Mediation Bill

Further comments from the
Hong Kong Bar Association (HKBA)

1. These comments are supplemental to the comments dated 2 July 2011 and are designed to address certain concerns raised recently by the Law Society ("LS") and the Hong Kong Association of Banks (HKAB).

Comments by LS

"Voluntary"

2. LS suggests that the definition of mediation fails to emphasis that: (a) it is a voluntary process; and (b) the parties themselves have the primary responsibility to achieve settlement with the assistance of the mediator.

3. In this context the following recommendation of the Working Party's report are relevant.

   (1) Recommendation 32 of the Working Party's Report: recommended mediation legislation, but stressed that the legislation should not hamper the flexibility of the mediation process.

   (2) Recommendation 45 of the Working Party's Report: recommended that compulsory referral to mediation by the court should not be introduced at this stage, but the question should be revisited by the Judiciary as and when mediation in Hong Kong becomes more developed.

4. The definition of mediation contained in the Mediation Bill does not expressly spell out whether the mediation is a voluntary or compulsory one. This would leave room for future development of mediation in Hong Kong. If in future, there is general consensus that there should be compulsory referral (whether by court or otherwise) to mediation, there will not be any need to amend the definition of mediation.

5. The LS's representation stated that "If the Government intends to promote facilitative mediation, the legislation should highlight the reality in practice that it is the parties who have primary responsibility to identify the issues in dispute, explore and generate options, communicate with one another and reach an agreement regarding the dispute. (see p. 1 of LS's representation).

6. It is true that facilitative mediation is the most popular mode of mediation in HK. However, that by itself is not a sufficient reason to revise the definition of mediation so as to highlight that feature. Mediation has many forms, and the Mediation Ordinance should be left as general as possible, so as not to suffocate the future development of mediation in HK.

7. The fact that the current definition of mediation does not stress the voluntary nature of mediation will not affect the continuous use or promotion of facilitative mediation. Parties, if they so wish, are free to opt for facilitative mediation (as opposed to any other form of mediation).

8. The HKBA is firmly of the view that it is important that the Mediation Bill provides a firm foundation for mediation whilst at the same time allowing for the potential of mediation developing to include other modes and styles.

Clause 7 of the Mediation Bill

9. LS is of the view that clause 7 is "unnecessary" and thus should be deleted.

10. It is the firm view of the HKBA that clause 7 should be included.

11. First, in Hong Kong, a similar provision has existed in the arbitration context since 14 July 1989 (by reason of s. 3 of the Arbitration (Amendment) Ordinance 1989). In UK, s. 36 of the 1996 Act makes it clear that a party to an arbitration may be represented by the person of his choice.

12. The rationale for providing such a legislative provision in the arbitration context is this. Given the private and consensual nature of arbitration, parties should be entitled to appoint advisers and advocates of their own choice, whether or not legally qualified and whether local or foreign. See: Robert Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary* (1997), [2F.03] (at p. 56).

13. Since both arbitration and mediation are forms of ADR and since both are private and consensual, it is difficult (if not impossible) to put forward any valid reason to treat mediation differently in this regard from arbitration.

14. Second, once it is accepted that non-qualified lawyers should, as a matter of policy, be allowed to provide support or assistance to parties to a mediation, there is the need of certainty, i.e. a certainty that they would not be said to have acted in breach of the Legal Practitioners Ordinance.

15. In this regard, the question of whether a party is acting as a solicitor or barrister has generated considerable litigation. See, e.g.: *The Magway*, unrep., HCAJ 14/1999 (1 August 2002) (Waung J); *Voce v Henley Group Ltd.* [2008] 5 HKLRD 429; *Piper Double Glazing Ltd. v D.C. Contractors* [1994] 1 WLR 777; *R (Factortame Ltd.) v Transport Secretary (No. 8)* [2003] QB 381; and *Agassi v Robinson (Inspector of Taxes) (No.2)* [2006] 1 WLR 2126.

16. Without clause 7, it is likely that such disputes would have to be adjudicated by the Hong Kong court in future. On the contrary, if clause 7 remains, there will not be the need to address such question and all incidental uncertainty surrounding representation or assistance in a mediation can be removed. Such certainty is important since one of the aims to enact the Mediation Ordinance is to enable people to know where they stand if they are to use mediation as a means of resolving disputes.

17. Third, if only qualified barristers and solicitors can provide assistance to parties to mediation (when there is no such requirement in the context of arbitration), many international disputes would not be mediated in Hong Kong and that would be detrimental to Hong Kong as an international dispute resolution centre.

18. Fourth, if clause 7 is to be deleted from the Mediation Bill (when a similar provision already exists in the arbitration context), there is a risk that the general public will perceive this as a means adopted by the legal profession to protect its self-interest.

<u>Clause 8(2)(e) of the Mediation Bill</u>

19. LS's concerns boils down to whether this exception for research, education, etc. is necessary and whether it may lead to disclosure of confidential information. Similar comments were also made by HKAB.

20. LS is certainly right in pointing out that HK is small place and some cases do attract great publicity. However, the HKBA is firmly of the view that there remains a need for this sub-clause.

21. To facilitate the healthy development of mediation in Hong Kong, the importance of education or evaluation cannot be gainsaid. Since mediation is private and confidential, it would be difficult to gather sufficient data for the purpose of conducting research or evaluation. Relying on consent from parties may not always be effective. Even in cases of arbitration, awards are published without reference to the parties' identity (eg. ICC Yearbook of Awards).

22. Besides, if the gathering of information is properly done, the risk of unintentionally disclosing confidential information can be reduced to the minimum.

23. Guidelines could be given to mediators for the purpose of revealing information for research or evaluation purpose. Such guidelines could be incorporated into a Code of Conduct so as to ease the mind of the parties.

Comments by HKAB

24. Amongst others, HKAB suggests that mediation conducted pursuant to the scheme to be administered by the Financial Dispute Resolution Centre ("FDRC") should be included in Schedule 1 to the Mediation Ordinance so that its provisions would not apply.

25. The key argument is that the FDRC mediation scheme is in effect a compulsory scheme.

26. It is a question of policy whether the FDRC mediation scheme should or should not be exempted from the Mediation Ordinance. Two matters are of relevance.

27. First, contrary to the suggestion made in HKAB's written representation, the draft Terms of Reference for the FDRC mediation scheme is yet to be promulgated. Thus, it appears to be premature to consider the suggestion raised by HKAB.

28. Second, at the moment, there is no sufficient basis to exempt the FDRC mediation scheme from the application of the Mediation Ordinance.

29. Put shortly, HKAB has not clearly identified how its members would be prejudiced if the Mediation Ordinance is to apply to the FDRC mediation scheme. Besides, if necessary, the future Terms of Reference may take into account the provisions in the Mediation Ordinance so as to ensure that the interests of all parties to FDRC mediation can be protected.

30. By way of example, if HKAB takes the view that the confidentiality provisions in the Mediation Bill are too loose, there is nothing to stop HKAB from advocating that an even stricter regime should be adopted by the FDRC Terms of Reference. Parties who participate in FDRC mediation would then be contractually bound by such a stricter regime. On the other hand, if HKAB takes the view that the confidentiality provisions in the Mediation Bill are too strict, advance consent to waive confidentiality can be put into the FDRC Terms of Reference so that the desired result could be achieved.

Hong Kong Bar Association

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