Speech for The Hong Kong Legal Week 2020 on "Case Settlement Conference Pilot Scheme" By The Hon Mr Justice Lam, VP 5 November 2020

Introduction

It is a pleasure for me to come here and to say a few words about the Case Settlement Conference ("CSC") Pilot Scheme. The opportunity is a very good one for the Judiciary to introduce the Scheme to everybody. Although the Judiciary has in the past given briefing or the report session on what has happened in the previous pilot scheme namely External Mediation Master ("EMM") Pilot Scheme, there are few things which are good for the Judiciary to clarify with the professions, so that there would not be any misunderstanding as to the Scheme.

Post-Civil Justice Reform ("CJR") litigation culture

Before I come into the features of this Scheme and the underlying concepts of it, I will talk about the post-CJR litigation culture, because there seem to be still some misconceptions around various people as to what is the role of the Court and the judges in the litigation process, as well as the role of the lawyers. To make it clear from the outset, what is important for the CJR is to instill a culture so that people appreciate that general civil litigations are means to resolve dispute but it is not the only means. When there are other available means to resolve dispute which can be more efficient and effective, the Court requires the parties and their lawyers to explore those other possibilities and options in a reasonable way with sincerity. That is why the concepts of case management

under the CJR is not just confined to the preparation of a case for adjudication by judges.

Order 1A Rules of District Court on case management

The Rules under Order 1A are the same for the High Court and the District Court. Order 1A Rule 1 sets out the underlying objectives of the court proceedings and the practicing procedures which should be followed. Among other things, Rule 1 sets out various matters which are related to why the Court should be involved in case management concerning not only with the process of adjudication but also the process of other possible Alternative Dispute Resolution ("ADR") modes:

- Sub-paragraph (a) requires to set out the objective of the procedures is to increase the cost effectiveness of the process;
- Sub-paragraph (c) refers to the promotion of a sense of reasonable proportionality and procedural economy in the conduct of proceedings;
- Sub-paragraph (e) refers to facilitation of settlement of dispute; and
- Sub-paragraph (f) refers to considering the ensuring of the resources of the Court are to be distributed fairly.

Order 1A Rule 4 sets out the Court's duty. I highlight the word "duty". This is the duty of the Court to manage cases and this is one of the features of the CJR and the Court would be proactive in case management, not just leaving the matters in the hands of the parties or the lawyers. Active case management under Rule 4 sub-paragraph 2 includes various matters:

- Sub-paragraph (b): identifying the issues;

- Sub-paragraph (c): deciding promptly which issues need full investigation, trial and disposing of the other issues summarily;

- Sub-paragraph (e): encouraging parties to use ADR procedure if the Court considers that to be appropriate and to facilitate the use of such procedure;

- Sub-paragraph (f): helping the parties to settle the case. So it is in fact the Court's duty as provided for in these rules that the Court should play some roles in assisting the parties to settle the case and to explore ADR; and

- Sub-paragraph (h) of that Rule also says that the Court's duty to case management includes considering the benefits and cost of a particular step in the proceeding.

Now it sets the scene for the Court being involved in what has conventionally been regarded as settlement and therefore purely a matter between parties with the assistance of the solicitors. But as we have seen from these rules, it is actually part of the CJR and I hope most of the people have already embraced this culture that the Court actually does have a role to play in that regard.

Lawyers' responsibilities

How about the lawyers? As we all know under Order 1A itself, the lawyers and the parties have a duty to assist the Court in case management and to achieve those underlying objectives. Therefore, the lawyers should also assist and educate the litigants on ADR strategy. I remember at the time when the Practice Direction 31 ("PD31") was introduced, the Mediation Practice Direction, I have already talked about this concept of ADR strategy. Some of the lawyers may already have been practicing that but it is useful for me to highlight it again for

the benefit of everybody. In terms of ADR strategy, what lawyer should consider is bearing in mind the underlying objective of the litigation process and also the Court's expectation in the parties, and that litigation or adjudication should not be the only mode to pursue in trying to resolve the dispute. Lawyers should educate their clients to pursue ADR when it is suitable to do so. It is not just considering whether to adopt that option but also to go into more details about what kind of ADR option we should pursue, when should we do it; and if we shall do it, what sort of neutral person to conduct that process should be engaged; and what are the costs and benefits to be derived from that process.

Costs sanction

Another feature which is prominent in the CJR, I think there are rooms for further utilization, is the scheme for sanctioned offers and payments. I have set out in a number of judgments how that procedure can be more effectively used with one sanctioned offer leading to another sanctioned offer by way of narrowing of the scope of dispute. Again that should form part of the ADR strategy of a litigation lawyer. An important concept is to try to narrow the issues, so that even if the matter cannot be resolved completely by way of settlement, at least there are issues which are worth fighting and there are issues which are not worth fighting. There is no point for coming to the Court just to take every point, trying to see whether you can get one of them home. Because that would be a very wasteful way to conduct litigation and a lot of costs and time will be incurred. That would not be conducive to the underlying objective.

Why should the court be involved?

Firstly, I have already mentioned about the Court's active duty under the Rules so it has to be proactive in case management. Case management is not confined to the process of adjudication. Under the Rules itself the Court also has a duty to help the parties to settle the case and to help them to make use of ADR procedure when it is appropriate to do so. The parties will have to go through a cost and benefit analysis themselves. The Court is there to assist them to do so.

Sometimes it may be difficult to persuade the clients to go into a more realistic consideration of the case. Without that, there might be a hindrance to positive negotiation in terms of settlement. In that regard, the Court has a role to play because, many lawyers have this experience that, it is much more effective for the Court to put across a message to the clients that they have to be more realistic, otherwise it would be to the disadvantage of everybody and in particular to the client who was acting unreasonably.

In the PD31, the mechanism for the consideration of mediation like Mediation Certificate, Mediation Notice and Mediation Response, provides a platform for lawyers to explain to the clients these matters which previously would be regarded as some signs of weakness or the lacking of confidence on the part of lawyers to one's case. But that is not the Court's intention. With this platform provided by the Court built into the litigation process itself, it provides a good opportunity to the lawyers to canvass these matters with clients. The CSC Scheme provides another platform and also tries to effect this possibility in a more constructive manner. I therefore have to stress that the CSC Scheme is not meant to pressurize the clients to settle. The Court is not going to do such things.

Settlement, whether by way of private negotiation, mediation or in the course of the CSC, has to be consensual and with the informed consent of the parties. Therefore, the Court in conducting CSC is not there to say to the client that they

must settle the case because of any reasons, rather what the Judiciary tries to achieve by way of this platform is to enable and ensure the parties themselves to make an informed decision as to how and what is the effective way to resolve this dispute. Such informed decisions include considerations as to the costs and benefit of pursuing the litigation by way of adjudication. Alternatively, the Judiciary would like to see if there are rooms for bridging the gap between the parties so that matter can reach a settlement, or if the Court can't settle everything, at least the issues can be narrowed down. So the whole process will be less costly and more procedurally economical. That is the purpose of the scheme. I want to stress that the Court needs the cooperation of the lawyers and the lawyers are needed to properly understand their roles in this process.

Now there is some saying that shouldn't the Court's role be restricted to adjudication? For the reasons I have explained concerning the purpose and spirit behind the CJR, that is a very outmoded way of looking at the Court's role. One has to appreciate that judicial resources are limited. There are many cases in the pipeline and the Court has to make sure that the judicial resources are being utilized in an efficient manner. So that is also one of the considerations why the Court should also be playing a role in terms of encouraging the parties to adopt ADR and to try to negotiate for settlement in a more constructive and responsible manner.

Now the position of a judge is also unique in a sense because each lawyer will advise their own client but they are having their side of their story, not only in terms of the merits of the case but also they might only have a picture of what is the cost they might incur. On the other hand, when the matter is to be considered by the Court, the Court will require information from both sides and those sort of information will be exchanged. So in this process, the other side's costs will be made known and this would be taken into account in the overall scheme of things. To some extent, the Court can contribute in terms of an

impartial view from a judge or a Master who would assist the parties to direct their focus onto the right question in order to make an informed decision. The Court is in a unique position to tell the parties to be more sensible because sometimes there are matters which can be narrowed down and which may not require adjudication.

Some may say there is already the PD31 to encourage parties to go for mediation, why is an enhanced platform still needed for the court involvement with settlement negotiations? One may recall that under PD31, there are requirements of filing of Mediation Certificate and other documents. One of the features of PD31 is costs sanction. I am not going to say much about it today but one can go back to the authority in which I discussed the matter. But I want to emphasize that it is only a rather negative way of looking at things. The primary purpose of the Court is not to impose costs sanction, but rather to encourage people to consider ADR. That is why I say costs sanction is only secondary. The primary goal is to steer the parties towards the mapping of a proportionate and effective means to resolve the dispute, and to ensure the parties are making informed decisions in that regard.

Drawbacks

Unfortunately, there were some drawbacks in the implementation of PD 31. The experience based on the mediation reports received by the Judiciary and day-to-day experience of judges, the PD31 response from the profession is that in most of the cases people just tick the box and say they would go for mediation. But there were inadequate considerations being given to ADR strategy, and in some cases there were lack of sincerity on the part of the parties in the participation in the ADR process. There are people just going to sham mediations. They just go there for one or two hours without real intention to engage in a constructive

manner. And there are inadequate contributions or assistance by lawyers to explore realistic settlement options in terms of trimming down unfruitful issues.

Ownership of the dispute

I would emphasize again that the ownership of the dispute should go back to the parties themselves. Since we are talking about the resolution of dispute by non-adjudicative mode and it has to be consensual, so the Court is not trying to force a settlement on the parties. On the other hand, the parties should take responsibility for that dispute which include their responsibility for the costs incurred and the time taken. Therefore, if there are other ways to resolve this dispute, it is their duty and responsibility to consider those. The lawyers must have a role to play and should make sure their clients are well informed and appropriate options are duly explored.

I must also clarify that it is not the intention of this CSC Scheme to generate distrust between the lawyers and their clients. There is a serious misunderstanding in that regard. I want to take this opportunity to emphasize that even in the CSC, the Court or the Master who is presiding over that would not impinge upon legal professional privilege. So there is no question of a Master asking the parties what they have been advised in terms of what happened between the lawyers and the clients. At the same time, in order to have a meaningful process, there is some basic information about what has happened in the past with regard to settlement negotiation, what is the cost that has been incurred, what is likely to be incurred and the time that the litigation will take in the future. These matters have to be gone into but I do not see that by going into that the discussions would impinge on legal professional privilege.

What the Judiciary hopes to achieve by this CSC Scheme is a collaborative effort on the part of everybody involved, not only the judge or the clients but

also the lawyers. The assistance of the lawyers is also needed in terms of formulation of realistic options to settle the matters and to bring that to the attention of the Court. So the process can be used positively and proactively.

The underlying concepts for CSC

Master Dick Ho will give a presentation on what has happened in the past in terms of the EMM pilot scheme in 2018 but the overall result is rather encouraging because they achieved a settlement rate of 43%. It is necessary to point out that in the District Court there are many cases where both sides were not legally represented. And they have also found it very helpful to have settlement conference. We would also be hearing later from the mouth of a solicitor who has participated in one of these conferences in the previous pilot scheme. The solicitor will explain the benefit that the lawyers find this platform provided to the resolution of dispute. So it is not a case where the Court is targeting the lawyers and trying to criticize them for the works they have done. The Court fully appreciates that there are clients who are difficult, and there are a lot of strategic and forensic considerations in the steps to be taken. But what the Judiciary tries to achieve by this CSC is to have the clients fully informed as to how things can proceed and also to give settlement a chance in terms of discussing the matter positively, constructively and responsibly. That is the basic idea behind the CSC Pilot Scheme.

Another important function of CSC is the narrowing of issues. There are many points taken in a trial which with the benefit of the hindsight are not that necessary and it would be just a waste of time and cost to entertain the same. Now the earlier the parties appreciate it, the better. One of the underlying objectives of the CJR in the Rules is to identify which are the issues which are

suitable and which are really necessary for adjudication. As to the rest they can be disposed of summarily.

CSC Masters

I have already talked about lawyers' responsibilities. What I want to stress is that the Court is looking forward to a collaborative effort on the part of the lawyers in order to arrive an effective way to resolve the matter. My colleague would say a few words about CSC Masters but I want to assure everyone that these Masters would not be the ordinary Masters whom one comes across in the District Court giving procedural directions. What the Court is going to have in place, firstly, are the legal professionals from the field and they will not be further engaged in the case if it is not settled. As it is also emphasized, the whole process of this CSC would be without prejudice. That means whatever happened in the course of that conference or session would not be admissible as evidence. If the matter goes to trial, that Master will not handle the case.

Another feature of these Masters is that they are regarded as very experienced in mediations and have the techniques and skills to try to bridge the gaps between the parties. Of course they are not there to conduct a mediation but there are things that a judge or a Master can do which a mediator cannot. With proper assistance and relevant information from the parties and the lawyers, I hope that this platform will be a good one for parties to come to some constructive and realistic dialogue to explore whether the dispute can be resolved by means other than full-fledged litigation, fighting way to the end or involving appeals and, at the end of day, resulting in empty judgments.

CSC x Mediation

I would also like to say a few words about the interplay between CSC and mediation. What the Judiciary expects is that if there are cases where parties are willing to go for mediation, the mediation will be conducted first before we come back to the Court for the CSC. That is why the information concerning what has happened before is needed in order to make the process more effective. Hopefully mediation will help the parties to re-examine their case. Parties and lawyers are expected to re-align their overall strategy in light of what they were told and what they learnt in the mediation process. There is always a possibility that, after CSC, the parties think it may be useful to have further mediation and that can be a way forward as well.

The CSC process

On the whole, what the Judiciary wants to achieve by way of this is by a Court deciding without prejudice procedure, the parties will have a real well-informed opportunity to consider various serious options.

Costs statement and estimates

I think legal professionals should be familiar with the costs statement and estimates. By now that how the CSC Scheme is using costs statement and when my colleagues introduce this scheme again, they will say a few words about it.

Synergy Effect

What the Judiciary hopes to achieve by this scheme and platform is to have a synergy effect between litigation and ADR process which after all is the

underlying objective of the CJR rules. What the Judiciary is doing now is to put that into practice in a more enhanced and effective way.

Conclusion

To conclude, I would say the Court and the judges are now aware and everybody involved in the litigation process is also aware that the litigation is not an end but only a means to resolve the dispute. Where there are other more time and cost effective options available, lawyers and parties should explore those and this scheme is a platform to assist and facilitate the parties to do so. Thank you very much.