

立法會
Legislative Council

Ref : CB2/BC/2/11

LC Paper No. CB(2)1468/11-12
(These minutes have been seen
by the Administration)

Bills Committee on Mediation Bill

Minutes of the second meeting
held on Tuesday, 10 January 2012, at 4:30 pm
in Conference Room 2A of the Legislative Council Complex

Members present : Dr Hon Margaret NG (Chairman)
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan

Members absent : Hon Albert HO Chun-yan
Hon CHEUNG Kwok-che

Public Officers attending : Department of Justice

Mr Simon LEE
Deputy Law Officer (Civil Law)

Ms Sou CHIAM
Deputy Principal Government Counsel

Miss Shandy LIU
Senior Government Counsel
(Law Drafting Division)

Miss Venus CHEUNG
Government Counsel

Clerk in attendance : Miss Flora TAI
Chief Council Secretary (2)3

Staff in attendance : Mr YICK Wing-kin
Assistant Legal Adviser 8

Ms Wendy LO
Council Secretary (2)3

Mrs Fanny TSANG
Legislative Assistant (2)3

Action

I. Meeting with the Administration

[LC Paper Nos. CB(2)732/11-12(01), CB(2)645/11-12(02), CB(2)769/11-12(01), CB(3)154/11-12 and CB(2)644/11-12(01)]

1. The Bills Committee deliberated (index of proceedings attached at **Annex**).

Follow-up actions required of the Administration

Admin 2. The Administration was requested to –

- (a) reconsider whether a note should be inserted under the definition of "agreement to mediate" in clause 2 in the light of members' views;
- (b) consider members' views on the drafting of the Chinese text of the definitions of "agreement to mediate" (調解協議) and "mediation communication" (調解通訊) as well as clause 2(2) in the Bill; and
- (c) provide a written response to the views received by the Bills Committee on the Bill.

Date of next meeting

3. Members noted that the meeting to receive views from deputations on the Bill was scheduled for 13 January 2012 at 10:45 am.

Action

II. Any other business

4. There being no other business, the meeting ended at 6:55 pm.

Council Business Division 2
Legislative Council Secretariat
21 March 2012

**Proceedings of the second meeting of the
Bills Committee on Mediation Bill
on Tuesday, 10 January 2012, at 4:30 pm
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker(s)	Subject(s)	Action required
000128 - 000303	Chairman	Opening remarks	
000304 - 001206	Administration Chairman Mr LAU Kong-wah	<p>The Administration's briefing on its responses to members' concerns raised at the meeting of the Bills Committee on 21 December 2010 [LC Paper No. CB(2)732/11-12(01)].</p> <p>In response to the Chairman, the Administration affirmed that the accreditation systems and training requirements adopted by the four major mediation service providers in Hong Kong (as set out in Annex 4 to the Administration's paper) were of a standard comparable with similar overseas bodies and on par with the international requirements.</p>	
001207 - 002545	Chairman Assistant Legal Adviser Administration	<p>The Administration's briefing on its responses to the letter of the Legal Adviser to the Bills Committee dated 16 December 2011 [LC Paper No. CB(2)769/11-12(01)].</p> <p>In response to the Legal Adviser to the Bills Committee, the Administration clarified that the proposal was to set up a non-statutory industry-led single accreditation body for mediators in the form of a company limited by guarantee, instead of a statutory organization.</p> <p>The Legal Adviser sought clarification on whether a party to a dispute could resort to common law remedies if the other party had breached the rule of confidentiality.</p> <p>The Administration responded that a party could resort to common law remedies if the other party had breached the rule of confidentiality. Nevertheless, a party could resolve any disputes that might arise from the mediation process including any claims concerning breach of confidentiality by further mediation.</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
002546 - 002922	Chairman Mr LAU Kong-wah Administration	<p>Mr LAU Kong-wah's enquiry on whether the Administration could sort out the application of the Mediation Ordinance to the offices set up by the Central People's Government ("CPG Offices") before completion of the scrutiny of the Bill.</p> <p>The Administration noted that the Mediation Bill, unlike the Arbitration Ordinance, did not specify its application to CPG Offices and explained that the background for legislating on arbitration and mediation was significantly different. The Administration needed time to study the implications of the Mediation Bill on the CPG Offices and envisaged that the issue could not be sorted out before the completion of the scrutiny of the Bill.</p>	
002923 – 003127	Mr LAU Kong-wah Chairman Administration	<p>In response to Mr LAU Kong-wah's enquiry about the implications of the Bill on the current practices of mediation, the Administration advised that the legislation would not affect the current practices of mediation in the community noting that mediation in general practice was of a facilitative mode without adjudication of the dispute.</p>	
003128 – 004712	Ms Miriam LAU Chairman Administration	<p>Noting that a mediator was defined as an impartial individual referred to in section 4(1) of the Ordinance to be enacted ("meaning of mediation"), Ms Miriam LAU expressed concern that anyone who claimed to be impartial could assume the role of a mediator. She made enquiries –</p> <ul style="list-style-type: none"> (a) whether a person needed to go through a certain period of training or be registered with a particular association in order to be qualified as a mediator in Hong Kong; and (b) about the definition of "mediator" in other overseas mediation legislation. <p>The Administration responded that –</p> <ul style="list-style-type: none"> (a) while there was at present no statutory requirement on the qualifications of mediators, a mediator was required generally in terms of his or her appointment to act in an impartial manner in resolving disputes; 	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>(b) the Administration had looked at overseas practices and the training requirements for mediators in Hong Kong in defining the term "mediator" in the Bill;</p> <p>(c) a neutral or an impartial mediator was a key element in the definition of mediation in overseas mediation legislation;</p> <p>(d) while a mediator in some jurisdictions (e.g. Republic of Trinidad and Tobago) was required by legislation to go through certain kind of training and be registered with a particular government agency, Hong Kong, like other countries, adopted a common model under which a mediator was not required by legislation to go through certain training and to be formally registered with accreditation body; but</p> <p>(e) mediation service providers in Hong Kong had prescribed requirements for training and continuing professional development for mediators to ensure the standard of mediators.</p> <p>Ms Miriam LAU reiterated her concern that any person who claimed to be impartial could act as a mediator and gave improper advice without bearing any consequences. She considered that a mediation system based on proper training and registration should be adopted to maintain the standard and accountability of mediators.</p> <p>The Administration supplemented that –</p> <p>(a) the accreditation of mediators could be further worked out after the establishment of a non-statutory industry-led single accreditation body for mediators;</p> <p>(b) parties to the dispute might enter into an agreement to mediate in writing which governed the conduct of mediation (e.g. the impartial manner of the mediator, the confidentiality of mediation communications) to ensure that the mediation was duly conducted;</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>(c) the mediation service providers, as and when required by the parties, would exercise due diligence in assigning a mediator to the parties to a dispute; and</p> <p>(d) the Administration would educate the public on how to seek appointment of mediators through publicity and assistance was available to the public from the Judiciary's Mediation Information Office and the Joint Mediation Helpline Office.</p>	
004713 – 005745	Mr LAU Kong-wah Chairman Administration	<p>Mr LAU Kong-wah's suggestion that consideration be given to specifying in the Bill that a mediator should be an impartial individual who had completed the mediation training course recognized by the four major mediation service providers in order to enhance public confidence in mediation services.</p> <p>The Administration responded that –</p> <p>(a) the proposed requirement was not considered appropriate at this stage as many practicing mediators who had received training overseas, accredited by other organizations or did not receive formal training but had acquired practical experience in mediation (e.g. experienced mediators in the areas of commercial and construction disputes) would be excluded from the practice of mediation, thus hampering the flexibility of the mediation process and the development of mediation in Hong Kong as a result;</p> <p>(b) such requirement would also limit the public's choice of mediator in resolving their disputes; and</p> <p>(c) the Administration was working with the stakeholders on the development of a non-statutory industry-led single accreditation body for mediators with a view to working out an accreditation system of mediators in future.</p>	
005746 – 010452	Ms Miriam LAU Assistant Legal Adviser Chairman The Administration	Ms Miriam LAU's enquiry on whether the Administration had consulted the four major mediation service providers on the definition of "mediator" in the Bill.	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>The Administration responded that the four major mediation service providers had indicated support for the Bill and no objection was raised on the proposed definition of "mediator" in the Bill. The Administration stressed that the Bill did not intend to bring about changes to the existing practices of mediation. The requirement that a mediator should be an impartial individual was included in the definition of "mediator" to reflect the main characteristic of mediation.</p> <p>The Legal Adviser to the Bills Committee advised that narrowing the definition of "mediator" might have an effect to limit the scope of application of the proposed provisions relating to confidentiality and privilege of mediation communication in the Bill.</p>	
010453 - 011012	Chairman Ms Miriam LAU Administration	<p>Ms Miriam LAU's enquiry about -</p> <p>(a) the difficulties of the transition from the absence of any governing framework on mediation to the establishment of a single non-statutory industry-led accrediting body for mediators; and</p> <p>(b) overseas experiences in establishing such an umbrella accrediting body.</p> <p>The Administration responded that –</p> <p>(a) it was envisaged that the public's understanding on the main aspects of mediation, such as the professional training required for mediator to resolve disputes in an impartial manner and the importance of the confidentiality of mediation communications, would be further enhanced following the enactment of the Bill; and</p> <p>(b) similar to the experience of some overseas jurisdictions, Hong Kong was moving towards the further development of mediation and it was expected that the establishment of the umbrella accrediting body could further enhance the accreditation system of mediators in future.</p>	
011013 – 012417	Chairman Administration Ms Miriam LAU Assistant Legal Adviser Prof Patrick LAU	<p>The Administration's briefing on clause 1 and the definition of the term "<i>agreement to mediate</i>" in clause 2 of the Bill.</p> <p>Ms Miriam LAU's query on the need to include a note under the meaning of "agreement to mediate".</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>She proposed to delete the note and to revise the meaning of "agreement to mediate" as "agreement to mediate means an agreement in writing by two or more persons (<i>including an agreement made in electronic form</i>) to submit a dispute between them to mediation".</p> <p>The Administration explained that –</p> <p>(a) a note was inserted in the Bill to draw readers' attention to the fact that an agreement to mediate could be made in electronic form according to section 5(1) of the Electronic Transactions Ordinance ("ETO") (Cap. 553); and</p> <p>(b) the proposed revision would give the impression that an agreement to mediate could be made in electronic form because of the Mediation Bill rather than ETO.</p> <p>The views of the Legal Adviser to the Bills Committee that the sentence "an agreement to mediate could be in electronic form" in the note carried substantive meaning that should not be included in a note form.</p> <p>The Chairman's view that the note was unnecessary and should be deleted to avoid controversies as the general public might not notice that the note was not intended to have a legal effect in the same way as a statutory provision.</p> <p>The Administration undertook to reconsider whether the note should be inserted in the light of members' view.</p>	<p>Admin (para 3 of minutes)</p>
012418 – 012532	Chairman Administration	The Administration's briefing on the definition of the terms " <i>dispute</i> " and " <i>mediated settlement agreement</i> " in clause 2.	
012533 – 013906	Chairman Administration Prof Patrick LAU Ms Miriam LAU	<p>Prof Patrick LAU's enquiry on whether the mediated settlement agreement was legally binding.</p> <p>The Administration responded that a mediated settlement agreement was an agreement agreed upon by the parties to mediation which was legally binding as a contract and legally enforceable.</p> <p>The Chairman's query on the need to obtain a court order to enforce the mediated settlement agreement given that the agreement was already legally binding in nature.</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>Ms Miriam LAU's views that the ruling of the court to be sought for the purpose of enforcing or challenging a mediated settlement agreement.</p> <p>The Administration explained that –</p> <p>(a) while some mediation processes were not conducted under legal proceedings, some were carried out as part of the civil proceedings following the implementation of Practice Direction 31 on mediation under which a mediated settlement by the parties concerned could be turned into a court order by consent to conclude the legal proceedings. Such consent order could deal with the cost and any other relevant matters of the case;</p> <p>(b) given that mediation was a voluntary process, the chance of overruling a mediated settlement agreement was rather slim in reality, but</p> <p>(c) similar to the enforcement of a contract, the parties to a dispute might seek an order from the court to enforce or challenge a mediated settlement agreement.</p> <p>Prof Patrick LAU's enquiry about the legal procedures for seeking a court order to enforce a mediated settlement agreement.</p> <p>The Administration's explanation and the Chairman's summary on the legal procedures that had to be gone through for seeking a court order for the enforcement of a mediated settlement agreement.</p>	
013907 - 014304	Chairman Administration Assistant Legal Adviser	<p>The Administration's briefing on the definition of the term "<i>mediation communication</i>" in clause 2.</p> <p>The Chairman's enquiry and the Administration's response on the content of the mediation communication.</p>	
014305 - 014734	Chairman Ms Cyd HO Administration	<p>Ms Cyd HO's remark that owners of premises who were affected by redevelopment projects very often were warned that they could not disclose the details of the written agreement on the compensation arrangement. Her enquiry about the protection to be afforded to these owners after enactment of the Bill.</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>The Administration explained that the parties had dealt with the cases by negotiation instead of mediation as it did not appear an impartial mediator was involved in the process. The Administration would continue to promote the use of mediation to resolve a dispute of the nature.</p>	
014735 – 015032	<p>Chairman Administration Ms Miriam LAU</p>	<p>The Chairman's views about drafting that –</p> <p>(a) the word "及" should be replaced by the word "或" in the Chinese text of the definition of "agreement to mediate" (調解協議); and</p> <p>(b) the words "說出" should be replaced by "所說" in the Chinese text of the definition of "mediation communication" (調解通訊).</p> <p>Ms Miriam LAU's views about the drafting of the Chinese text of clause 2(2) of the Bill that –</p> <p>(a) the phrase "調解的任何一方" and the phrase "調解的每一方" were repetitive in meaning and consideration should be given to deleting the latter phrase; and</p> <p>(b) the words "提述" should be deleted when they appeared the second time in the provision.</p> <p>The Administration undertook to consider members' views about the drafting of the definitions of "agreement to mediate" and "mediation communication" as well as clause 2(2) of the Bill.</p>	<p>Admin (para 3 of minutes)</p>
015033 – 015535	<p>Chairman Prof Patrick LAU Administration</p>	<p>The Administration's briefing on clause 3 ("Objects of the Ordinance").</p> <p>Arrangements for receiving public views on the Bill</p> <p>The Administration undertook to provide a written response to the views received for the Bills Committee's consideration.</p>	<p>Admin (para 3 of minutes)</p>