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BY FAX & BY POST

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Dear Mr Yick,

Mediation Bill

I refer to your letter of 16 December 2011 and set out below our responses to the questions relating to the Mediation Bill ("Bill") that you had set out in your letter.

Clause 2 - Interpretation

(a) After consultation with stakeholders on a working draft of the Bill in June 2011, we noticed that some stakeholders might not be familiar with the general application of the Electronic Transactions Ordinance (Cap. 553) according to which an agreement to mediate could be in electronic form. A note is therefore inserted in the Bill to draw readers' attention to the fact that an agreement to mediate could be in electronic form and for that purpose reference is made to the Electronic Transactions Ordinance. The note serves as an aid to readers and provides factual information available in the Electronic Transactions

Ordinance. The note is not intended to have a legal effect in the same way as a clause in the Bill. The contents of this note should not be incorporated into the meaning of the term. An example of a similar note can be found in the definition of "food distribution business" in section 2(1) of the Food Safety Ordinance (Cap. 612).

(b) The definition of "mediation communication" in clause 2 of the Bill is broadly drafted to include initial communications which take place before the formation of an agreement to mediate that satisfy the criteria laid down in the definition. Thus, if the things said, the documents prepared or information provided are "for the purpose of" mediation, then they may fall within the definition of "mediation communication" and will not be excluded from the definition simply because they take place before a mediation agreement is formed between the disputing parties. Therefore, as long as the examples highlighted in your letter, namely, an invitation to resolve a dispute by mediation, negotiation on terms of appointment of a mediator and communications in relation to arrangement on costs payment and schedule of the mediation process, are "for the purpose of mediation", they will be regarded as "mediation communications" for the purposes of the Bill. For your information, it has been pointed out to us by practising mediators that it is not unusual for parties to approach them and discuss in some details matters or issues relating to the intended mediation or even the parties' specific disputes before the formation of an agreement to mediate. Therefore there is concern that such initial communications should be regarded as mediation communications for the purposes of the Bill otherwise parties will be hesitant in approaching them. Besides, if the parties agree that they should be at liberty to disclose any of such initial communications, they can make provisions to that effect in their agreement to mediate.

Clause 4 – Meaning of mediation

There are different models of mediation including facilitative and evaluative models of mediation. In Hong Kong, facilitative is, in the main, the model of mediation for resolving family, commercial and court related matters. Mediation, whether facilitative or evaluative, does not involve any determination of the disputes by the mediator that is binding on the parties. The Bill is aimed at providing a regulatory framework for its proper conduct and development. It is not intended to hamper the flexibility of the mediation process. Mediation is a flexible process and the core concept is for the mediator to facilitate the parties to make their own decisions, instead of imposing a decision on them. Whereas adjudication is a process by which

parties agree that the adjudicator has the power to make a binding decision on them. Adjudication is not mediation and is very different from incidental evaluative comments that a mediator may make in the course of mediation. If, as suggested in your letter, the mediation process incidentally involves evaluation of any party’s case on merit or evidence, such evaluation may be made by the mediator for the purpose of carrying out a reality check of a party’s case, the incidental evaluation done by the mediator is not an adjudication by the mediator that is binding on the parties and will not transform the mediation into an adjudication. Hence the mediation concerned does not fall outside the scope of the meaning of “mediation” simply because, in the course of mediation, the mediation incidentally involves evaluation of or comments on a party’s case.

Clause 6 – Application to Government

We fully appreciate that, unlike section 6 of the Arbitration Ordinance (Cap. 609), clause 6 of the Bill does not specify that the Bill applies to the Offices set up by the Central People's Government ("CPG Offices") in the Hong Kong Special Administrative Region. We have been studying the implications of the application of the Bill to the CPG Offices. Meanwhile, the Administration proceeded to introduce the Bill into the Legislative Council in order to allow more time for the examination of the Bill before the end of this legislative term. Following the Judiciary's promulgation of the Practice Direction 31 on Mediation which came into operation in 2010, mediation is much more widely attempted by parties to civil litigation to resolve disputes. It is considered important to submit the Bill to the Legislative Council early for Members' consideration.

Clause 8 – Confidentiality of mediation communication

(a) The Bill does not make provisions to deal with sanctions for breaching the rules of confidentiality. The Mediation Task Force (“Task Force”) which was set up by the Secretary for Justice and its Mediation Ordinance Group (“MOG”) had considered the recommendation of the Working Group on Mediation (“Working Group”) that provisions be made for sanctions for breaching the rules of confidentiality[1]. The Task Force and its MOG took into account the feedback during the public consultations, the laws in other jurisdictions and deliberated on the matter before deciding that no provisions be made for such sanctions. For information,

[1] Recommendation 38 of the Working Group on Mediation at page 135, Report of the Working Group on Mediation, 2010, Department of Justice, Hong Kong.

we are not aware of any sanctions provided in mediation legislation of other common law jurisdictions. Of the jurisdictions that have mediation legislation, only Austria has provided for criminal sanctions. if there be a breach of confidentiality by a mediator, parties aggrieved may file complaints to the professional body to which the mediator belongs. Further, a party is able to rely on civil remedies available from the Courts for breaches of confidentiality. These civil remedies include an injunction (interim or final) to stop or prevent a potential breach and/or damages if loss is suffered as a consequence of the breach and can be proven.

(b) The phrase "other similar procedures" in clause 8(2)(c) was added to ensure that other procedures that have different names or descriptions but are similar in nature to discovery in civil procedures are included. An example of such "other similar procedures" is the production of documents in international commercial arbitration. Such production of documents is not exactly the same as discovery in civil proceedings and is governed by different rules, but is a procedure similar to discovery. The phrase "other similar procedures" in clause 8(2)(c) is not intended to include criminal procedures.

(c) The term "a person" in clause 8 is not confined to persons who are parties to the mediation. As provided for in clause 8(2)(c), a person may disclose a mediation communication if the content of the mediation communication is information that is otherwise subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or control. This exception is important to prevent people from abusing the mediation process by introducing otherwise discoverable information into mediation in order to make it "undiscoverable".

No provision on default appointment of mediators

(a) It is acknowledged that the Working Group recommended the making of provisions on default appointment of mediators[2] which is similar to clause 32 of the Arbitration Bill[3] and such provisions were included in the Department of Justice's information paper on the proposed Mediation Bill issued for discussion at the meeting of the Panel on Administration of Justice and Legal Services held on 21 July 2011. It is also acknowledged that according to the paper, an industry led

[2] Recommendation 37 of the Working Group on Mediation at page 135, Report of the Working Group on Mediation, 2010, Department of Justice, Hong Kong.

[3] This is now section 32 of the Arbitration Ordinance (Cap. 609)

company limited by guarantee would be referred to in the proposed Mediation Bill as default appointing authority of mediators.[4]

(b) The Working Group in 2010 recommended that a single accreditation body for mediators could be in the form of a company limited by guarantee and that the possibility for establishing this body should be reviewed in 5 years.[5] However, during the 3 months public consultation, the overwhelming response was that the single accreditation body should be set up as soon as possible. The Task Force, taking into account the public response, decided to facilitate the major mediation service providers towards the formation of a single accreditation body.

The Accreditation Group formed under the Task Force prepared a draft Memorandum and Articles of Association ("M&A") for a single accreditation body to be called the Hong Kong Mediation Accreditation Association Limited ("HKMAAL") for discussion. This industry-led initiative is currently still being discussed among the major mediation service providers including the Law Society of Hong Kong, the Bar Association, the Hong Kong Mediation Centre and the Hong Kong International Arbitration Centre ("HKIAC").

In anticipation that the terms of the draft M&A could be settled and the HKMAAL could be registered with the Companies Registry, a draft clause designating HKMAAL as the default appointing body for mediators was included in a working draft of the Bill that was put up for stakeholder consultations at the end of June 2011. As the major mediation service providers are still working on the draft M&A and the proposed HKMAAL is not yet registered with the Companies Registry, the draft provisions designating HKMAAL as the default appointing body were subsequently omitted from the Bill.

It is considered that in practice the absence of a mechanism for default appointment of mediators would not affect parties' incentive to resort to mediation because there is assistance available on questions relating to the appointment of mediators from the Judiciary's Mediation Information Office, the Joint Mediation Helpline Office ("JMHO") and other mediation service providers.

[4] LC Paper No.CB(2)2389/10-11(01))

[5] Recommendation 28 of the Working Group on Mediation at page 134, Report of the Working Group on Mediation, 2010, Department of Justice, Hong Kong.

Other matters

(a) The Bill does not provide for rules governing the conduct of mediation and the mediation process. The question of whether to include model mediation rules into the Bill was considered by the Working Group to be not really necessary and if any rules were to be included, it should only serve as a guide and should not be made mandatory in order to maintain the flexibility of the mediation process.[6] The flexibility and adaptability of the mediation process are two of the most valued features of mediation. Thus, rules incorporated into the agreement to mediate are best suited for governing the conduct of a particular mediation. The Task Force and its MOG took into account the public feedback from the consultation and considered that model rules were not to be included in the Bill. Currently relevant bodies such as the HKIAC have mediation rules posted on its website which can be adopted by mediators in agreements to mediate.

The Task Force has promulgated the Hong Kong Mediation Code ("Code")[7] which is a code of conduct for mediation in Hong Kong. The Code was discussed with mediation service providers in a targeted consultation exercise conducted on 26 June 2009. Over 60 people including representatives from 25 mediation service providers and principal users in Hong Kong attended the consultation meeting including representatives from mediation service providers, the Judiciary, Consumer Council and universities.

A survey on the application of the Code was recently conducted. The 8 professional bodies that form the JMHO which is located in the High Court Building have all adopted the Code and have robust complaints and disciplinary processes to enforce the Code. The Code can be accessed on their respective websites or have been incorporated as part of their internal guidelines. Complaints on breaches of the Code can be made to the respective mediation service providers to which the mediators belong.

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[6] Recommendation 42 of the Working Group on Mediation at page 135, Report of the Working Group on Mediation, 2010, Department of Justice, Hong Kong. See also discussions at paragraphs 7.191 to 7.193 at page 121 of the Report.

[7] Annex 7 of the Report of the Working Group on Mediation, 2010, Department of Justice, Hong Kong at page 161.

(b) The matters relating to accreditation of mediators are being worked on. A non-legislative industry-led approach to accreditation is the dominant approach world-wide and especially in common law jurisdictions. The major mediation service providers are working on the draft M&A of a company incorporated by guarantee and it is hoped that the accreditation body be set up in the near future. We are aware of the concerns expressed by Members at the first meeting of the Bills Committee about the time of formation of the accreditation body. We would like to assure Members that we are working hard on it and we will facilitate its setting up as soon as practicable.

(c) The Bill does not provide for the enforcement of mediated settlement agreements. The Working Group deliberated on this matter and found it unnecessary to recommend the inclusion of a statutory mechanism for enforcement of mediated settlement agreements.[8] One of the key reasons is that unlike arbitral awards which are imposed by the arbitrator after a process of adjudication, mediated settlement agreements are reached by parties voluntarily. The Working Group was of the view that effective “reality testing” conducted by mediators during the mediation process assists in ensuring that the settlement agreement reached is reasonable and will be complied with such that the chances of parties refusing to perform their obligations under the mediated settlement agreement is much less. Further, the enforcement of mediated settlement agreements can be done through the normal enforcement of agreement processes in the tribunals and courts (including an application for summary judgment under Order 14 of the Rules of the High Court). This is the predominant practice in common law jurisdictions including Australia (where there are legislation on mediation) and England.[9]

I hope I have adequately responded to the questions raised. Please let me know if you have any further queries or comments.

[8] Recommendation 41 of the Working Group on Mediation at page 135, Report of the Working Group on Mediation, 2010, Department of Justice, Hong Kong. See also discussions at paragraphs 7.181 to 7.190 at pages 118 to 120 of the Report.

[9] Paragraph 7.189 at page 120 of the Report. Research in Australia conducted by the National Alternative Dispute Resolution Advisory Council (NADRAC) supports this proposition (See NADRAC, "Legislating for alternative dispute resolution: A Guide for government policy-makers and legal drafters," at www.nadrac.gov.au)

Yours sincerely,

(Mr Simon LEE)
Deputy Law Officer (Civil Law)

cc LDD (Attn: Miss Shandy LIU, Senior Government Counsel)
LA (Legal Service Division, Legislative Council Secretariat)
SALA1 (Legal Service Division, Legislative Council Secretariat)