

Written Submission to Bills Committee on Mediation Bill
Legislative Council, HKSAR, PRC.

13 January 2012.

I am in full support of a Mediation Ordinance to be enacted in Hong Kong as soon as possible. It is the opinion of some academics that Hong Kong should not leave it too late, citing the situation in Australia as a warning. I also agree that, in order to speed up the process, some issues which require more time for discussions, because of many different views expressed by different stakeholders, should best be left alone for later amendments. This is the case in the Hong Kong Mediation Accreditation Association Limited, which deals with the very important issue of assessing mediators. However, we should re-visit it in the near future.

If Hong Kong wants to fortify its status as an international dispute centre, apart from enactment of mediation legislations such as the Practice Direction 31 to encourage local disputants to make use of mediations to resolve their disputes, we must also ensure there is an adequate number of quality mediators possessing a high professional standard and standing. Their quality is extremely important.

An incompetent mediator may be the reason why a mediation fails. He may not be able to detect non-viable options agreed by both Parties. He may inadvertently leak out confidential information during separate sessions with the other Party. He may even give the wrong advice which can be detrimental.

This will result in a low success rate of mediation, which is generally quoted as 70% in most Western countries, and even up to over 90% in others. Litigants will lose confidence in mediations, and go back to litigations. It is also unfair for the Judiciary to "encourage" litigants to try mediations first if the failure rate is unreasonably high. Moreover, Hong Kong will not achieve its goal of becoming an international centre.

I believe, this is why in the pamphlet 'What is Mediation?' published by the Judiciary in October 2008, it was clearly stated that "Mediation is a voluntary process in which a trained and impartial third person, the mediator" The same statement is also clearly printed in another pamphlet 'General Guide to Practice Direction 31 --- Mediation', published by the Judiciary in January 2010.

It is therefore rather surprising to notice that the key word "trained" is absent in

the Mediation Bill, and I propose to put it back in the Ordinance. I raised this question in the Consultation Meeting in June 2011, and I was told that the word "trained" is controversial, which I did not agree. Of all the issues in the Mediation Bill, training has to be the least controversial one. A 40-hours Mediation Training Course has been accepted in other countries as the minimum standard of training for years, and it is the norm in Hong Kong too. It is very discomfoting (to say the least) that the Mediation Ordinance may be interpreted as no training is required to become a mediator.

Nowadays, not only professionals need to have training, even non-professionals such as sale persons and drivers etc need training. We can no longer persuade people that experience is all that counts."

As an assessor and a trainer, I can observe the improvement training has made in most students. It only takes one bad case of mediation to spoil the work of a hundred cases of well-performed and successful ones in this early stage of development in Hong Kong. Of course, even trained mediators make mistakes. However, with training, the chance of making mistakes should be less and the degree of harm should be less, than without training.

Furthermore, there is accreditation to assess those who are trained, and therefore there is double assurance of the quality of mediators. For reasons I have stated above, the issue of accreditation is best discussed after the enactment of the Mediation Ordinance in the near future. It should then be discussed as soon as practicable after that.



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