Speech for "Mediate First" Pledge Mediation Forum 2023 on "Synergy of Mediation in Case Settlement Conferences" "Ownership of Dispute and Party-Driven Dispute Resolution Strategy"

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Ownership of dispute

The parties themselves are the owners of the dispute. It is the transaction between the parties which generates the dispute. There are usually human and relational factors contributing to the escalation of conflict which the litigation process may not be able to adequately address. The parties themselves know better than anyone else about their own economic, commercial and social needs and interests which must be accommodated if a dispute is to be resolved satisfactorily. Even if a litigant engaged lawyers to represent him or her in the litigation, the ownership of the dispute would not be transferred to the lawyers.

Settlement of dispute by a non-adjudicative mode has to be consensual. But one cannot achieve party-autonomy without party-responsibility. Ownership of properties carries with it the incidence of benefit as well as burden. It is the same for ownership of a dispute. Whilst naturally a party may take advice from his lawyers in handling a dispute, the party must bear the ultimate responsibility on how the dispute is managed. Very often, litigants are prone to shy away from facing the consequences flowing from their disputes and they tend to pass the responsibility of litigation onto lawyers. This is not the correct attitude. Litigant has to understand that, like it or not, **ultimately he or she would have to bear the**

consequences personally (in terms of time, expenses, psychological stress and relational impacts) arising from the way in which a dispute is resolved.

As the owner of a dispute, the party should exercise his or her ownership by considering the different options in resolving it and the opportunity costs in respect of each option. The consideration is not confined to the terms of settlement but also the different means or process by which the dispute is to be resolved. Adjudication by court is a non-consensual option and it has its merits. But it is not the only means as there are other options. Even when negotiations fail, there are other alternative dispute resolution mechanisms. Case settlement conference (CSC) and the newly introduced mediator assisted CSC (M-CSC) are platforms provided by the courts in our civil procedures to facilitate consensual resolution of civil disputes. As demonstrated by the statistics presented this morning, properly used, these platforms can be the effective process to achieve settlement.

Therefore, litigant should explore using such platform and learn to engage the process constructively and effectively. As owner of a dispute, he or she should consider the pros and cons of the various options (on the substantive terms of settlement as well as the process to achieve resolution) and participate in the CSC or M-CSC with sincere efforts to settle. At least, the way he should seek to reduce the scope of the dispute.

Party-driven dispute resolution strategy

Though the litigation process is governed by the procedural rules of the courts and judges are more proactive in case management nowadays, a litigant should formulate his own dispute resolution strategy and roadmap.

Such strategy and roadmap should involve calculating the affordability (in monetary and non-monetary terms) of various options and assessing the appropriate timing for pursuing various Alternative Dispute Resolution (ADR) processes.

Whilst the rules of the court regulate the procedural roadmap of the court process, the parties are responsible for formulating their own ADR strategy and roadmap as a complementary scheme in their attempts to achieve consensual settlement.

An ADR strategy should address which ADR process would be suitable for the resolution of a particular dispute in light of its nature and the parties involved. For example, it may generally start with negotiations (with or without the assistance of lawyers). If negotiations do not bring about full resolution, the parties may consider mediation. If mediation is to be explored, one has to consider how to identify a suitable mediator and at what stage one should start the mediation process. Experience tells us that sometimes it may be more meaningful to start the mediation process after some ground works have been done by the parties on litigation. Moreover, different options could be utilised at the same time: e.g. sanctioned offers/payments could be made before or, depending on what transpired at the mediation, after it. Mediation can also lead to a M-CSC.

The 2022 version of the CSC scheme provides for parties-driven CSC or M-CSC. It is therefore open to the parties to include this ADR process in their ADR strategy. If they have undergone mediation without achieving settlement, they may review whether there could be a better chance of achieving the same when a CSC master, who is an officer of the court and usually has great dispute resolution skill and experience, is involved in a CSC or M-CSC. In that respect, they may consider with the mediator in the original mediation on the possibility of "continuing" the

mediation process by means of a M-CSC. Alternatively, such a suggestion may come from the mediator.

Lastly, I would repeat what I had previously said in 2020 concerning the objectives of CSC,

"What the Judiciary tries to achieve by way of this platform is to enable and ensure the parties themselves do make informed decisions as to … what is the effective way to resolve this dispute. Such informed decisions include considerations as to the costs and benefit of pursuing the litigation by way of adjudication. The Judiciary would also like to see if there are rooms for bridging the gap between the parties so that matter can reach a settlement, or if they can't settle everything, at least the issues can be narrowed down so that the whole process will be less costly and more procedurally economical. … [In other words, a CSC is a platform to make the litigants] fully informed as to how things can proceed and also to give settlement a chance in terms of discussing the matter positively, constructively and responsibly."