



Hong Kong Mediation and Arbitration Centre

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BY E-MAIL AND POST

Clerk to Bills Committee on Mediation Bill,
Legislative Council Secretariat,
Legislative Council Complex,
1 Legislative Council Road, Central,
Hong Kong

08 February 2012

Dear Sir/ Madam,

Mediation Bill
Submission of the Hong Kong Mediation and Arbitration Centre

Hong Kong Mediation and Arbitration Centre (the "HKMAAC") is in full support of the Mediation Ordinance to be enacted in Hong Kong. We are of the view that the Mediation Bill (the "Bill") is a key step to provide legal framework and foundation for mediation which aims at promoting, encouraging and facilitating the resolution of disputes by mediation, together with providing a legal basis for the protection of confidential communications throughout the mediation process.

With respect, HKMAAC would like to raise concerns and has the following comments on the Bill:-

1. Meaning of Mediation

Clause 4 of the Bill

The Report on Mediation published by the Secretary for Justice's Working group on Mediation recommended that the meaning of mediation should include, inter alia, the following elements:-

1. the process is voluntary;
2. process is conducted by an independent third party (the mediator) who will maintain a neutral and impartial role throughout the process; and
3. mediator will not in any way determine the dispute or give any opinion or evaluation to any party to the dispute.

We note that the aforementioned underlined elements are not being included in the Clause 4(1) of the Bill. If the Government regards these elements as important and intends to incorporate them into the mediation practices in Hong Kong, we are of the view that the provision should be redrafted so as to accommodating and highlighting these crucial features.

2. Confidentiality of Mediation Communications

Clause 8 of the Bill

Clause 8 of the Bill stipulates different situations under which the Mediation Communications may be disclosed. That being the case, the clause does not provide whether such Mediation Communications (e.g. records of mediation, mediation bundles, agreement to mediate etc) should be kept for any minimum period for record purposes or destroyed within any maximum period for the protection of confidentiality. By not addressing this aspect, the Bill could not serve as a clear guidance to mediation practitioners on what kinds of documents they should keep, and if any, for how long.

Other comments

3. Professional Immunity for Mediators

We notice that there is no express professional immunity provided for mediators in the Bill for the performance and conduct of mediation proceedings. Without such immunity, mediators, like other professionals, may be held professionally liable or negligence at common law. Under such circumstances, since the Bill does not stipulate any statutory requirements for the purchase of professional liability insurance, if the mediators are not protected under any professional insurance schemes, the public confidence on the usefulness of mediation would be undermined in case of any negligence. By the same token, individuals would have reservation to become mediators as they are not certain on their legal status towards their potential professional liability.

May we reiterate that we are in principle support to enact the Mediation Ordinance. We therefore sincerely hope that our views can be addressed to all the appropriate parties with due attention and consideration.

We hope that the Committee could take into account all the abovementioned comments before passing the Bill. Should you have any queries, you are more than welcome to contact us.

Yours sincerely

Albert SO

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