Opening Remarks for the Conference on Mediation Practice Model after Civil Justice Reform

The Honorable Mr Justice Poon

In the Foreword to the book entitled Civil Justice Reform – What Has It Achieved?, a collection of the papers presented at the conference on Civil Justice Reform held in April 2010, our former Chief Justice said that in Hong Kong, mediation was being encouraged because of its well known benefits as a process for dispute resolution compared to the litigation process, less costly, greater expedition and reduced stress for the parties. He also noted at present, that is, as at early 2010, not all members of the legal profession fully appreciated the advantages of mediation. He earnestly hoped that with more experience and with greater public understanding, both they and their clients would increasingly realize that it was in the best interests of the clients to explore mediation to settle their disputes. He predicted with confidence that the momentum for the use of mediation would increase and that it would become a significant feature of dispute resolution in Hong Kong.

It is now almost a year since our former Chief Justice made his remarks and 15 months since the Practice Direction on Mediation came into force in January 2010. What have we achieved so far? Absent any reliable statistics, and one will readily agree that we should collate the data over a longer period than one year, it is difficult to give an accurate assessment of the overall picture now. Fully aware of the limitation, what I will do is to present to you some observations based on my own experience and that of some other judicial officers whom I have consulted.

I begin with a bold statement contained in a textbook on liberal studies, a subject which all secondary school students in Hong Kong must

take. There, the authors said, "It will be a breach of the rule of law if the parties to a civil dispute settle the matter privately without going to the court for adjudication." Their view is of course wholly misconceived. It nonetheless serves two useful purposes. It inferentially shows that the authors esteem the courts highly and expect the readers to do so. That is commendable, at least from my perspective. Perhaps more significantly for today's purpose, it serves as a timely reminder that although mediation has now become an entrenched feature in our civil justice system, many are still laboring under the misconception that litigation is the only option for dispute resolution. That underscores the urgent need for educating the public on mediation and for changing the mindset of the parties embroiled in civil disputes. I will return to the change of the mindset in a moment.

According to the rough data collected by the High Court Masters, for general civil actions where the Practice Direction on Mediation applies, less than 30% of the cases in which the parties mediated results in settlement. The rate of success is well below expectation and is, frankly, rather disappointing. A host of possible reasons may explain the unsatisfactory position. I will mention only three which readily came to mind.

First, the parties and their legal advisers do not understand what mediation is about. They fail to appreciate fully the benefits of mediation. Consequently, they do not regard it as a viable and effective dispute resolution. I learnt from a judicial officer that a member of the profession, who will remain anonymous, confessed to him that he had no idea of how the mediation process operated. One naturally wonders how is he able to properly advise his clients to consider mediation, something he must now do under the Code of Conduct. This particular case is, I am afraid, not an isolated incident. I will strongly repeat what other judges have said: The legal profession must embrace mediation. They must first educate themselves of mediation. Then they must properly and adequately advise

their clients of the benefits of mediation. It is only then can the clients make an informed decision on mediation.

Second, the quality of the service rendered by some mediators does not instill sufficient confidence in the parties in the mediation process. Understandably, the parties are not impressed. Some serious efforts from all the stakeholders are necessary to address the problem.

Third, the parties only take mediation as just another interlocutory step in the litigation process which they need to go through. They just pay lip service to the process in order to avoid any possible costs sanction. There is no genuine attempt to mediate at all. Judges and masters find this reason most disturbing. We may well spend more resources to educate the public of the benefits of mediation. We may well strengthen the training for the practitioners and pull up the standard and quality for mediators. All the efforts will, however, come to naught if there is no material change in the culture in the conduct of dispute resolution.

The change in the culture is the key to the success of the CJR. It is essential and indeed indispensible insofar as mediation is concerned. Given its consensual nature, the mediation process is meaningful and effective only if the participants, assisted by their legal advisers, are truly and firmly committed to it. The process requires the participants to cooperate in resolving the dispute together. They and their legal advisers can no longer approach the dispute with a traditional adversarial mindset focusing on the rights and wrongs of past events. Instead, they must be willing, and sincerely willing, to work out a solution according to their present needs and concerns of all involved. They do not appear before the mediator for adjudication. They enlist his assistance for an amicable settlement. These are all elementary. Indeed, I can still recall that they were taught at the very first lesson when I attended the CEDR mediation course some two years ago.

Yet in actual practice, to what extent are they followed? How is mediation perceived by the legal advisers? How do they advise their clients to consider mediation? How do they see their role and perform accordingly when they represent or assist their clients in the mediation process? Unless the mindset for the conduct of dispute resolution on the part of the parties and their legal advisers, as contemplated and directed by the reforms, are, to quote Lam J, "revolutionized", mediation still has a long way to go before its purpose and function is fully served in Hong Kong.

To conclude, I will leave you with a very brief outlook for future development. The Judiciary is determined to put mediation to its most effective use. The Chief Justice's Working Party on Mediation, chaired by Lam J, will continue to explore the way forward. One thing for sure is that mediation will soon be extended to administration actions. I will not be surprised if its scope is to be further enlarged in the near future. The legal profession must gear up for a more extensive application of mediation in civil disputes and their practice.

Finally, I would like to wish this conference every success.

4 April 2011