



立法會秘書處 法律事務部  
LEGAL SERVICE DIVISION  
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF :  
本函檔號 OUR REF : LS/B/4/11-12  
電話 TELEPHONE : 3919 3511

傳真 FACSIMILE : 2877 5029  
電郵 E-MAIL : wkyick@legco.gov.hk

By Fax (2136 8277)

16 December 2011

Mr Simon LEE  
Deputy Law Officer (Civil Law)  
Department of Justice  
Civil Division  
Planning, Environment, Lands and Housing Unit  
Advisory Team  
3rd floor, Murray Building,  
Garden Road, Hong Kong

Dear Mr LEE,

### **Mediation Bill**

We are scrutinizing the legal and drafting aspects of the captioned Bill and have the following questions relating to the Bill for your clarification-

#### Clause 2 - Interpretation

- (a) Please clarify why there is a need to include a "Note" under the meaning of "agreement to mediate". Is the Note intended to have legislative effect? If so, should the contents of the Note be incorporated into the meaning of the term?
- (b) It is noted that "mediation communication" means anything said or done, any documents prepared, or any information provided for the purpose or in the course of mediation. Please clarify whether this covers the initial communications which take place before the formation of an agreement to mediate (e.g. invitation to resolve a dispute by mediation, negotiation on terms of appointment of a

mediator, communication in relation to arrangement on costs payment and schedule of the mediation process concerned, etc). Is it the Administration's policy intent that the Bill should apply to these initial communications?

#### Clause 4 - Meaning of mediation

If the mediation process incidentally involves evaluation of (or making comment on) any party's case (on merit or evidence) in the subject dispute by the relevant mediator(s), would the mediator(s) be regarded as adjudicating the dispute and hence the mediation concerned falls outside the scope of meaning of "mediation"?

#### Clause 6 - Application to Government

It is noted that unlike section 6 of the Arbitration Ordinance (Cap. 609), this clause does not specify that the Mediation Ordinance applies to the Offices set up by the Central People's Government in the Hong Kong Special Administrative Region. Please clarify the reason(s) for adopting a different approach in the Bill.

#### Clause 8 - Confidentiality of mediation communication

- (a) It is noted that while the Working Group on Mediation recommended that the proposed Mediation Ordinance should include provisions dealing with sanctions for breaching the rules of confidentiality and privilege (see. paragraphs 7.138 - 7.140 and Recommendation 38 of the Report of the Working Group on Mediation), no such provision is proposed in the Bill. Please clarify the reason(s) for not adopting the Working Group's recommendation in the Bill.
- (b) Regarding the exception to the rule of confidentiality under clause 8(2)(c) (i.e. the content of the mediation communication subject to discovery in civil proceedings or to other similar procedures), please clarify what are intended to be covered by "other similar procedures" in this clause. Could the phrase be construed to include criminal procedures?
- (c) It appears that the term "a person" in clause 8, as drafted, is not confined to persons who are parties to the mediation concerned. If this is the case, by virtue of clause 8(2)(c), it is therefore possible that a person, who is not a party to the mediation but is a party to

civil proceedings (or other similar procedures) which is not related to the subject dispute in the mediation but has possession, custody or control of certain information contained in the mediation communication which is subject to discovery in the civil proceedings, may be able to disclose the mediation communication concerned. Does this reflect the Administration's intention? If so, would this defeat the purpose of the proposed rule of confidentiality?

#### No provisions on default appointment of mediators

- (a) It is noted that the Working Group recommended the making of provisions on default appointment of mediators which is similar to clause 32 of the Arbitration Bill (i.e. now section 32 of the Arbitration Ordinance (Cap. 609)) (see Recommendation 37 of the Report of the Working Group on Mediation) and that this recommendation was also included in the Department of Justice's information paper on the proposed Mediation Bill issued for discussion at the meeting of Panel on Administration of Justice and Legal Services held on 21 July 2011 (LC Paper No. CB(2) 2389/10-11(01)). According to the paper, an industry-led company limited by guarantee would be referred to in the proposed Mediation Bill as default appointing authority of mediators.
- (b) However, it is noted that the Bill does not contain any provisions on default appointment of mediators. Please let us know the reason(s) for not making such provisions in the Bill and the practical implications of the lack of such provisions.

#### Other matters

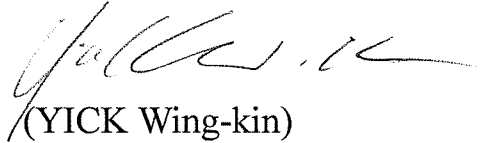
It is noted that the Bill does not provide for the following matters-

- (a) rules governing the conduct of mediators and the mediation process,
- (b) matters relating to accreditation of mediators; and
- (c) enforcement of mediated settlement agreements.

Please clarify how the above matters will be dealt with in the absence of relevant provisions.

It is appreciated that your reply in both languages could reach us as soon as possible, preferably by 6 January 2012.

Yours sincerely,



(YICK Wing-kin)  
Assistant Legal Adviser

cc DoJ (Attn.: Miss Shandy LIU, Sr Asst Law Draftsman (Acting))  
(By Fax: 2869 1302))  
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