High Court in respect of the court's discretionary power on costs has been amended to reflect the new changes under the civil justice reform. It provides that in exercising its discretion as to costs, the court is required to take into account such special matters as the underlying objectives set out in O 1A, r 1 and the conduct of all parties before and during the proceedings. This is an exception to the general rule of costs that costs should usually follow the event, ie the losing party bears the costs of the winning party.

> *facilitate [sic] the continuation of the project as soon as possible … From a business point of view, it is much better to spend management time and costs on restoring the project than on a piece of litigation which may ultimately result in a 'no win' situation for both parties".*[45]

While mediation is the method of ADR which is focused upon in the CJR, there are of course other forms available. For example, in the State of Victoria, Australia, scholars and practitioners have argued for a wider use of ADR other than mediation, given that they have been historically under-utilized in the civil justice system.[46] Hence, it may be sensible not to restrict ADR methods in Hong Kong by taking lessons from other jurisdictions.

4. ADR in Hong Kong after CJR: Are Legal Professionals Ready?

Lack of Knowledge and Experience

For many lawyers, their first reactions to the "formal" advent of ADR are "What's that?", "Does it concern me?" "Why does it concern me?", and "How does it concern me?" The unfamiliarity with ADR and lack of requisite skills in the legal profession unfold sharply under the civil justice reform.

Arbitration may be the exception to this general ignorance of ADR as it has a long history in Hong Kong predating the CJR, and is governed by the Arbitration Ordinance (Cap 341).[47] Unlike arbitration, other ADR processes such as mediation do not have any statutory procedures and operation (as far as Hong Kong is concerned). The apparent lack of experience in and enthusiasm for ADR among the legal profession is perhaps partly attributable to the traditional environment and culture in which they were trained and now practise. ADR courses are seldom made the compulsory curriculum in law schools. They do not even find their place in the professional qualification courses either. Traditional legal education focuses on legal arguments, case analysis, litigation processes and advocacy skills. Litigation as a "legitimate" form of dispute resolution is deeply cultivated in the mind of all law students. Hence, apart from any settlement negotiations in which they may be engaged in non-contentious

[45] *Paul Y Management Ltd v Eternal Unity Development Ltd*, CACV 16/2008 (unreported), per Lam J at para 52. *See* also *obiter* comments per Yeung JA in *iRiver Hong Kong Ltd v Thakral Corporation (HK) Ltd* [2008] 6 HKC 391 (Court of Appeal).

[46] Albert Monichino, "Civil Justice Review", (2008) 1 *Arbitrator & Mediator* 27.

[47] Hong Kong Arbitration Ordinance (Cap 314) was first enacted in 1963, and the latest revision took place in 2009.

businesses, lawyers regard litigation as the standard form, or perhaps the sole one, for resolving their clients' disputes. As the chairman of the Hong Kong Mediation Council, Mr Chan Bing Woon and his assistant Oscar Tan point out, lawyers who are prepared to opt for mediation are minimal in numbers and only about 0.08 per cent of the practising lawyers have mediation training.[48] Due to their scarce knowledge in ADR, lawyers commonly cast doubt on its effectiveness and fear that option for ADR may be a sign or admission of weakness in their clients' cases.

Incorporating ADR into the litigation process is an unprecedented move for the civil justice system in Hong Kong.[49] Needless to say, lawyers will be uncertain about how ADR will be implemented. For example, what factors the court will take into contemplation in identifying cases that are suitable for mediation? There is no conclusive evidence that any type of case or any particular feature of a case will indicate the appropriateness of mediation or other forms of ADR.[50] Will it be possible to reach a conclusion of "unsuitability" if both parties are not willing to engage in mediation because they have had bad feeling towards each other? If so, how can the parties' bad feeling be taken into consideration given that it is impossible for the court to seek a report from the mediator on the mediation process and behaviour of the parties due to the confidential nature of mediation. How will the court approach this issue given its recognition of the importance of protecting the privilege in mediation?[51] In addition, apart from active without prejudice settlement negotiation, what else constitutes basis for refusal? Will it be justified to refuse a proposal for mediation because the opposite party is not acting in good faith or employs delaying tactics or initiates a fishing expedition in order to ascertain the merits or weakness of the other party? To the least extent, party attitude and conduct in responding to the mediation proposal shall be a relevant factor in final imposition of costs by the court.

It is true that reference can be drawn from the case law of other jurisdictions, particularly the England where the law has developed since the CPR has implemented for about 10 years. But the law there is not settled and decisions are always inconsistent. In some cases considered suitable for mediation, the successful party was deprived of costs due to his outright

[48] Chan Bing Woon and Oscar Tan, "Building a Mediation Culture in Hong Kong", (2007) *Asian Dispute Review* 126.

[49] *See* also, discussions below, in section V. "The Way Forward for the Legal Profession in Hong Kong", under the sub-heading, "Review of Professional Role".

[50] Commentary 3 to Principle 10.17 of the *Hong Kong Solicitors' Guide to Professional Conduct* (Vol 1), effective from 1 Oct 2008.

[51] Penny Brooker and Anthony Lavers, "Commercial Lawyers' Attitudes and Experience with Mediation", (2002) 4 *Web Journal of Current Legal Issues*, available at http://webjcli.ncl.ac.uk/2002/issue4/brooker4.html (visited 26 Mar 2010).

refusal to mediate even though he had strong belief that he had a water-tight case.[52] Conversely, in some other cases, the court refused to impose costs sanction on the relevant defendant because it did not believe that there would be a prospect of success in mediation.[53]

Pressure from the Court

In Hong Kong, lawyers are trained to act in the best interests of their clients, such as winning a case, but not necessarily to pursue the cause of justice.[54] Regardless of whether their clients win or lose the case, their fees are based on the volume of work done. They can therefore benefit from prolonged proceedings. With their expertise in complex rules and the non-interventional role of judges, the litigation system is susceptible to abuse by lawyers by way of instituting lots of unnecessary satellite interlocutory applications and appeals. Then, they are able to charge excessive costs that are unpredictable for their clients. The growing number of lawyers and keen competition in the legal market also lead them to squeeze opportunities and strive for survival. Ironically it is the lawyers rather than the litigants that have a vested interest in the civil procedures. "Greedy lawyers" have been criticised by a former District Judge Wayne Gould:

> *"Economic reality prevails over ideas. The individual lawyer is as concerned with his profit as with the welfare of his client or the higher concepts of justice. This is not unnatural. If we are lucky, the individual lawyer suppresses his personal interest as much as possible. If we are unlucky, it governs everything he does".*[55]

The courts' encouragement and facilitating of ADR rather than litigation shifts the conventional role of lawyers who control the proceedings to that of the court for case management, so that unreasonable costs, delay, and injustice will be kept under strict control by the court. As Lord Woolf remarked, the court should be the last resort for resolving disputes and used only for those cases for which it is really needed.[56] The civil justice reform will thus put lawyers under the court pressures for pushing forward the ADR scheme and will place their financial greediness in peril.

[52] *Dunnett v Railtrack Plc* [2002] 1 WLR 2434; *Hurst v Leeming* [2003] 1 Lloyd's Rep 379; *Leicester Circuits Limited v Coates Brothers Plc* [2003] EWCA Civ 333; *Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence* [2003] All ER (D) 171.

[53] *McCook v Lobo* [2002] EWCA Civ 1760.

[54] Michael Wilkinson and Janet Burton (eds), *Reforms of the Civil Process in Hong Kong* (HK: Butterworths Asia, 2000), p 11.

[55] Cited in Wilkinson and Burton, *Reform of the Civil Process in Hong Kong*, *ibid*, p 11.

[56] "An Interview with Lord Woolf", *Hong Kong Lawyer*, August 2001, p 6.

Despite the fact that use of mediation and other forms of ADR under the amended RHC is voluntary, the court nevertheless has the power to make adverse costs orders against a party who has unreasonably failed to attempt mediation up to a minimum required level. Unlike the situation in those existing pilot schemes on mediation which are entirely voluntary, the judicial pressure on costs and solicitors' new duty to advise clients of the availability of mediation may deter lawyers and their clients from taking this matter lightly since the latter may be exposed to the risk of costs penalty and the former will be liable for professional negligence.

Experience in England shows that the court's stance in supporting ADR, particularly mediation, is resolute. An example is *Halsey v Milton Keynes General NHS Trust*, where Dyson LJ expressed the view that the court should proceed on the basis that many disputes are suitable for mediation and that all members of the legal profession who conduct litigation should routinely consider with their clients whether their disputes are suitable for ADR.[57] In Hong Kong, the courts are pursuing the same course in advance of the implementation of this aspect of the CJR. In *iRiver Hong Kong Limited v Thakral Corporation (HK) Limited*, the Court of Appeal said that:

> *"This is a typical case where parties should have explored resolution of their disputes by mediation. The total damages are just over $1 million. However, we are told that the total legal costs incurred by the parties, including costs of this appeal, run up to about $4.7 million. Apart from usual attempts in settlement negotiation conducted by solicitors' correspondence, the parties have not tried other means of dispute resolution. We have not been told whether the solicitors have given advice to their respective clients on the possibility of resolving the matter through mediation … The mere fact that negotiation between solicitors fails to result in a settlement does not mean that the parties would not benefit from mediation conducted by a skilled mediator".*[58]

The Court of Appeal then cited a number of English cases, including *Dunnett v Railtrack*, *Hurst v Milton Keynes General NHS Trust*, *Burchell v Bullard*, and *Egan Motor Services (Bath)*, all of which placed emphasis on the benefits and effectiveness of ADR in resolving disputes for litigants.[59] The court in *Cable & Wireless plc v IBM United Kingdom Ltd* even stayed the proceedings for the parties to attempt mediation notwithstanding the reference to mediation in the relevant commercial contract for resolving

[57] *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002.
[58] *iRiver Hong Kong Limited v Thakral Corporation (HK) Limited* [2008] 6 HKC 391.
[59] *Dunnett v Railtrack* [2002] 2 All ER 850; *Hurst v Milton Keynes General NHS Trust* [2004] 1 WLR 3002; *Burchell v Bullard* [2005] Build LR 330; *Egan Motor Services (Bath)* [2007] EWCA Cir 1002.

disputes was vague in terms.[60] Therefore, it is anticipated that the court in Hong Kong will continue to push forward the use of mediation without reservation and will be mindful to impose costs sanction if it thinks fit.

As far as the Practice Direction on Mediation is concerned, the costs risk may also push some litigants to place more reliance on the advice from their lawyers regarding whether it is really beneficial for them to use mediation other than litigation to resolve their disputes.[61] When they approach lawyers to institute litigation, litigants normally do not contemplate a mediated settlement. Hence, lawyers will not only need to advise their clients on the possibility of mediation and the costs comparison for mediation and litigation as prescribed, but also whether their clients' case is suitable for mediation. Cost savings are not, however, an absolute guarantee. Overseas research reveals that unsuccessful mediation may indeed lead to increased costs for litigants because the parties have to proceed with the litigation process.[62]

As mentioned previously, many lawyers are not familiar with the procedures, techniques, benefits and drawbacks of various ADR processes, but the new rules and practice direction will require them to gain a profound knowledge in all of these in order to discharge their duty to the court and clients. This may cause great difficulty since they will be exposed to the risk of professional negligence if they fail to inform or properly advise their clients on mediation in appropriate cases,[63] despite the lack of a clear line on what case type is really suitable for using mediation and other forms of ADR whatsoever.[64] In fact, the Law Society has recently amended the solicitors' code of professional conduct, requiring that "[a] litigation solicitor should consider and appropriately advise his client on alternative dispute resolution procedures such as mediation, conciliation and the like."[65]

5. The Way Forward for the Legal Profession in Hong Kong

Change of Attitude and Approach

The first thing that lawyers should do is to change their habitual mindset towards dispute resolution. One of the arguments against the use of

[60] *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059.
[61] Practice Direction on Mediation, paras 4 and 5.
[62] Prof Hazel Genn, "The Central London County Court – Pilot Scheme Evaluation Report" (1998), available at http://www.adrnow.org.uk/go/SubPage_97.htm (visited 26 March 2010).
[63] David Ravenscroft, "Mediation and Civil Justice Reform", *Hong Kong Lawyer*, October 2008, p 51.
[64] *See* discussions at the previous section, "Lack of Knowledge and Uncertainty about the Law".
[65] Commentary 3 to Principle 10.17 of the *Hong Kong Solicitors' Guide to Professional Conduct* (Vol 1), effective from 1 October 2008.

mediation is that failure to achieve settlement agreement is likely to emerge and the consequential losses will inflate.[66] It is noteworthy that while the full support of the judiciary in promoting and facilitating ADR is certain, the primary objective is to secure the just and efficient resolution of disputes according to substantive rights of the parties.[67] Litigation is still there in the civil justice system and the increase in the profile of ADR certainly will not kill off mainstream litigation. History in England shows that the process has gone in full circle. The levels of litigation in 2008-09 are as high as they were before the Woolf reforms.[68]

The breakthrough, however, has been that ADR can resolve matters more flexibly, not just entire disputes, but also elements of disputes, leading to more expeditious trials.[69] Hence, what lawyers have learned in their past professional practice will not become useless. The fact is that litigation and ADR processes have a complementary relationship. As concluded by Sir Laurence Street, the Former Chief Justice of the Supreme Court of New South Wales, Australia,

> *"[ADR] is not in truth 'alternative'. It is not in competition with the established judicial system. It is an 'additional' range of mechanisms within the overall aggregated mechanisms for the resolution of disputes …"*[70]

In a speech in March 2006, the Hong Kong Secretary for Justice noted that mediation was not as popular in Hong Kong as elsewhere and ascribed this to the attitudes of parties and lawyers. In tandem with the Justice Secretary's policy review, in his Policy Address in October 2007, the Chief Executive stated:

> *"To alleviate conflicts and foster harmony, we will promote the development of alternative dispute resolution services. On many occasions, interpersonal conflicts need not go to court. Mediation can reduce social costs and help the parties concerned to rebuild their relationship. This is a new trend in advanced regions around the world. The cross-sector working group headed by the Secretary for Justice will map out plans to employ ADR in general and mediation in particular more extensively and effectively in handling higher-end and commercial disputes and relatively small-scale local disputes".*[71]

[66] Prof Hazel Genn, "Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure" (2007), available at http://www.adrnow.org.uk/go/SubPage_134.html (visited 26 March 2010).

[67] Order 1A, r 2(2) of the RHC and RDC.

[68] *See* n 31 above, p 51.

[69] *Ibid.*

[70] Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (Sydney: Butterworths, 1991), p 55.

[71] "Policy Address by Chief Executive", *South China Morning Post*, 1 Dec 2007, p 1.

Accordingly, it is essential to remove lawyers' skepticism and resistance towards mediation and other ADR processes. They have to acknowledge the respective benefits of different types of dispute resolution and that litigation is not, and should not be, the sole form. Lawyers need to bear in mind that ADR processes are more flexible than the courts' rules and procedures and as such parties can avoid the stress brought about by litigation. In addition, as one of the main "selling points", ADR encourages the preservation of the parties' relationship.[72] Even though parties may fail to reach any settlement in mediation, it is still a constructive process which may narrow down the differences between parties, leading to subsequent settlement without court proceedings.[73] These advantages are highly appreciated by the Chief Justice who has expressed the unequivocal commitment by the Judiciary to the development of mediation and other ADR means in Hong Kong.[74]

The value and success of ADR processes are fully advocated by the Government. The Hong Kong International Arbitration Center and its division, Hong Kong Mediation Council, were established in 1985 and 1994 respectively to promote and provide arbitration and mediation services in Hong Kong. In 1992, multi-tier dispute resolution processes for disputes in the construction contracts were set up in the Government's Airport Core Program (ACP) Project in which both mediation and arbitration were involved and proved successful.[75] Recently, the Government has initiated combined mediation and arbitration scheme in resolving Lehman-Brothers related investment product disputes, which again proves the comparative beauty of ADR to litigation.[76] Barristers and solicitors in Hong Kong should take full cognizance of these factors in establishing correct attitudes towards dispute resolution.

Last but by no means least, users' response to ADR means is also inspiring. A study for the Judiciary's three-year pilot scheme on family mediation, which was launched in 2000, shows that 86.5 per cent of the cases were mediated and 79.2 per cent of which resulted in agreements (69.5 per cent full agreement; 9.7 per cent partial agreement; 20.8

[72] Heather Douglas, "Mediation: The Emerging Option", *Hong Kong Lawyer*, April 1998, p 38.

[73] *Chun Wo Construction & Engineering Co Ltd v China Win Engineering Ltd*, HCCT 37 of 2006 (unrep.), 12 June 2008.

[74] Speech delivered by the Hon Chief Justice Andrew Li of the Hong Kong High Court, at the Conference "Mediation in Hong Kong: The Way Forward", 30 Nov 2007, Hong Kong International Arbitration Center. Details of the speech can be viewed at http://www.info.gov.hk/gia/general/200711/30/P200711300131 (visited 26 Mar 2010).

[75] A more detailed description of the ACP dispute resolution scheme can be viewed at Karl Mackie, "ADR in the Hong Kong Airport Project", (1994) 5 *World Arbitration and Mediation Report* 104.

[76] For a summary of the scheme, *see* "Mediation and Arbitration Services for Lehman Brothers-related Disputes", (2009) *Asian Dispute Review*, 3.

per cent no agreement).[77] That study further shows that nearly three-quarters of the users were satisfied or very satisfied with the service they had received.[78] The success rate indicates the future popular trend of mediation scheme in Hong Kong.

Court Pressure as Catalyst for Moving Forward

As previously outlined, the cost penalty for failure to attempt mediation under the Practice Direction on Mediation has caused some serious concerns for the legal profession since it may lead to professional negligence for lawyers failing to advise clients properly. However, if lawyers can view such judicial pressure from another perspective, it can serve as a catalyst for their taking positive action towards various ADR processes in the civil justice system. As Lord Woolf has stated, "It is an engine that is used to change the legal culture".[79] Research shows that if a court-annexed ADR scheme such as mediation is entirely voluntary without any pressure for the litigants, they and their legal representatives may probably end up doing nothing.[80] Moreover, by making ADR processes part of the formal procedures in court proceedings, it helps to remove the worry of most lawyers that pursuing dispute resolution other than litigation is a sign of weakness.

Some evaluations in England have demonstrated the influence of ADR schemes and the "judicial engine" on the legal profession. Many lawyers' cognition and acceptance of ADR has been much enhanced after the implementation of the CPR, particularly after the decision of *Dunnett v Railtrack plc* in 2002 where a costs penalty was first imposed on a successful party who had refused to mediate.[81] In 1998, immediately before the CPR was put into effect, Professor Hazel Genn reviewed the two-year voluntary pilot mediation scheme established by judges of the Central London County Court in 1996. She found that there was only 5 percent participation for non- family civil disputes in attempting mediation and that the demand was lowest when both parties had legal representatives.[82] The settlement rate on the other hand, was highest when neither party had any legal representatives in the mediation process.[83] These findings not only reflected lawyers' ignorance and lack of experience with respect to ADR during the pre-CPR

[77] The Judiciary, "Evaluation Study on the Pilot Scheme on Family Mediation: Final Report" (2004), available at http://www.judiciary.gov.hk/en/publications/hkpu_finalreport.pdf (visited 26 Mar 2010), p 6.
[78] *Ibid.*, p 48.
[79] *See* n 56 above.
[80] *See* n 51 above.
[81] *Dunnett v Railtrack* [2002] 2 All ER 850.
[82] *See* n 62 above.
[83] *Ibid.*

era, they also revealed the vital influence of lawyers upon their clients' decisions on dispute resolution. Professor Genn published another report in 2007 on the basis of a survey of cases at Central London County Court from 1999 to 2004 when the voluntary pilot mediation scheme had been made permanent. She concluded that court direction, pressure from judges and fear of cost penalty did spur the use of mediation at court proceedings and the numbers increased significantly.[84] In a similar vein, another recent ADR survey in England on some commercial lawyers revealed that their knowledge, recognition, and experience with respect to mediation increased sharply in the post-CPR stage. It is reported that,

> *"The data provided that, rather than fearing the effect of mediation on their customary practice and revenue, commercial respondents in the ADR survey are incorporating mediation into the dispute resolution process. The findings confirm that a sizable number of commercial mediations have taken place and the number of 'repeat-users' indicate that respondents to the survey perceive that positive benefits can be achieved by using the process for commercial cases".*[85]

It is thus expected that, subject to the different circumstances that may exist in England, Hong Kong will have to walk the same path in changing its civil justice culture. Of course, time is required to build up knowledge, cognition, confidence, and experience. That is the eternal rule for most revolution or evolution which cannot take place overnight. The mindset and approach of legal professionals in relation to ADR will hence need to develop gradually, with the catalysing efforts by courts and judges.

Knowledge and Training Opportunities

Lawyers' lack of knowledge and skills in ADR can be remedied, however, through education and training. In view of the increasing importance and popularity of mediation and other ADR processes after the implementation of CJR, it is envisaged that relevant curriculum will be offered in law schools, particularly in the professional qualification courses.[86] At a conference in November 2007 where both the Chief Justice and Secretary for Justice stressed the promotion of mediation as part of their

[84] *See* n 66 above.

[85] *See* n 51 above.

[86] For example, the University of Hong Kong, Faculty of Law, in tandem with civil justice reform and associated training of ADR professionals, has introduced since Sept 2007 a specialized LLM Program on Arbitration and Dispute Resolution, concentrating on courses such as arbitration, mediation, and other alternative dispute resolution methods. Details of this LLM program can be viewed at the Law Faculty website, http://www.hku.hk/law/programmes/pp_intl_arbitration_dispute_settlement.html (visited 26 Mar 2010).

official work, the Chief Justice went so far as to say that ADR should be a compulsory part of law students' education.[87] There are also a growing number of continuing education courses and training opportunities for lawyers offered by legal professional bodies, enabling them to be more competent and proficient when advising clients on dispute resolution generally and ADR processes specifically.[88]

It is necessary to increase ADR providers' involvement in promoting ADR in Hong Kong. There is now greater need than ever before for ADR providers to market themselves and inform the public and the judiciary standards to which they work. The system of standards and accreditation of ADR providers needs to be transparent. The creation in the England of the Civil Mediation Council[89] (which, among other things, has the power to give formal accreditation to approved mediation providers and has, since 2008, been developing a voluntary registration scheme for mediators), was one step towards trying to achieve these aims. The Hong Kong International Arbitration Center and Hong Kong Mediation Council have also offered accreditation procedures as to how to develop into the career track of being a mediator or arbitrator in Hong Kong.[90] Furthermore, the Mediation Council maintains a panel of accredited mediators, with the International Arbitration Center Mediation Rules as the procedural code and general ethical code for mediators.[91] There are additional signs of this with the Law Society's accredited mediation workshops being offered by a few training consultancies.[92]

Review of Professional Role

As practitioners in law, lawyers should carefully consider their role in the civil justice system. Quoting Karl Llewellyn's words,

> *"What, then, is this law business about? It is about the fact that our society is honeycombed with disputes. Disputes actual and potential; disputes*

[87] *See* n 74 above.

[88] For example, the Hong Kong Law Society has been organizing CJR-related and mediation program training courses for its members as part of its Continuing Professional Development (CPD) program. Details of the training courses can be viewed at the website of the Hong Kong Academy of Law, available at http://www.hklawacademy.org/course_cpd.php#mtp (visited 26 Mar 2010).

[89] For a general overview of the Civil Mediation Council, available at http://www.civilmediation.org (visited 26 Mar 2010).

[90] HKIAC's Procedures for Accreditation of Mediators is available at its website, http://www.hkiac.org/HKIAC/HKIAC_English/Guide_Mediators/en_guideam.html (visited 26 Mar 2010).

[91] The HKIAC Mediation Rules is available at its website, http://hkiac.org/HKIAC/pdf/Rules/en_mediation.pdf (last visited 25 Nov 2009).

[92] Keith Brandt and Sam Morton, "Civil Justice Reform – Implications for the Future of Alternative Dispute Resolution in Hong Kong", (2009) *Asian Dispute Review* 50.

> *to be settled and disputes to be prevented; both appealing to law, both making up the business of law … This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they are judges or sheriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself".*[93]

If, as said, "doing something about disputes" is the law itself, lawyers do have the undisputable duty to help clients make informed decision of all the available dispute resolution options in order to assist clients to reach a satisfactory outcome.[94] Moreover, lawyers stand at the forefront of the system and have direct contact with clients. Being the "gatekeeper", they should always think about their clients' need and expectations. Professional conscience and ethics are the pillars to build up clients' confidence and trust in the legal profession. The allegation that ADR is a threat to lawyers' income is misconceived. As explained already, if barristers and solicitors take a positive attitude towards ADR and learn the relevant knowledge and skills, they can be important role-players in the picture as well. Since most ADR processes operated are not statutorily prescribed, lawyers' advice on the available approach to be taken and possible outcome to follow if parties fail to reach any settlement agreement will be urgently needed. Below are some of the specific examples as to how and where lawyers can earn fees when mediation is used.

First, as discussed above, the court-annexed mediation scheme requires lawyers' advice to the litigants on the option of mediation before the litigants decide to proceed with court proceedings. Secondly, with popularity of using ADR as an addition and alternative to litigation process, inclusion of ADR clauses in commercial contracts may become a rising trend which lawyers may help with drafting and cautioning their clients both before and after dispute arises. Thirdly, lawyers are involved into the entire ADR process directly with their clients. Take mediation as an example. Lawyers need to engage in the preparatory work prior to the mediation process such as preparing mediation agreement, selecting mediator(s), etc. Within the mediation process, lawyers can help evaluate and generate options for parties that match their mutual needs and interests. They can further advise on settlement proposals, reviewing agreement terms

[93] Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Dobbs Ferry, N.Y: Oceana Publishing, 1960), p 12.

[94] Frank E.A. Sander and Michael L. Prigoff, "Professional Responsibility: Should There Be a Duty to Advise of ADR Options?", *ABA Journal*, Nov 1990, p 50.

and reducing them into writing.[95] The aforementioned services provide billable hours and appealing business to the legal profession.[96]

Apart from acting as advocates in ADR processes, lawyers can also practise as neutrals. Law practitioners acting as arbitrators are already commonplace. The expected increase and popularity in adopting mediation will attract more lawyers to be qualified as mediators under the accreditation schemes. It is perceived that lawyers' professional legal background is an advantage given that most dispute resolution processes involve legal issues. However, it also needs to be borne in mind that lawyers should appreciate and embrace the different approaches and skills required for mediation and litigation, the former being a problem solving and interest based negotiation process whilst the latter an adversarial process with focus on fact-finding, legal issues, arguments, and advocacy skills.[97] In the evaluation study of the Judiciary's pilot scheme on family mediation, it has been revealed that some of the users preferred to have mediators to be trained in law so that they can be better informed of relevant issues and principles although this may not be the uniform pattern.[98] All taken, it is gaining increasing recognition that acting as neutrals can generate another stream of income and simultaneously, boast another area of specialization.[99]

Conclusion

The Civil Justice Reform has been put into practice for more than a year, and the Practice Direction on Mediation has just been implemented. It is hoped that practitioner involvement, some of which has been addressed in this article, will be noted and quick action taken. As alluded to throughout this piece, the legal profession still has much to do to contribute to a successful civil justice system in Hong Kong. The success of the reform in light of the development of ADR in general and mediation in particular will not be due to what is contained in the several thousand pages of the rules but due to the attitudes of the courts, practitioners, and parties. Given that the judiciary has embraced the use of ADR in Hong Kong, wider and greater involvement by practitioners is anticipated. This

[95] Chan Bing Woon, "Can Hong Kong Lawyers Act as Mediation Advocates?" *Hong Kong Lawyer*, Aug 2007, p 57.

[96] This and the following paragraph are also in response to an early discussion on lack of knowledge and experience of incorporation ADR into the litigation process by lawyers in Hong Kong. *See* discussions previously, in section IV. "ADR in Hong Kong after CJR: Are Legal Professionals Ready", under the sub-heading, "Lack of Knowledge and Experience".

[97] Cinnie Noble L. Leslie Dizgun and D. Paul Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Canada: Emond Montgomery Publications Ltd 1998), pp 110–112.

[98] *See* n 77 above, p 35.

[99] *See* n 48 above, p 127.

development coincides with a notable shift away from the adversarial attitude and a growth in mediation practice in the court room.

With the introduction of various ADR processes into court proceedings, the new civil justice culture will focus on resolving disputes in a more economic, expeditious and fair manner. The changes brought by the new ADR revolution have caused much concern among most of the litigation lawyers, especially in view of their lack of knowledge and skills in various ADR schemes and the threat to their current source of income. Nevertheless, being the frontier participants of the civil justice system, lawyers must face the reality proactively. Their active response can convert the challenge into opportunities, and the challenge will indeed be set off by the opportunities that come forward. The intelligent and dynamic culture of the legal profession in Hong Kong can lead its practitioners to adapt to civil justice reform.