

Keynote address by Secretary for Justice at Asia Pacific International Mediation Summit in India (English only)

The following is the keynote address delivered by the Secretary for Justice, Mr Rimsky Yuen, SC, today (February 15) at the Asia Pacific International Mediation Summit held in India:

"Developing Mediation: Sharing the Hong Kong SAR Experience"

Distinguished guests, ladies and gentlemen:

First of all, may I express my gratitude for inviting me to this Asia Pacific International Mediation Summit, and also for giving me this opportunity to address such a distinguished audience.

The Asia Pacific region is a region of diversity. Different jurisdictions have different legal history, different legal culture and different historical background. However, mediation knows no boundary, and is a form of dispute resolution which can overcome the challenges of different legal systems. I have no doubt that different jurisdictions can join hands to build a better foundation and a common platform for the future sustainable development of mediation.

With this in mind, the topic I have chosen for this morning is "Developing Mediation: Sharing the Hong Kong SAR Experience". I intend to share with you the experience of the Hong Kong Special Administrative Region (HKSAR) in developing and promoting mediation as a means of dispute resolution. By so doing, I have no intention to suggest that the HKSAR model is necessarily the correct model, still less the only correct model. Far from it. It is plain that each jurisdiction would have to search its own path. My intention is to offer our experience, so as to hopefully trigger more exchanges of experience amongst jurisdictions interested to develop and

promote mediation.

Overview

Mediation, as a means of dispute resolution, has been used in Hong Kong for a considerable period of time, especially in the context of family disputes and construction disputes. However, admittedly, the developments that have made mediation an integral part of the dispute resolution landscape only took place in the past decade (and especially since 2007). In less than a decade, not only has mediation become much more popular than before, it has since developed into a form of deeply rooted dispute resolution culture in different sectors of the Hong Kong community.

This development, as I see it, is the result of the combination of various factors, including: (1) government policy; (2) an appropriate legislative framework; (3) strong institutional support; (4) joint efforts of the legal and dispute resolution communities; (5) extensive promotion and publicity efforts.

Government Policy

Let me start with government policy. For years, by capitalising on its strong common law tradition and modern legal infrastructure, the HKSAR Government has been consolidating and promoting the HKSAR as a centre for international legal and dispute resolution services in the Asia Pacific region. As far as mediation is concerned, this objective was first formally announced in the 2007 Policy Address. (For those who are not familiar with the situation in the HKSAR, Policy Address is the government policy paper of the highest level published on an annual basis.) To demonstrate our continuous commitment, this policy objective was reiterated in even clearer terms in the 2014 and 2015 Policy Addresses.

You may ask why the HKSAR Government places great importance on dispute resolution, including mediation. We believe there are at least three good reasons.

The first reason concerns the rule of law and access to justice. Lord Bingham, in his well-known book *The Rule of Law*, identified eight elements when explaining the concept of the rule of law. One of the eight elements is dispute resolution. According to Lord Bingham, "[m]eans must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve" (Note 1).

Traditionally, access to justice was equated with access to court. However, as the concept of civil justice evolves, this is no longer the case. As the Chief Justice of our Court of Final Appeal observed in another mediation conference, "... the administration of justice includes as an integral activity the resolution of disputes to arrive at a just, proper and legally justifiable result. Mediation fits into this rubric." (Note 2) In this regard, it may also be pertinent to note that access to justice has been defined broadly by the European Union to include not only access to court, but also access to out-of-court or extra-judicial dispute resolution (Note 3).

Second, we believe dispute resolution has a close relationship with economic development (which is of crucial importance to the HKSAR as an international financial centre). Effective dispute resolution regime plays a significant role in protecting private properties and enhancing confidence in commercial activities, which in turn promotes economic development.

The third reason is a sociological one. A fair, just and cost-effective dispute resolution regime is vital in maintaining social harmony. It enables citizens to have their disputes resolved through proper channels, so that their

grievances can be properly addressed and differences effectively resolved.

To take forward the government policy of promoting mediation, the Department of Justice has established various cross-sectors committees at different stages to work on the relevant aspects. The first one is the Working Group on Mediation, which was established in 2007. It published its report in February 2010, setting out 48 recommendations covering three important areas, namely, regulatory framework, accreditation and training, as well as publicity and promotion. One of the key recommendations was the need to enact a mediation legislation, which I will deal with later. The second one is the Mediation Task Force, which was established in late 2010, and which was tasked to implement the numerous recommendations made by the Working Group. This Task Force completed its tasks by late 2012, and was replaced by the Steering Committee on Mediation, which is the current committee assisting the HKSAR Government in the promotion and development of mediation.

Legislative Framework

Mediation cannot be conducted in a legal vacuum. Some jurisdictions have specific legislations governing the conduct of mediations, and some do not. In the case of the HKSAR, the Mediation Ordinance was enacted in June 2012 and came into effect on January 1, 2013, following the recommendation of the Working Group on Mediation.

Apart from taking heed of the international trend (as illustrated by, for instance, the EU Directive 2008/52 and the UNCITRAL Model Law on International Commercial Conciliation), we take the view that the enactment of the Mediation Ordinance can remove uncertainty, enhance clarity and promote accessibility.

In particular, the Ordinance removes any uncertainty

created by case law over the extent of confidentiality (which is the cornerstone of mediation). In this regard, section 8 of the Mediation Ordinance sets out the fundamental principle that a person must not disclose mediation communications, which is followed by a list of the exempted situations where mediation communications may be disclosed. In addition, section 9 thereof stipulates that mediation communications may be admitted in evidence in any proceedings (including judicial, arbitral, administrative or disciplinary proceedings) only with leave of the court or the tribunal pursuant to the requirements set out in section 10.

Besides, by stating the legal position concerning the key issues relevant to mediation, the Ordinance enables mediation practitioners and end-users to have a quick understanding of the legal position in a clear and accessible manner, and thereby obviates the need of having to plough through the case law. This advantage is not without significance since not every mediation practitioner or end-user has legal training.

In short, the Mediation Ordinance encourages the use of mediation by ensuring confidentiality, while at the same time preserves the flexibility of the mediation process.

Institutional Support

Government efforts alone would not be sufficient to promote and maintain a sustainable development of mediation. Supports from other sources are definitely necessary.

As in the case of some other common law jurisdictions, civil justice reform and the support of our independent judiciary provide additional impetus to the development of mediation in the HKSAR. One of the most important impetuses, perhaps, is the HKSAR Judiciary's introduction of Practice Direction 31 ("PD 31"). This PD 31 was introduced as part of the Civil Justice Reform and came into effect on January 1,

2010. With the exception of certain specified legal proceedings, PD 31 applies to all civil proceedings in the Court of First Instance (Note 4) and the District Court which are begun by writ. Under PD 31, all litigants of the relevant legal proceedings are required to make genuine attempts to settle their disputes through mediation. Failure to mediate without a reasonable explanation may attract adverse costs consequences. Besides, the HKSAR Judiciary has promulgated other Practice Directions for specific proceedings, including personal injuries claims, building management disputes, probate and related disputes as well as shareholders disputes, which contain similar requirements.

In addition to Practice Directions, the HKSAR Judiciary has set up a Mediation Information Office within the High Court Building with a view to assisting litigants to make the best use of mediation in resolving their disputes. Further, Mediation Coordinators' Offices have been set up in the Family Court and the Lands Tribunal, so that appropriate assistance can be provided.

Another form of support which is also of crucial importance is the provision of legal aid for mediation. In this regard, the Legal Aid Department has been very supportive. Initially, legal aid was only made available in matrimonial cases. Since 2009, legal aid has been extended to all forms of civil proceedings covered by our legal aid schemes. The financial aids so provided cover mediators' fees and related expenses incurred by the legally aided persons undergoing mediation in the course of the aided proceedings. By way of example, in the year 2014 alone, legal aid for mediation was granted in a total of 974 cases (out of which 148 were matrimonial cases).

The statistics provided by the Legal Aid Department show that from April 2009 to December 2014, of the legally aided cases that proceeded to mediation, about 58% of them resulted in settlement. Hence, the availability of legal aid for

conducting mediation in legally aided proceedings has greatly facilitated the satisfactory disposal of those legally aided cases.

Support from the financial sector is also worth noting. In October 2008, one month after the collapse of Lehman Brothers, the Hong Kong Monetary Authority appointed the Hong Kong International Arbitration Centre to administer an Investment Products Dispute Resolution Mediation and Arbitration Scheme to resolve the Lehman Brothers-related mini-bond claims between banks and small investors. The success of this scheme eventually led to the establishment of the Financial Dispute Resolution Centre (FDRC) in November 2011 jointly by the Hong Kong Monetary Authority and the Securities and Futures Commission. The FDRC is a non-profit making company limited by guarantee, and is responsible for administering an independent Financial Dispute Resolution Scheme to resolve financial disputes between individual customers and financial institutions by adopting the approach of "mediation first, arbitration next".

Joint Efforts of the Legal & Dispute Resolution Sectors

The quality, competence, professional ethics and integrity of mediators are crucial in inspiring public confidence in the use of mediation as a means of dispute resolution. Further, to ensure that mediation will enjoy a sustainable development, the proper training of mediators is equally important.

One of the challenges faced by the HKSAR, as may be perhaps also faced by other jurisdictions, is how to ensure professional standards on the one hand, and at the same time, guard against over regulation (which may have the effect of stifling the healthy development of mediation). We also believe mediation should be best promoted as a multi-disciplinary art of dispute resolution, and hence the practice of mediation should not be confined to the legal

profession. Instead, non-legal professionals should be encouraged to join the mediation circle.

At the end, the HKSAR chose self-regulation. This is the reason why the Mediation Ordinance I mentioned earlier does not contain any provisions dealing with the qualification or accreditation of mediators, but instead contains a provision aimed to encourage non-lawyers to practice mediation (Note 5).

Following the recommendation of the Working Group on Mediation, the Hong Kong Mediation Accreditation Association Ltd. (HKMAAL) was incorporated on April 2, 2013. It is a non-statutory, industry-led body tasked to deal with the issues of accreditation, training standards and disciplinary matters concerning mediators. It has 11 corporate members, including the four Founding Members, namely, the Bar Association, the Law Society, the Hong Kong International Arbitration Centre and the Hong Kong Mediation Centre. These bodies are the major stakeholders and their members are closely involved in the development and promotion of mediation in the HKSAR.

As at January 2015, HKMAAL has over 2,100 accredited mediators, and is now the largest single accreditation body for mediators in the HKSAR. To avoid conflicts of interest, HKMAAL itself does not offer training courses. The mediators accredited by HKMAAL have a very diverse background and come from different disciplines and professions, including legal, accountancy, architecture, medical, social work, just to name a few. The aim is to ensure that there would be a reasonably sufficient pool of skilled mediators with specialised knowledge and experience to cater for mediations involving different types of disputes.

Since its commencement of operation in April 2013, HKMAAL has put in place policies and standards concerning grand-parenting and accreditation. It has also formulated

standards of mediation training courses, and has devised a set of disciplinary procedure for addressing complaints against mediators. In short, HKMAAL is heading towards the direction of becoming the premier mediation accreditation body of the HKSAR, which is the very aim of its incorporation.

Apart from HKMAAL, another non-profit making organisation worth mentioning is the Joint Mediation Helpline Office jointly established in 2010 by eight professional bodies (namely, the Bar Association, the Law Society, the Hong Kong Mediation Council, the Hong Kong Mediation Centre, the Chartered Institute of Arbitrators (East Asia Branch), the Hong Kong Institute of Arbitrators, the Hong Kong Institute of Architects and the Hong Kong Institute of Surveyors.) Working closely with the Mediation Information Office but independently, this Joint Mediation Helpline Office provided assistance to parties (especially parties who are not legally represented) seeking to settle disputes via mediation.

Promotion & Publicity

To cultivate a mediation culture so that people from different sectors of the community are willing and prepared to resolve dispute by mediation, publicity and promotion are indispensable. This task of publicity and promotion is handled by the Public Education and Publicity Sub-committee, one of the three sub-committees established under the Steering Committee on Mediation.

Seminars and talks are held from time to time, catering for the different interests of different target groups. One example is the Mediation Week held in March last year, which comprised a 2-day conference with 46 local and overseas leading speakers including Lord Woolf. This conference alone attracted over 1,000 participants from different sectors of the community. In addition, the Mediation Week offered 18 other seminars and workshops devised for different specific sectors; there were also 24 mediation talks delivered to

primary and secondary school students, so that the younger generation can have a taste of mediation at an early stage, and so that peer mediation can be better promoted.

Apart from focusing on training to people in the community, the HKSAR Government does not neglect training for its own civil servants. The Department of Justice has been organising seminars and training for its own legal counsel, as well as for non-legal civil servants who may be involved in mediation. So far, over 1,000 civil servants without legal background have been trained in mediation, so as to ensure that the mediation culture can also be spread within the government.

Looking Ahead

So far, I have been dealing with what have happened in the past. Let me move on to briefly deal with the future, since the promotion and development of mediation is a continuous process. In short, the Department of Justice, with the help of the Steering Committee on Mediation and other stakeholders, are working on various initiatives to ensure a sustainable and healthy development of mediation in Hong Kong.

One of the key initiatives is the study on the need to introduce an apology legislation in the HKSAR. As in some other common law jurisdictions, the making of an apology may well have legal implications as it may be perceived to constitute an admission of liability. This legal concern often prevents parties to a dispute to offer an apology, even though we know full well that sometimes an apology at an appropriate time may be highly conducive to the striking of a settlement, especially in cases where monetary compensation is not the key consideration. With a view to doing away such legal concerns so as to enhance the possibility of settlement, the Regulatory Framework Sub-committee of the Steering Committee on Mediation has been tasked to look into the desirability and viability of introducing an apology

legislation in the HKSAR. The work has been progressing constructively, and we expect the report will be released in the near future.

Another initiative we are working on concerns the specialisation of mediation, with reference to specific types of disputes. One of the areas we are working on is the use of mediation to resolve intellectual property disputes. On top of facilitative mediation, we are exploring the use of evaluative mediation to resolve intellectual disputes (including licensing disputes) since the HKSAR is a key intellectual property trading hub in the Asia Pacific region. In this regard, I anticipate further announcements will be made in the next few months, followed by activities for attaining this objective.

The third area we will be looking into is the relationship between mediation and other forms of dispute resolution. Whilst we may not fully subscribe to Professor Frank Sander's concept of the "multi-door courthouse", we do see the desirability of strategically planning the future development of mediation against the bigger picture of dispute resolution. To this end, we believe there is both desirability and room to develop an appropriate relationship between mediation and other forms of dispute resolution, such as arbitration and expert determination. As the law of the HKSAR now stands, we already have sections 32 and 33 of our Arbitration Ordinance (Cap. 609) dealing with "Med-Arb" or "Arb-Med". We believe similar forms of "marriage" between mediation and other forms of dispute resolution can be further explored.

Concluding Remarks

Ladies and gentlemen, I am glad that mediation is flourishing and booming in the Asia Pacific region. May I conclude by making this remark. I firmly believe that jurisdictions within and beyond the Asia Pacific region do

not need to perceive each other as competitors, still less as rivals. Instead, we each have our strength and we can be perfect partners in the future development of mediation. The HKSAR stands ready to co-operate with other jurisdictions in taking the development of mediation to a new height, and we welcome further exchanges and dialogues on how there can be better co-operation amongst jurisdictions within the region and beyond. I hope to see you soon in the HKSAR, either making use of our mediation services or sharing with us your experience.

Thank you.

Note 1: Tom Bingham, *The Rule of Law*, (Allen Lane) (2010), Chapter 8 (at p. 85).

Note 2: See: para. 8 of the Welcome Address by the Hon. Mr. Justice Geoffrey Ma, CJ, delivered on 20 March 2014 (collected in *Mediate First for a Win-Win Solution 2014*, at pp. 2-3).

Note 3: See: Simone White, "Directive 2008/52 on certain aspects of mediation in civil and commercial matters: a new culture of access to justice?" (2013) *Arbitration* 52, at 54.

Note 4: In the HKSAR, the Court of First Instance is part of the High Court.

Note 5: See section 7 of the Mediation Ordinance.

Ends/Sunday, February 15, 2015