Concluding address by SJ at Conference on Civil Justice Reform (English only)
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The following is the concluding address by the Secretary for Justice, Mr Wong Yan Lung, SC, at the Conference on Civil Justice Reform this afternoon (April 16):

Chief Justice, distinguished judges, ladies and gentlemen,

A key feature in the Civil Justice Reform (CJR) is the greater use of mediation as a means to facilitate settlement of disputes.

We held an international conference entitled "Mediation in Hong Kong: The Way Forward" back in November 2007. Among the eminent speakers was Madam Justice Bergin from Australia. She told us about initiatives taken by the Australian courts to direct litigants to mediate, described by some as the "Spring Offensives" and the "Autumn Offensives". She urged that there was no other way to make mediation work apart from the compulsory route.

Court-ordered mediation is, of course, still controversial in the United Kingdom, and does not form part of our CJR. According to the Court of Appeal in Halsey, which you are familiar with, compulsory mediation would contradict parties' right to access to a court and a fair trial under Article 6 of the European Convention on Human Rights.

The debate over compulsory or mandatory mediation highlights the difficulty and the importance of maintaining a proper balance when the Court sets out to facilitate more efficient, expeditious and fair disposal of cases, which is the key objective of the CJR. Just how pro-active or rigorous should the Court be in case management? With its armoury significantly strengthened by costs and other sanctions, how far should the Court go on the offensive, without being "offensive"?

Consensus among stakeholders

Fortunately in Hong Kong, improvement in the administration of justice tends to take place on a consensual and harmonious basis. The CJR has been made possible after years of hard work involving all the stakeholders.

A majority of the recommendations under the CJR

involve amendments to primary legislation and existing rules and practices of the courts. The drafting exercise was a mammoth task in itself, and we from the Department of Justice did our best to assist including fronting up before the numerous Bills Committee meetings and also the sub-committee meetings.

The legal profession was consulted extensively on the draft Practice Directions and had time to familiarise with them before "D-Day". Training courses were run with the full support of the legal profession as well as the academic institutions.

These joint efforts were made upon the common goal to enhance access to justice, by reducing litigation costs and speeding up dispute resolution.

Improvements on access to justice can only be achieved within the applicable budgetary constraints. We in Hong Kong can take comfort in the fact that we are not facing any cuts in the judiciary's budget. The Administration has always been supportive of the judiciary in seeking sufficient funding. For the year 2010-2011, subject to approval of the Legislative Council later next week, there will be an increase of over 10% in the judiciary's budget.

Judicial resources are very precious. So are resources of the litigants (including the Government, as a litigant funded by general revenue and the private persons funded by legal aid or other means).

As regards civil legal aid, unlike other jurisdictions who are faced with possible shrinkage, upon completing the five-yearly review on the relevant criteria, the Administration is proposing, among other things, to raise the financial eligibility limits for the Ordinary and Supplementary Legal Aid Schemes by 50% and 100% respectively.

Promotion of mediation is another area which my department is working on in earnest. It has been elevated to the policy level of the entire Administration and featured in the Chief Executive's Policy Address in 2007.

In this area, again, we witness the same admirable consensus and joint efforts by almost all the stakeholders concerned. The cross-sector Working Group on Mediation, which I chair, comprises representatives of the Judiciary, the Administration, the two legal professional bodies, major mediation service providers

and the academic institutions. We have reviewed the current development of mediation and put forth over 40 recommendations for public consultation. The recommendations relate to public education and publicity to change people's mindset, accreditation and training to ensure the standard of mediators and a proposed regulatory framework to standardise certain aspects of mediation.

All these efforts will complement the changes made in the CJR to improve the access to justice in Hong Kong.

The Achievements

Although it is still early days for the implementation of the CJR, we are already seeing some positive signs. Gone are the days when civil procedure can be approached at a leisurely pace. Non-compliance with deadlines prescribed by the court orders is now viewed as a subversion of the case management system.

One does not have to look very far before finding judgements refusing a change to milestone dates, an adjournment, or leave to call an additional witness at trial. Even in public law litigation, where my department is more frequently engaged, Mr Justice Andrew Cheung just last month held that the substantive hearing date for an application for judicial review is in substance a milestone date and accordingly approached an application by a putative interested party to be heard in the spirit of the CJR.

In making sure that legal costs are kept in proper proportion and the judicial resources are fairly distributed and utilised, the Court will not be slow to curb expert shopping or succumb to a fait accompli presented by a party having procured expert reports unbeknown to the court. The Court will also readily invoke the new powers conferred upon it to determine interlocutory application without an oral hearing and specify the consequences of non-compliance.

But of course it is with the imposition of sanctions that the pinches are mostly felt. Pursuant to the new practice directions, we have seen the Court having acted more robustly with costs orders. For example, a litigant who acted unreasonably and increased unnecessarily opposing party's costs was ordered to pay costs on an indemnity basis. A plaintiff who failed to disclose an important fact on a statement of claim supported by a statement of truth was refused leave to

amend the pleadings and, in addition, had his claim struck out with costs on an indemnity basis. A plaintiff who failed to beat a sanctioned payment at taxation was ordered to pay costs on an indemnity basis with interest at 3% above judgement rate.

Need for fine-tuning

In the past two days, I have no doubt that you have had a lot more examples quoted to you. However, on the way forward, allow me to make some observations and echo some of the expert views already expressed.

First, many of the new practices remain untested by actual cases. For example, we are yet to see a case where someone is cited for contempt for making a false statement in a document verified by a statement of truth, or where a practitioner is visited with a wasted costs order. This, I hasten to add, may well be viewed as a demonstration of the success of the reform rather than its failure.

And of course Practice Direction 31 itself has only come into effect on 1 January this year. There are bound to be practitioners who remain sceptical about mediation. I have come across one or two who frankly admit they don't believe in mediation at all and fear that it might undermine the quality of justice in individual cases and in the long run.

As you know, certain cases have been identified as unsuitable for mediation by the Chief Justice's Working Party on CJR. These include cases raising constitutional issues, where rights are being tested, establishing principles and procedures, where the power imbalance between the parties is such that no fair agreement can be expected to result from the process, and where a party shows by conduct that mediation is being abused to the prejudice of the other party (e.g. where mediation is being used as a fishing expedition or a delaying tactic). No doubt we shall need the case law to help clarify the ambits of these exceptions.

Furthermore, the court system and the individual judges will need time and support to adjust to the new environment. Are they having enough time to read the papers at the pre-trial stage to assume the role of the robust case manager? The task is particularly onerous where cases involve litigants in person. With the percentage of hearings involving unrepresented litigants standing at 41% and 55% respectively in the High Court

and the District Court in 2009, the challenge is indeed a daunting one.

Need to evaluate scientifically

Second, as Lord Neuberger reminded us yesterday by reference to the seminal report prepared by Lord Justice Jackson, it is important to evaluate the effect of the CJR scientifically and statistically. In this connection, I am pleased to know that the monitoring work of the reformed system is in the safe hands of a Committee chaired by the Chief Judge, Mr Justice Ma.

Are the new court practices achieving the results one sets out to attain? Are they saving costs at the end of the day? The effectiveness and benefits have to be assessed on the basis of empirical data to be collected over a period of time.

In the same vein, on the benefit of mediation, I also urged at a mediation conference last month that relevant statistics should be kept. How much time and money can be saved by the use of mediation? Are the users satisfied? We need to actively build up an archive on successful mediation cases and maintain statistics to demonstrate the effectiveness of mediation.

Statistics such as the court-annexed mediation model devised by Lord Woolf having contributed significantly to a substantial reduction in the proportion of issued claims that have proceeded to hearing from 5.1% in 1999 to 2.9% in 2005. Statistics such as the survey quoted in this month's issue of the Hong Kong Lawyer among construction lawyers, who are repeat users of mediation, indicated that mediation has a settlement rate of 73% with a further 9% achieving partial settlement. We need more of these and more systematic and comprehensive monitoring. These are matters that all stakeholders have to work on diligently.

In collecting data on costs, it is also important to evaluate where possible the impact on the legal services and the legal profession, with a view to ensuring changes overall are sustainable and healthy.

Because of circumstances unique to Hong Kong, legal costs may sometimes escalate upfront without necessarily reducing the overall figure. Since the Court requires a lot more assistance from the lawyers at the pre-trial stage in terms of preparation and readiness, clients, including the Government as a litigant, need to pay the

lawyers, including counsel sometimes, sufficiently to enable them to get familiar with the cases pre-trial. In Hong Kong, where a good counsel's diary is always full, counsel engaged at an early stage may not necessarily be available at a later stage. Change of counsel may be inevitable especially when the Court nowadays may not fix the hearing in consultation with counsel's diary. Overall costs may well be jacked up instead of coming down in some cases.

Need for Change of Paradigm

Third, we have to work on a cultural change on the part of the litigants and their legal representatives. The new O.1A, RHC has already made it clear that the parties and their legal representatives shall assist the court to further the underlying objectives of the rules of court. Court users now have to be vigilant lest they run the risk of being vested with adverse orders as sanctions. However, something more is required in addition to sanctions.

Take mediation again, with which I am more familiar, a change of paradigm among lawyers and clients alike is called for. It is important to make sure that the new procedures are not just followed in letter but also in spirit. It is only when genuine attempts are made by all participants that confidence in mediation as a meaningful alternative to litigation can gradually be built. To pay it lip service by merely satisfying what may suffice to be a minimum level of participation, in order to ward off adverse cost orders, will only spiral into a self-fulfilling prophesy of failure. That would only serve to reduce mediation to a "tick box" as part of the litigation process.

Unless done wholeheartedly, the mediation protocol may itself generate a separate set of costs which does not help in reducing, or in increasing the chance of reducing, the overall cost outlay.

Moreover, a new culture of accountability in litigation will have to be nurtured among the clients themselves. Somebody from the client will have to make a decision early as to whether to mediate and to settle. Someone senior will need to stand ready to take part in the mediation process. To be able to do that, the client will need to get on top of the case and the dispute without delay. They can no longer leave it to the lawyers or to the court or to the last minute. The line of authority in making decisions within an organisation will

also have to be streamlined.

Finally, as more and more people are getting accredited as mediators, we also have to make sure that there is sufficient work and that mediators can be adequately remunerated in order to ensure the new system is sustainable. At present, reliance is still placed on a fair amount of pro bono work or concessionary rates being levied by those who otherwise would be charging quite differently for their usual professional work.

Hence it is important to stimulate the interest, generate demand and to get the business and entire community to repose confidence in mediation. In this area, a culture-changing campaign needs to be pursued rigorously. We have to educate more and get more to make the "Mediate First" pledge. This is in fact one of the key areas which the Working Group on Mediation has identified and been working on. It is perhaps here where the change of paradigm is most needed and where we truly have to go on the offensive.

Thank you.

Ends/Friday, April 16, 2010