(1) The appointment of mediator by HKIAC under clause 32(1)

and

(2) Report of the Working Group on Mediation and proposed amendments to clauses 32, 103 and 104

I. Introduction

This paper addresses the request made by Members at the meeting of the Bills Committee of the Legislative Council held on 3 December 2009 for the Administration to explain the rationale for proposing that the appointment of a mediator under clause 32(1) of the Arbitration Bill ("the Bill") was to be made by the Hong Kong International Arbitration Centre ("HKIAC"), in response to the views expressed by the Hong Kong Mediation Centre ("HKMC") in its letter dated 17 July 2009 (LC Paper No. CB(2)2303/08-09(01)). This paper also sets out the proposed amendments to clauses 32,103 and 104 of the Bill in the light of the recent recommendations on mediator immunity as put forward by the Secretary of Justice's Working Group on Mediation.

II. The appointment of mediator by HKIAC under clause 32(1)

2. The HKMC through its letter dated 17 July 2009 (LC Paper No. CB(2)2303/08-09(01)) suggested that it should be authorized to appoint a mediator under clause 32(1) of the Bill.

3. The Administration is of the view that it would not be desirable to authorize more than one authority to appoint mediators under clause 32(1). The power of appointing mediators in clause 32(1) would be used as a last resort and only where there is a written *arbitration agreement* between the parties. The power can only be exercised if a third party has been authorized by the arbitration agreement to appoint a mediator and such appointment has not been duly made. As the power of appointment of mediator under this clause is derived from an arbitration agreement, we consider that the default appointment power should be exercised by the HKIAC which is consistent with similar power given to it by clause 24(2) of the Bill for appointing arbitrators where a party has failed to make the necessary appointment under the terms of an

arbitration agreement. The default appointment authority under a stand-alone mediation agreement may be addressed by the Working Group on Mediation in the context of the general framework for development of mediation in Hong Kong.

III. Report of the Working Group on Mediation and proposed amendments to clauses 32, 103 and 104

4. The Working Group on Mediation set up in early 2008 under the chairmanship of the Secretary for Justice ("the Working Group") published its report in February 2010 ("the 2010 Report").

5. Paragraphs 7.141 to 7.173 of the 2010 Report discuss the issue of mediator immunity. The Working Group considered arguments for and against mediator immunity and expressed the view that the issue of whether to grant mediator immunity from civil suits is a controversial one. The Working Group is of the view that there should not be statutory immunity for mediators. The most common type of mediation conducted in Hong Kong is facilitative and the mediators do not perform any judicial function. Therefore the rationale underlying immunity for judges and arbitrators does not apply.

6. Judging from overseas experience, the chance of mediators being sued is slim. Furthermore, mediators can include suitable provisions in their contracts of appointment or they can take out insurance to cover such litigation risk. Although the Working Group does not recommend that such immunity be granted, it considers that it may be desirable to allow partial immunity, especially in respect of *pro bono* or community mediation. (See Recommendation 39 of the Working Group).

7. The Working Group has referred to clause 103 (i.e. arbitral tribunal or mediator to be liable only for dishonest acts or omissions) of the Bill in paragraph 7.167 of the 2010 Report and noted (at paragraph 7.173) that it may be desirable to give further thought to clause 103 of the Bill for the sake of consistency and in light of the discussion of the Working Group on the general issue of mediator immunity. In particular the Working Group poses the questions of whether the immunity conferred by clause 103 only applies when an arbitrator acts as a mediator pursuant to clause 33, or is the immunity enjoyed by all mediators (irrespective of whether the mediator also acts as an arbitrator). If the immunity conferred under clause 103 only applies to arbitrator acting as

mediator, the Working Group queries whether the wording of clause 103 should be appropriately revised.

8. In our view, clauses 32 and 33 envisage two different scenarios respectively. In clause 32, subclauses (1) and (2) deal with the appointment of a mediator by the HKIAC where the appointment of mediator by a third party is provided for in the written agreement and the third party has failed to act. Subclause (3) applies if any written agreement provides for the appointment of a mediator and for the mediator so appointed to act as arbitrator if the dispute cannot be settled by mediation. In such a case, the parties cannot object to the mediator's acting as an arbitrator. In other words, under clause 32(3), mediation precedes arbitration. It is believed that this provision will have the positive effect of encouraging the parties to attempt mediation before arbitration.

9. Clause 33 deals with a different scenario. There may not be a prior mediation agreement. After the commencement of arbitration, the parties may there and then agree in writing to ask the arbitrator to act as mediator in which case the arbitral proceedings would be stayed. If mediation is unsuccessful, arbitration will be resumed and the parties cannot object to the arbitrator solely because he has acted as a mediator. In both scenarios under clauses 32 and 33, the mediation is conducted within the framework of an arbitration agreement.

10. In the light of the above and in order not to prejudice the consultation process of the Working Group on the issue of mediator immunity, the Administration suggests that clause 103 (i.e. arbitral tribunal or mediator to be liable only for dishonest acts or omissions) should apply to mediation conducted under clauses 32 and 33 within the framework of the arbitration agreement(s). At the same time, it should be clarified that, in relation to mediation, clause 104 (i.e. appointors and administrators to be liable only for dishonest acts and omissions) should only apply to the situations as provided for in clauses 32 and 33.

11. In summary, the Administration considers that it should be made clear that, in relation to mediation, clauses 103 and 104 only apply to the situations as provided for in clauses 32 and 33, thus confining the immunity available to mediators only to mediation that is conducted within the framework of arbitration under clauses 103 and 104 of the Bill.

12. The Administration will propose amendments to clauses 103 and 104 of the Bill to read as follows:

103. Arbitral tribunal or mediator to be liable for certain acts and omissions

(1) An arbitral tribunal or mediator is liable in law for an act done or omitted to be done by –

(a) the tribunal or mediator; or

(b) an employee or agent of the tribunal or mediator,

in relation to the exercise or performance, or the purported exercise or performance, of the tribunal's arbitral functions or the mediator's functions only if it is proved that the act was done or omitted to be done dishonestly.

(2) An employee or agent of an arbitral tribunal or mediator is liable in law for an act done or omitted to be done by the employee or agent in relation to the exercise or performance, or the purported exercise or performance, of the tribunal's arbitral functions or the mediator's functions only if it is proved that the act was done or omitted to be done dishonestly.

(3) In this section, "mediator" (調解員) means a mediator appointed under section 32 or referred to in section 33.

104. Appointors and administrators to be liable only for certain acts and omissions

(1) A person -

(a) who appoints an arbitral tribunal or mediator; or

(b) who exercises or performs any other function of an administrative nature in connection with arbitral or mediation proceedings,

is liable in law for the consequences of doing or omitting to do an act in the exercise or performance, or the purported exercise or performance, of the function only if it is proved that the act was done or omitted to be done dishonestly.

(2) Subsection (1) does not apply to an act done or omitted to be done by –

(a) a party to the arbitral or mediation proceedings; or

(b) a legal representative or adviser of the party,

in the exercise or performance, or the purported exercise or performance, of a function of an administrative nature in connection with those proceedings.

(3) An employee or agent of a person who has done or omitted to do an act referred to in subsection (1) is liable in law for the consequence of the act done or omission made only if it is proved that -

(a) the act was done or omission was made dishonestly; and

(b) the employee or agent was a party to the dishonesty.

(4) Neither a person referred to in subsection (1) nor an employee or agent of the person is liable in law for the consequences of any act done or omission made by –

(a) the arbitral tribunal or mediator concerned; or

(b) an employee or agent of the tribunal or mediator,

in the exercise or performance, or the purported exercise or performance, of the tribunal's arbitral functions or the mediator's functions merely because the person, employee or agent has exercised or performed a function referred to in that subsection.

(5) In this section, ~~"appoint" (委任) includes nominate and designate.~~

(a) "appoint" (委任) includes nominate and designate; and

(b) "mediator"(調解員) has the same meaning as in section 103(3), and "mediation proceedings"(調解程序) is to be construed accordingly.

13. Furthermore, in order to make it clearer that clause 32 only applies to the appointment of mediator as provided for under an arbitration agreement, we propose to revise clause 32 so that it clearly refers to "arbitration agreement" instead of "written agreement" as follows:

32. Appointment of mediator

(1) If –

(a) any ~~written agreement~~ arbitration agreement provides for the appointment of a mediator by a person who is not one of the parties; and

(b) that person –

(i) refuses to make the appointment; or

(ii) does not make the appointment within the time specified in the arbitration agreement or, if no time is so specified, within a reasonable time after being requested by any party to make the appointment,

the HKIAC may, on the application of any party, appoint a mediator.

(2) An appointment made by the HKIAC under subsection (1) is not subject to appeal.

(3) If any ~~written agreement~~ arbitration agreement provides for the appointment of a mediator and further provides that the person so appointed is to act as an arbitrator in the event that no settlement acceptable to the parties can be reached in the mediation proceedings -

(a) no objection may be made against the person's acting as an arbitrator, or against the person's conduct of the arbitral proceedings, solely on the ground that the person had acted previously as a mediator in connection with some or all of the matters relating to the dispute submitted to arbitration; or

(b) if the person declines to act as an arbitrator, any other person appointed as an arbitrator is not required first to act as a mediator unless it is otherwise expressed in the ~~written agreement~~ arbitration agreement.

Department of Justice
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