

立法會
Legislative Council

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**Paper for the House Committee Meeting
on 2 December 2011**

Legal Service Division Report on Mediation Bill

I. SUMMARY

1. **Objects of the Bill** To provide a regulatory framework in respect of certain aspects of the conduct of mediation and to make consequential and related amendments.
2. **Comments**
 - (a) The Bill seeks to implement certain recommendations set out in the Secretary for Justice's Report of the Working Group on Mediation published in February 2010 (the Report).
 - (b) The Bill applies to the Government.
 - (c) Certain processes of conciliation and mediation under existing Ordinances will not be affected by the Bill.
 - (d) Disclosure of a mediation communication is prohibited except in specified circumstances or with leave of the court or tribunal.
 - (e) The Bill does not provide for -
 - (i) rules governing the conduct of mediators and the mediation process,
 - (ii) sanctions for breaching the proposed rule of confidentiality,
 - (iii) arrangement for default appointment of mediators,
 - (iv) matters relating to accreditation of mediators, and
 - (v) enforcement of mediated settlement agreements.
3. **Public Consultation** According to the LegCo Brief, after the 3-month public consultation exercise conducted on the Report in early 2010, the Department of Justice prepared a draft Mediation Bill and conducted two consultation sessions with stakeholders in June 2011. There was general support for the enactment of a Mediation Ordinance.
4. **Consultation with LegCo Panel** The Administration briefed the Panel on Administration of Justice and Legal Services (AJLS Panel) on the draft Mediation Bill on 21 July 2011. Members of the Panel expressed divergent views on the need for the enactment of a Mediation Ordinance.
5. **Conclusion** In view of the views expressed by members of the AJLS Panel, members may consider whether a Bills Committee should be formed to scrutinize the Bill in detail.

II. REPORT

Objects of the Bill

To provide a regulatory framework in respect of certain aspects of the conduct of mediation and to make consequential and related amendments.

LegCo Brief Reference

2. LegCo Brief (with no reference number) issued by the Department of Justice in November 2011.

Date of First Reading

3. 30 November 2011.

Background

4. Mediation is a dispute resolution process that is used to resolve disputes other than through litigation in the courts. At present, there is no specific piece of legislation on mediation in Hong Kong. In the 2007-08 Policy Address, the Chief Executive announced the establishment of a cross-sector working group headed by the Secretary for Justice (the Working Group) to review the development of mediation and to map out plans to employ mediation more extensively and effectively in both commercial disputes and at community level. On 8 February 2010, the Working Group published its Report (the Report) for a three-month public consultation. The 48 recommendations contained in the Report covered the three important areas of training and accreditation, legal framework and publicity and public education.

5. In respect of the legal framework for mediation, the Working Group recommended that there should be a stand-alone Mediation Ordinance to provide a proper legal framework for the conduct of mediation without hampering the flexibility of the mediation process. The Working Group also recommended that the proposed Ordinance should set out its objectives and key terminology such as "mediation" and "mediator" and make provisions for rules of confidentiality and privilege, including provisions for the statutory exceptions to the application of such rules. In respect of enforcement of mediated settlement agreements, the Working Group did not consider it necessary to include in the proposed Ordinance a statutory enforcement

mechanism as such agreements could be enforced by the courts as contracts where necessary. According paragraph 19 of the LegCo Brief, in the three-month public consultation there was overwhelming support for the enactment of a Mediation Ordinance. After the end of the three-month public consultation exercise, a Mediation Task Force chaired by the Secretary for Justice was set up to assist in implementing the relevant recommendations of the Working Group with a view to promoting wider use of mediation in Hong Kong.

Comments

6. The Bill seeks to implement certain recommendations set out in the Report to provide a regulatory framework in respect certain aspects of the conduct of mediation. The Bill does not provide for rules governing the conduct of mediators and the mediation process, sanctions for breach of the proposed rule of confidentiality, matters relating to accreditation of mediators and statutory mechanism for enforcement of mediated settlement agreements. The main proposals are summarized in the following paragraphs.

Objects of the enacted Mediation Ordinance

7. The objects of the enacted Mediation Ordinance, as provided in clause 3 of the Bill, are:

- (a) to promote, encourage and facilitate the resolution of disputes by mediation; and
- (b) to protect the confidential nature of mediation communications.

Meaning of "mediation" and "mediation communication"

8. Under the Bill, "*mediation*" is defined to mean a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to identify the issues in dispute, explore and generate options, communicate with one another, and/or reach an agreement regarding the resolution of the whole, or part, of the dispute. The term "*mediation communication*" is defined to mean anything said or done, any document prepared, or any information provided, for the purpose of or in the course of mediation, but does not include an agreement to mediate or a mediated settlement agreement.

Scope of application of the Bill

9. The Bill applies to any mediation conducted under an agreement to mediate if the mediation is wholly or partly conducted in Hong Kong or the agreement to mediate provides that the Bill or the law of Hong Kong is to apply to the mediation. The Bill does not apply to the processes under various Ordinances as specified in Schedule 1 to the Bill. These processes include conciliation under the Labour Tribunal Ordinance (Cap. 25) and the existing four anti-discrimination Ordinances, mediation under The Ombudsman Ordinance (Cap. 397) and the Arbitration Ordinance (Cap. 609).

10. Clause 6 states that the Bill applies to the Government. It is noted that unlike section 6 of the Arbitration Ordinance (Cap. 609), the Bill does not stipulate that it applies to the Offices set up by the Central People's Government in Hong Kong Special Administrative Region. The Legal Service Division will ask the Department of Justice the reason for adopting a different approach in the Bill.

Provision of assistance or support in mediation

11. Clause 7 provides that the provision of assistance or support to a party to mediation in the course of the mediation does not constitute an infringement of section 44 (penalty for unlawfully practising as a barrister or notary public), section 45 (unqualified person not to act as solicitor), and section 47 (unqualified person not to prepare certain instruments, etc) of the Legal Practitioners Ordinance (Cap. 159). The effect of this is that non-lawyers or foreign lawyers can participate in mediation conducted in Hong Kong. It is noted that this proposal is in line with Recommendation 37 of the Report.

Confidentiality of mediation communication

12. Clause 8 stipulates that a mediation communication must not be disclosed to anybody except as provided in clause 8(2) and (3). Clause 8(2) sets out the circumstances under which a mediation communication may be disclosed. These include disclosure with the consent of all relevant parties and the mediator, the availability of the content of the mediation communication to the public, and the content of the mediation communication being subject to discovery in civil proceedings. Under clause 8(3), a person may disclose a mediation communication with leave of the court or tribunal for specified purposes.

13. It is noted that while the Working Group recommended the provision of sanctions for breaching the rules of confidentiality

(Recommendation 38 of the Report), no such provision is proposed in the Bill. The Legal Service Division will ask the Department of Justice to clarify this point.

Admissibility of mediation communication in evidence

14. Under clause 9, a mediation communication may be admitted in evidence in any proceedings (including judicial, arbitral, administrative or disciplinary proceedings) only with leave of the court or tribunal granted under clause 10 of the Bill. Clause 10 sets out matters that the court or tribunal must take into account in deciding whether to grant leave for a mediation communication to be disclosed or admitted in evidence. Clause 10 also specifies the court or tribunal to which an application for leave should be made.

Consequential and related amendments

15. Schedule 2 to the Bill sets out the consequential and related amendments to existing Ordinances. The purpose of the proposed amendments is to standardize the use of "調解" as the Chinese rendition for "mediation" and "調停" as the Chinese rendition for "conciliation" in existing legislation. According to paragraph 15 of the LegCo Brief, the proposed amendments will bring the terminology in line with that used in the recently enacted Arbitration Ordinance (Cap. 609).

Default appointment of mediators

16. According to Recommendation 37 of the Report, the proposed Mediation Bill should include a provision dealing with the default appointment of mediators along the line of section 32 of the Arbitration Ordinance to cater for the situation where the person who is given the power to appoint by virtue of an agreement refuses to make the appointment or does not appoint within the time specified to do so in the agreement. This proposal was also set out in the Department of Justice's information paper to the Panel on Administration of Justice and Legal Services (AJLS Panel) issued in July 2011 [LC Paper No. CB(2)2389/10-11(01)]. According to the paper, an industry-led company limited by guarantee will be referred to in the proposed Mediation Bill as default appointing authority of mediators. However, it is noted that the Bill does not contain any provisions on this matter. The Legal Service Division will be seeking clarification with the Department of Justice on the reason for not adopting this recommendation in the Bill and the practical implications of the lack of such provisions.

Commencement

17. If enacted, the Bill comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

Public Consultation

18. According paragraph 19 of the LegCo Brief, after the Report was published for a 3 months' public consultation in February 2010, there was overwhelming support for the enactment of a Mediation Ordinance. After the public consultation exercise, the Department of Justice prepared a draft Mediation Bill and conducted two consultation sessions with stakeholders in late June 2011. According to the Department of Justice, there was general support in the responses received for the enactment of a Mediation Ordinance.

Consultation with LegCo Panel

19. The AJLS Panel discussed issues relating to the Mediation Bill at its meetings held on 22 February 2010 and 19 April 2011 respectively. At the Panel meeting held on 22 February 2010, the Department of Justice advised that the primary objective of the Mediation Bill was to provide a proper framework for the conduct of mediation in Hong Kong, and the draft bill would not contain any mandatory rules governing the conduct of mediation. At the meeting held on 19 April 2011, the Department of Justice advised the Panel that the draft bill would provide clarifications on the meaning of mediation and the relating terms, and it would provide for provisions of confidentiality and privilege in mediation.

20. The Department of Justice further briefed the AJLS Panel on the contents of the draft Mediation Bill at its meeting held on 21 July 2011. The Department of Justice explained that the Mediation Bill would not be drafted in a complicated manner so as to ensure flexibility in the mediation process and that if enacted, the Mediation Ordinance would be reviewed taking into account the development of mediation in Hong Kong. Some members of the Panel expressed support for the enactment of a Mediation Ordinance but were concerned how the proposed Hong Kong Mediation Accreditation Association would perform its role as a single industry-lead accrediting body in the absence of relevant provision in the draft Mediation Bill to provide for its statutory power. Some other members queried the need for enacting a Mediation Ordinance which, in their view, seemed to have no particular impact on the general public.

Conclusion

21. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the views expressed by members of the AJLS Panel, members may consider whether a Bills Committee should be formed to scrutinize the Bill in detail.

Prepared by

YICK Wing-kin
Assistant Legal Adviser
Legislative Council Secretariat
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