

Ms. Flora Tai,
Clerk to Bills Committee,
Legislative Council Complex,
1 Legislative Council Road, Central,
Hong Kong.

Jan. 7th, 2012.

By email to ftsang@legco.gov.hk

Dear Ms. Tai:

RE: Consultation on the Draft of the Mediation Bill

Thank you for your letter dated 4th Jan. 2012 to C&L Holdings Ltd. and our apology that we will not be able to send representatives to the Bill Committee on 13 Jan. but please find our written submission on the Mediation Bill for your information.

The Bill is important for Hong Kong to develop into a Dispute Resolution Centre in Asia. I therefore wholeheartedly support having a Mediation Bill for Hong Kong. This will mark an important milestone for the development of Mediation in Hong Kong.

The content of the Bill must address the concern of the general public/end users, practitioners/mediators, advisors/representatives to end users. All areas must be covered in order that everyone involved can have equal protection from the Bill.

Article 2: Agreement to Mediate can be by conduct, performance. Does it mean this Bill will not cover such other mediation other than in writing?

Article 5: My concern is the jurisdiction of mediation can be an argument with legal representatives. There are many cross border mediation and their agreement to mediate being signed in Hong Kong but mediation to be conducted outside of Hong Kong. We should encourage such practice in Hong Kong and we should take into account such cross border mediation. Flexibility on place of mediation is needed in this area.

Article 8 (2d): I think “reasonable grounds” are very low threshold for mediation communication to be disclosed. Parties may not want to disclose asset position during mediation as a result of this low requirement. Parties can also use this clause to request disclosure of mediation communication easily. Mediators can easily be challenged and requested to disclose mediation communication especially for parties who do not want to honour the settlement agreement. The required duration for mediation communication shall be kept needs to be stated and surely can not be unlimited.

Article 10 (1): I agree to judicial proceedings subject to leave of the Court, but I do not agree with arbitral or administrative proceedings. This will open up too much uncertainty for mediation communication to be admissible.

Article 10(2c) also gives too much room for mediation communication to be disclosed. The intention of mediation is not to admit mediation communication as evidence in future proceedings so that the mediation process can be flexible and effective. We must protect this privilege right of the mediator and parties.

Furthermore, I can see that there is much room for parties with intent to use Clause 9 and 10 in the Bill to challenge a mediator. I therefore think it is appropriate that certain indemnity clause is necessary to protect the interests of the mediator within the Bill. One of the objectives of the Bill is to promote mediation, without such protection to the mediator. I think the Bill will discourage interested individuals to become mediators because of the disclosure risk involved. The Bill should also consider waiver to pro-bono mediation, school, and community mediation which can be more flexible than commercial mediation.

In addition, it is important for Hong Kong to have a Single Accreditation Body to govern practitioners in terms of qualification requirement and disciplinary issues. However, the set up of such body needs to be open, transparent, maximum involvement of interested parties especially end users. The nature of mediation is parties' autonomy and therefore parties' involvement is even more important to the success of mediation.

Hope these comments can be of assistance and I look forward to the early legislation of a Mediation Ordinance in Hong Kong.

Sincerely yours,

Prof. Raymond HM Leung