

Further Written Submission on Mediation Bill
by
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Background

- (1) Since the introduction of the Mediation Bill to the Legislative Council, there have been a few submissions addressed to the Bills Committee discussing the confidentiality provision - Clause 8(2)(e). The concern is whether the exception provided by the Clause will operate to the detriment of mediation parties by divulging information not expected by the parties including their true identity.

The Relevant Provision

- (2) Clause 8 (2)(e) reads:

“[A person must not disclose a mediation communication except] the disclosure is made for research, evaluation or educational purpose, without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates”

- (3) There is no doubt confidentiality is the cornerstone of Mediation as it is essential to promote candid and informal exchange regarding events in the past, provide a safe environment to disclose information and emotions and make parties talk realistically.
- (4) At a closer examination of the Clause, one may conclude that the scope of exception is in fact very narrow:
- First, the disclosure cannot reveal or be likely to reveal the identity of the person. Hence, if the manner in which a researcher intends to describe the case is likely to reveal the identity of a person involved in mediation due to the fact that Hong Kong is a small place or that a case is frequently reported in the media, such disclosure cannot be made at all.
 - Second, not only should the disclosure be made on an anonymous basis, the

provision further restricts disclosure which may lure any third parties to draw indirect inference as to the identity of the parties involved. In other words, even if a researcher avoids using parties' names, if the way he describes an event will give rise to a chance for the others to ascertain the identity of the persons involved in the mediation, he is not allowed to make such disclosure.

- (5) In reality, a mediator will not report more than necessary to achieve educational and teaching purposes, as doing so will put his own integrity at risk. More often, only information with educational value will be extracted and used with adequate disguise. A sensible researcher will also avoid publishing information which compromise the flexibility of mediation (e.g. settlement amount which may be treated as a precedent)
- (6) Hence, the chance Clause 8(2)(e) will operate to the detriment of the parties and undermine the effectiveness of mediation is very remote.

Overseas Practice

- (7) In USA where mediation is more popular, the promotion of mediation has been relying heavily on various mediation schemes and programmes operated by the courts and government. Their experience is that evaluation and quality assurance are conducive to the success of such schemes and confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programmes by responsible persons.
- (8) It is argued that under appropriate circumstances, researchers may be permitted to obtain access to statistical data, individual case files, make observations of live mediations, and interviews with participants in order to monitor the quality of mediation services provided via mediation schemes and programmes.
- (9) In Hong Kong, the mediation scheme operated by the Financial Dispute Resolution (FDRC) is one of those schemes which requires such close monitoring in order to safeguard public interest.
- (10) We also take note the *Model Standards of Conduct for Mediators* issued by the American Arbitration Association, a widely adopted code of conduct for mediators, stipulates at Paragraph A3, Standard V that "*If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality*". That is to say, disclosure for teaching, research or evaluation is permissible.

- (11) It is noted legislation in some states also contain similar provision: *“Nothing in this (confidentiality) section shall prevent the gathering of information for research or educational purposes, or for the purpose of evaluating or monitoring the performance of a mediator, as long as the mediation parties or the specific circumstances of the mediation parties’ dispute are not identified or identifiable.”*

Conclusion

- (12) Mediation in Hong Kong is still in its embryonic stage. Theories have yet to develop and there are very few publications on Mediation, particularly those relate to mediator skills and best practices which rely heavily on field work and empirical research. Clause 8(2)(e) will definitely facilitate the conduct of such research. Same as in arbitration, arbitral awards are published on an anonymous basis for academic studies.
- (13) We note cases with educational value are those complex ones which involve multiple parties and issues. If the consent of each and every participant has to be obtained, empirical study of such case types will be very difficult, if not impossible.
- (14) The inclusion of Clause 8(2)(e) in the Mediation Bill is necessary for the better development of Mediation in Hong Kong, in particular, for the facilitation of best practices research.
- (15) A proper guideline for researcher will further reduce the already slim chance of divulging undesirable information to the detriment of the parties and should be sufficient to ease the worry of the organizations concerned.

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