THE
HONG KONG
ASSOCIATION
OF
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香港銀行公會

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Bills Committee on Mediation Bill
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Sirs

Mediation Bill

We refer to the Mediation Bill ("**Bill**") which was gazetted on 18 November 2011 and first read by the Legislative Council ("**LegCo**") on 30 November 2011. We would like to submit the following comments on the Bill for the consideration of the Bills Committee.

1 Comments on section 8 (*Confidentiality of mediation communications*)

We consider that section 8 (Confidentiality of mediation communications) of the Bill is too broad in scope and does not serve its intended purpose of providing legal certainty regarding confidentiality of mediation communications. In particular, the following subsections need to be reviewed and reconsidered.

Section 8(2)(d)

Section 8(2)(d) of the Bill allows disclosure where it is necessary to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a child. It is undesirable for this exception to be set out in the Bill as it would create inconsistency with the current position on privilege in without prejudice communications in court litigation. Currently, mediation communications are akin to general non-mediated without prejudice communications. They are subject to privilege and not discoverable. It is not an exception for general non-mediated without prejudice communications to be disclosed for the reason of preventing or minimizing the danger of injury to a person or of serious harm to the well-being of a child. We do not see any strong reason to justify why mediation communications under the Bill should be treated differently from general non-mediated without prejudice communications.

Incorporated by Ordinance, Cap. 364
根據條例第364章成立

Section 8(2)(e)

Although disclosure under section 8(2)(e) of the Bill is subject to without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates, it is often difficult to avoid disclosure of identity in practice. It is noted that as from the experience of the recent issues around the Personal Data (Privacy) Ordinance, there were occasions where the names of the parties were eventually revealed by the media or through enquiry of the LegCo.

Further, whilst technically individual media publications or mediation settlements are not precedents, in reality the public may nevertheless consider (or have an expectation for) any publications or settlements as standards or precedents for damages. The public may not appreciate that each case turns on its own facts and that cases that appear similar on the face of it may actually have very different outcomes.

The Report of the Working Group on Mediation February 2010 ("**Report**") considered the common law position and various legislations in other jurisdictions on confidentiality and privilege in the context of mediation. Paragraphs 7.125 and 7.126 of the Report cited various legislative provisions in Australia and other jurisdictions concerning confidentiality and privilege. We note that of the various legislative provisions cited in the Report, the scope of permitted disclosure is much more restricted as compared to section 8(2) of the Bill. In particular, none of the cited legislative provisions allow disclosure for research, evaluation or educational purposes, as currently provided in section 8(2)(e) of the Bill.

Therefore, allowing disclosure of every detail of a mediation is contrary to the fundamental reasons for protecting confidentiality and privilege as set out in paragraphs 7.128 to 7.136 of the Report, i.e. to enhance the confidence of parties to mediation to speak freely and frankly and thus the value of mediation as an alternative dispute resolution mechanism. We have no objection to the publication of general statistics as to the outcome of the mediations. However, any descriptions of the details of the mediations will be entirely inappropriate and against international standards. Apart from the possible unintended disclosure of the details in a mediation, it may also create unnecessary expectations on the outcome of a mediation.

Section 8(3)(c)

Section 8(3)(c) provides that leave of the court or tribunal may be granted for any other purpose that the court or tribunal considers justifiable in the circumstances of the case. We consider that this section gives the court or tribunal too wide a discretion to allow disclosure of a mediation communication without setting out any guiding principles. Further, this section is unnecessary as the court or tribunal could consider established common law authorities in any event when determining whether to grant leave for disclosure.

2 Mediation Ordinance should not be applied to mediation conducted under the Financial Dispute Resolution Centre ("FDRC")

The Bill would also affect the implementation of the mediation process under the FDRC, which would be mandatorily applied to members of HKAB. We note that there are potential conflicts between the Terms of Reference ("**ToR**") and the Mediation and Arbitration Rules ("**Rules**") of the FDRC, and the Bill concerning confidentiality and admissibility in evidence. In particular, the exceptions to the confidentiality and admissibility principles set out in sections 8 to 9 of the Bill go beyond what is disclosable in the ToR and the Rules. For example, disclosures under sections 8(2)(a), (b), and (d), section 8(3)(b) and section 10(2)(b) are not expressly stipulated in the ToR and the Rules.

As the Bill would effectively override the ToR and the Rules detailing the mediation process under the FDRC unless otherwise specifically provided, we request that mediation conducted under the FDRC be included in Schedule 1 to the Bill (*Processes to Which this Ordinance Does Not Apply*). Mediation conducted under the FDRC is similar to the various mediation and conciliation schemes currently included in Schedule 1 to the Bill. It is a scheme specifically set up to resolve financial disputes between the financial institutions and consumers by way of primarily mediation, and is different from the general voluntary mediation in nature. There would also be a full set of self-contained rules and procedures governing the operation of the FDRC and the conduct of mediation. Being a unique scheme as such, it is therefore more appropriate for it to be excluded from the jurisdiction of the Bill in order to avoid unnecessary confusion to the general public and the industry when the FDRC starts operation.

3 Sanctions for breaching the rules of confidentiality and privilege

Paragraph 7.138 and Recommendation 38 of the Report provide that the Bill should include provisions dealing with the sanctions for breaching the rules of confidentiality and privilege, and that one option that may be considered is the introduction of an express statutory provision stipulating that the parties to the mediation and the mediator (and possibly any other parties who have an interest in the matter) may apply to the court for an injunction to restrain the use of confidential or privileged materials. Such provision is absent in the current Bill and our view is that such provision is essential in safeguarding the protection of confidentiality and privilege in the context of mediation.

4 Appointment of mediator

We note that the proposed section 7 of the previous draft of the Bill is deleted from the Bill. We welcome this amendment but would appreciate if it can be clarified whether the Hong Kong International Arbitration Centre, which is already well equipped to perform this function, is to serve as the default body for appointing mediators.

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We would appreciate if the Bills Committee could consider our views further and we welcome any opportunity to discuss this further.

Yours faithfully

Ronie Mak
Secretary