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

Dear Sirs

Mediation Bill

We write in relation to the Administration's responses ("Administration's Responses") to the comments made by the Hong Kong Association of Banks ("HKAB") (LC Paper No. CB(2)1499/11-12(03)).

Our review of the Administration's Responses has been facilitated by our meeting with representatives from the Department of Justice ("DOJ") and the Financial Services and the Treasury Bureau ("FSTB") on 12 April 2012 ("the Meeting"). In particular, from the Meeting, we understand that the Administration considers that properly regulated mediation research would be conducive to the development of mediation in Hong Kong, as reflected in the current formulation of Clause 8(2)(e) of the Mediation Bill (the Bill"). We understand this policy intention but we consider that this has to be carefully balanced against the importance of preserving confidentiality of mediation cases, especially if Hong Kong is to aspire to be a mediation centre going forward.

In this context, we note that Clause 8(2)(e) allows the disclosure of "mediation communication", which is widely defined in the Bill, for research, evaluation or educational purposes provided that such disclosure would not reveal or likely reveal, directly or indirectly, the identity of a person to whom the mediation communication relates. However, the criteria that "the disclosure would not reveal or likely reveal, directly or indirectly, the identity of a person to whom the mediation communication relates" would be subject to interpretation which may vary among the large bodies of individuals and institutions currently conducting "research, evaluation or educational" activities.

Chairman The Hongkong and Shanghai Banking Corporation Ltd
Vice Chairmen Bank of China (Hong Kong) Ltd
Standard Chartered Bank (Hong Kong) Ltd
Secretary Ronie Mak

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主席 香港上海匯豐銀行有限公司
副主席 中國銀行(香港)有限公司
渣打銀行(香港)有限公司
秘書 麥依敏

Further, the Administration's Responses provided that nothing in Clause 8 permits disclosure of any detail of the mediation agreement or the mediation settlement (e.g the settlement sum, breakdown or terms) as "mediation communication" specifically excludes "an agreement to mediate or a mediated settlement agreement" under Clause 2(1) of the Bill. However, "mediation communication" is still widely defined to include anything said or done, any document prepared, or any information provided, for the purpose of or in the course of mediation. We consider that any such "mediation communication" would inevitably involve discussions on the settlement sum, breakdown or terms etc.

The Administration's Responses also considered various legislations in other jurisdictions on disclosure of mediation communication for the purpose of research. However, we have to disagree with the Administration's view that "similar provisions are found in a number of overseas jurisdictions" as the legislations referred to by the Administration are not even mediation acts which deal primarily with commercial disputes. Rather, some of the legislations, such as the Community Mediation Centres Act (Cap 49A) in Singapore and the Community Justice Centres Act 1983 in New South Wales, concern resolving mostly social and community disputes through mediation at the local community centres. These legislations are therefore not a good comparison to the proposed mediation bill in Hong Kong. Further, most of these cited legislations only permit disclosure for the purpose of statistical analysis as provided in the Supreme Court of Queensland Act 1991 and the Alternative Dispute Resolution Act in Tasmania. Disclosure is also limited to any researches or evaluations carried out by or with the approval from the relevant governing authorities, as provided in the Community Mediation Centres Act (Cap 49A) in Singapore and Community Justice Centres Act 1983 in New South Wales, and not by "any person" as currently proposed in the Bill. We set out the relevant legislations to which the Administration referred in the table attached (Appendix 1), which we would strongly suggest the Bills Committee to consider.

For the above reasons, we propose that "mediation communication" be defined along the following lines (with our suggested changes in italics):

"mediation communication means but does not include an agreement to mediate or a mediated settlement agreement *or any details of such agreement to mediate or mediated settlement agreement that may be contained in any information or document referred to in paragraphs (a) to (c) above;*"

On the specific Clause 8(2)(e) of the Bill, we would like to comment further as follows:

1. Parties may expressly agree by contract to limit the scope of disclosure

We note the Administration's suggestion in relation to Clause 8(2)(e) of the Bill that if there is any further concern that any specific matter in the mediation communication may be prone to revealing the identity of the persons concerned and therefore should not be disclosed as a class, it is open to the parties to agree by contract to a more stringent disclosure regime. However, the relevant clause in the Bill is not drafted to reflect such intention. We recommend that a clause be included in Clause 8 (*Confidentiality of mediation communications*) to the effect that the parties to mediation may expressly agree by contract to limit the scope of disclosure in the event that any matters in the mediation communication are likely to reveal the identity of any of the parties concerned.

2. Disclosure by "a person"

Clause 8(2)(e) is currently drafted to allow "a person", i.e. *any* party to disclose mediation communication for research, evaluation or educational purposes so long as it does not reveal or likely to reveal the identity of the parties to the mediation. We believe that to protect the right to confidentiality of both parties to the mediation, the disclosee of this Clause 8(2)(e) should be restricted to the mediator only. It should not be subjected to the parties' view on whether a specific case is of any educational or research value, rather, the mediator is in a better position to assess whether this exemption is applicable. In addition, the meaning and scope of "*research, evaluation or educational purposes*" is vague, undefined and thus prone to be abused.

3. Timing of disclosure of mediation communication

With regard to timing of the disclosure of any mediation communication, we firmly believe the fact that a mediation has taken place or is continuing should remain confidential, not to mention that the details disclosed by the parties during mediation should be kept confidential. It is entirely inappropriate to allow disclosure at a premature stage of the mediation unless mutually agreed by the parties to the mediation and the mediator. With a view to promoting Hong Kong as a mediation centre, it is essential to ensure that parties to mediation are able to express their views freely without inhibition.

In the event that a mediation fails to resolve a dispute, the parties to the mediation may wish to further advance their cases in court or in arbitration. Allowing disclosure of any detail of a mediation before the case is finally resolved may not only be prejudicial to both parties and the case itself, it may also create unnecessary expectations on the outcome of any similar subsequent mediations, contrary to the general principle that the outcome of each mediation should be determined on its facts and merits and very often depends on the concessions the

relevant parties are willing to make. We understand that the court may grant interim reliefs if there has been actual abuse or threatened abuse of mediation communication. However, we stress that once the details of a mediation is leaked out, any damage done will not be adequately compensated by any interim or injunctive relief.

To address the concerns explained in (2) and (3) above, we suggest that Clause 8(2)(e) be amended along the following lines (with our suggested changes in italics):

(2) A person, *save for subsection (e) which is restricted only to the mediator*, may disclose a mediation communication if –

(e) the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates. *For the purpose of this subsection (e), “research, evaluation or educational purposes” is restricted to the purpose of assisting the public in developing an improved understanding of, and appreciation for, mediation; nothing in this subsection (e) shall mean the disclosure of such information to the public through any media irrespective of the platform used, including all types of broadcast, electronic and print media. For the purpose of this subsection (e), in no event should any such information be disclosed at a time before the final resolution of the disputes in the mediation case; or*

4. Unified guideline to regulate use of mediation communication

There is no single mediation accreditation body in Hong Kong and the mediation institutions may have different rules on regulating the use of mediation communication. We therefore urge the Government to issue a unified guideline on monitoring of the independent educational institutions, scholars, researchers and tutors in relation to the disclosure and use of mediation communication for genuine research, evaluation and educational purposes.

We appreciate that the Government may wish to consult the relevant parties in developing the unified guideline to ensure it is effective and workable. Given the importance of the unified guideline, we consider that it should be made publicly available after the Mediation Bill is enacted but before it commences into operation.



We hope that the Bills Committee would take into account our views in the deliberation of the Bill. If you have any questions or require any clarification, please do not hesitate to contact us.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Ronie Mak', is written over a horizontal line.

Ronie Mak
Secretary

Enc.

c.c. FSTB (Attn: Ms Julia Leung)

HKMA (Attn: Ms Meena Datwani)

SFC (Attn: Mr Jimmy Chan)

Table of relevant Legislations referred to by the Bills Committee on Mediation Bill

Jurisdictions	Legislation	Relevant Section	Quote
Australia	New South Wales 1 Community Justice Centres Act 1983	Section 29	<p>(1) A mediator shall not commence to exercise the functions of a mediator without first taking an oath before a justice of the peace in or to the effect of the form set out in Schedule 2 or making an affirmation in or to the effect of the form set out in Schedule 3.</p> <p>(2) A person who is or has been a mediator, a Director, a member of the staff of a Community Justice Centre or a person making an evaluation under section 26 or carrying out research referred to in paragraph (e) may disclose information obtained in connection with the administration or execution of this Act only as follows:</p> <p>(a) with the consent of the person from whom the information was obtained,</p> <p>(b) in connection with the administration or execution of this Act,</p> <p>(b1) if the disclosure is for the purposes of giving evidence:</p> <p style="padding-left: 40px;">(i) as to the fact that an agreement the parties have agreed is to be enforceable has been reached at, or drawn up pursuant to, a mediation session, and</p> <p style="padding-left: 40px;">(ii) as to the substance of that agreement,</p> <p>(c) where there are reasonable grounds to believe that disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,</p> <p>(c1) where the disclosure is made for the purposes of section 29A,</p> <p>(d) where the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the mediation session for the purpose of aiding in the resolution of a dispute between those parties or assisting any such parties in any other manner,</p> <p>(e) where the disclosure does not reveal the identity of a person without the consent of the person and is reasonably required for the purposes of research carried out by, or with the approval of, the Director or an evaluation pursuant to section 26, or</p> <p>(f) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.</p>

Jurisdictions	Legislation	Relevant Section	Quote
	<p>Queensland 2 Supreme Court of Queensland Act 1991</p>	Section 112(2)	<p>(1) An ADR convenor must not, without reasonable excuse, disclose information coming to the convenor's knowledge during an ADR process.</p> <p>Maximum penalty: 50 penalty units.</p> <p>(2) It is a reasonable excuse to disclose information if the disclosure is made:</p> <p>(a) with the agreement of all the parties to the ADR process; or</p> <p>(b) for this part; or</p> <p>(c) for statistical purposes without revealing, or being likely to reveal, the identity of a person about whom the information relates; or</p> <p>(d) for an inquiry or proceeding about an offence happening during the ADR process; or</p> <p>(e) for a proceeding founded on fraud alleged to be connected with, or to have happened during, the ADR process; or</p> <p>(f) under a requirement imposed under an Act.</p>
	<p>Tasmania 3 Alternative Dispute Resolution Act</p>	Section 11	<p>A mediator or evaluator may disclose information obtained in connection with a mediation session or neutral evaluation session only in any one or more of the following circumstances:</p> <p>(a) with the consent of the person from whom the information was obtained;</p> <p>(b) in connection with the administration or execution of this Act or any other Act under which a mediation session or neutral evaluation session is conducted;</p> <p>(c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property;</p> <p>(d) if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session or neutral evaluation session to any person, agency, organisation or other body and the disclosure is made with the consent of those parties for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner;</p> <p>(e) in accordance with a requirement imposed by or under a law of Tasmania (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth;</p>

Jurisdictions	Legislation	Relevant Section	Quote
	Victoria 4 Evidence (Miscellaneous Provisions) Act 1958 No. 6246 of 1958	Section 21M(1)	<p>(f) for the purpose of statistical analysis or evaluating the operation and performance of mediation and neutral evaluation processes.</p> <p>(1) A person who is or has been-</p> <p>(a) a mediator; or</p> <p>(b) a member or employee of a dispute settlement centre; or</p> <p>(c) a person working with or for a dispute settlement centre (whether or not for fee or reward)-</p> <p>shall not communicate to any other person or publish any information or document acquired by the person by reason of being such a mediator, member, employee or person unless the communication or publication-</p> <p>(d) is made with the consent of the person from whom the information or document was obtained; or</p> <p>(e) is made for the purposes of evaluating the operation and activities of dispute settlement centres and does not disclose the identity of any person without his or her consent; or</p> <p>(f) is made by a person who reasonably considers that it is necessary to disclose the information or document for the purpose of preventing or minimising injury or damage to any person or property.</p>
Canada	British Columbia 5 Notice to Mediate (General) Regulation, BC reg 4/2011 (Law and Equity Act)	Section 36(2)	<p>(1) Subject to sections 37 and 39 and subsections (2) and (3) of this section, a person must not disclose, or be compelled to disclose, in any civil, criminal, quasi-criminal, administrative or regulatory action or proceeding,</p> <p>(a) any oral or written information acquired in anticipation of, during or in connection with a mediation session,</p> <p>(b) any opinion disclosed in anticipation of, during or in connection with a mediation session, or</p> <p>(c) any document, offer or admission made in anticipation of, during or in connection with a mediation session.</p> <p>(2) Subsection (1) does not apply</p> <p>(a) in respect of any information, opinion, document, offer or admission that all of the participants</p>

Jurisdictions	Legislation	Relevant Section	Quote
			<p>agree in writing may be disclosed,</p> <p>(b) to any fee declaration, agreement to mediate or settlement document made in anticipation of, during or in connection with a mediation session, or</p> <p>(c) to any information that does not identify the participants or the action and that is disclosed for research or statistical purposes only.</p> <p>(3) Despite subsection (1), if and only to the extent that it is necessary to do so for the purposes of section 33 or 34, a party may disclose evidence of any act or failure to act of another party that is alleged, for the purposes of section 33, to constitute a failure to comply with a provision of this regulation.</p>
Singapore	6 Community Mediation Centres Act (Cap 49A)	Section 20	<p>A person who is a mediator, a Director, a member of the staff of the Community Mediation Centre or a person making an evaluation under section 16 or carrying out research referred to in paragraph (e) may disclose information obtained in connection with the administration or execution of this Act only as follows:</p> <p>(a) with the consent of the person from whom the information was obtained;</p> <p>(b) in connection with the administration or execution of this Act;</p> <p>(c) where there are reasonable grounds to believe that disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property;</p> <p>(d) where the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the mediation session for the purpose of aiding in the resolution of a dispute between those parties or assisting any such parties in any other manner;</p> <p>(e) where the disclosure does not reveal the identity of a person without the consent of the person and is reasonably required for the purposes of research carried out by, or with the approval of, the Director or an evaluation pursuant to section 16; or</p> <p>(f) in accordance with any order of the court or a requirement imposed by or under any written law.</p>