Speech by Secretary for Justice at EMBA Forum 07-08 "Law, Society and Business"
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Following is the speech by the Secretary for Justice, Mr Wong Yan Lung, SC, at the EMBA Forum 07-08 "Law, Society and Business" today (February 25):

Professor Chan, distinguished guests, ladies and gentlemen,

Introduction

The topic today is extremely wide. Your Programme Director Professor Andrew Chan assured me that I could speak on anything I liked. I had informed him that I am going to concentrate on one very important development of the law, namely, mediation, and how it may impact on society and business in Hong Kong. I hope the context of considering mediation as an alternative to traditional litigation will provide food for thought as to the function of the law in society and business.

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

Law and Business

We need the law to set the parameters for doing business. We need the law to help resolve commercial disputes. The quality of the law, the efficiency of corporate governance, 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 and attractiveness of the business environment.

Protection of economic rights

Effective protection of property rights and economic rights is a pre-requisite for the success of a market economy and a financial centre. The right to private property of individuals and companies is protected on the constitutional level by the Basic Law (and has generated quite a few important cases). In addition, we of course have a whole range of laws regulating companies, partnerships, trade, contracts, sale of goods, and special types

of business activities, some of which are backed up by criminal sanctions, and all of which are developing with the changing world.

Corporate governance

Hong Kong's stock market is the seventh largest in the world and the third largest in Asia. "CG Watch 2007 – Corporate Governance in Asia" released in September last year by the Asian Corporate Governance Association regarded Hong Kong as the top market in Asia in terms of corporate governance quality. Last year, the total number of overseas companies establishing a place of business in Hong Kong reached a record high of 748. There were 52 newly listed companies on the Main Board in the first nine months of 2007. International investors looking to tap into the fast growing China market can invest in "H shares" and "red chips" listed in Hong Kong, with the assurance that the Mainland companies listed here meet international standards and practices. The Chairman of the Securities and Futures Commission, Mr Eddy Fong, said last Wednesday that "the reason for listing Mainland companies in Hong Kong was motivated by a conscious and deliberate policy to expose and subject Mainland enterprises to Hong Kong standards and fast track their transformation to world class companies that meet international norms on governance and performance."

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 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, 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, whose capacity has been increasing with the phenomenal growth of the economy of the Mainland and the corresponding international investments. We must have a full range of dispute resolution facilities to strengthen our position in this competitive world.

Arbitration

A long-standing alternative dispute resolution ("ADR") is of course arbitration, which is particularly useful in settling commercial and investment disputes. 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.

International businesses very often opt to settle their disputes by arbitration because arbitration does not attract as much publicity as litigation. Arbitration is also favoured because it is much easier to enforce arbitral awards in jurisdictions around the world, thanks to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. On the other hand, no similar international conventions are currently in force in respect of court judgments.

One of the policy goals that my department, the Department of Justice, is actively pursuing is the development of Hong Kong as an international arbitration centre. 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.

Hong Kong's proximity to the Mainland and the economic integration of the two economies under CEPA make it an ideal venue for arbitration of commercial disputes between Mainland enterprises and international businesses.

My department will continue to work hard to provide the best possible environment for conducting international arbitration in Hong Kong. Apart from applying the New York Convention, we have concluded an arrangement for reciprocal enforcement of arbitral awards with the Mainland in 1999. We are also 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. A consultation paper was published by my department in December and we hope to introduce an Arbitration Bill to the Legislative Council to implement the reform proposals after the conclusion of the public consultation exercise.

To enhance our role as a centre for international arbitration, in addition to helping the Hong Kong International Arbitration Centre, our own arbitration body, we are in discussion with reputable international arbitration bodies with a view to inviting them to establish a presence in Hong Kong, making Hong Kong a regional hub of arbitration.

Mediation

What is Mediation?

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

What actually is mediation? How is it different from an out-of-court compromise, which is happening over lawyers' telephone discussions or outside the court rooms day in and day out now?

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 the case and the mediator will ensure that everyone understands what the case is and will allow parties to make responses to help 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. The mediator will be careful not to disclose the confidential information provided by a party at the private meeting and will only disclose confidential information of one party to the other with the agreement and to the extent particularly allowed by the party concerned. In this way, the mediator is in the unique position to examine the important issues and needs of each party and therefore can assist the parties to identify and focus on those issues and needs and to generate creative options to resolve the dispute.

In mediation, the task is to have each party to focus on the party's real interests rather than its contractual or legal rights. Unlike litigation, which is a rights-based process, mediation is an interest-based process. 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. The mediator is able to, through mediation, identify the real need of each party and help to find and generate a viable solution to address it 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, ensures that the parties focus on the real issues and needs and assists in the generation of options to resolve the dispute by 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. It is a process that allows the parties to have control over its outcome, to communicate with each other effectively and confidentially through the mediator on a without prejudice basis without having the sensitive matters or information becoming public. The process is not binding on the parties until they sign the settlement agreement. The parties to a mediated settlement are more likely to be satisfied with and willing to implement the terms and conditions of the settlement as they voluntarily agree to those terms and conditions which are not imposed on them. It is generally acknowledged that the parties to a dispute are more likely to retain a normal and friendly relationship after mediation than they would after litigation.

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.

Overseas experience on mediation

The trends in other jurisdictions are definitely encouraging us to tap into the potential of mediation as an alternative, particularly in the commercial context.

Together with the Judiciary and other stakeholders, my department hosted a conference entitled "Mediation in Hong Kong: The Way Forward" last November, attended by mediation experts from different jurisdictions who shared with us their experience in the development and use of mediation.

We note that in Australia, Courts have now annexed mediation schemes, and have incorporated mediation into their general case management procedures.

In England, under the new Civil Procedure Rules that came into force in 1998, the Court must, as a matter of good case management, encourage the parties to use an alternative dispute procedure if the Court considers that appropriate. A survey referred to by our speaker from the UK examined the approach of 21 blue chip international companies to ADR. The results confirmed that in large corporations, mediation was the most used form of ADR. Out of 21 firms, only two did not use ADR and seven had mediation embedded in the organisation. In seven, it played a central role in their dispute resolution systems. It was evident that many of the largest law firms and their corporate clients have come to look upon mediation as a natural first step in resolving the disputes they are involved in.

We also heard from a speaker from the US how commercial mediation developed as business leaders in the United States were grossly discontented with the public justice system. Causes for the discontent were many and included costs, delay, harm to business relationships caused by litigation, limits of legal solutions, lack of certainty and uniformity and waste.

Commercial 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 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.

To give another example, some of you may recall that in the 1990s certain construction works of the new territory-wide strategic sewage disposal scheme met with serious problems due partly to unexpected levels of water inflow. They precipitated major disputes between Government and the contractor involving huge sums of money. The parties went into arbitration on liability, and substantial quantum issues were subsequently resolved within a matter of months through mediation. Had these quantum issues proceeded to arbitration, it would undoubtedly have taken many more years to finalise the outcome of the dispute proceedings.

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.

The Working Party on Mediation established by the Chief Justice has proposed another pilot scheme for voluntary mediation in petitions presented under section 168A and petitions for winding on the just and equitable ground under section 177(1)(f) of the Companies Ordinance (Cap. 32) where there is no allegation of insolvency concerning the subject company. The proposal is to encourage the parties to consider the use of mediation as a possible additional means of resolving purely disputes between shareholders not involving the interest of creditors of the subject company in a cost-effective and more expeditious manner.

Mediation and Society

Moving from commerce to community, 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.

High legal fees in Hong Kong is well-known and the number of litigants in person is increasing rapidly. Ever expanding conventional legal aid cannot possibly be the answer. That would place an intolerable burden on public finances. And there will always be a “sandwich class” who fall outside the means-test threshold and yet finding it hard to pay private lawyers. As regards high legal fees, the Law Reform Commission has recently studied the possibility of introducing conditional fees in Hong Kong. However, the commission concluded that such a scheme would not be viable in Hong Kong as there was little likelihood of appropriate insurance being available to litigants at an affordable premium to cover their opponent’s legal costs.

We want to help ordinary people resolve disputes by quicker and more cost-effective ways. Taking the smaller disputes to the judicial system is simply disproportionate. Setting up more specialised tribunals is not the answer and cannot be easily justified as a matter of public spending. We also want to foster a more harmonious society where seven million of us are living very closely to one another and mostly in high-rise buildings.

A lot of disputes and distress have arisen from building management matters. The severity of the problem can be illustrated by the large number of building management complaints to the ICAC. In 2007, there were over 870 cases, accounting for 41% of the total private sector complaints of the ICAC.

Community Mediation in Hong Kong

On the community side, mediation is particularly suitable for resolving matrimonial disputes. I hope none of you will have to go through this but you can imagine the painful situation where the estranged husband and wife spending huge sums of legal fees and months or even years in preparing divorce proceedings, digging out all the dirty linen against each other in court, and yet still have to sit down together to sort out the affairs of the children in the meantime.

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 scheme produced a high user's satisfaction rate and a high agreement rate. Because of this, it was decided to maintain the Mediation Co-ordinator's Office at the close of the pilot scheme. Although family mediation services are now provided on a fee-charging basis, some non-governmental organisations operate fee exemption and reduction schemes for those with financial difficulties.

On March 15, 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. During the period of the pilot scheme, 88 cases were mediated, of which 61 cases (69%) reached either full or partial agreement. Further, 69 (90%) of the respondents of a questionnaire survey have rated the scheme positively. 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.

Recently, the Lands Tribunal has introduced a pilot scheme to encourage parties to building management disputes to resolve their cases by mediation before or after they proceed with proceedings in the Lands Tribunal. Under the scheme, if there are means to resolve a dispute by mediation, unreasonable failure to make a bona fide attempt in mediation on the part of either party will be relevant conduct to be taken into account by the Lands Tribunal in deciding on costs. It is ongoing and we are monitoring the progress to see if it can be used to save building management disputes.

We see the potential of mediation in other areas such as labour and employment related disputes including discrimination issues. In fact, the Equal Opportunity Commission is required by law to attempt to settle discrimination claims through conciliation before litigation. In this connection, the Hong Kong Federation of Insurers has pitched in to promote the use mediation in employment compensation cases. In 2006, they donated HK$250,000 to the Hong Kong Mediation Council to set up a pilot scheme to promote settlement of employee's compensation claims by mediation. An injured worker assisted by this scheme got his compensation with satisfaction within weeks, as opposed to the average of two years had the case gone onto the conventional litigation route.

Way forward: Change of paradigm

To take mediation forward in Hong Kong, there has to be a fundamental change in culture and paradigm.

First and foremost, we believe informing the business sectors of what mediation is and what benefits it can bring is a matter of priority. In the US, big corporations sign pledges to use mediation as the first means to resolve their disputes. The pledges are to be signed by both the chief legal officer and chief executive officer of the corporation. We learn that the pledge has served to boost the awareness of mediation of the highest echelons of corporate thinking and "mainstreamed" the use of ADR. It is said that the pledge has had an enormous impact on stimulating the growth of commercial mediation and is a dynamic instrument for rational commercial practices in commercial conflict management.

Second, more resources will need be spent on educating the public as to mediation as an alternative. There are misconceptions about mediation including 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 mediation is therefore essential if it is to be accepted and used more widely. As the Chief Justice has suggested, all concerned and the public must gain and enhance their understanding of mediation and its advantages. To this end, training programmes need be increased and public education is necessary.

Third, there has to be a cultural change among many legal professionals, many of whom remain sceptical of the effectiveness of mediation and concerned with any erosion mediation may bring 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 mediation not just for the benefit of their clients but also for their professional development.

Fourth, 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 not have many different service providers, their emphases and target users are quite different and the number of providers is on the rise. 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 mediation.

Fifth, there is question as to the role of judge and mediation confidentiality. In some jurisdictions like Australia, the Federal Court Rules provide for judicial mediation and allow a Judge to act as a mediator. However, judges were reluctant as they were concerned that a judge's impartiality would be perceived to have been compromised if the judge embarked on private or secret communications with the parties and the legal representatives of the parties as part of the mediation process. Even if we do not make judges mediators, how much power should judges have to compell parties to mediate is itself a controversial issue. Experience in overseas jurisdictions has generated different schools of thought. First, some are convinced that voluntary take-up of invitations to engage in mediation is not effective and there must be certain degree of judicial compulsion to ensure mediation will take off. Second, there are others who believe willingness to participate in mediation is critical to its success and thus emphasis should be placed on facilitation, education and encouragement. And in between, background pressure such as appropriate costs orders may play a very significant role.

Sixth, there is the question whether we have to introduce legislation to push mediation forward effectively. There are pros and cons, advantages as well as drawbacks. However, it is observed that a number of issues such as confidentiality and conduct of mediator which are central to the interests of parties to mediation may best be dealt with by legislation. No doubt this important aspect will have to be carefully considered.

Conclusion

In his policy address delivered in October, our Chief Executive pledged to develop mediation services in Hong Kong. The Department of Justice has already set up a cross-sector working group to map out our plans to promote mediation. It comprises representatives from the Department of Justice, the Judiciary, the legal professions, the mediation bodies, academic experts, and other stakeholders.

The issues mentioned above will be taken up by the cross-sector Working Group on Mediation which I shall head. We will be mapping out the overall strategy to promote the development of mediation services in Hong Kong, and there will be a consultation.

The judiciary is also playing an active role in the promotion of mediation. Apart from the various pilot schemes mentioned above, the Chief Justice's Working Party on Civil Justice Reform had made proposals on the extent to which ADR, mediation in particular, should be brought in to the formal civil justice system. Having considered the responses to the proposals, the Working Party on Civil Justice Reform recommends measures to promote court-related mediation, to limit initial legal aid funding to that of mediation in suitable cases, and to provide the Court with power to make adverse costs orders in cases that I have mentioned earlier. Proposed amendments to the Rules of the High Court are now being scrutinised by a sub-committee of the Legislative Council. The Chief Justice had announced at the ceremonial opening of the legal year 2008 that the target date for the implementation of the Civil Justice Reform would be 2 April 2008. Hence getting ready for mediation is becoming a necessity for any far-sighted legal practitioner.

In the fast-changing business 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 appeal to you to take part in this paradigm shift and to make full use of mediation to benefit your organisation and the community.

On that note, may I end by wishing you all happiness and success in the years to come. Thank you.

Ends/Monday, February 25, 2008