

Opening remarks by SJ at "Mediate First" conference (with photo/video)

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Following are the opening remarks by the Secretary for Justice, Mr Wong Yan Lung, SC, at the "Mediate First" conference at the Hong Kong Convention and Exhibition Centre this morning (May 11):

Chief Justice, distinguished guests, ladies and gentlemen,

Introduction

I still have very vivid memory of the first Mediation Conference held in November 2007, which the Honourable Madam Justice Bergin also attended and where she kindly shared with us the Australian perspectives on mediation. Everyone was so eager to learn. The panel discussions during the conference were hardly enough to quench our thirst and a seminar was quickly put together at the Jury Assembly Room of the High Court enabling us to pick the brains of our overseas experts further.

In the past four and a half years, a lot has happened on the mediation front, thanks to the concerted efforts of many. Today I am pleased to report that mediation as a dispute resolution method has indeed taken root in Hong Kong.

A core value encapsulated in mediation is harmony. Here in Hong Kong we have been fortunate to experience that harmony among almost all key stakeholders who have been working closely together to develop mediation. I would therefore like to take this opportunity to thank all of you who have taken part in the Mediation Working Group, the Mediation Task Force, and the various sub-groups, for your time and fruitful labour in the past few years.

The Working Group and the Task Force

Just to recap what has happened since the last Mediation Conference: First, a cross-sector Mediation Working Group was set up in early 2008 concentrating on the various critical areas identified. The Working Group Report with 48 Recommendations was published in February 2010 for public consultation. After the three months' consultation, a total of 88 written submissions were received.

To follow up on the recommendations and the responses,

a more compact Mediation Task Force was set up in December 2010. Specific goals were set and some are close to accomplishment. I will come to them in a moment.

The Civil Justice Reform and Legal Aid

But we must all acknowledge that the single most important impetus for the use of mediation is Practice Direction 31 on Mediation, introduced by the Judiciary as part of the Civil Justice Reform (CJR).

After Practice Direction 31 became effective on January 1, 2010, parties to litigation are required to comply with the procedure including the filing of Mediation Certificate, Mediation Notice and Mediation Response. This procedural requirement ensures the parties and their legal advisers would make genuine efforts to settle their disputes through mediation prior to litigation. One important motivation or driving force is that a party will have to face an adverse costs order if he fails to engage himself in mediation without any reasonable explanation.

The change of the landscape is significant and readily felt. Practitioners came to realise when it comes to mediation, Caesar has crossed the Rubicon. They, however reluctantly, would have to learn how to help as a mediator as opposed to fight as a gladiator. The number of legal practitioners seeking training and accreditation shot up. As of today, we have over 1,600 mediators who are accredited or have attained professional qualifications.

Another significant milestone in the development of mediation is the Director of Legal Aid's confirmation that expenses incurred by legally aided persons when undergoing mediation in the course of the legally aided proceedings are now regarded as costs incidental to the legal proceedings and thus covered by legal aid. In 2010, the Legal Aid Department approved funding for mediation in 555 assigned out cases. This is not the most up-to-date figure. But I have no doubt the figure would have been higher in 2011.

With mediation becoming an integral part of the dispute resolution regime in Hong Kong, it is imperative that parties to litigation can readily access the information as to what mediation is about, and how they can engage reputable mediation service providers. In this connection, apart from the Mediation Information Office set up by the Judiciary in 2010, the professional bodies themselves have also taken initiatives. In 2010, a non-profit-making organisation, the Joint Mediation Helpline Office Ltd, was jointly founded by

eight professional bodies, seeking to promote the effective use of mediation and provide mediator referral services.

Accreditation

The 1,600-plus mediators in Hong Kong are accredited by a number of different bodies, each adopting its own training and accreditation criteria. One key recommendation of the Mediation Working Group was to set up a single accreditation body. However, in view of the diversity of existing service providers and the obvious challenge to persuade them to surrender jurisdiction without legislative backing, the Working Group originally recommended the matter be reviewed in five years' time after mediation had become more entrenched in Hong Kong. However, the majority of the submissions received were overwhelmingly supportive of the establishment of a single body for accrediting mediators much sooner.

A main reason is the fear, and sadly the experience of some, that mediation could be reduced to a tick-box before litigation, and parties went through the formality engaging mediators of dubious qualifications or ethics charging insulting fees.

The Mediation Task Force therefore grappled with the subject of accreditation with an added sense of urgency. However, as anticipated, the task of setting up a single accreditation body proved to be easier said than done. First, what should be the role of the single accreditation body? Should it accredit individual mediators, or the assessors, or the organisation of mediators, or the courses? How does it enforce standards? How do we preserve flexibility and diversity while stipulating on standards?

Second, we also have to face very practical issues and vested interests. Mediation training and accreditation are admittedly lucrative businesses. The more established mediation service providers are understandably reluctant to lose their market niche and influence by merging with others into a common body.

However, with the hard work of the Accreditation Group of the Task Force and that of the major mediation bodies, I am pleased to report that broad consensus has eventually been reached among the major mediation bodies. We are now working on the detailed constitution of an industry-led single accreditation body, by the name of the Hong Kong Mediation Accreditation Association Limited (the Association). The Association will perform the role of the premier accreditation body for mediators in Hong Kong, discharging accreditation

and disciplinary functions. The current thinking is that the four major mediation service providers, namely the Law Society, the Bar Association, the Hong Kong International Arbitration Centre and the Hong Kong Mediation Centre, will be the founding members of the Association, as well as the anchor members of its Council which would include elected and co-opted members. It is also proposed that a body which joins the Association will have to terminate its own existing accreditation system.

It is expected that the Memorandum and Articles of Association of the Association will be finalised and registered with the Companies Registry within this year. This will no doubt be a major milestone in the development of mediation in Hong Kong. Let me thank all stakeholders concerned for your understanding and willingness to put long-term public interest first.

The Mediation Bill

Another significant target almost reached is the enactment of a Mediation Ordinance to provide a regulatory framework for mediation. By the time we published the Working Group Report in 2010 a broad outline as to what should and what should not be legislated upon had been put together. The response received was also overwhelmingly supportive.

Since then, the Mediation Ordinance Group of the Task Force worked closely with my department producing numerous drafts of the Mediation Bill, conducting further consultation among stakeholders, surveying overseas legislations, researching into numerous legal issues, engaging our legislators and addressing concerns raised by different bodies.

Among other things, the Mediation Bill seeks to set out a clearer regime regarding important issues such as confidentiality and admissibility of mediation communications. Later this morning, we will have opportunities to discuss with overseas experts more about mediation legislation-related matters.

We are hoping to enact the Bill within this legislative year, if not within May. My sincere hope is that the passing of this important bill, which is the product of such hard work, deliberations and consultations, and which is of such importance to Hong Kong, will not be jeopardised by any quorum or filibustering issues troubling our legislature at this moment.

As we engaged the public, other stakeholders and our

legislators, it became apparent to us many still do not fully understand what mediation is all about and the scepticism is quite entrenched in certain sectors. It confirms the importance of the third prong which we have been pursuing, and that is public education and publicity.

Public Education and Publicity

By now, many of you in Hong Kong must have come across our Mediation Ad on TV or radio using the concept of "untying the knot" or "unlocking the dispute". In government terms, the ad is called API, standing for "Announcement in the Public Interest". Absolutely right as the availability and use of mediation to resolve disputes is a piece of good news of great public importance.

I am pleased to report that since the airing of the API, we have seen a marked increase in the inquiries on mediation services. The Public Education and Publicity Group of the Task Force is now working enthusiastically on another API. It will be useful to sustain and strengthen the message we have put across to the public.

Today's conference is entitled "Mediate First". In fact, back in May 2009, we already launched a very successful "Mediate First" Pledge campaign with more than 100 companies and trade organisations pledging to consider the use of mediation first before resorting to other means of dispute resolution.

In parallel, we also launched the Pilot Project on Community Venues for Mediation in 2009 to identify suitable venues for mediation available at nominal or no fees, to promote such venues to mediators and the public.

To change the community's mindset involves a lot more concerted and sustained efforts of all sectors. In this connection, we have been encouraged to see many are pitching in and voting in favour of mediation by concrete action. One particularly noteworthy venture is the setting up of the Financial Dispute Resolution Centre (FDRC) by the Government with the support of the financial institutions, following the success of the Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme, which scored an 89 per cent settlement rate. The FDRC, for which establishment is expected shortly in mid-2012, aims to provide an independent and affordable avenue for resolving monetary disputes between individual clients and financial institutions, and will seek to settle such disputes through mediation first.

Conclusion

There are still a number of issues identified in the Working Group Report which remain to be considered. For example, whether there should be compulsory referral to mediation as in some other jurisdictions. However, I believe we would be better placed to come up with the right solution after mediation has gained a much firmer foothold in our community.

I remember Professor Dame Hazel Genn raised a question with me back in 2007 when we met: Why is the Hong Kong Government playing such an active role in promoting mediation? Well, because we see the merits and potential of mediation, as they are almost universally recognised.

By way of illustration, the mediation reports filed in the District Court regarding the CJR-related cases in the period between January 1, 2011, to December 31, 2011, showed that settlement was reached in 47.9 per cent of the cases which have undergone mediation.

We need hard facts. As the saying goes, "Prejudice is a great time saver. You can form opinions without having to get to the facts." At this critical stage in the development of mediation in Hong Kong, we need figures and statistics, to show clients' satisfaction, to prove the saving of time and costs, so as to conduct meaningful evaluation, to convince the sceptics, and eventually to successfully change the community's mindset. At the same time, we also have to be vigilant to keep abreast of what is happening in jurisdictions who have walked much further than us on the mediation path.

Today, we shall have the opportunity to share experience and exchange views with many experts from overseas on some very crucial elements and directions in the development of mediation. I am sure we shall all cherish and enjoy this time. To our guests from overseas, may I extend a big "Thank you" to you all for coming and for partnering with us to build an even stronger foundation for mediation in Hong Kong. I hope you will find some time to enjoy our vibrant city and to savour our food and hospitality.

Ends/Friday, May 11, 2012