Speech by Secretary for Justice at Second Quarterly General Meeting 2008 of the Hong Kong Institute of Architects (English only)
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Following is the speech by the Secretary for Justice, Mr Wong Yan Lung, SC, at the Second Quarterly General Meeting 2008 of the Hong Kong Institute of Architects on "Use and Benefits of Mediation in Resolving Construction Dispute in Hong Kong: A Review of Government Experience" today (June 23):

Ronald, Patrick, Bernard, Distinguished Guests, Ladies and Gentlemen,

Introduction

Thank you for this opportunity to talk to you about mediation.

Architects are perfectionists. But of course we live in an imperfect world. Just think of the torrential rain we had in the last two weeks and how it had adversely affected various construction works projects and created more. However elaborate the contract provisions are, matters like unforeseen ground conditions, post contract variations, disruptions in supply of materials, etc can trigger complex problems and disputes.

As sensible business partners of a project, all concerned would no doubt wish to have problems resolved in an amicably way where the interests of all parties are taken into account. It may be possible to resolve routine claims through the normal contractual processes of referral to the Architects or Engineers for decision. The parties will also deal with problems at meetings and endeavour to resolve their differences by direct negotiations with each other. Direct negotiations will usually work in most cases when the problems are not complicated.

However, when the differences are more complicated, they are likely to escalate into disputes. Direct negotiations may not work, in particular, when parties' stances are substantially different due to policy issues or the higher commercial risks at stake.

The conventional formal way of tackling a dispute would be to refer the dispute to arbitration or to the court. The objective then would be to obtain a binding determination by an arbitrator or by the judge on the dispute.

Such disputes, which invariably involve large sums of money, are always laden with complex factual and technical issues. To litigate these disputes is extremely labour-intensive, time-consuming and expensive. The amount of papers photocopied in discovery of documents can be a major environmental disaster.

The parties to these disputes are usually big names in the construction industry. Time and money will be better spent on business rather than in court. Many of the parties are extremely concerned with their business reputation, which will be tarnished by the mere publicity of the court proceedings irrespective of the result. Because the disputes are often highly factual, there is plenty of room for

misunderstanding. And because business reputation is at stake, it is not always easy to sit down and talk things out. However, the paradox is that many litigants were, before litigation began, good business partners whose longstanding relationship has taken years to build up.

Hence it makes sense to explore alternatives before a dispute is referred to arbitration or litigation. The growing trend worldwide is to try mediation.

I know I am probably preaching to converts here, judging from the fact that your Institute is among the first professional bodies in Hong Kong to run a pilot scheme for mediation in construction matters. But today perhaps let me try to see if I can further encourage along that line by telling you a bit more about the Government's experience in mediation and what we are doing in promoting mediation generally in Hong Kong.

Mediation

As stated in the introduction to your pilot scheme, "mediation is cost and time effective to settle disputes. It is a voluntary process in which the impartial third person, the mediator, will assist the parties through a structured process to communicate and discuss issues in a confidential setting. Through negotiations and better understandings of the needs and interests of each party, a settlement acceptable to both parties could usually result."

It is not an ad hoc settlement negotiation which takes place day in and day out outside the courtrooms and conducted by the lawyers. It is a structured process involving an impartial mediator. The mediator will usually start the process by holding a joint meeting with the parties at which the mediator will clarify the process and establish the ground rules. Each party will then present his or her case and the mediator will ensure that everyone understands what the case is all about and 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 an attempt to reach a settlement.

In mediation, the task is to help each party 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. Mediation will not always result in a settlement which can square with the relevant legal principles, but a settlement that the parties can live with and can shake hands after its completion. Hence, mediation may not be suitable for all kinds of disputes if you do need an authoritative legal ruling for whatever reason.

Construction Mediation

Mediation has been in use in public works construction disputes in Hong Kong since the late 1980s. From the early 1990s, it was adopted for all major public works

contracts, including the Airport Core Programme (ACP) contracts, where it was made a mandatory requirement of the dispute resolution procedure. It proved to be very effective in reducing the number of claims that would otherwise have proceeded to arbitration. The ACP contracts were specifically drafted for a unique project of great complexity implemented on a grand scale and for completion within a very tight timeframe. Understandably, special measures were required by necessity to enhance the successful implementation of the project and for the resolution of the resulting claims, including the provision and proactive use of mediation to resolve disputes.

In the light of the successful use of mediation in ACP contracts, the Government has continued to use mediation as a method of dispute resolution under its current Standard Form Contract procedures. The Government's Standard Form dispute resolution provision expressly provides that mediation will be conducted in accordance with the procedures contained in the Government's Construction Mediation Rules or any modification thereof in force at the date of such request.

Policy to use Mediation

The commitment of the Government to use mediation to resolve construction disputes is enshrined in the Administrative Guidelines issued together with the Government's Construction Mediation Rules by the Works Bureau. While recognising that mediation in not a panacea for all disputes, the policy requires that the merits of the disputes should be given careful consideration in all cases before deciding whether to agree to or to refuse mediation. The policy is to implement mediation wherever it is possible that a dispute may be resolved speedily and at less cost to the Government than if the dispute escalates to formal arbitration or litigation.

In a contract where a dispute has already been referred to arbitration or litigation, mediation may still provide a cheaper, speedier and more acceptable solution and by agreement of the parties can be adopted at any stage of the proceedings, while the arbitration or litigation is put on hold pending the outcome of the mediation. Mediation proceedings are conducted without prejudice to the parties' position in subsequent arbitration or litigation proceedings.

In our experience, the essential ingredients to a successful mediation are the quality of the appointed mediator and the willingness of the parties to resolve their disputes.

The Mediator

A good mediator requires great skills and this applies particularly for the conduct of substantial construction disputes, involving complex technical issues with substantial sums of money at stake. The mediator's role is to facilitate the negotiations of the parties in order to help the parties to arrive at a settlement on terms and conditions that are acceptable to the parties. Therefore a mediator will need to understand the issues in dispute, to possess good communication skills and the sensitivity to identify the real needs of the parties. It will also help if the mediator is

innovative in coming up with new dimensions of negotiation and settlement for the parties to consider.

The mediator will also need to have the trust and respect of the parties. As mediation is a confidential process and the parties may be expected to disclose to the mediator in private meetings sensitive information on a without prejudice basis, a mediator will have to be trusted by the parties otherwise the parties will be wary in revealing to the mediator important information relating to their fundamental underlying interests or objectives. A mediator has therefore to be very careful and disciplined in his meetings with the parties and must only disclose a party's confidential information to another when there is express authority for the mediator to do so.

Even with the express authority for disclosure, the mediator must be mindful to make the disclosure in a purposeful manner. Experience is that premature disclosure or late disclosure during the mediation process may be counter productive. The parties will have to rely on their mediator to decide when the confidential information they provide to the mediator will be disclosed during the mediation process in order to best facilitate their negotiation for a settlement of their dispute. This is not easy for the mediator and the mediator will need to rely on his experience, his understanding of the process, and his skills in fully utilising the information confided in him by the parties with a view to assisting them to reach agreement.

As regards the appointment of the mediator, Rule 5 of the Government's Construction Mediation Rules provides that this shall be by agreement between the parties. If the parties fail to agree, either party may request the Hong Kong International Arbitration Centre (HKIAC) to appoint a suitable mediator. I note that under your Pilot Scheme, your Institute has a team of qualified mediators and will nominate a mediator from your list upon receipt of an application to use the service.

In our experience, the parties have generally been able to agree a suitable mediator following discussions. The preferred candidates for appointment as a mediator in construction disputes are individuals with extensive professional experience in the construction industry. They can be practising architects, engineers, surveyors or lawyers who are familiar with the range of issues involved in construction disputes. Previous experience of acting as a mediator is also an important consideration, especially in large cases.

The abilities in understanding the issues, ascertaining the underlying interests of parties, assisting the parties to realise how realistic their respective stances are, and helping the parties to generate mutually acceptable settlement proposals are important qualities of a mediator. In recent years, due to the fact that construction mediation has been in use in Hong Kong for many years and to the substantial experience gained from handling these cases, we have indeed established a pool of experienced construction mediators in Hong Kong and we hope this experience will continue to grow and develop.

Willingness to Settle

Our experience is that parties who agree to mediate are generally willing to settle. The fact that in some cases, mediation does not result in settlement due to the nature and complexity of the disputes, does not mean there is no willingness to settle but rather that the parties were unable to reach agreement on mutually acceptable terms. Even cases which at first sight seemed incapable of resolution through mediation were able to benefit from the mediation process. For example, we have had cases involving very difficult legal issues which, as they involved important issues of legal principle, could not be settled by mediation. In such cases, the parties can proceed directly to arbitration on liability in respect of the legal issues and, having obtained the award on liability, then proceed to resolve the outstanding quantum issues through mediation.

There are a number of other considerations that increase the parties' willingness to settle. As mentioned before, these considerations relate to the benefits of using mediation to resolve disputes, including costs savings and the voluntary nature of mediation.

Our experience is that mediation incurs substantially less costs when compared with arbitration or litigation. The resources required to prepare for arbitration or litigation are much higher and may cause disruption to the efficient operation of the parties' business, including the allocation of valuable management resources and staff time to the conduct of the dispute. In addition, the winning party will not recover the full costs incurred in an arbitration or litigation, as costs will generally be awarded on a party and party basis.

Mediation is by definition a voluntary process. Parties are not compelled to mediate. If parties do not consider mediation to be conducive to settlement, or if they consider the terms of a proposed settlement unacceptable, they can terminate the mediation as and when they consider appropriate. In short, in contrast to arbitration or litigation, where the proceedings are conducted by the arbitrator or Court respectively, the parties themselves retain the conduct of the mediation process. They therefore have all the more incentive to ensure its success. The terms and conditions of a settlement agreement are not imposed on the parties, as with an arbitral award or a Court judgment, but are derived from the negotiations between the parties and their joint agreement to the resulting settlement.

Preparation for Mediation

Another essential ingredient to a successful mediation is thorough preparation by the parties. Mediation of a construction dispute is not a straight forward exercise. Preparation for mediation requires considerable amount of work, although it may not to the same amount as that required for preparation for arbitration or litigation.

In our experience, the Government's mediation team is required to conduct a detailed assessment of the legal and quantum issues, with the advice of independent consultant engineers and quantum and programming analysts as the case may require. The mediation team will carry out a careful assessment of the claims in order to prepare its negotiation position for the mediation. Based on the preparation, the mediation team will also obtain the necessary internal financial approvals from the

Financial Services and Treasury Bureau for the purposes of the mediation, although this approval will still be subject to obtaining final approval when a settlement is reached.

Promotion of mediation in Hong Kong

Ladies and Gentlemen, you may be aware that I am chairing a cross-sector Working Group on Mediation to work out an overall strategy to promote the development of mediation services in Hong Kong. This follows an announcement by the Chief Executive in his Policy Address last year. Issues that will be examined by the Working Group include public education and publicity, accreditation and training, and regulatory framework affecting the promotion and use of mediation in Hong Kong.

You may also be aware that the Judiciary is also playing an active role in the promotion of mediation. Last year, the Judiciary has 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 the parties who unreasonably refuse or fail to attempt 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 Alternative Dispute Resolution (ADR), mediation in particular, should be brought into 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 where mediation has been unreasonably refused after a party has served a notice requesting mediation on the other party or after mediation has been recommended by the Court. This is so called background coercion. Proposed amendments to the Rules of the High Court are now being scrutinized by 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 2009. Hence getting ready for mediation is becoming a necessity for all, not just legal practitioners.

Conclusion

Ladies and Gentlemen, your Institute is definitely commended for introducing and operating the Pilot Scheme and offering your members services as mediators. I wish you all success in operating the Pilot Scheme. The experience you gain in running the scheme will be useful to promote mediation as a means to resolve construction and building disputes in particular and generally to promote the use of mediation in our community.

There are good reasons for me to believe that architects will make good mediators; may be even better than lawyers.

Firstly, you are more innovative while lawyers are trained to suppress imagination but stick to rules and logic. You are more ready to think out of the box. Although I have heard that in Hong Kong, many architects are under pressure to behave like solicitors, having to maximize you client's interests by maximizing floor areas. Having said that, you are more creative.

Secondly, while lawyers are trained and duty-bound to establish his client's case and to demolish the opponent's, in your discipline as architects you are trained to achieve harmony, to balance between different elements, even conflicting elements: be it the interaction between metal, wood, water, fire and earth, and more practically, the relationship between man and nature, between modernity and heritage, and many more.

On that note of harmony, I wish you all good health and happiness. Thank you.

Ends/Monday, June 23, 2008