

By Email

(ftsang@legco.gov.hk)

6th January 2012

Clerk to Bills Committee on Mediation Bill
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Sir / Madam,

COMMENTS ON THE MEDIATION BILL

With respect to the invitation by the Bills Committee on Mediation Bill for submissions of views on the Mediation Bill, ADR Consultancy Hong Kong Limited will like to submit the followings to the Bills Committee for consideration. We are pleased to note that some of our previous comments on the Draft Mediation Bill made in June 2011 have been incorporated into the current Mediation Bill.

Part A: General Comments

The Mediation Bill serves to provide a regulatory framework to govern the confidentiality and disclosure of mediation communications. It does not fulfil the object, stated in Clause 3(a), to promote, encourage and facilitate the resolution of disputes by mediation.

In the Mediation Bill, same as the original draft of June 2011, there is no discussion to the followings which are recommended in the 'Report of The Working Group on Mediation':¹

- ◆ Stay of proceedings pending mediation (Recommendation 36);
- ◆ Enforceability of mediation agreement (Recommendation 36);
- ◆ Provisions dealing with the rules of privilege and exceptions thereof (Recommendation 38);
- ◆ Sanctions for breaching the rules of confidentiality and privilege (Recommendation 38);
- ◆ Mediator immunity, especially in respect of pro bono or community mediation (Recommendation 39);
- ◆ Provision of suspension of the running of the limitation periods during the mediation

¹ Hong Kong Department of Justice, "Report of The Working Group on Mediation", February 2010, Recommendation 8 and at pages 34-36.

process (Recommendation 40);

- ◆ Enforceability of mediated settlement agreement (Recommendation 41);
- ◆ Model mediation rules (Recommendation 42);
- ◆ Enforceability of cross-boundary mediated settlement agreements (Recommendation 47);
- ◆ Legal aid to mediation (Recommendation 48).

Some of the above recommendations are of significant importance to the legal rights, or interests, of the parties in dispute, of the mediator(s), and of other person(s) who attend a mediation meeting.

Part B: Specific Comments

Clause 2(1) – In the definition of ‘agreement to mediate’, there is no mentioning of the mediator(s) who is/are the contracting parties to the ‘agreement to mediate’. Under the existing mediation practice, the agreement to mediate shall include the responsibilities and obligations of the mediator(s) and the parties in dispute.² If the bill is passed, then the mediation service stakeholders will have to change their practice to suit with the legislation, which is contrary to the local and international mediation practice.

Clause 2(1) – In the definition of ‘mediation communication’, it does not include agreement to mediate or mediated settlement agreement which will serve as a statutory exclusion of confidentiality of the two documents by all persons involved in a mediation.

Clause 4(2) – A mediation meeting may be conducted by more than one mediator, hence the clause should be amended to cater for such situation.

Clause 5(4) – The clause provides a retroactive effect for protection of confidentiality of mediation communication regardless when the mediation communication is made. Such unrestrained retroactive provision may not be in the interests of the parties in dispute, especially to those who have settled their dispute well before the commencement of the Bill, not to mention the adverse impact on the without prejudice privilege of the parties.

Clause 8(2)(a) – This is the most controversial provision in the Bill about the protection of confidentiality of mediation communications. Under the provision, a person may disclose a mediation communication with the consents of (i) the parties, (ii) the mediator(s) and (iii) the person who made the communication. The privilege, or benefits, of the confidentiality of a mediation meeting belongs to the parties. If the Bill is passed, then parties will have to seek

² The Accreditation and Training Sub-group of the Secretary for Justice’s Working Group on Mediation, “Hong Kong Mediation Code”, at para. 3(c).

the consents from all persons attending the mediation before the parties may disclose the mediation communication, which is unreasonable to the parties.

Clause 9 – If a mediation communication may be admitted in evidence in any proceedings with the leave from the court or tribunal, parties may, in future, call mediator(s) as witness, or require him/them to produce in evidence any records or notes relating to the mediation in any such proceedings. This again goes against the existing mediation service practice.

Clause 10 – This puts the burden on the specified court or tribunal to determine leave application for disclosure or admission in evidence of mediation communications. This is contrary to the objective of the Civil Justice Reform and may create more litigation cases arising from mediation itself.

Yours sincerely,

For and on behalf of
ADR Consultancy Hong Kong Limited

LUI Shu Tim

Director & Executive Consultant