

Keynote speech by SJ at a mediation workshop (English only)

The following is the keynote speech by the Secretary for Justice, Mr Wong Yan Lung, SC, at the International Chamber of Commerce (ICC) Dispute Resolution Services: Amicable Dispute Resolution (ADR) Workshop today (November 12):

Ms Kim Rooney (Chair, ICC Hong Kong Arbitration Committee), Mr Cameron Hassal (Partner, Clifford Chance), Ms Kong Cheng-yee (Director and Counsel, Secretariat of the ICC International Court of Arbitration - Asia Office, Hong Kong), Mr Ow Kim-kit (Director of ICC Arbitration and ADR, Asia, Singapore), Professor Nadja Alexander (Speaker at the Workshop), Mr Christopher To (Executive Director, Construction Industry Council) Distinguished Guests, Friends, Ladies and Gentlemen,

Introduction

Thank you very much for inviting me to address you at your workshop on mediating commercial disputes this afternoon.

I have to say time really flies. It has been two years since the ICC extended its arbitration arm to Asia and established its branch Secretariat in Hong Kong. I am very pleased to know that things are working well with you, and I also notice from your letterhead that you have established yourself as ICC - Hong Kong, China, which signifies the establishment of your strategic presence here.

I note from the title of your workshop that "ADR" means "Amicable Dispute Resolution". It points more to "mediation" which is the subject of today's workshop. But as many of you know, "ADR" also stands for "Alternative Dispute Resolution", traditionally represented by arbitration.

And talking about Arbitration, I hope you have been informed that just two days ago, the new Arbitration Ordinance was passed in the Legislative Council. This is truly a landmark in the development of ADR in Hong Kong.

The Ordinance introduces a unitary regime for all types of arbitration on the basis of the UNCITRAL Model Law on International Commercial Arbitration. It will make our arbitration law more user-friendly to the

international business community. In line with the Model Law, the Ordinance will accord a greater degree of autonomy to the parties in the conduct of arbitral proceedings and limits the extent to which the court can intervene in the arbitration to the circumstances as expressly provided for in the Ordinance.

References to Mediation in the new Arbitration Ordinance

Fresh from the legislative oven, this new Arbitration Ordinance touches on mediation as well. If you don't know about that, can I just provide you with a quick snapshot:

Division 2 of Part 4 of the new Ordinance is devoted to "Mediators". Section 32 therein covers the appointment of mediator in an arbitration agreement. It also provides that no objection can be made against an arbitrator solely on the basis that the same person had acted previously as a mediator in the dispute.

Section 33 provides that an arbitrator may act as a mediator after the arbitration has commenced provided all parties consent in writing. It further provides if an arbitrator acts as a mediator, the arbitral proceedings must be stayed to facilitate the conduct of the mediation. It also deals with the disclosure obligation where the arbitrator obtains information from a party during the mediation proceedings conducted by the arbitrator as a mediator.

I believe, later on, you have a session on "Med-Arb" which will deal with the benefits and pitfalls of a composite mechanism enabling one to switch from arbitration to mediation, and vice versa. No doubt I think the new Ordinance will have some bearing on the topic.

In connection with the combined use of arbitration and mediation, some of you may be aware that the Financial Services and the Treasury Bureau of the Hong Kong Government has proposed the establishment of a Financial Disputes Resolution Centre in Hong Kong. This new centre will handle financial disputes using mediation and arbitration. This proposal was put to public consultation this year and it is expected that there will be an announcement soon on whether or not the Centre will be set up.

The idea of setting up such a centre was triggered by the collapse of the Lehman Brothers and the resulting

complaints and claims by the disgruntled investors, numbering an estimated 48,000 between them who had bought HK\$20 billion of financial products associated with Lehman Brothers. Incentive to set up such a centre also came from a successful pilot scheme set up by the Hong Kong Monetary Authority (HKMA) and Hong Kong Mediation Council to assist these Lehman Brothers investors to resolve their disputes with the banks through mediation and arbitration. By August 2010, 88 mediations had been conducted under the umbrella of this HKMA Scheme; 77 of these achieved full settlement, resulting in a settlement rate of around 88 per cent.

How is Mediation relevant to you?

Now, having the potential to obtain favourable results such as these, mediation is indeed increasingly being used and integrated into legal systems around the world. Hong Kong is actively following this global trend.

If you are in business, mediation is highly relevant because if any of your commercial disputes go to court, you are likely to be advised by your in-house counsel and panel lawyers to consider mediation to resolve the dispute and to engage in litigation only as a last resort.

As experienced businessmen, no doubt you will be acutely conscious of your business bottomline and will be managing your risks astutely when it comes to incurring litigation costs. In the court case of *iRiver (Hong Kong) v. Thakral* (2008) 4 HKLRD 1000, which is a case relating to supply of MP3 players, the dispute arose in 2004 and the appeal was conducted in 2008. The damages awarded in this case were only HK\$1 million but costs incurred were HK\$4.7 million. It is not surprising that the Court of Appeal expressed regret that the parties had not explored mediation to resolve their dispute.

Current developments in Mediation

Here in Hong Kong, while mediation has established a "foothold" in areas such as family disputes and construction contract disputes, there is indeed a need for a concerted and focused effort to promote and facilitate the wider use of mediation. The benefits of mediation should be made known to a wider segment and to more diverse elements of the Hong Kong society. It should also cover a broader range of disputes ranging from complex commercial disputes to conflicts among ordinary citizens.

Hong Kong is very unique in that all stakeholders, by that I mean the Judiciary, the Government, the legal professions and of course the mediators themselves, and academia, are all speaking with the same voice in the promotion of mediation.

The Hong Kong Judiciary has taken a leading role in this regard. The Civil Justice Reform, implemented by the Judiciary in 2009, emphasises the facilitation of dispute settlement. The Court has since taken on the duty as part of active case management to encourage the parties to use alternative dispute resolution. Practice Direction 31 on Mediation, commonly known as PD 31, requires the parties to civil litigation to file a Mediation Certificate, a Mediation Notice and Response.

This procedural requirement ensures the parties and their legal advisers will attempt mediation before litigation. It provides a mechanism for the parties to enter into a dialogue through mediation. There are potential cost sanctions for any party who chooses not to attempt mediation. The Court will take into account the conduct of the parties in whether they have unreasonably refused to consider mediation.

As for the Government, a Working Group on Mediation was set up under my chairmanship, which had almost all stakeholders represented. We have worked together to make recommendations as to how to promote and facilitate the wider and sustainable use of mediation in Hong Kong.

The Working Group published a Report, including 48 recommendations, earlier in February this year. A three months' public consultation was launched and over 80 written submissions were received. The valuable feedback from mediation stakeholders and the public will help us map the way forward for mediation in Hong Kong.

The mediation service providers themselves are also rallying their efforts. In July this year, the Joint Mediation Helpline Office was set up by eight mediation service providers to provide a one-stop mediation referral service for parties in need of mediation services. The Helpline Office is located at the High Court Building and acts as a central referral agency.

This Office and the participating service providers have adopted the Hong Kong Mediation Code, which is a Code of Ethics for mediators promulgated by the Working Group on Mediation. The service providers have also set up robust complaints resolution processes to enforce

compliance of the Code.

But mediation cannot take off in the commercial world unless the end users are prepared to give it a try. One of the recommendations of the Working Group on Mediation is to further the promotion of the "Mediate First" pledge within the business and commercial areas. The "Mediate First" pledge is a statement of policy by business, companies and trade organisations to use mediation as a preferred method to resolve both internal and external business related disputes. If your companies or trade organisations, or your clients, have not yet signed the pledge, I would encourage you and your clients to do so, and to join the ranks of more than 100 companies and trade organisations in Hong Kong who had already pitched in.

Way Forward for Mediation in Hong Kong

The Working Group on Mediation has now completed its work according to its terms of reference. Going forward, in order to continue with the momentum built up in the development of mediation in Hong Kong by the Working Group, I am in the process of setting up a Mediation Task Force. This new body will advise on and assist in the implementation of the recommendations set out in the Report of the Working Group.

Some of the key issues identified from the public consultation that the Mediation Task Force will be focusing on include:

- * Continuing with the public education and promotion of mediation;
- * Secondly, accreditation and training of mediators through the establishment of a single accreditation body. There has been some controversy as to the manner in which we arrived at accreditation, but we received quite strong views from the consultation that there should be a single body and that the process should be expedited. So, we will be looking at that very closely with the stakeholders;
- * Thirdly, the promulgation of a Mediation Ordinance. My department will be responsible for pursuing that. As you know, for those of you who have read the Report, we in fact have decided that there are certain essential components of the mediation procedures, features like confidentiality and so on, which will be strengthened by the existence of a legislative framework.

Conclusion

Ladies and Gentlemen, Hong Kong aspires to be the leading regional dispute resolution centre. We shall continue to make the most of our unique and strategic position as the most international city and the only common law jurisdiction within the PRC.

About 3 weeks ago on October 25, I signed a Co-operation Arrangement with the Vice Chairman of the China Council for the Promotion of International Trade (CCPIT), which is the overseeing body of the China International Economic and Trade Arbitration Commission (CIETAC). One of the aims of the Arrangement is to strengthen the cooperation between the arbitration and mediation bodies based in Hong Kong and bodies like CIETAC of the Mainland.

The arrangement is yet another confirmation of the role of Hong Kong in providing legal services for and fostering legal cooperation with the Mainland, as she continues to march into the global economy.

Well, I will stop here. You have an exciting Workshop programme on the practical aspects of mediation ahead of you and I wish you all a successful Workshop. Thank you very much.

Ends/Friday, November 12, 2010