The Speech of the Honourable Mr Justice Lam, Justice of Appeal

at the "Mediate First" Pledge Reception on 18 July 2013

Let me start by sharing with you a case I recently heard in the Court of Appeal. It was a partnership dispute and the parties are lawyers. They had been partners in a solicitor firm. The dispute was about the extent to which the partners who retired in 2005 from the firm should be responsible for contribution to the professional indemnity scheme. The amount involved was $85,000 odd. The case was tried in the District Court in 2012, it took 6 days. The unsuccessful party appealed, and the appeal was heard in 2013. At the end the appeal was allowed. We were told that for the appeal, one side incurred costs of about $500,000 whilst the other side incurred about $200,000. These were only the costs of the appeal. The costs of the trial would not be less since the appeal lasted only for one day whilst the trial took 6 days. At the end of the judgment, the court expressed regret that the parties should find it necessary to resort to such disproportionate means to deal with their dispute. And the court further said,

"Bearing in mind that these parties are solicitors by profession, I can only express the hope that they could be more sensible in advising their own clients in their litigation practices. Otherwise, they would not be acting in accordance with their professional duties under Order 1A r 3 and they should take steps to re-align themselves to the spirit of the CJR."[1]

[1] [2013] 1 HKLRD 1206

Mediation has established itself as a satisfactory mode of resolving dispute in Hong Kong. Since the implementation of the Civil Justice Reform and Practice Direction 31, many cases coming to court have been referred to mediation and in many instances parties were able to reach a solution through mediation. In the commercial sector, I believe we should promote a Mediate First culture. I shall take this opportunity to share with you three aspects of Mediate First: "What? Why? and How?"

What is Mediate First? It is the adoption of a policy of resolving disputes through mediation before resorting to other more drastic means like litigation or arbitration. In the commercial world, when conflicts arise, parties usually make attempts to negotiate to see if a solution can be agreed. There are cases where they can reach such solution by themselves. But there are cases where they cannot. Mediation is actually a form of neutral assisted negotiation. The mediator acts as a neutral person using his skills to assist the parties to explore and arrive at a mutually acceptable solution. It is a consensual process. Parties participate in it voluntarily. They also have to participate in it proactively. In mediation, no-one is forced to accept a solution. The mediator may analyse certain aspects of a case with the parties, sometimes together, sometimes in separate sessions. But ultimately it is up to the parties to decide for themselves what is acceptable and what is not acceptable in the light of their own practical needs. The mediator does not have the power to adjudicate on rights and wrongs. He does not have the power to order anything to be done. He only controls the process, making sure that the mediation is being conducted in a constructive and orderly manner.

Why Mediate First? Unlike litigation where the preparation works are mostly done by lawyers and the formulation of the case and proposed remedies are worked out by lawyers, in a mediation the parties themselves are in control and they decide where they want to go and devise their own solutions. The parties can focus more on their respective needs in assessing what solutions would be acceptable as opposed to the mere examination of rights and wrongs in the past according to some legal analysis. If they can come up with a solution, it would be their own solution as opposed to a judgment imposed on them by the court. In many respects, this is often a more satisfactory way to resolve a commercial dispute than litigation. The parties would have true ownership of their disputes instead of letting the lawyers and judges dictating what can be done and what cannot be done. Statements would not be ruled inadmissible or irrelevant. The mediator may allow some canvassing of the personal needs of the parties in the process which they would find difficult to ventilate in a witness box. And there will not be any hostile cross-examination as in a trial.

Further, mediation is also much less formal in terms of the paper works that needed to be done and it can be arranged to take place in a much shorter time frame. The process can be completed within a matter of weeks. The costs will be much less than those one might incur in the litigation process which usually takes years to finish.

Since the solution is mutually acceptable as opposed to being imposed upon the parties by the court, there is less likely to have problems in terms of the implementation of the solution. In other words, it is more likely that the parties would implement their common solution willingly without the need of taking steps to enforce it as in the case of court judgment. There is also less risk of an empty judgment.

How to Mediate First? I have mentioned that it is the adoption of a policy. But actually it is more than that. It is the establishment of a mindset on the part of the management to deal with conflicts in a collaborative manner and the cultivation of such a culture in the commercial world. Commercial entities which make a Mediate First pledge should take steps to establish such mindset and culture within their own organizations starting right from the CEO and its directors. They should learn more about mediation and how to use it as an effective means to deal with disputes. Training can be arranged for those in the organization. Then they could make known to those they have business dealings that their organization adopts a Mediate First policy and invite their partners to adopt similar policy. They can even include a "mediate first clause" into their contracts. They can engage professionals, like lawyers, who endorse similar policy. Whenever dispute arises, they would use mediation to find a solution. When they attend mediation, the representative must have a full understanding not only in terms of the dispute but also the needs of the parties. They must also be prepared in terms of having the necessary authority to settle at a reasonable level. They must show good faith in participating in the process. They must be prepared to work out a solution through active listening and considering the case of the other party. The adoption of a right attitude in participating in mediation is essential for reaching a solution through that process. Otherwise, it would only be a waste of time.

After a substantial number of commercial entities have embraced a Mediate First culture and the momentum has been built up, those who are lagging behind will need to follow. Commercial disputes need not end up in court, taking up substantial time and costs for its resolution. It would be much more fruitful and commercially rewarding for parties to spend their time and energy on constructive business dealings rather than litigating in court.

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