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Bills Committee on Mediation Bill
Legislative Council
8 Jackson Road
Hong Kong

Dear Sir/Madam

The Mediation Bill

We refer to the Mediation Bill (the Bill) and would like to offer the following views on the Bill.

First we would like to note the "contradiction between legislating on mediation and maintaining the flexibility of the mediation process" which has already been drawn to the Committee's attention by some members of the Working Group.[1] The former Chief Justice of Nigeria at a Conference a few years ago said "don't let the lawyers take over mediation like they have arbitration"[2] he issued this warning in the context of observing how arbitration which originally was meant to be a fast, inexpensive alternative to lengthy and costly court trials has now become a very complex and substantial process involving often huge amounts of written evidence and lengthy legal argument by lawyers.

It is submitted that there is the possibility of the law of unintended consequences applying once the Bill goes into law. By creating legislation which we support strongly in its objectives[3]there is potentially a danger that it may provide grist for some lawyer's mill. As one lawyer has commented recently in the UK "there are no bounds to the ingenuity of the arguments of parties seeking to attack the effectiveness of a settlement agreement and therefore what has transpired during a mediation leading to such agreement" [4] However although we believe it is important to flag this potential problem, so far in our experience of cases in Hong Kong administered by us we have found that lawyers and their clients have been genuine in their attempts to mediate. They have been willing to accept settlement agreements that they have negotiated hard for even if the terms agreed are not ideal or perfect from their point of view.

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[1] LC Paper NO CB (2) 645/11-12(01) Ref CB2/BC/2/11
[2] World Jurist Association Conference Vienna 2009
[3] Mediation Bill Clause 3
[4] Andrew Manning Cox Wragge & Co

Meaning of Mediation

Clause 4 defines the meaning of mediation and we see no problem with 4 (1) albeit that this is not the way many ADR institutions would describe it. However, respectfully, we do have concerns with 4 (2) and 4 (3) as follows:

If under 4(1) mediation must comprise of a session and this can include under 4(2) "any activity arranging or preparing for such a meeting whether the meeting takes place or not..." and under 4(3) the meeting can be conducted by telephone. Does this mean for example a mediator having a pre-mediation telephone conversation with a party or their lawyer about the choice of venue is a mediation session and that for the purposes of the Ordinance a mediation session has therefore been conducted and then it is conceivable that recalcitrant parties can then assert "We conducted a mediation session fulfilling our obligations under the Mediation Practice Direction but we couldn't agree on the venue"

If the above scenario could prove to be the case then we submit that this is not our understanding of "mediation" because we regard the above activity as merely mediation preparation, not mediation nor indeed do we regard it as a mediation "session".

We do however agree completely agree with offering parties the opportunity to mediate over the telephone, video conferencing or any other electronic means as it is important that parties are afforded the most convenient forum that suits their case.

Without Prejudice Privilege

The Bill does not refer to the term "without prejudice" or the "without prejudice privilege" but Clause 10 appears quite clearly to be addressing the same elements of what would be included in any legislation dealing with evidence covered by the privilege. Whilst fully accepting that there needs to be exceptions to both the confidentiality and without prejudice principles in mediation, we submit that it should be noted that the success of mediation as a dispute resolution method is substantially founded on the principle that what takes place in the mediation is and remains inaccessible to the courts in subsequent litigation if the mediation does not result in settlement. The rationale is that parties would be disinclined to take part in mediation if they thought at a later date the information disclosed at mediation was liable to be used against them. In the Bill the tests for a court or tribunal to take into account before granting leave for disclosure do not it is submitted appear to be very high obstacles to overcome. (Clause10 (2) (b) "whether it is in the public interest or the interests of the administration of justice" (c) "any other circumstances") It is to be hoped that Hong Kong case law will in future demonstrate that these fears are ill-founded and that the courts will preserve this vital element of mediation to a very high degree.

We commend the drafters of the Bill for their hard work and appreciate that it is impossible to cover every eventuality or circumstance in the Bill. So we offer the above views in a supportive and collegiate spirit. This is an extremely important step in Hong Kong's mediation history and we are happy to fully support it in any way that we can in the future.

Yours sincerely,

Danny McFadden

Managing Director CEDR Asia Pacific