

Speech by Secretary for Justice at Conjoint Congress of Royal Australasian College of Surgeons and College of Surgeons of Hong Kong (English only)

Following is the speech by the Secretary for Justice, Mr Wong Yan Lung, SC, on "The Future of ADR in Hong Kong" at the Conjoint Congress of the Royal Australasian College of Surgeons and the College of Surgeons of Hong Kong today (May 16):

Distinguished Guests, Ladies and Gentlemen,

Introduction

Good afternoon. It is a great honour for me to be invited to speak to an audience from a profession which is so fundamentally different from mine. But is there anything in common between surgeons and lawyers? In Hong Kong, some would say many of the eminent politicians are either lawyers or surgeons by training. I would like to think we both have a sharp mind. But of course, for you surgeons you have a sharp knife in addition. But no doubt we must have at least one more thing in common. Practitioners in both professions try very hard to solve the problems and safeguard the interests of their clients.

Today, James has asked me to speak on a very important development of the law in Hong Kong, namely, alternative dispute resolution (ADR), and how it may impact on our society. This subject naturally can only be considered against a broad context, but I would try as far as possible to explore how it may impact on the practice of medicine in Hong Kong.

In particular, I hope the context of considering arbitration and mediation as alternatives to traditional litigation will provide food for thought as to the function of the law in our society. The alternatives may also encourage you to consider how best to avoid litigation as well as to safeguard the interests of all parties to a conflict.

Before I go into the substance, last year, I had the privilege of attending a lecture delivered by Father Cormac Burke from the Vatican who is both a priest and a judge. I was particularly impressed by his theme that the law is designed to heal. He said "Law, like medicine, has a particular healing power - always provided it is properly applied." That proviso is of course the most difficult and controversial one. Yet, the objective to administer the law for the common good must be paramount. And alternative dispute resolution, and mediation in

particular, has a particular appeal when it comes to the healing touch.

Law and Dispute Resolution

We need the agency of the law to set the parameters for governing behaviour in our society, whether it is the doing of business or the practice of a vocation or a profession. For example, when things go wrong in the care of a patient, the law may intervene to allocate responsibility and provide redress to the aggrieved patient or to defend a medical practitioner who has done his best in accordance with the best prevailing practice. The quality of the law, the effectiveness of the dispute resolution mechanisms, and the importance the society attaches to the rule of law, are all crucial factors for the stability of our community.

Dispute resolution

As to the effectiveness of dispute resolution mechanisms, the Judiciary of Hong Kong is, by any standard of the world, top class and commands strong confidence among the public. According to the survey on "Confidence in Asian Judicial Systems" conducted by the Political and Economic Risk Consultancy Ltd, Hong Kong's grading in terms of confidence in the judiciary is the best among Asian judicial systems. In fact, worldwide, Hong Kong's score on confidence in the judiciary is only second to Australia, but higher than that of the USA.

Limitation of conventional litigation

However, litigation, when carried to its conclusion, is often distressing and acrimonious. Sometimes, the relationship between parties suffers irreparable damage as a result of long drawn-out litigation. Whilst liability may have been decided and judgment given, litigation may signify the end of a close partnership or cooperation which required a very long time to foster.

Furthermore, the conventional processes for resolving disputes are overloaded despite the development of the judicial institution and the growth in the size of the legal profession. Although we are increasing resources and simplifying the judicial procedures, the court process can still be lengthy, costly, antagonistic, and uncertain, and can lead to dissatisfaction with the legal process.

Hong Kong is a global financial centre, our economy is rapidly expanding with the phenomenal growth of the economy of the Mainland and the corresponding inward international investments. We must have a full range of dispute resolution facilities to strengthen our position in this competitive world.

Arbitration

A long-standing form of ADR is of course arbitration, which is particularly useful in settling commercial and investment disputes. Arbitration differs from litigation in that it is a less formal process. A dispute is referred to an arbitrator or an arbitration tribunal for determination. Arbitration is based on the consent of the parties and the arbitrator or arbitral tribunal is very often selected by a means that has been agreed in advance by the parties in dispute, often when the contract is first drawn up or when the parties agree to arbitrate.

The decision of the arbitrator or an arbitration tribunal is called an award. The effect of an award is similar to a court judgment and very often it may be enforced as if it were a judgment. Thanks to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which applies to Hong Kong, very often it is easier to enforce an arbitral award in a foreign jurisdiction than it is a court judgment. No equivalent international instrument of wide general application is in force in relation to court judgments.

Arbitration enjoys many advantages over litigation. It can be a quicker (though not necessarily cheaper) means of settling a dispute because the parties to arbitration have more control over the proceedings. For example, parties can choose the arbitrators, decide on the venue for the hearings, as well as provide for the procedure and rules to be adopted for the arbitral proceedings.

There is a lot to be said about the parties' ability to appoint experts as arbitrators. For medical claims, it means that medical experts who have been given proper training in arbitration may be appointed to serve as arbitrators. This may be seen as having great advantage over litigation where one would not normally expect the presiding judge to have the same expertise and professional knowledge as a medical expert in relation to the medical evidence. In any trial, it is likely that a judge will have to be assisted by experts to enable him to evaluate the evidence. On the other hand, the use of a professional arbitrator who himself is a medical expert will save the parties' cost in retaining expert witnesses. The appointment of medical experts as arbitrators will also enable a defendant in a case based on professional malpractice to be judged by his or her own peers.

The notion that justice must be seen to be done means that court proceedings are normally open to the public and names of parties in high profile litigation often appear in newspaper headlines. Evidence produced during a trial quickly falls into the public domain. To avoid the public nature of litigation, international businesses very often opt to settle their disputes

by arbitration because arbitration does not attract as much publicity as litigation.

One of the policy goals that my department, the Department of Justice in Hong Kong, is actively pursuing is the development of Hong Kong as an international arbitration centre. The Chief Executive of the Hong Kong SAR has included this initiative as part of his policy in his Policy Address in October last year. Hong Kong is particularly suited to play that role because of the strength of our legal profession and our first class legal and business infrastructures.

We have in Hong Kong over 5,000 solicitors and over 1,000 barristers. There are also over 1,000 foreign lawyers practicing the laws of their home jurisdictions in Hong Kong. Hong Kong also has a home grown arbitration body: the Hong Kong International Arbitration Centre. It handles about 400 international arbitration cases annually and is ranked second in Asia in terms of the number of such cases handled.

To enhance our status as a regional hub for international arbitration, in addition to helping the Hong Kong International Arbitration Centre, we are in discussion with a number of international arbitration bodies to explore with them the possibility of establishing a presence in Hong Kong.

In this connection, the International Court of Arbitration of the International Chamber of Commerce, which is based in Paris, will shortly be opening a branch of its Secretariat responsible for supervising ICC arbitration in Hong Kong to serve the Asia Pacific Region. This is a significant move by an international arbitration institution of high repute and a show of confidence on Hong Kong's position as a centre for dispute resolution. With the convenience of the Hong Kong branch of the Secretariat of the International Court of Arbitration, I hope to see more ICC arbitration being conducted in Hong Kong and in the region. Our arbitration practitioners would also benefit by the enrichment of their experience in ICC arbitration.

Moreover, the future for arbitration involving the Mainland is very bright and the potential for development tremendous. Although the New York Convention cannot apply to relations between Hong Kong and the Mainland, back in 1999, we have already concluded an arrangement for reciprocal enforcement of arbitral awards with the Mainland. We also keep our arbitration law under constant review to ensure that it takes account of global developments. After a comprehensive review, we are proposing to reform Hong Kong's arbitration law by unifying the legislative regimes for domestic and international arbitrations on the basis of the United Nations Model Law on International Commercial Arbitration.

Mediation

So much for arbitration. Now what about Mediation? While arbitration is more informal and flexible, it is still litigation and is based on an adversarial system. Mediation, however, is more result-oriented and as an ADR, many will say the "A" stands for "amicable". In this busy world where disputes are inevitable, speedy resolution of differences is always the goal, but it would be even better if breakdown of relationships can be avoided.

Mediation is essentially a dispute resolution process conducted confidentially and on a without prejudice basis, in which a neutral third party, the mediator, is appointed by the parties in dispute to assist the parties to arrive at a negotiated settlement.

The mediator will usually start the process by holding a joint meeting with the parties at which the mediator clarifies the process and establishes the ground rules. Each party will then present his or her case and the mediator will ensure that everyone understands what the case is and will allow parties to respond. The mediator helps the parties to identify the issues that need to be dealt with. At an appropriate time, the mediator will break up the joint meeting and send the parties to their separate rooms. The mediator will then hold private meetings with the parties by shuttling between the parties and gathering information from the parties in confidence.

In the medical context, the presence of a neutral mediator will be instrumental to enable the patient and the doctor to hear each other out, at a time when communication is difficult because of emotional distress and the eagerness to find someone to blame. The opportunity to listen, with a trusted mediator facilitating communication, may already go a long way to ensure the understanding of what had happened objectively, and to narrow down the dispute. Where appropriate, an apology may be made easing the resolution of the entire dispute.

In mediation, the task is to help each party to focus on its real interests rather than its contractual or legal rights. That is the essence of mediation. Unlike litigation, which is a rights-based process, mediation is an interest-based process. That is why not every case is suitable for mediation. An often quoted example to illustrate the distinction is one concerning a dispute over a consignment of oranges by two parties. In the strict litigation setting, a lot of time and money will be spent on who has the legal entitlement to the consignment. Through the confidential private meetings with the parties, the mediator is able to understand that one party needs the oranges for their juice and the other for the rind. With this knowledge, the mediator assists

the parties to arrive at a "win-win" situation with an agreement in which the solution to the dispute is favourable to both parties. Through mediation, the mediator is able to identify the real need of each party and help to find and generate a viable solution to address them accordingly.

Mediation is not the equivalent of adjudication and the mediator has no authority to make decisions binding on the parties. The mediator is not there to advise the parties of the merits of their case in the dispute or to determine their rights. The mediator is there to restore negotiations, ensure that the parties focus on the real issues and assist in the generation of options to resolve the dispute by an agreement that the parties consider that they can live with.

It is recognised that mediation is a speedy process and is less expensive as compared with litigation. Mediation is quick because it can be arranged within a few weeks and may last just one or two days. For example, in Mexico where the Government is actively pursuing ADR in the medical context, the experience suggests that the earlier a medical related dispute is referred to mediation, the greater the likelihood that it will be resolved satisfactorily in a matter of days. Under the model of Government-sponsored medical arbitration and conciliation in Mexico, 73% of almost 15,000 such conflicts in 2001-2003 were solved within two days via immediate intervention by a specialized consultant or personal contact with the medical institution or with the medical professional responsible for the patient (note 1).

Winning a case in court may enable you to recover damages over a breach of contract. But it could be at the expense of losing a long-time business partner. A key attraction of mediation is the preservation of harmonious relationships despite the resolution of the dispute. As aptly described by Lord Justice Brooke in *Dunnett v Railtrack* [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."

It has been suggested that there is something distinctly Asian about mediation, as there is a strong element of compromise and harmony. So in promoting mediation, we may well be embarking on a process of cultural awakening.

Mediation in Hong Kong

In Hong Kong, mediation has already established a very steady foothold in specific areas of the commercial world. It is

difficult to obtain statistics because mediation settlements between parties are private and usually governed by confidentiality clauses.

However, the use of mediation in construction disputes in Hong Kong is well-known and goes back to the early 1980s. Since the early 1990s, mediation was adopted for all major public works contracts such as the Airport Core Projects (ACP) contracts. This proved very effective in reducing the number of claims which would otherwise have proceeded to arbitration.

Last year, the Judiciary introduced a two-year pilot scheme for mediation of construction disputes. Although mediation under the scheme is voluntary, confidential and without prejudice to the parties, the relevant Practice Direction backing the pilot scheme provides that an "adverse costs order" may be made against parties who unreasonably refuse or fail to attempt mediation.

Community Mediation in Hong Kong

Mediation, with all its advantages, assumes great significance in promoting social harmony and access to justice for the ordinary citizen, against the background of escalating legal fees and lengthy litigation process.

On the community side, mediation is particularly suitable for resolving matrimonial disputes. In 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. In the light of the encouraging results of the pilot scheme, the Government now intends to establish mediation in legally-aided matrimonial cases as a permanent feature of the legal aid service, and is working on the detailed features of the permanent scheme.

More pilot schemes are implemented and planned, in other areas such as the disputes handled by the Lands Tribunal and certain companies winding up cases. We also see the potential of mediation in other areas such as labour and employment related disputes including discrimination issues.

With such experience and development, there is no reason why mediation or other forms of ADR cannot be considered as a real alternative for disputes arising from the practice of medicine in Hong Kong.

Medicine and ADR

As in most other common law jurisdictions, medical negligence cases going to court has been on the rise in Hong Kong. The use of arbitration to resolve medical disputes is very rare here. As

regards mediation, the dentists in Hong Kong have moved faster than the doctors. The Hong Kong Dental Association has set up a Patient Complaints Mediation Committee some time ago to mediate disputes between patients and dentists. The Hong Kong Medical Association followed suit and a similar committee was set up in 2005.

However, it remains a fact that ADR in medical cases, be it arbitration or mediation, is still very much a novelty in Hong Kong. It is not difficult to understand why.

Firstly, it is unusual for doctors and patients in Hong Kong to enter into a formal agreement prior to treatment regarding dispute resolution. Patients are likely to perceive such an agreement to use ADR as a unilateral undertaking to give up litigation because medical claims are invariably initiated by patients. In fact, in the US, there is criticism that arbitration agreements entered into between doctors and patients prior to treatment have deprived patients of the right to a trial by jury. Since it is rare for there to be a jury in a civil case in Hong Kong, that may not be a concern here, but it has also been argued that the consent to such an agreement, though express, is not true consent.

Secondly, it is understandably hard to reach an agreement to mediate after the occurrence of an alleged medical malpractice. At that stage, a patient may have died or suffered, emotion and stress are running high, and any good will between the parties would have been long dissipated.

Thirdly, and perhaps more fundamentally, many still don't know ADR exists or what advantages ADR can offer. Lawyers also worry about ADR because some of them might be under the impression that it is more difficult to get their hands on important documentary evidence in the same way as they can with litigation. I should add that this kind of worry is not justified as many modern regimes and legislation for arbitration have made elaborate provisions for disclosure and discovery of documents.

Fourthly, at present in Hong Kong, whereas legal aid is available to pursue medical negligence cases in court, legal aid has not been extended to ADR generally. Hence naturally, the recourse for many patients is still the judicial process.

However, in view of the advantages ADR can offer and some overseas experience we have seen, it would be wrong not to consider and explore ADR seriously, at least as an option to resolving a medical dispute.

In the US, we have seen hospitals taking initiative to embark on hospital-based mediation programmes. The results have been

encouraging, particularly in terms of cutting legal costs and fostering more harmonious relationship. As described by John Kelly, MD, the chief patient safety officer of Abington Memorial Hospital in Pennsylvania which has adopted such a programme:

'It wasn't acrimonious. It was civil; it was humane. In one case it resulted in the creation of a perennial lectureship on patient safety. One party at the end of the mediation literally hugged us. Money was awarded, but that wasn't the healing power of it.'

In the UK, the Clinical Dispute Forum, a multi-disciplinary body formed to promote more cost-effective ways to resolve medical dispute, has drawn up a Pre-action Protocol for the Resolution of Clinical Disputes. The Protocol provides that both the Claimant and Defendant may be required by the Court to provide evidence that ADR was considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued permanently when settlement is still actively being explored. Parties are warned that if the protocol is not followed then the Court must have regard to such conduct when determining costs. It isn't that ADR is recognized as a panacea for the ills of increasing medico-legal claims. But it is certainly now perceived as a true alternative.

As I have mentioned above, in Mexico, the Government was very proactive and decided to fund and establish a statutory body called the National Commission of Medical Arbitration whose main goal is to address conflicts between doctors and patients by encouraging the use of ADR. Whilst this form of Government intervention may not suit every place, the Mexican attempt is still an admirable and bold step to lessen the impact, and hasten the satisfactory resolution, of disputes between doctors and patients. I understand that the Mexican experience is regarded as highly successful with patients and doctors who participated in the process reporting a high level of satisfaction. The system there is faster, less expensive and less damaging than litigation.

There are more reasons to support the use of ADR in medical negligence cases.

In developed countries where there is proliferation of medical negligence claims (such as the USA), medical practitioners have a tendency to avoid specializations which have a high rate of claims. This would hinder research and development of new techniques and medical procedures. This may also result in unwillingness on the part of some doctors to treat seriously ill patients and patients who require more risky medical procedures. With the use of ADR, doctors may feel more secure and protected and less inclined to practise defensive medicine to avoid being sued.

The increase in the quantum of damages awarded in litigation involving medical claims has also driven up the costs of insurance. It is generally thought that damages awarded by arbitrators who are medical experts themselves and damages agreed in mediation settlement agreements were considerably more rational and reasonable than those obtained in litigation. If true, this should bring down insurance premia in the long run and would benefit both doctors and patients.

In Hong Kong, the lack of arbitrators and mediators qualified and experienced to conduct ADR in the medical field needs to be addressed. In the context of medical mediation, as in other cases involving alleged negligence or malpractice of a professional, a key factor is the trust and confidence the parties repose in the mediator. That in turn depends on who the mediator is, as well his ability to maintain neutrality and to assist the parties to understand the strength and weakness of each other's case.

For the doctor and the hospital, there may be more readiness to resort to ADR. After all, arbitrations and mediations are done in private and in confidence. In a small community like Hong Kong, professional reputation can be ruined even with a mere allegation of medical malpractice or negligence, which invariably attracts intense publicity. However, as mentioned, the scepticism on the part of the patients may be more difficult to overcome.

Way forward: Change of paradigm

That leads me to the more general concluding note. To take ADR forward in Hong Kong, there has to be a fundamental change in culture and paradigm.

First and foremost, we believe informing the business sectors and the community of what arbitration and mediation are and what benefits they can bring is a matter of priority. This will enable a person to make an educated choice between litigation and ADR. More resources will need to be spent on educating the public as to arbitration and mediation as alternatives to litigation.

There are misconceptions, with mediation in particular, that it is a sign of weakness, a waste of time and money if it fails and yet another cost to the parties concerned. Better understanding of ADR is therefore essential if they are to be accepted and used more widely. To this end, training programmes need to be increased and public education is necessary. In this regard, training should be designed and given to medical professionals if medical arbitration and mediation are to be developed as alternatives to litigation. This will ensure that a pool of experienced medical arbitrators and mediators are available to meet the needs of the community.

There has to be a cultural change among many legal professionals, many of whom remain skeptical of the effectiveness of ADR and are concerned with any erosion to their traditional litigation business. ADR has been dubbed as "Alarming Drop in Revenue". It will be a big challenge for the legal professional bodies to demonstrate to their members the reasons why they should embrace ADR not just for the benefit of their clients but also for their professional development.

With respect to the application of ADR to the practice of medicine, the concerns of the legal professions, doctors and patients to the use of ADR in medical cases that have been outlined earlier will need to be addressed head on. These concerns may be addressed by better public education, the establishment of better mediation and arbitration facilities and proper training. However, some problems, such as the lack of transparency of awards and settlements in ADR, will have to be more carefully studied and considered.

Finally, ADR 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 recognised. Although currently Hong Kong does have an increasing number of different service providers, their emphasis and target users are very varied. A concerted effort will need be made to look into issues relating to proper accreditation, as well as to eliminate duplication of work. However, while streamlining standards is necessary, it is also important to maintain diversity bearing in mind the wide spectrum of subject matters which are suitable for arbitration and mediation.

Conclusion

In the fast-changing world, the capability to foresee, appreciate and adopt changes determines one's competitiveness. Leaders are those who can ride the changes and make waves. I therefore appeal to the medical profession to take part in this paradigm shift and to make full and better use of ADR to benefit your organization, your profession and the community as a whole.

On that note, may I end by wishing you all happiness and success in the years to come, and a very enjoyable stay in Hong Kong. Thank you.

Ends/Friday, May 16, 2008

Note:

1. As report in Malpractice in Mexico: arbitration not litigation by Carlos Tena-Tamayo and Julio Sotelo, the British Medical Journal Vol. 331 August 2005, p. 448-451.