

SJ's speech at the Mediation Roundtable Conference
(English only)

The following is the speech by the Secretary for Justice, Mr Wong Yan Lung, SC, at the Mediation Roundtable Conference "Changing the Mindset" today (March 29):

Good afternoon, ladies and gentlemen,

I was given to understand that most of the participants of the conference today were in-house counsel and bosses of SMEs. But then (Mr Chan) Bing Woon told me that 90% of the participants were mediators or had experience of mediation. I am actually talking to the converts. So later on in my speech when I mention scepticism, I am referring to those who are not yet ready to change their mindset regarding mediation as a means to resolving disputes. We have to work together to change their mindset.

I see that we have got some friends from India. A warm welcome to you all to Hong Kong. I hope you have been enjoying the conference so far.

As you may know, the Working Group on Mediation under my chairmanship has issued our report recently. I hope you will let us have your views and comments, so that we can work together to develop mediation in Hong Kong.

Misconception as to what mediation is

As a start, it is important to accept that save in areas such as construction and family law, resolving disputes by mediation (as we have been referring to at this conference) is a relatively new concept in Hong Kong until recently.

Many still do not know what mediation really is. Others think they do - but in fact what they have in mind is not the mediation we have been talking about.

There are many misconceptions about mediation. Most people know that it is a way to resolve disputes other than by courtroom litigation. Some think it is but a glorified name for negotiation and out-of-court settlement. Others cannot distinguish it from arbitration.

At the social welfare and NGO level, many have taken

mediation as equivalent to conciliation (such as that offered by the Consumer Council and the Equal Opportunities Commission). Indeed one of the first tasks we have to undertake, as recommended by the Working Group, is to clarify the terminology, and to draw a distinction between mediation and conciliation.

Misconception as to what mediation can or cannot do

Then there is another far more stubborn misconception, shared by lay and professional people alike about mediation. That is whether mediation is truly effective. Is it really as good as everyone on stage today has been talking about? There are still many in the legal profession who are sceptical about mediation. Some frankly admit they don't believe in it at all. When I went before the Panel of the Legislative Council to talk about the Report of the Mediation Working Group, the response I got was not exactly enthusiastic.

Admittedly, the Civil Justice Reform and Practice Direction 31 are not greeted with universal enthusiasm even in the legal circle. Some lawyers are accepting them with reluctance. No doubt, some lawyers are more interested in figuring out what is the minimum degree of participation in mediation, in order to get round mediation and get on with their case in court.

At both the client and lawyer levels, some may think taking the initiative to mediate is an acknowledgement of weakness and may undermine the ultimate position on the final settlement. Some are concerned that if mediation fails, another set of costs would be incurred.

So when it comes to "changing the mindset", it is important that some of these commonly held misconceptions and misgivings are specifically identified and addressed.

So how are we going to change the many different mindsets?

Presenting hard evidence

Many of you may have been singing the advantages of mediation. However, educating the public on the theories and principles is one thing, showing them the clear evidence is another.

Overseas and Local Experience

First, overseas experience. What I can testify to is

that in all my overseas visits to different common law jurisdictions so far, I made it a point to talk about mediation. The message I got about mediation is pretty consistent.

In both Australia and Canada, the courts in many places are so convinced about the merits of mediation that they have resorted to mandatory or compulsory mediation. This has in fact improved the rate of settlement. In the United Kingdom, the Ministry of Justice was able to report that in the 2008/2009 financial year the UK Government had saved ?90.2 million by using ADR (Alternative Dispute Resolution) in resolving disputes.

Experience from other jurisdictions sounds very good indeed, but we do need local experience as evidence.

Mr Justice Johnson Lam has given you some local case references this morning. With the new Practice Direction 31 on Mediation underway, hopefully very soon we will have a rich collection of cases to help make the points.

We need concrete figures and statistics. How much time and money can be saved? We need the local users of mediation to declare their satisfaction. We need real cases to feature in the TV promotion that we have been talking about. We in Hong Kong should actively build up an archive on successful mediation cases and maintain statistics to demonstrate the effectiveness of mediation. These are matters that all stakeholders have to work hard on.

"Mediate First" Pledge

Another important reference is to look around to see how people in the same business and fields are reacting to mediation. If commercial enterprises smarter and more successful than yours are already switching to mediation as a matter of first choice, it makes commercial sense to pause and consider whether there is really something in it.

Since we launched the "Mediate First" Pledge campaign in May 2009, we have now more than 100 companies and trade organisations pitching in. This snowballing is continuing.

Using the catch phrase of the International Finance Corporation in its Manual on "Implementing Commercial Mediation", what mediation can do is to "Unlock your

dispute. Back to business!"

Just to recap, as summarised in the Working Group's Report, with the help of an independent mediator interceding, disputes could be resolved with saving of time, money and risk. Furthermore, it had the added benefit of alleviating stress, preserving dignity and relationships.

Pilot Schemes

Another useful means of enhancing mediation is the use of pilot schemes to build up familiarity and confidence gradually.

Before the general use of mediation under the umbrella of Practice Direction 31, the judiciary had tried pilot schemes in various areas such as family law, building management, and certain companies winding up. Outside of the Judiciary, we have the New Insurance Mediation Pilot Scheme targeting work-related personal injuries cases, and the Pilot Project on Community Venues for Mediation which identified suitable community mediation venues at low or even no cost.

In Annex 3 of the Working Group Report, we have set out the experience regarding the Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme, which was set up to resolve the disputes between the investors and the banks over the "minibonds" by means of mediation and arbitration. Although the number of cases handled by the Scheme was not high admittedly owing to a number of reasons, for those which did go to mediation, the settlement rate was as high as 88%.

The Government is also an active player in this regard apart from leading the Working Group. No doubt you have heard that in February the Financial Services and Treasury Bureau released a Consultation Paper on the Proposed Establishment of a Financial Dispute Resolution Centre. The proposed scheme includes using mediation first and only if mediation is unsuccessful can the claimants choose to bring the case to arbitration. I think my colleague Julia (Leung) has shared with delegates details of the proposal this morning.

And more recently, you have heard from another colleague of mine, Carrie Lam, our Secretary for Development, that she would be working with my Department and the Judiciary to consider a pilot mediation scheme where the parties could try mediation before triggering

the compulsory sale process under the Lands (Compulsory Sale for Redevelopment) Ordinance Cap. 545.

But of course a most significant reassurance is that the Legal Aid Department has accepted that the cost of mediation in civil cases may be regarded as costs incidental to the legal proceedings for which legal aid has been granted. So mediators' fees incurred in civil cases will be treated the same way as legal costs and disbursements incurred in legally aided cases.

Quality of mediation service

Apart from urging people to use mediation and creating more opportunities for its use, for the community to believe in mediation, the mediators must deliver. There is this Chinese saying: "有麝自然香" or in English "Good wine needs no bush". Hence the training, accreditation and eventually regulation of mediators are absolutely key.

We think it is desirable to establish a single body to accredit mediators in order to ensure quality and consistency. It will also help educate the public about mediation and mediators, and ultimately enhance public confidence in mediation. However, the Working Group does not think now is the time to prescribe a standardised system of accrediting mediators. We recommend reviewing the position of setting up a single mediation accreditation body in five years' time.

Meanwhile, we have promulgated the Hong Kong Mediation Code, which is an ethical code of conduct for mediators in Hong Kong. I have personally written to mediation service providers to encourage them to adopt the Code and to set up robust complaints and disciplinary processes to enforce it. We hope this can provide momentum towards establishing a common standard among mediators irrespective of what discipline they are in.

We also believe it will be useful to have a stand-alone Mediation Ordinance to regularise certain procedural aspects of mediation. We do not recommend any mandatory mediation rules as we think the mediation process should be kept as flexible as possible. However, having statutory and standardised rules governing areas like confidentiality and privilege, and exceptions thereto, will be useful, in order to avoid unnecessary controversy.

For the Lawyer and would-be lawyer

Each month we are seeing more mediator accreditation courses being offered and many colleagues giving up a week or so of their lives trying to get accredited. However, I daresay some would admit they are just preparing for the inevitable. It is still a major challenge to convince lawyers and others that mediation is not merely a new procedural hurdle they have to overcome, but is truly a workable and desirable alternative well worth trying wholeheartedly.

In this connection, the Working Group has encouraged the law schools and faculties to enhance mediation education and to revisit the question of incorporating mediation into the compulsory courses of PCLL, LLB and JD. We have also suggested to the universities to consider offering common core courses on mediation and dispute resolution as an integrated inter-disciplinary programme within the first year undergraduate curriculum. We must remember that mediation is not confined to the legal professions alone.

Furthermore, as our Chief Justice Mr Andrew Li has said, mediation training programmes "should include the young at the school level so that they gain a good understanding of mediation at an early stage". The Working Group has recommended that consideration be given to support the expansion of the Peer Mediation Project within our primary and secondary schools.

For the Lawyer-mediator

Now, a word about changing mindset for lawyers who act as mediators.

Incidentally, the cover story of this month's Hong Kong Lawyer is entitled "From gladiator to mediator: the challenges for lawyers who become mediators". Words such as "cooperation", "neutrality", "non-intervention", "interest based needs of parties" and "peaceful conflict resolution" have become qualities sought after and the buzzwords of the new dispute resolution landscape.

Some of these qualities are not inherent in the training of lawyers; and some may even be in conflict at first brush. It is important for lawyers to change some parts of our mindset when we act as mediators. No doubt before you get accredited, you would have passed all the tests on mediation ethics. What has to be worked on include, I think, the requirement of impartiality (as opposed to pushing your client's case come what may), the

ability of effective communication (as opposed to merely giving legal opinion), the innovation and creation in terms of generating options and solutions for the consideration of the disputing parties (as opposed to just rigidly following the hard legal rules).

For the client using mediation

Finally, by virtue of the Practice Direction 31, at the client level, particularly for the corporate clients, they will need to get ready for a more robust attitude towards resolving disputes. The directors, for example, may have to take a well formulated stance at a much earlier stage. They need to be ready to be more hands-on when it comes to resolving the disputes by mediation. They can no longer just leave it to the lawyers or leave it to the court.

Conclusion

Ladies and gentlemen, I have been involved in two major initiatives in Hong Kong which have an element of initiating some kind of a cultural change. The first one is correcting the misconception regarding the use of psychotropic substance. The other one is changing the public's unawareness or scepticism about mediation. Both are very important for the public good and call for sustained and concerted efforts. Paradigm changing is never easy. As someone said, "Prejudice is a great time saver. You can form opinions without having to get to the facts."

Well, ladies and gentlemen, the fact that you are spending today at this conference to find out more about the facts of mediation shows that you belong to those who have the capacity to explore and embrace new things. I trust you will not be disappointed with mediation. I trust that you will get a lot from this conference today as co-workers to promote mediation.

Thank you.

Ends/Monday, March 29, 2010