Civil Justice Reform – Implications for the Future of Alternative Dispute Resolution

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Civil Justice Reform

Among the many amendments to the rules of the High Court and District Court in Hong Kong that will come into effect on 2 April this year through the Civil Justice Reform ("CJR"), there are several that have a direct or indirect effect on ADR.

Order 1A imposes upon parties and legal representatives a duty to assist the court to further 6 Underlying Objectives. The court has a duty to actively manage cases, and this includes:

"encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate, and facilitating the use of such a procedure."[1]

The new Case Management Powers are provided for in Order 1B. Put simply, these powers enable the court to intervene in a case and make orders of its own motion. Orders 1A and 1B and the principles they espouse are both completely new and are viewed as two of the most major changes under the CJR. Although Order 1A r.4(2e) is the only provision with direct reference to ADR, it is worth noting that all of the other Underlying Objectives are also supportive of mediation and that the power in Order 1B to "stay the whole or part of any proceedings or judgment either generally or until a specified date or event"[2] will be of great assistance where mediation is anticipated.

Several other new Orders may well have an effect on ADR. Order 22 (Offers to Settle and Payments into Court), Order 25(1) (Case Management Summons and Conference) and Order 62 (Costs) are all relevant. There is now a requirement for parties to fill out a questionnaire providing information to facilitate the management of a case within 28 days after the pleadings in an action are deemed to be closed.[3] This is likely to lead to increased outset costs or "front loading" as parties will need to demonstrate at an advance stage of the proceedings that they are fully on top of the issues and preparation of their respective cases. Conduct of the parties both before and after proceedings have been commenced (e.g. whether they have genuinely contemplated and acted upon the idea of ADR as a method of resolving their dispute) can be a factor in the court's determination of costs[4], with "conduct" being broadly defined.[5]

In short, there is a general thrust to require parties to think more laterally, to be more innovative and to consider ways of settling a matter outside of the

[1] Order 1A r.4(2)(e)

[2] Order 1B r.1(2)(e)
[3] Order 25 r.1(a)(b)
[4] Order 62 r.5(1)(e)
[5] Order 63 r.5(2)

courtroom. Additionally, the costs of litigation look likely to rise in the short term through the introduction of the new rules. There will be the attendant learning curve for legal practitioners getting to grips with the demands of the CJR changes. It is doubtless anticipated that costs should, in time, ultimately fall once the streamlining and efficiency behind the concept of active case management are fully realised,_Initially, at least, until familiarity and certainty of the new procedure become entrenched, it is reasonable to anticipate that ADR will look like an attractive (and cheaper) option.

A specific pre-action protocol for mediation, which would demand that parties properly consider mediation as an alternative to litigation (owing to implied costs consequences), had been considered during the lengthy consultation process of the CJR[6], but this protocol and the other ones that had been proposed were removed at a late stage by the Legislative Council. It was thought that there were reservations about the proposed imposition of automatic sanctions for non-compliance with pre-action protocols. There will be a Practice Direction on mediation, but its implementation has been postponed until 1 January 2010.

The Woolf Reforms

While the CJR amends existing rules of civil procedure, in the UK in 1999, the then Lord Chief Justice, Lord Woolf, instigated the introduction of the brand new Civil Procedure Rules (the "CPR"). Both the UK and the Hong Kong jurisdictions have responded to a need for change in civil procedure. Although at first glance the CPR seems perhaps more radical than the significant amendments that have formed the CJR, a closer examination reveals several direct correlations between the 2 sets of rules.

CPR 1 (Overriding Objective) is very similar to the Underlying Objectives of Order 1A of the CJR. In the court's duty to actively manage a case, it is responsible for (in almost exactly the same wording as that used in the CJR):

"encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure."[7]

The CJR mirrors other parts of the CPR, sometimes in direct comparison with the Orders described above. The most relevant are: CPR Part 3 (Case Management Powers), where the court has the power to make an order of its own initiative[8], CPR Part 36 (Offers to Settle and Payments into Court), which had the subsequently applauded impact of fostering an atmosphere of earlier settlements in the litigation process 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.[9]

Unlike the CJR, the CPR has a number of pre-action protocols, some of which require consideration of ADR. In the Practice Direction to these protocols, one of the objectives is to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings.[10] Furthermore, under this Practice Direction, the court can make (and indeed in a number of leading UK cases has imposed) significant costs sanctions if it believes that non-compliance with a pre-action protocol has led to the commencement of proceedings that

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[6] The Hong Kong Mediation Council's Working Group response to the Civil Justice Reform
[7] CPR 1.4(2e)
[8] CPR 3.3
[9] CPR 44.3(4a)(5a-d)
[10] Practice Direction – Protocols 1.4(2)

should not have needed to be commenced.[11] If a party refuses to consider ADR at an appropriate point, it could well end up facing adverse cost implications. Legal practitioners have to be very alive to the spirit of full compliance with pre-action protocols, especially in light of the current economic climate, where:

"lawyers should have a heightened awareness as to their duty under their Code of Conduct to discuss alternative means of settling a client's dispute."[12]

ADR/Litigation after the Woolf Reforms

As was widely expected, mainstream litigation was affected by the introduction of the CPR. According to some judicial statistics released by the Department for Constitutional Affairs, the number of proceedings started in the Queen's Bench Division decreased by just over 300% from 70,000 in 1999 to 17,000 in 2002. This huge decrease could have been attributed to a number of factors related to the CPR (such as the publicity surrounding the impetus for the reforms, fears of increased costs and delays, and a decline in public funding for civil litigation), but a key element was felt to be the increase in the development and use of ADR, which had been a natural and desired result of the CPR.[13] In addition, the Centre for Effective Dispute Resolution (CEDR) reported that an upsurge in the number of mediations occurred immediately after the introduction of the CPR, but that a plateau seemed to have been reached in 2001 at the 1,000 mark. [14] The latest CEDR Mediation Audit available (2007) revealed that the ADR market in the UK had grown by 33% in the last two years[15], a clear demonstration that reform to the rules of procedure can bring about a cultural change in the mindset of parties towards the use of different methods of dispute resolution.

Judicial rulings, in light of the changes brought about by the CPR, were keenly anticipated to see if an interpretation of the rules would lead to court-ordered mediation. In the years that followed the introduction of the CPR, despite some inconsistency in rulings, there was rather a general move towards penalising a side by not awarding its costs if it had failed to consider ADR as a feasible route at an earlier stage of proceedings. In one of the leading cases in this area, the judge commented that a refusal to consider a reasonable offer to mediate would lead to:

"uncomfortable cost consequences."[16]

Although the UK courts have looked to promote ADR at an early opportunity and have required excellent reasons for a refusal to comply, they have stopped short of ordering compulsory mediation. Refusal to mediate can be acceptable if it is clear that the motive for suggesting mediation is purely for tactical reasons to further a party's ends and not a bona fide attempt to settle the dispute.[17] 9 years after the Woolf Reforms, 2 recent cases[18] highlighted how adherence to this principle has been imposed with guidelines on reasonable refusal to mediate. These guidelines were introduced in a pivotal judgment in 2004.[19] The guidelines

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[11] Practice Direction – Protocols 2.3
[12] "The Court of Appeal slams lower court for failing to control small claims" – Amanda Wadey – 158 NLJ 1751 - 2008
[13] "The CPR regime five years on" - Khawar Qureshi – 154 NLJ 644 – 30 April 2004
[14] "ADR and mediation – boom or bust?" – Michael Lind – 151 NLJ 1238 – 17 August 2001
[15] See: www.cedr.com/news/resolutions/Review07
[16] Dunnett v Railtrack plc [2002] EWHC 9020
[17] Wyatt Co (UK) Limited (Pt 20 Claimants) v Maxwell Batley (Pt 20 Defendants) [2002] EWHC 2401 (Ch)
[18] Vale of Glamorgan Council v Roberts [2008] EWHC 2911 and Nigel Witham Limited v Smith & Another [2008] EWHC 12 (TCC)
[19] Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576

state that the court will weigh up the conduct of the parties and their lawyers, who will need to consider and answer whether they had reasonably refused to mediate based on several factors. These factors include: the nature of the dispute; the merits of the case; any attempts at other settlement methods; whether mediation costs would have been unreasonably costly; whether any delays occasioned by mediation would have been detrimental; and finally whether the mediation had a reasonable prospect of success.

It should be noted that case law in the UK has also shown that a failure to follow contractual machinery which requires parties to engage in some form of cooperative dispute resolution process can lead to a party being precluded from recovering its costs.[20]

ADR in Hong Kong after the CJR

Supporters of the piecemeal approach of the CJR point out that these reforms apply not only the best aspects of the Woolf Reforms, but are also the result of a detailed analysis of other common law jurisdictions' rules of procedure, such as Australia and Canada. The Final Report proposal to opt for selective amendment was an approach adopted in New South Wales.[21] The conclusions to Hong Kong's evaluation of the need for change were that a CPR-like total overhaul was unnecessary. On the other hand, there are concerns that the CJR is a half-hearted approach, inadequate to bring about desired changes, one of which, inevitably, is the requirement to consider ADR at an appropriate stage so that it becomes truly institutionalised, as it has in the UK.

Despite such concerns, there is a sense in the legal community that there will be a greater use of ADR. The questionnaire required by Order 25 means that cases will have to be analysed at a very early stage. As this will more than likely incur greater costs at the start of proceedings, unmeritorious claims and defences will be removed. In tandem with the active case management by the court through Order 1A, there will be (as also happened in the UK) an increased use of ADR.

Just how far will the judiciary go in "encouraging" and "facilitating" mediation under Order 1A? Much will depend on the Practice Direction to be implemented early next year and whether the courts will use this to make adverse costs orders if there has been an unreasonable refusal to mediate. Will there be as much case law on this point as there was in the UK after the Woolf Reforms? Though it is not possible at this stage to gauge this, a useful indication may well have come from a recent Court of Appeal judgment that highlighted the benefits of considering mediation since:

"…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."[22]

Steps to promote ADR in Hong Kong after the CJR

Much can be learned from the development of ADR in the UK after the introduction of the CPR.

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[20] Douglas Harper v Interchange Group Limited [2007] EWHC 1834 (Comm) and Cable & Wireless plc v IBM United Kingdom Ltd [2002] EWHC 2059 (Comm)

[21] Civil Justice Reform: Final Report – Section 2 paragraph 9

[22] Paul Y Management Ltd v Eternal Unity Development Ltd, unreported, CACV 16 of 2008. See also the obiter comments from Iriver Hong Kong Ltd v Thakral Corp (HK) Ltd [2008] 6 HKC 391

Initially, it will be vital to continue to build judicial confidence in the embracing of ADR in Hong Kong, where in certain areas (such as in the construction sector, for example) positive steps to use ADR have been well ahead of other jurisdictions. Still, some scepticism towards ADR could remain. Judges may well worry that if they follow Order 1A and encourage and facilitate ADR at what is thought to be an appropriate stage only to see it subsequently fail, then this will add to the costs and the delay of litigation, contrary to the objective of the Order. However, once judges have built on their awareness of the abilities and qualifications of ADR providers (as happened in the UK after the introduction of the CPR), they will doubtless be more inclined to encourage parties to use ADR.

This is tied in with the challenge of ensuring government support. The government needs to make more information available about ADR services, especially to the judiciary. Equally, the government needs to ensure that it allays understandable fears that the judiciary may have about resolving matters outside the court, something that could weaken the financial viability of the courts. The government needs to allow the courts to cover their own costs.

A further key component of promoting ADR in Hong Kong is to increase practitioner involvement. Will the CJR change litigation culture as much as the Woolf Reforms did? There is now a greater need than ever before for ADR providers to market themselves and inform the public and the judiciary of the standards to which they work. The system of standards and accreditation of ADR providers needs to be transparent. The creation in the UK of the Civil Mediation Council, (which among other things, has the power to give formal accreditation to an Approved Mediation Provider and has, since 2008, been developing a voluntary registration scheme for mediators), was one step towards trying to achieve these aims. There are already early signs of this in Hong Kong with Law Society accredited mediation workshops being offered by some training consultancies.

Greater public awareness of ADR should be addressed once the CJR comes into effect. This is the responsibility of those involved in dispute resolution. In the UK, innovations like the Lawworks Mediation Scheme (a partnership between the Solicitors' Pro Bono Group and the Law Centres Federation) helped increase public awareness. Practitioners in Hong Kong need to press ahead and promote recent initiatives, such as the 2007 introduction by HKIAC of the Commercial Mediation Pilot Scheme Rules.

Finally, and perhaps most importantly, there will be the challenge of keeping a sense of proportion. Although the changes that the CJR will herald have the potential to be significant, litigation will not be replaced by ADR and ADR will not become the only method of dispute resolution. This is not the intention of the CJR. The CPR, though it did much to increase the profile of ADR, certainly did not kill off mainstream litigation. History in the UK shows that the process has gone full circle. Litigation levels of 2008/2009 in the UK are as high as they were before the Woolf Reforms. It could also be argued that culturally, perhaps, there will always remain a Chinese natural tendency to prefer a formal judicial determination, even if it leads to an unfavourable outcome. The challenge, rather, will be to show that ADR can be used flexibly, not just to resolve entire matters, but also to partially resolve disputes, leaving for trial what cannot be resolved.

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