

**Speech by the Hon WONG Yan Lung, SC, JP
Secretary for Justice
at Hong Kong Mediation Council Annual Dinner
on Friday, 17 March 2006**

The Benefits of Mediation

Mr. Norris Yang (Chairman), Justice Ma, Justice Yam, Distinguished Guests, Ladies and Gentlemen,

Last month, the Financial Secretary revealed in his Budget Speech that Hong Kong's GDP registered a growth of 7.3 per cent, reaching a new high of \$1,382.2 billion last year. Economic activities in Hong Kong, and those between Hong Kong and other places, are indeed spiraling again. More business inevitably leads to more disputes, and a greater demand for effective and efficient dispute resolution services. And of course more work for lawyers.

2. And yesterday in the Special Finance Committee meeting at LegCo, legislators complained to the Judiciary Administrator on delay in court hearings particularly when cases go part-heard.

3. It has been recognized for some time that the conventional processes for resolving disputes are overloaded despite the rapid growth in the number of courts and in the size of the legal profession. It has also been acknowledged that the court process is not always the most satisfactory way of settling disputes. It can be lengthy, costly, antagonistic, and uncertain, and can lead to dissatisfaction with the legal process. Alternative Dispute Resolution ('ADR') offers a different and, hopefully, better approach.

Mediation as an ADR process

4. During the last few years there has been a worldwide interest in ADR. Jurisdictions as varied as the USA, Australia, the UK, Japan and the PRC have all developed ADR. Mediation, which is probably of Chinese origin, is the principal and most widely used form of ADR. Apparently, it has been used in Asia for many centuries. I think it is not unfair to say there is something distinctly Asian about mediation, as there is a strong element of compromise and harmony. However, the Americans have in the recent past developed commercial mediation, which demonstrated the versatility of this type of ADR.

5. Many people still think that mediation is, in effect, an informal arbitration. Nothing could be further from the truth. Mediation does not seek to establish liability. It is not a weapon for use in the 'blame culture' that we see in so many parts of the world. Mediation is a process that seeks to help the parties find a solution to their problems that they 'can live with'. Mediation is not tied to traditional judicial remedies. It can be, and often is, highly imaginative and can have the effect of bringing the parties back into a good relationship.

6. In Hong Kong, many organizations and individuals have contributed to the development of mediation. These include, of course, the Hong Kong Mediation Council, and its predecessor the Mediation Group of the Hong Kong International Arbitration Centre, and the Hong Kong Mediation Centre. In addition, members of the Bar Association, the Law Society and other local professional bodies have played their part, and so have the Judiciary and the Government.

Construction Mediation

7. As early as in 1984, the Government began a trial scheme for mediation of construction disputes. Since the early 1990s, the Government has supplemented its use of arbitration for dispute resolution with other ADR methods. In particular, mediation was adopted not only for the Airport Core Projects (ACP) contracts but for all major public works contracts. This has proved very effective in reducing the number of claims which would otherwise proceed to arbitration. Under the ACP contracts, mediation was a mandatory requirement of the dispute resolution process, and 80% of all ACP disputes were settled at mediation or through negotiation at the mediation stage.

8. Mediation has continued to play an active part in our tiered system for the resolution of construction disputes under our standard form construction contracts. Mediation remains an ideal method for the resolution of construction disputes due to its inherent flexibility, the ability of the mediator to discuss issues with the parties confidentially, and the scope for adopting a pragmatic commercial approach. It is also much less expensive than more formal dispute resolution methods such as arbitration.

9. Mediation has been very effective in resolving claims between Government and its contractors and consultants. Statistics show that the number of cases being mediated has continued to increase in recent years. We currently have some 20 mediation cases on-going, and new cases are referred to mediation at the rate of about one per month.

10. Currently, the Judiciary is proposing to implement a three-year pilot scheme for voluntary mediation in the Construction and Arbitration List. The scheme will be implemented by way of a Practice

Direction, and comments on the proposed pilot scheme are being invited from the users of the Construction and Arbitration Court and from other interested parties. The purpose of the proposed scheme is to encourage parties to use mediation as a possible cost-effective means of resolving disputes.

11. Under the scheme, construction mediation may be initiated by a Mediation Notice issued by any party. The Notice has to set out specified information including the nomination of the rules under which the mediation is proposed to be conducted. These rules include the mediation rules published by the Hong Kong International Arbitration Centre.

Family Mediation

12. Construction mediation is only one of the models for mediation. In May 2000, a three-year pilot scheme on Family Mediation was launched by the Judiciary. A Mediation Co-ordinator's Office was set up within the Family Court building to assist in implementing the pilot scheme. The Judiciary funded the mediation fees for 930 matrimonial cases during the three-year period. The Judiciary concluded that mediation helped produce a high user's satisfaction rate and high agreement rate and resulted in saving court time. Because of this, it was decided to maintain the Mediation Co-ordinator's Office at the close of the pilot scheme. The Mediation Co-ordinator will therefore continue to hold information sessions on family mediation and generally assist couples seeking mediation to help resolve their problems in a non-adversarial way. Although family mediation services are now provided on a fee-charging basis, some non-governmental organizations operate fee exemption and reduction schemes for those with financial difficulties, such as recipients of Comprehensive Social Security Assistance or those with a monthly income

of \$4,000 or less. In this regard, mediation is considered as a viable option for family dispute resolution in Hong Kong.

Legal aid for mediation

13. The Chief Justice's Working Party on Civil Justice Reform considered the possibility of making mediation a condition of legal aid. It recommended giving the Legal Aid Department the power, in suitable cases, to limit its initial funding for persons who qualify for legal aid to the funding of mediation. The Final Report of the Working Party also suggested that the Administration should conduct its own pilot scheme to evaluate the cost-effectiveness of the proposal before deciding on the way forward.

14. On 15 March 2005, the Government launched a one-year pilot scheme to establish whether extending funding to mediation of legally aided matrimonial cases could be justified on grounds of cost-effectiveness and other implications. Under the pilot scheme, both the legally aided person and the other party were invited to join the scheme on a voluntary basis. There was a panel of 72 mediators rendering service for the scheme at \$600 per hour. Up to 8 October 2005, 89 cases were referred to the Mediation Co-ordinator's Office of the Judiciary to attend information sessions. As a matrimonial case normally takes about two years to conclude, the Government aims to complete the evaluation of the cases covered under the scheme in 2007-08.

Some Features of Mediation in England

15. While we wait for the results of that scheme, it may be useful also to consider the UK experience of mediation. Prior to the introduction of the Civil Procedure Rules ("CPR") in 1999 the use of mediation was at

its infancy in England and Wales. Lord Woolf's approach in CPR was instrumental in the development and use of mediation. By introducing the concept of 'proportionality' into dispute resolution, Lord Woolf forced all concerned to reconsider the traditional options and to think 'outside the box'.

16. Encouragement to use ADR takes many forms and various courts take advantage of the provisions in different ways. The Commercial Court in London will effectively order parties to try mediation. A recent Admiralty Court direction made provision for the parties to mediate.

17. Part 1 of the CPR, often referred to as 'the spirit of Woolf', requires parties to co-operate with each other, and the court keeps in reserve its power to punish by withholding costs. There has been a variety of cases where costs have been denied because a party failed to mediate. What is clear is that litigants who refuse to mediate without very good cause do so at their peril.

18. The English Court of Appeal has its own mediation scheme and all parties are invited to participate rather than blindly going ahead with their appeal. It seems that the results have been encouraging in the relatively short while that the scheme has been in operation.

19. Various court centres in England, for example in Central London, Birmingham and Exeter, have their own mediation schemes. These schemes offer litigants the opportunity to mediate on a fixed fee basis accordingly to the scheme rules.

20. As not all courts have their own scheme for mediation, in England there is currently a National Mediation Helpline whose details are

available in all courts. This is a new service. Litigants can apply to the Helpline which refers them to one of the Mediation Providers.

21. Next week, some of you will have the opportunity of hearing more about the UK experience direct from two leading mediation specialists from UK, as part of the Judicial Studies Board's Mediation Training Programme.

Advantages of Mediation

22. The aim of mediation, like other processes of ADR, is to reach an accommodation, which may not necessarily reflect the exact legal standing of the parties but is a solution which the parties can accept. Compared to litigation or arbitration, the parties' control over the process (including the choice of tribunal) is much greater and varies according to the procedure used.

23. As you know, mediation enables the parties to communicate, negotiate and eventually resolve their dispute amicably, through a trained neutral third party. The mediator, acting as a catalyst, provides supportive and practical steps to help the parties to discuss the areas in dispute; to explore each party's needs and interests; to identify options and select the most suitable solution; and to draw up a detailed agreement setting out how parties have agreed to solve each problem. In family mediation, the settlement or agreement reached is not only responsive to the needs of each party, but also to the needs of their children, and the continuing relationship as parents can also be enhanced. Mediation avoids the tension and conflict in the adversarial system, and may generally start or be terminated at any time. Users save time and money in not having to contest matters in court. Mediations are conducted in a calm, constructive

and confidential setting, which is a major consideration for parties involved in family or commercial disputes. As one of the users of the Judiciary's Family Mediation Service commented, "The mediator talked with me in mediation sessions like chatting in family and I felt that the conversation concerns [the mediator] as a person who has feeling."

24. In addition, mediation can result in settlements which go beyond the legal remedies that a court may allow. As aptly described by Lord Justice Brooke in Dunnett v Rairack [2002] 2All ER 850, "Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve ... by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live."

Mediation : the possible step forward

25. Given the advantages of mediation, why is mediation not as popular in Hong Kong as it is in some other jurisdictions? First, I would like to say something about the parties in dispute. In most civil disputes, the parties who initiate action and demand redress always take the view that they are right and believe they will win the case. They insist that it is justice and not compromise that they want and hence they opt for their "day in court". The other party in the action may also wish to opt for his "day in court", perhaps for the same reason or for another – to avoid, delay or minimise payment.

26. Another reason why some people with legal problems do not choose mediation is that they are not aware of the process, let alone its advantages. The lack of awareness may be attributed to the relatively

young age of mediation, as opposed to litigation and arbitration. Even if they are aware of it, they may have little faith in the process and therefore choose other forms of resolving their disputes.

27. Then, it's the lawyers. When people seek advice from the legal profession, mediation may not be recommended because their lawyers are not familiar with the process. As a result, they may not be able to see what mediation adds to normal negotiation. Some lawyers may consider that the process does not fit with adversarial tactics. Others may fear that it will show weakness and reveal their hand. Some may also fear that advising clients to resolve disputes by way of mediation instead of litigation is creating an unpleasant form of ADR – Atrocious Drop in Revenue!

28. Experience in England shows that an increasing number of lawyers are becoming involved in mediation. However, because of their legal training, they may tend to adopt procedures similar to litigation or arbitration. One reason why parties want to use ADR is to escape the legal process (and lawyers) and they do not always take kindly to a lawyer mediator.

29. Conclusions drawn from evaluations in other jurisdictions point to two common features. First, voluntary take-up of invitations to engage in mediation remains modest and, second, the direction of appropriate cases to a mediation process is likely to be more effective than the direction of all cases.

30. I have already outlined the initiatives on the part of the Judiciary and the Government in Hong Kong to develop mediation services and the advantages of mediation. I am sure you will agree that

mediation service providers should likewise do their part in increasing awareness of this form of ADR and its merits.

31. In addition to developing the market for mediation, service providers may also wish to explore ways in which the quality of their services may be improved and how qualifications can be streamlined and universally recognized. Hong Kong is privileged to have first class expertise in our service industries. Architects, surveyors, accountants, social workers and members of other professions (many of whom are bilingual) may also be trained and retained as mediators. Various existing resources may also be coordinated and pooled to provide services in a more cost-effective way.

32. Ladies and Gentlemen, the development of mediation in Hong Kong, the Mainland and internationally will help strengthen Hong Kong's position as the leading dispute resolution centre in the region. We need to make more focused and concerted efforts in order not to fall behind other countries such as Singapore. Mediation is very much on my agenda and I shall try my best to see how my department could offer assistance in this area. Finally, may I thank the Hong Kong Mediation Council for your good work and leadership in developing mediation in Hong Kong and wish you every success in all your worthwhile endeavours.

33. Thank you.