Speech for International Dispute Resolution and Risk Management Conference 2024 on "Ownership of Dispute and Party-Driven Dispute Resolution Strategy"

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Ownership of dispute

The effectiveness of a dispute resolution process often depends very much on the participation by the parties in the process in good faith with realism and proper preparation. Like other disputes, international commercial dispute arises from the dealings or the transaction between the parties. There are usually underlying human and relational factors contributing to the escalation of conflicts which a litigation process may not be able to adequately addressed. As 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, the parties themselves should acknowledge the ownership of their dispute. Even if the parties engaged lawyers to represent them in litigation, the ownership of a dispute could not be passed onto the lawyers.

Settlement of dispute by a non-adjudicative mode has to be consensual. Party-autonomy is not achievable without party-responsibility. Ownership of properties carries with it the benefit in terms of its use and enjoyment as well as the burden in terms of its maintenance and repair. The same applies to the ownership of a dispute. Naturally, a party may seek advice from his lawyers or get assistance from a mediator in resolving a dispute. Yet, the party himself must bear the ultimate

responsibility on how the dispute is actually handled. This important responsibility is easily overlooked. There are many instances where a party is only engaged passively in a dispute resolution process and looks upon their legal representatives to take care of its progress. Very often, litigants are prone to shy away from facing the consequences flowing from their disputes and pass the responsibility of litigation onto lawyers. This is not the correct attitude and those advising or assisting a party, including lawyer and mediator, should make a litigant aware of his ownership and responsibility in handling the dispute. Whether one likes it or not, a litigant ultimately has to bear the consequences arising from the way in which a dispute is handled. These consequences include impacts in terms of time and expenses spent on the process, psychological stress and relational ties. Sometimes the intangible non-monetary costs one has to pay is much more onerous than the financial burden of legal costs.

As the owner of a dispute, a 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 of options is not confined to the assessment of the proposed terms of settlement but also the different dispute resolution processes one chooses to embark upon. Adjudication by court or arbitration are non-consensual processes and they have their merits. But they are not the only means as there are other options. Even when negotiations fail, there are other alternative dispute resolution mechanisms. Mediation has become more and more popular as a dispute resolution process in the commercial world. In Hong Kong, we have developed hybrid processes incorporating some aspects of mediation in our litigation regime. Case Settlement Conference and the newly introduced Mediator assisted Case Settlement Conference are platforms provided by our civil procedures to facilitate consensual resolution of civil disputes. In these hybrid

processes, a judicial officer (assisted by a mediator) would steer the parties to a proactive discussion on different options in resolving a dispute. The judicial officer is in a better position to offer independent views on the legal merits whilst the mediator can act as the facilitator of constructive dialogue and assist the parties to explore various options in light of their respective needs and interests. Experiences in our courts show that these platforms, properly used, can be very effective in achieving settlement.

A litigant should explore the use of the appropriate platforms and learn to take part in the relevant process constructively and effectively for the resolution of his dispute. As the owner of a dispute, a party should consider the pros and cons of the various options and participate in the process he chooses with sincere efforts to settle or, at least, to reduce the scope of a dispute.

Party-driven dispute resolution strategy

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

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

An ADR strategy should address the choice between different ADR processes for the resolution of a particular dispute in light of its nature and the character of the parties involved and their current circumstances. If mediation is to be explored, one has to consider finding 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 groundworks have been done. Otherwise, there could not any effective meaningful dialogue which is a prerequisite to a settlement acceptable to both parties.

Since the litigant remains the owner of the dispute, he should be the one who decides on the option which he would pursue. A lawyer must explain all the pros and cons to his client to enable the latter to make an informed choice. Sometimes, a mediator can also assist in helping the parties to find the right mode to resolve their dispute.

The Judiciary in Hong Kong has made great effort in promoting the use of mediation and other ADR processes to facilitate settlement of disputes and we will continue to do so. After more than two decades of building up experience and awareness of the benefits of the use of mediation and ADRs, it is time for the parties and those advising them to be more proactive in finding the appropriate means to resolve their disputes and to take part in their own chosen process with the correct attitude and proper preparation. Hopefully, this would enhance the effectiveness and satisfaction with such process.